IN THE SUPREME COURT OF FLORIDA

RONALD L. MARCOUX,

Petitioner,

v.

CATHERINE M. MARCOUX,

Respondent.

CASE NO. 65,078

AMICUS CURIAE BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS SUPPORTING POSITION OF PETITIONER

ACADEMY OF FLORIDA TRIAL LAWYERS
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PREFACE

Petitioner, Ronald Marcoux, was the husband in the dissolution of marriage proceedings in the Circuit Court and Respondent, Catherine Marcoux, was the wife. The Husband was the Appellant before the Fourth DCA and the wife was the Appellee. The Fourth DCA affirmed and certified the present question before this Court. The husband is now the Petitioner before this Court and the wife the Respondent. Herein the parties will simply be referred to as the husband and the wife.

CERTIFIED QUESTION ON APPEAL

DO CONNER v CONNER, 439 So.2d 887 (Fla. 1983) AND KUVIN v KUVIN, 442 So.2d 203 (Fla. 1983); LIMIT THE SCOPE OF APPELLATE REVIEW ENUNCIATED IN CANAKARIS v CANAKARIS, 382 So.2d 1197 (Fla. 1980)?

STATEMENT OF THE CASE AND FACTS

The Academy of Florida Trial Lawyers does not have a copy of the record on appeal or any portion of it, but all the relevant facts necessary to answer the certified question appear to be set out in the opinion of the Fourth DCA. (See Fourth DCA opinion, attached to this brief as an appendix.)

The parties were married for thirteen years and have two minor children, ages 13 and 11. The parties were married just after high school graduation and niether had any assets at that time. All the assets were accumulated in the course of the marriage, during which time both parties worked.

The parties jointly own the marital home which has about $53,000.00 equity in it, and a $5,000.00 bank account which the wife withdrew at the time of separation. The husband has, in his own name, some stock ownership in three small corporations, the value of which totals $82,666.66. The husband also owns half of another corporation, Draughon and Marcoux, Inc., which according to the wife's accountant, the husband's interest is worth $292,500, primarily due to the "good will" of the business; even though his actual "book value" interest is only worth $80,000. The Fourth DCA stated it doubted that this small closely held personal service business would have such a substantial good will value.

Viewing the evidence in a light most favorable to the wife, the husband has assets in his own name totaling about

$375,000 but most of it is intangible "good will." Without the speculative good will factor the value of the husband's actual tangible assets in his own name are around $162,000. The wife is 31 years old and in excellent health but testified that her teenage children need her constant attention until they leave for college and she cannot enter the professional world.

In the final judgment the wife was awarded the entire marital residence and all its furnishings, plus $100,000 lump sum alimony, plus $15,000 a year in permanent periodic alimony, plus $6,000 a year child support, plus the wife's attorneys fees, accountant fees and appraiser's fees totalling $9,650.

On the husband's appeal to the Fourth District Court of Appeal, the Fourth DCA stated that it must reluctantly affirm even though it believes the husband had been shortchanged by the trial judge. The Fourth DCA stated that its affirmance seemed to be compelled by this court's language in Conner v Conner, infra, and Kuvin v Kuvin, infra; because these cases seem to say that a District Court of Appeal does not have jurisdiction to review this type of an order to determine whether a party has been shortchanged. The Fourth District Court stated, "If our scope of review does not encompass a review of the facts to determine that a party has been shortchanged, then we question our role in dissolution cases." (See Appendix.)

The Fourth DCA certified the question to this Court

whether, by the language used in Conner, infra, and Kuvin, infra, this Court intended to limit the "abuse of discretion" scope of appellate review enunciated in Canakaris, infra. Judge Letts concurred in the decision to certify the question but otherwise dissented and stated he would reverse the trial court's judgment. Judge Letts wrote that if a trial judge cheats one of the spouses that is an abuse of discretion which no reasonable man would adopt, but this Court's language in Conner and Kuvin appears to make the judgments of trial judges all but irreversible in domestic cases.

The husband filed his Notice to Invoke Discretionary Jurisdiction on the certified question and this Court has ordered the parties to file briefs going to the merits.

ARGUMENT

WHETHER THIS COURT IN CONNER v CONNER, 439 So.2d 887 (Fla. 1983) AND KUVIN v KUVIN, 442 So.2d 203 (Fla. 1983); INTENDED TO LIMIT THE SCOPE OF APPELLATE REVIEW ENUNCIATED IN CANAKARIS v CANAKARIS, 382 So.2d 1197 (Fla. 1980)?

