OA 11.14.84

IN THE SUPREME COURT OF FLORIDA

CASE NO. 64, 641

MARILYN WALTER,

Petitioner,

vs.

David L. WALTER,

Respondent.

APPEAL FROM THE DISTRICT COURT OF APPEALS,

FIFTH DISTRICT

PETITIONER'S BRIEF ON THE MERITS

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

Attorney for Petitioner

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PRELIMINARY STATEMENT

The District Court decision in this case, Walter v. Walter, 442 So. 2d 257 (Fla. 5th D.C.A., 1983) (A-6), is before this Court for review. The District Court decision was rendered on November 10, 1983. On December 12, 1983, the Petitioner filed an application with this Court to review this decision and to invoke discretionary jurisdiction on the basis that this decision expressly and directly conflicted with decisions of other district courts of appeal and of this Court on the same question. After briefs on jurisdiction were submitted and the matter initially reviewed, this Court accepted jurisdiction and entered an Order on July 2, 1984, ordering that briefs on the merits be filed and served. This matter is presently scheduled for oral argument before the Court on November 14, 1984.

In the District Court, DAVID L. WALTER, was the Appellant and MARILYN WALTER was the Appellee. This appeal was taken from a Final Order granting Marilyn Walter's Petition for Modification of Final Judgment of Dissolution of Marriage (R 370 - 373). This Final Order was entered by Judge George N. Diamantis on March 4, 1982, Circuit Court of the Ninth Judicial Circuit, Orange County, Florida, Case No. 72-5299. The District Court affirmed the Final Order in all respects except as to an award of permanent alimony in the amount of $350.00 per month to the Petitioner. As to this award, the District Court, in its opinion, reversed and, instead, remanded the case to the Circuit Court for the purpose of substituting a rehabilitative alimony award to her.

In the record before this Court, references are made in the Transcript of Proceedings to a separate lawsuit between Petitioner and Respondent relating to a $10,000.00 promissory note executed on June 20, 1974, by the Respondent to the Petitioner (A-2). This action was commenced at the same time as the Petition for Modification and was filed as a separate suit. The case number designated to it was Case No. 81-6592.

The modification proceeding and the suit on the promissory note were consolidated by Order of Court (R 222).

The promissory note suit resulted in a judgment in favor of Petitioner and against Respondent (A-1). This Final Judgment was not appealed by Respondent to the District Court.

For purposes of clarity and identification, the Petitioner will be referred to in this Brief as MARILYN and the Respondent as DAVID.

References in this Brief to the Record on Appeal will be referred to by the letter "R," and as to the Transcript of Proceedings, by the letter "T." References to Petitioner's Appendix will be referred to by the symbol "A."

STATEMENT OF THE CASE

Marilyn and David were married on September 18, 1965, at Columbus, Ohio. There were three (3) children born of the marriage, to-wit: JAMES MICHAEL WALTER, born on June 5, 1967, PATRICK LEE WALTER, born on June 5, 1970, and CHRISTOPHER DAVID WALTER, born on September 10, 1971 (R 202 - 208).

The parties had marital difficulties in the early part of 1972 and entered into an Agreement, which later was the subject of a Final Order of Dissolution of Marriage (R 202 - 208).

At the time of the Agreement and Final Order, David had been terminated from his employment as a supervisor for Frisch's Big Boy Restaurant (T 20 - 21). Apparently the reason for his termination from employment and Marilyn's reason for divorcing him were one and the same (T 20 - 21 and 23).

Although the Agreement acknowledged that David had been advised of his right to separate counsel, he declined to employ counsel in the dissolution action (Agreement page 3; R 202 - 208).

The parties acknowledged in paragraph 5 of the Agreement that because the husband was then unemployed, he was unable to pay child support and alimony. The parties agreed that the Settlement Agreement contained no provisions for alimony and child support and the trial judge, after reading the Agreement, made a finding in paragraph 4 of the Final Judgment that the husband was unable to pay child support and alimony at the time of the dissolution because he was then unemployed (R 207).

The Final Judgment specifically reserved jurisdiction over the subject matter and the parties to enter future Orders pertaining to child support or alimony for the support and maintenance of the wife and minor children (R 207).

As will hereafter be discussed in the Statement of Facts, Marilyn had reasons for not taking legal action to establish alimony and child support until a turn of events in the fall of 1980.

On July 2, 1981, Marilyn petitioned for an establishment of child support, alimony, medical and dental expenses, educational expenses for the children at a parochial school in Brevard County, attorney's fees and court costs (R 198 - 200). At that time, the children were ages fourteen, eleven and ten.

Prior to trial, Marilyn moved the Court to amend her Petition so as to allege and pray for lump sum alimony in the form of David's interest in a home located at 2966 Barkway Drive, Cocoa, Florida 32922, or, in the alternative, exclusive occupancy and possession of the same until the youngest child attained the age of eighteen years and a requirement that he make the mortgage payments, pay the electric bill, the pest control bill, the lawn maintenance expense, homeowners insurance, real estate taxes and all repairs and maintenance on the residence (R 228 - 231). Marilyn's Motion to Amend was granted (R 232 - 234).

Further, at trial and after an objection was made, Marilyn moved to amend her pleadings to conform to the evidence so as to require David to designate the minor children as

beneficiaries on all policies of life insurance insuring his life. The Motion was granted (T 53 - 54).

After hearing all of the testimony, receiving into evidence financial affidavits and other documentary evidence and hearing argument of counsel, the Court read into the record citations of authority to support its rulings and rendered judgment for Marilyn (T 155 - 165).

The Court denied Marilyn's claim for lump sum alimony in the form of a conveyance of David's interest in the Barkway Drive residence, but did award to her sole and exclusive occupancy and possession of the same until the youngest child, CHRISTOPHER, attained majority, died, married, or until Marilyn remarried, or until she and the youngest child permanently left the residence. During the period of such occupancy and possession, David, as an incident to child support, was required to make all of the mortgage payments on the residence, pay all of the taxes and insurance, and pay all repair and maintenance expenses in excess of $200.00 (R 370 - 371 and 374). The Barkway Drive residence is titled solely in the name of David, but Marilyn had loaned to him the sum of $2,000.00 to buy it and make the down payment (T 28 and 39 and R 246).

The Final Order granting the Petition for Modification also awarded to Marilyn $350.00 per month as permanent periodic alimony and $350.00 per month per child for the two minor children: PATRICK WALTER and CHRISTOPHER WALTER. The oldest child, JAMES WALTER, had been living with David for more than one

year (T 102).

The Final Order required David to carry life insurance for the benefit of the two minor children in the custody of Marilyn, to carry hospitalization and major-medical insurance, to pay unreimbursed dental expenses and to pay attorney's fees and court costs to Marilyn's attorney of record (R 370 - 375 and 297 - 298).

Since the promissory note suit and the modification proceeding were consolidated, there are references in the Transcript to payments allegedly made by David to Marilyn beginning in June, 1974. David claimed he made these payments to her on the $10,000.00 promissory note he executed on June 25, 1974. Marilyn claimed these payments were for child support when she was not working. On the promissory note suit, the trial judge granted in favor of Marilyn a Final Judgment against David and specifically ruled against him on his defense of payment (A-1 and T 155 - 157).

On David's appeal, the District Court re-evaluated and reconsidered the trial evidence and reversed the award of permanent alimony to Marilyn. The District Court, substituting its opinion for that of the trier of fact, laid down the rule that permanent alimony should be awarded only in those cases where the former spouse must have financial assistance from her former husband in order to maintain herself. If there is evidence as to any actual or potential capacity for self-support on the part of the requesting party, then rehabilitative, rather than permanent,

alimony should be awarded. Further, the burden of proof is upon the requesting party to show such lack of actual or potential self-support and, further, that her former spouse has the present financial ability to continue to support her (A-6).

Marilyn takes the position before this Court that the District Court's decision arbitrarily narrows and limits a trial judge's discretion in making an award of permanent alimony and undercuts the standards expressed by this Court in Canakaris v. Canakaris, 382 So. 2d 1197 (Fla., 1980). Further, it is the Petitioner's position that the District Court exceeded its proper scope of appellate review by reversing the award of permanent alimony especially in light of the fact that this Court had already published its opinion in Conner v. Conner, 439 So. 2d 887 (Fla., 1983), before the rendition of the decision.

As will be discussed, the award of permanent periodic alimony to Marilyn is based upon substantial and competent evidence in the record. The trial judge not only detailed his findings of fact and conclusions of law, but cited into the record the cases he relied upon in reaching this conclusion. As the trier of fact and the decision maker as to the law, Judge Diamantis' Final Order went before the District Court clothed with the presumption of correctness and it is submitted that his decision as to an award of permanent periodic alimony to Petitioner was both reasonable and proper as a matter of law, Canakaris, supra.

STATEMENT OF FACTS

While it is true, as stated in the District Court opinion, that Marilyn and David were legally husband and wife for only seven years, they lived together after the divorce almost continually and shared their parental love and affection for the three minor children born of the marriage until only eight or nine months before Marilyn instituted the modification proceedings (T 23, 25 - 26, 38 - 39 and 41 - 42).

During this period, Marilyn twice became pregnant by David, but suffered miscarriages (T 42 and 81 - 82).

Marilyn testified that even when she divorced David, she still loved him, but could no longer put up with his affairs (T 20 - 21 and 23).

Three months after the divorce, David moved back into the home with Marilyn and lived there for almost one year before moving to Brevard County, where he is now a resident (T 23).

After he moved to Brevard County, Marilyn made plans to sell her home in Maitland which had been conveyed to her by David in the divorce settlement (T 24). She testified that David had persuaded her to move to Brevard County with the hopes of a reconciliation (T 24 - 25). Marilyn sold the former marital home at a profit of $15,000.00 and David moved her to Brevard County (T 25 and 26). Marilyn is presently a resident of Brevard County.

Marilyn testified at trial that the joint savings account was split at the time of the divorce and she did not, as David suggests, take it all for herself (T 21).

After the move, David told Marilyn that he had borrowed money from his parents to begin a pizza business in Merritt Island. He asked her for a loan of $2,000.00 and later for an additional $8,000.00 in order to open a second pizza restaurant in Cocoa. Marilyn acceded to David's request and loaned him the $10,000.00 (T 26 - 27). David executed in favor of Marilyn a promissory note for $10,000.00, at 15 percent interest, agreeing to repay this amount in five years with monthly installments of $250.00 per month, with the first payment being due on October 1, 1974 (T 29 - 30 and A 2). In the promissory note suit, David contended that he had paid this note in full by installment payments to Marilyn beginning June 9, 1974 (the first check was not cashed until June 21, 1974), and on this $10,000.00 obligation, he had repaid to Marilyn $23,000.00. When asked at trial why he repaid $23,000.00 when the principal was only $10,000.00 (interest eight years later totaled $11,476.00), and he claimed that he had satisfied the obligation four to five years ago, David testified that he apparently paid the excess amount because he was "stupid" (T 61 and 118 - 119).

After moving to Brevard County, Marilyn testified that it was David's preference not to have her work, but rather to stay at home with the children (T 33 - 36).

Marilyn testified that after her move, she asked her former husband for a support agreement if he wished her not to work (the children were then ages seven, four and two and one-half) because the Final Order indicated no alimony or child

support need be paid by him. She testified that ten years ago, or in 1974, David began to set a standard of living for the family by paying her the sum of $200.00 per week. Accordingly, from the spring of 1974 to August 8, 1975, David delivered to Marilyn each week a personal support check in the amount of $200.00 for her and the three minor children (T 30 - 32).

On August 10, 1975, Marilyn went to work for her former husband at his place of business in Merritt Island. After that time, she did not receive the $200.00 per week personal support check, but instead, received a corporation paycheck each week drawn on Christy's Pizzeria for $200.00 (T 33 - 34). Marilyn worked at the Merritt Island restaurant until May, 1976, when she quit to become again a full-time mother and housekeeper (T 33 - 35).

From May, 1976, to June 5, 1977, David again reverted to the pattern of delivering to Marilyn his personal check for $200.00 each week for the support of the family (R 34 - 35).

David contended that these sums were payments which he made on the $10,000.00 note, but Marilyn testified that she at no time observed such a notation on David's checks; he did not communicate this fact to her and she never intended in receiving the payments to credit them on the loan (T 35 - 37).

In addition to the $10,000.00 loan, Marilyn also loaned David the sum of $2,000.00 because he needed it to make the down payment on the Barkway Drive home in Cocoa where Marilyn and two of the minor children now reside under the Final Order (T 28).

As a result of these loans by Marilyn to David, she returned to him 80 percent of the net proceeds she received on the conveyance of the former joint marital residence and David had the use of these funds, and interest thereon, from July, 1974, until she finally obtained a Final Judgment. She was repaid under the Final Judgment less than half of the amounts, with interest, that David truly owed to her (A 1).

Returning again to work in June, 1977, Marilyn worked for David in his businesses until he fired her in December, 1981 (T 36).

From June, 1977, until her termination, Marilyn received only corporation paychecks and never again received a personal $200.00 per week support check (T 36). David himself set her salary at $300.00 per week and again established a new standard of living for her and the minor children in her custody (T 37 - 39).

While working for her former husband, Marilyn progressed to manager and, at the time of commencing the modification proceeding, she was the manager of Mr. Frog's Fish 'n Chips Restaurant in Cocoa (T 44 - 45).

Since 1972, Marilyn has implored David to execute some type of written agreement setting definite support, but at all times David indicated that there was "no way he's going to be legally obligated to pay me a dime" (T 37 - 38).

Marilyn testified that until October, 1980, she thought that through her love for David, the two of them would get back

together. She discovered David's true attitude, however, when she telephoned him while in the process of a having a miscarriage and asked him to take her to the hospital. David refused, stating that he was already engaged with someone else and that he didn't want to be bothered (T 42).

Marilyn testified that after filing the modification action, she made early efforts to settle all issues (T 44).

Marilyn stated that after filing the modification action against David, he, directly and indirectly, attempted to intimidate her into dismissing the suit by both threats of violence and loss of employment (T 58 - 59 and 82).

Marilyn testified at trial that her net take-home pay in working for her former husband was $950.00 per month during 1981. She testified that her expenses were $1,665.00 per month and that she made up the difference by charging on credit cards, obtaining odd jobs at different times or borrowing from her former husband (T 38 and 76 - 79 and A-5).

At the time of trial, Marilyn testified that the only support she was receiving was indirect support in that David was making the mortgage payment on the home in which she and the two minor children were living and occasionally purchased clothing for the children (T 39 - 41).

Marilyn testified that she pays all of the expenses for the two minor children, including their parochial school and dental expenses (T 41).

Although David paid no support, Marilyn had been

permitting him to declare the three minor children as dependents on his federal income tax each year since the divorce because she wanted to help him financially and still loved him (T 40).

In the summer of 1981, Marilyn asked David permission to take a vacation to the state of Ohio with the minor children to visit her father, who was dying of cancer. David refused her request at this time (T 45).

In November, Marilyn made a similar request and told him that she wanted to travel there at Christmastime. David responded that he could not permit Marilyn to take time during the Christmas season because it was company policy (T 46).

Marilyn made sure that she did all of her ordering before the scheduled trip to Ohio and that there were necessary employees on hand to handle the business of the restaurant (T 46 - 47).

Marilyn pointed out that business was bad and that especially at Christmastime it dropped off even more, to less than perhaps $200.00 per day (T 47).

Marilyn was gone one week on vacation and, after returning on New Year's Day, she was fired (T 47 - 48).

David told the trial judge that he had not fired Marilyn, but that she had merely not contacted him after her return. David did, however, admit on cross-examination that he had changed the locks on the restaurant without giving Marilyn a key and he had further taken her last two paychecks and applied them to an outstanding company loan because it was corporate policy to

do that from "time to time" (T 113 - 115).

Darlene Alyce Friedgen, an employee of Mr. Frog's Fish 'n Chips Restaurant, testified that Marilyn did the ordering well in advance of leaving and that while she was gone, there were more than enough employees to take care of customers. Even Mark Bowes, an area manager for Christy's Pizzerias, testified that the business was losing profits badly and did not make any profit at all in either November, or December, 1981 (T 87 - 92).

Marilyn testified that at the time her employment was terminated, she had a $500.00 loan outstanding with her former husband's corporation and was counting on her last two paychecks to support her until the February trial. After termination, David applied one paycheck in the amount of $200.00 and another paycheck in the amount of $140.00 to the loan (T 48 - 49).

At the time of trial, Marilyn was unemployed and had looked for a job for one and one-half months (T 48 - 52).

She stated that she was looking for a clerical or secretarial position, but knew she could not earn the $1,300.00 per month that she had been receiving from her former husband's business, but would probably earn only a gross monthly income of approximately $800.00 (T 51). 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 (T 100 - 101). David also testified that in addition to salary, he would give Marilyn food from the restaurant for her and the boys (T 101).

Marilyn testified that she was seeking $1,300.00 per month alimony and $800.00 per month child support (T 52).

Marilyn further testified that she was thoroughly familiar with her former husband's spending habits and financial ability and was certain that he could pay the amount she requested (T 52).

Marilyn pointed out that the financial affidavit of David was incomplete (R 245 - 247 and A-3). In the asset column, she stated that he should have included a 1981 Cadillac Seville, which is owned by his corporation (T 54 and 124). She further stated that he owns individually a 1981 Datsun automobile that is not listed. She testified that he pays $1,300.00 per month as a payment on a thirty-four foot Carver boat which he purchased in December, 1980, for $80,000.00, but that he had told her it was worth $100,000.00 (T 54 -55). She states that while she does not own a home, David owns two homes and a condominium, plus real property in Cocoa on which Mr. Frog's Fish 'n Chips Restaurant is located and property in Melbourne on which Christy's Pizzeria is located (T 55, A-3).

In his case, David, on cross-examination, admitted the foregoing revelations made by Marilyn at trial. He further conceded that in late December, 1981, he had paid a total of $9,537.85 at a closing for certain real property (R 122 - 123).

David testified that he receives all of his compensation from a business known as Action Management and that in 1981, he received $6,000.00 in dividends from Christy's Pizzeria in

Rockledge (T 123 - 124).

David, on direct examination, testified that he planned to sell his boat, but would then have the equity in it (T 108).

David acknowledged to Marilyn's counsel that the checks and bank statements which had been given during discovery proceedings were true and correct copies (T 124 - 125). At trial, Marilyn's counsel read into evidence an increase in deposits in to David's personal checking account from 1980 to 1981 of $35,542.64 (T 133 - 134). David attempted to rebut this evidence by showing that deposits of $65,778.57 in 1981 as against total deposits of $30,235.98 in 1980 were the result of depositing checks which were reimbursements to him of business expenses (T 136 - 138). Even with this explanation, however, there was available monthly $5,481.54.

David owns all of the stock of Christy's Pizzeria, Inc., and Christy Corporation. He also does business as Action Management and Supply Company. He also owns 60 percent of the stock in Christy's Pizzeria of Rockledge, Inc. (A 4, page 17) It is interesting to note that, as a sole stockholder of two Christy Corporations, David draws no compensation, but does have a sizeable loan account of over $40,000.00 (indirect compensation) and the corporations have bought him two new cars and an $80,000.00 boat (A-3 and T 107 - 124) .

In 1981, the gross sales of Christy's Pizzeria, Inc. increased $324.537.00 over the previous year. The increase was also $411,936.00 over the sales of 1979 (A 4, page 18).

ARGUMENT

POINT ONE

THE DISTRICT COURT OPINION IN THIS CASE CONFLICTS WITH THIS COURT'S PREVIOUSLY EXISTING DECISION IN Conner AND ITS LATER DECISION IN Kuvin.

In dealing with an award of periodic alimony, Conner, supra, and Kuvin v. Kuvin, 442 So. 2d 203 (Fla., 1983), judicially direct that evidentiary and factual issues initially determined by a trial judge and his decision as to whether to award permanent or rehabilitative alimony are matters clearly within his discretion. Unless it is found that the award is one that "no reasonable man" could uphold, or that the trial judge had applied an incorrect rule of law, district courts of appeal are preempted from substituting their judgment, McSwigan v. McSwigan, 450 So. 2d 284 (Fla. 4th D.C.A., 1984), Marshall v. Marshall, 445 So. 2d 706 (Fla. 4th D.C.A., 1984) and Marcoux v. Marcoux, 445 So. 2d 711 (Fla. 4th D.C.A., 1984).

Conner goes to the issue of a factual determination and creates a presumption of the trial judge's correctness in an award of permanent alimony when judged against Canakaris standards.

Kuvin, on the other hand, holds that it is the role of a trial judge to make a determination as to the type of periodic alimony based not only upon the ability of the husband, but also upon the needs of the wife and the best interests of the parties. Specifically, this decision commands that trial courts take into account all facts and circumstances, including the

criteria for permanent alimony as set forth in Canakaris (at 1201 and 1202).

As tested by Conner and Kuvin, if the findings of the trial court come before a district court of appeal and are based upon substantial and competent evidence, then it is not the function of the district court to substitute its judgment by re-evaluating and reconsidering the testimony and evidence and applying their personal views and selective rules of law, Shaw v. Shaw, 334 So. 2d 13 (Fla., 1976).

Although the marriage in this case was initially a brief one, the trial court considered and weighed the evidence as to the relationship of the parties and the continued dependence of Marilyn upon David for support. The fact that the marriage had ended and that this was not an initial award of alimony in a dissolution action under F.S. 61.08 did not prevent Judge Diamantis from accepting the demonstrated needs of Marilyn, the demonstrated financial ability of David, their past and prospective earning abilities and potential, their ages, their stations in life, the value of their respective estates and the standard of living enjoyed by them as a family since 1972.

Further, just remarriage or a separation does not prevent a court from doing "equity and justice between the parties," F.S. 61.08, neither does this relatively short marriage, but long continuing relationship of Marilyn and David prevent the trial court in this case from making an award of permanent alimony where a reservation of jurisdiction for that purpose was initially made in the Final Judgment, Claughton v. Claughton, 393 So. 2d

1061 (Fla., 1980), Martyn v. Martyn, 422 So. 2d 960 (Fla. 4th D.C.A., 1982) and Geisinger v. Geisinger, 436 So. 2d 439 (Fla. 4th D.C.A., 1983).

In this case, it has been pointed out that, as early as 1974, David set a standard for his former wife and the three children by paying $200.00 per week, or $860.00 per month. In addition, David supplied housing to them and hospitalization and major-medical insurance. Each year he increased his former wife's salary to reflect changes in the inflation rate (R 316 - 362).

As Marilyn testified at trial, the $950.00 she received from David each month as a net salary did not even meet all of the needs of the family, but went a long way towards doing so (T 37 - 39 and 77 - 78). Further, David well knew that she was not and could not be self-supporting on this amount or on less since she frequently had to borrow monies from him or his corporation (T 38, 48 - 49, 77 - 78 and 100 - 101). The trial judge was well acquainted with these facts since he had before him all of the earning records and income tax of Marilyn for the years 1976 - 1980 (R 316 - 362).

Further, the trial court was conscious of the fact that David wanted Marilyn to spend time to take care of the children without the burden of extraordinarily long hours of employment now that the two boys were coming into their teenage years. This factor was of importance, but was not the sole motivation for an award of permanent alimony by the trial court in this case, Hurtado v. Hurtado, 407 So. 2d 627 (Fla. 4th D.C.A., 1981) and Kuvin.

The trial judge also calculated that David had the right to deduct almost one-third of the permanent periodic alimony payment he would make to Marilyn; as such, the out-of-pocket expense to him is $234.50 per month and when the child support obligation of $700.00 per month is added to this, it can readily be seen that the direct support requirements of the Final Order are only $74.50 per month more than the voluntary payments which David made to Marilyn by personal check in the years 1974 - 1975 and 1976 - 1977.

In summary, eight years later, the trial judge's award as an adjudication of alimony and child support is only $190.00 more, or 22.5 percent in excess of the support standard which David established for the family in 1974, when Marilyn first moved to Brevard County.

The trial judge in this case was an experienced and capable man. Each party was afforded ample opportunity to present evidence and make legal arguments based upon the testimony, documentary evidence and applicable law.

The trial judge evaluated and weighed the testimony and evidence based upon his observation of the bearing, demeanor and credibility of the parties and witnesses appearing before him.

Furthermore, the trial judge had before him ample evidence pertaining to the relationship of the parties, their respective assets, their respective sources of income, their respective living standards and their respective needs. For each

ruling made, the trial judge supported the same with citations of authority which appear in the record.

In making his decision, Judge Diamantis exercised his judicial discretion skillfully. He correctly applied the law, and as to factual and evidentiary findings and awards, he did so within the bounds of reason and logic. His conclusions were based upon justification, logic and reason. They were not inconsistent, unreasonable, fanciful or whimsical.

Marilyn requested the trial court to award to her $1,300.00 per month as alimony, presumably the same as David was paying for his boat (A-3 and T 52 - 55). The court awarded to Marilyn a little more than 25 percent of what she requested and David, who could have settled all matters out of court in 1972, complained on appeal to the District Court. Both parties are not really happy with the trial court's award and, therefore, it is suggested that in all probability, the award is not only fair but reasonable.

The District Court opinion (2-to-1) (A-6) in this case was nothing more than a "second trial" for David. The majority determined that Marilyn earned over $15,000.00 in 1981, and that she had been supporting herself and her children for the past ten years (page 258). This conclusion, however, rests upon the evidentiary foundation that David had employed her or, when she was unemployed by him, he gave her funds for such support. Any extra money earned by her was because the salary paid to her by David was insufficient to support her and the two minor children (T

38). To "leapfrog" as the majority did from such a tenuous employment and support relationship to the conclusion that Marilyn, at the time of the trial, had the capacity to make her way unassisted by David is without support in the record and totally contrary to the facts of this case. Further, to state as the majority did that even though Marilyn had been a devoted and dutiful spouse or former spouse, permanent alimony should not be given to her as a reward, is to add unnecessary dicta to an already unsupported decision in either fact or law (pages 258 and 259).

The dissent correctly pointed out that being self-supporting is not necessarily the same thing as having employment or income. Marilyn is forty-one years old and, considering her station in life, is not a candidate for rehabilitative alimony as the majority had determined. An award of rehabilitative alimony would not be designed to aid or regain for her ability for self-support similar to that which had existed or which would have existed except for the intervening period of time (page 260).

The trial judge was very specific in his award of permanent alimony and pointed out that by such an award, he did not wish Marilyn to be an "alimony drone," Hurtado, supra. Further, the trial judge pointed out that a change of circumstances could be shown at any time by David and thus the word "permanent" is not synonymous with "forever," Ruhnau v. Ruhnau, 299 So. 2d 61 (Fla. 1st D.C.A., 1974).

The permanent alimony award made to Marilyn was given

to her by Judge Diamantis for the purpose of supplementing her income and so that she, as well as David, could contribute to the support of the two minor children in her custody, F.S. 61.13(1).

There is nothing in this record to indicate that this award of permanent periodic alimony was designed to enable Marilyn to sit back and relax without working. It was awarded to her by the trial judge because it did "justice and equity between the parties," considering not only the financial aspects of this case, but their long-term relationship in living and working together. It was designed to enable Marilyn to enjoy at least a semblance of the standard of living she had enjoyed prior to her termination from the husband's employment. It was further designed so that when she sought or obtained employment, she could count on at least a fixed sum each month so that she could coordinate her working schedule or make plans to care for the two minor children and supervise their activities during their periods of junior and high school education.

The award of permanent alimony by the trial judge was part of an interrelated remedy and overall scheme or goal. His goal or scheme was arrived at by carefully trying this case and applying to it the high standards of judicial discretion commended to him by this Court in Canakaris (at page 1202).

By removing the award of permanent-periodic alimony and substituting instead rehabilitative alimony, the District Court singled out rather than viewed as a whole the trial judge's overall plan. The District Court decision took from Marilyn that

which the trial court's broad discretionary authority had given to her and, further, placed upon her a burden of proof to extend the rehabilitative alimony or to convert it into permanent alimony. This unfortunate result reached by the District Court was initially considered by the trial judge in this case, but was immediately rejected by him (R 160 - 161). Another long term consequence of the District Court's decision is that it places upon future litigants seeking permanent alimony the burden of proof that he or she is completely and permanently dependent upon the other spouse because he or she is not nor can ever be self-supporting (A-6, page 259).

The District Court's decision in this case violates the rationale of Canakaris, Conner and Kuvin. Its findings have no evidentiary support and its application of the legal test used to reverse Marilyn's alimony award is a departure from stare decisis.

ARGUMENT

POINT TWO

THE LEGAL TEST APPLIED BY THE DISTRICT COURT IN THIS CASE TO REVERSE THE AWARD OF PERMANENT PERIODIC ALIMONY TO PETITIONER IS HARMFUL AND REVERSIBLE ERROR AS A MATTER OF LAW.

The legal test adopted by the Fifth District in determining whether a wife or husband is entitled to rehabilitative or permanent alimony is an inflexible one. It concentrates only on one's employability or potential for income, and as such, it focuses on this exclusive standard.

It ignores the criteria for permanent alimony approved by this Court in Canakaris, supra (at 1201 and 1202) and takes no account of the other factors considered in an award of periodic alimony under F.S. 61.08, and Tronconi v. Tronconi, 425 So. 2d 547 (Fla. 4th D.C.A., 1982).

While expanding the meaning of rehabilitative alimony as defined in Canakaris, it also restricts the availability and use of permanent alimony by suggesting that rehabilitative alimony is a preferrable award.

In employing this principle of law, the Fifth District expressly narrows judicial discretion and requires a trial court to view an award of permanent alimony "independently" from the planned overall relief which the court may believe necessary to do "justice and equity between the parties"; as such, it erodes the authority of the chancellor to view all remedies as interrelated and requires him to act contrary to the mandates of Canakaris, supra (at 1202 and 1203).

The District Court decision not only frustrates the decision making of circuit court judges, but also places unexpected burdens of proof on litigants receiving rehabilitative alimony and then attempting to modify it, Walter, supra (A-6 at 259).

Its application cuts across the board and denies an award of permanent alimony to those approaching middle age, Ente v. Ente, 442 So. 2d 232 (Fla. 5th D.C.A., 1983), and those with no employment or employment prospects, Thornton v. Thornton, 433 So. 2d 682 (Fla. 5th D.C.A., 1983).

The Fifth District not only follows this rule of law as to "support alimony," but further will not even substitute an award of permanent alimony to compensate a wife where the trial court has initially made an inequitable distribution of marital assets to her, Pralle v. Pralle, 444 So. 2d 455 (Fla. 5th D.C.A., 1983).

Other districts do not elect to follow the reasoning of Walter or other earlier Fifth District decisions.

In Wagner v. Wagner, 383 So. 2d 987 (Fla. 4th D.C.A., 1980), the wife was employed as a schoolteacher, earning $12,000.00 a year. Arguable, she had "actual or potential capacity for self-support" as the Fifth District would decide, and yet, an examination of the record indicated that there was no evidence of Mrs. Wagner's ever expecting a substantial increase in earnings or earning capacity. In this case, rehabilitative alimony would serve no useful purpose since such an award would not reasonably be anticipated to rehabilitate her to greater

financial success. In this case, an award of rehabilitative alimony was reversed and permanent alimony substituted. The Fourth District pointed out that the trial court had not applied the correct legal rule, and as such, its judgment was error as a matter of law.

In Vandergriff v. Vandergriff, 438 So. 2d 452 (Fla. 1st D.C.A., 1982), the First District, on facts admittedly different from this case, held that an award of rehabilitative alimony to the wife was improper. It stressed that, while the wife may have the background to be self-supporting, she had no present ability to do so. Further, having an actual potential for self-support is not the sole test. The trial court must look to her needs and necessities, the ability of the husband to support her and the standard of living enjoyed during the marriage. All of these factors have been previously sanctioned by this Court in Canakaris.

The Third District in Hawkesworth v. Hawkesworth, 345 So. 2d 359 (Fla. 3d D.C.A., 1977), decided likewise as did the Fourth District, Weeks v. Weeks, 416 So. 2d 811 (Fla. 4th D.C.A., 1982).

The Third District in DeCenzo v. DeCenzo, 433 So. 2d 1316 (Fla. 3d D.C.A., 1983), noted that the classification by a trial court of alimony as permanent or rehabilitative, is a question of law and requires the application of a correct legal rule. It is not a matter of discretion.

An award of rehabilitative alimony must have eviden-

tiary support in the record, and when making such an award, the trial court must be fully aware that the burden of proof is then placed upon the recipient to show a substantial and material change in circumstances before such rehabilitative alimony can be extended or converted to permanent alimony, Colucci v. Colucci, 392 So. 2d 577 (Fla. 3d D.C.A., 1981).

DeCenzo stressed that merely because the wife is not able to show a complete and permanent dependence by her on the husband, is not reason to deny her permanent alimony. Such proof is not an essential element, but is merely a factor to be considered by the trial court, Garrison v. Garrison, 380 So. 2d 473 (Fla. 4th D.C.A., 1980).

It is interesting to note in this case that the Third District cited with approval the Fifth District's decision of O'Neal v. O'Neal, 410 So. 2d 1369 (Fla. 5th D.C.A., 1982). This decision came before the Fifth District on an appeal from a modification proceeding and a close reading of this opinion would lead one to believe that the Fifth District may view in a different light the factors to be considered when a modification of alimony is at issue rather than those factors which are initially considered by the trial court when the issue of periodic alimony first comes before him:

> "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 divorced wife is entitled to live in a manner reasonably commensurate with the standard

> established by the husband during the course of a long-term marriage. Nicolay v. Nicolay, 387 So. 2d 500 (Fla. 2d D.C.A., 1980). A court must base an award of alimony to a wife upon the ability of her husband to pay that award and her financial needs in light of the standard of living she enjoyed during the marriage ... These principles were not changed by Canakaris v. Canakaris, 382 So. 2d 1197 (Fla., 1980) ..." (at 1371)

It is legally wrong for an ex-wife to be required to exhaust her capital assets in order to live and achieve self-support, DeCenzo. It must also be remembered that being self-supporting is not the same thing as having employment or income, O'Neal and Fazli v. Fazli, 434 So. 2d 1022 (Fla. 2d D.C.A., 1983).

All other districts have held that an award of permanent alimony is not limited to the long-established housewife or mother or the unemployed wife, but may be used as an equitable award in supplementing the present or future earnings or income of a former spouse, Wagers v. Wagers, 444 So. 2d 520 (Fla. 1st D.C.A., 1984), Maloy v. Maloy, 431 So. 2d 473 (Fla. 2d D.C.A., 1983), Greer v. Greer, 438 So. 2d 535 (Fla. 2d D.C.A., 1983) and Kozelski v. Kozelski, _____ So. 2d _____, 9 F.L.W. 959 (Fla. 2d D.C.A., April 25, 1984), Stiff v. Stiff, 395 So. 2d 573 (Fla. 2d D.C.A., 1981), Neumann v. Neumann, 413 So. 2d 1203 (Fla. 3d D.C.A., 1982) and Heilig v. Heilig, 400 So. 2d 182 (Fla. 4th D.C.A., 1981).

Permanent alimony may also be initially awarded and increased as children attain their majority, thus safeguarding the future needs of the ex-wife, Nash v. Nash, 376 So. 2d 413

(Fla. 1st D.C.A., 1979).

As can be seen, the reasoning of the Fifth District as to permanent alimony and its approach to it is in variance with the four other District Courts of Appeal.

The District Court test outlined in Walter, and earlier decisions relied upon, further finds conflict with this Court's decision in Canakaris and the analysis of that decision as reviewed in Tronconi and presently pending before this Court.

Once and for all, this Court has the opportunity and should offer judicial guidance to the Fifth District so that in the future, its decisions may be in harmony with other district courts of appeal in making a determination as to when permanent alimony should be awarded and what factors a trial court may take into account in making that decision.

CONCLUSION

The District Court decision reversing the award of permanent periodic alimony to MARILYN WALTER is nothing more than a three-judge panel by appellate review deciding 2-to-1 that their collective judgment should be substituted for that of the trial judge who heard the evidence and applied the existing law. Their review of the record did not have the superior vantage point of Judge Diamantis, who heard the live testimony of the parties and their witnesses and who, after doing so, made detailed findings of fact and conclusions of law. Despite substantial and competent evidence in the record supporting the permanent periodic alimony award, the majority chose to read the record and interpret the evidence in a selected manner so as to neatly fit the "self-support test" adopted in earlier decisions. The dissent correctly pointed out that the decision of the majority was contrary to this Court's pronouncement in Conner and that the presumption of correctness given to a trial court's findings and decision should be upheld. After this Court has rendered its decision in Kuvin, there seems to be little doubt that the dissent proved to be absolutely correct.

First of all, the District Court opinion in this case should be reversed because the majority exceeded their scope of proper appellate review and, secondly, because the legal test applied by the majority to the evidence in this case is erroneous as a matter of law.

Respectfully submitted,

MICHAEL R. WALSH

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States mail, postage prepaid, to JEFF B. CLARK, ESQUIRE, 126 East Jefferson Street, Orlando, Florida 32801, this 20th day of July, 1984.

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

Attorney for Petitioner