We do not believe this Court intended in Conner, supra, and Kuvin, supra, to virtually eliminate appellate review over a trial court's judgment on the valuation and distribution of property in a domestic case. However the Fourth DCA's reluctance to interpret the language used in any other way is perhaps understandable and, with the Fourth DCA in doubt as to its own role in dissolution cases, the scope of review needs to be clarified by this Court. If, as the Academy believes, the scope of review enunciated just four years ago in Canakaris, supra, still continues to be the proper scope of review, then it is respectfully submitted that this Court should reaffirm this, in light of the doubt that has been cast by Conner and Kuvin, supra.

In Canakaris v Canakaris, 382 So.2d 1197 (Fla. 1980) this Court approved the use of lump sum alimony as one of the available means of effectuating an equitable distribution of property acquired during the marriage. But this Court noted that it would not be equitable unless the husband is in a position to make payment of the sum over and above the requirements attendant upon the maintenance of his business and without jeopardy to his business. ID. at

1201.

On the question of appellate review, this Court clearly envisioned that there would be such review. This Court noted that appellate courts must review the various remedies utilized by the trial judge as a whole to determine whether the result falls within the range of reasonableness. ID. at 1202. This Court established in Canakaris the "abuse of discretion" standard of review over a trial judge's exercise of discretion in these matters. When the trial judge's decision is arbitrary, fanciful or unreasonable, and no reasonable person would take the view adopted by the trial court, then an appellate court would be acting properly in reversing the trial court. ID. at 1203. This court stated that the discretionary power of the trial judge on these matters is not without limitation and it cannot be exercised with whim or caprice nor in an inconsistent manner. ID. at 1203.

This Court in Canakaris, supra at 1203, quoted the following immortal words of Justice Cardozo:

> "The judge, even though he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion

that remains."

This Court in Canakaris, supra at 1203-1204, also quoted with approval the principles enunciated in Brown v Brown, 300 So.2d 719 (Fla. 1st DCA 1974), where the First District Court stated:

> "In the case sub judice, the wife has been shortchanged. . . . We hold that the trial court abused its discretion in awarding the wife a pittance of the material assets accumulated in the husband's name during 21 years."

So, clearly in Canakaris, this Court recognized that although the scope of review would be "abuse of discretion" (admittedly a difficult burden for an appellant in most cases), there is at least appellate jurisdiction to review the facts in totality to determine whether one spouse has been so utterly shortchanged as to fall outside the range of reasonableness and constitute an abuse of discretion. Thus it is a matter of degree and while the appellant's burden is substantial to reverse the trial judge, there is at least an avenue of appellate review to act as a check and balance against the occasional trial judge who, in a divorce case, may act as a "knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness."

After all, trial judges are occasionally subject to the same human frailties, bias, passions, prejudices, hubris and arbitrariness that sometimes afflict us all. (So too are appellate judges but, theoretically, the collective judgment of a panel of judges should check against

the personal motivations of an individual which may not even be consciously realized by that individual.) Some judges, for example, may have personal experiences with divorce or domestic matters which may color the judge's perspective even though that judge makes every effort not to let this affect his judgment in other cases. The appellate process must exist to guard against what we should recognize as an unfortunate, yet undeniable latent characteristic in all of us to be predisposed on certain subjects.

According to some statistics, 73% of wives and children suffer a decline in their standard of living after the dissolution while former husbands experience a 42% rise in their standard. See 259 AFTL Journal 22; Comment, 28 UCLA Law Rev. 1181. Other cases may represent a backlash from judges who are sensitive to such reported statistics and perhaps over-react in a given case and unreasonably shortchange the husband. While considerable discretion must be reposed in the trial judge, appellate review must exist to discourage or overturn the occasional abuse of discretion which so severly shortchanges one spouse as to fall outside any acceptable range of reasonableness.

We do not believe this Court intended to abolish appellate review by what was written in Conner v Conner and Kuvin v Kuvin, supra. In Conner, supra, this Court stated:

> ". . . the determination that a party has been 'shortchanged' is an issue of fact and not one of law, and in making that determination on the facts before it in the instant case, the district court

exceeded the scope of appellate review."
[e.s.]

The key language is the underlined language limiting the holding to the facts of that case. It does not say that an appellate court, in every case, may no longer review the facts in totality to determine whether one spouse has been so utterly shortchanged as to fall outside the range of reasonableness and constitute an abuse of discretion. It is still a matter of degree. However, based on the facts in Conner, the District Court erred in reversing the trial court's award on grounds that it shortchanged one of the spouses because it did not fall beyond the range of reasonableness.

This does not create a new universal rule to further limit appellate review in all such cases. It simply refers back to the familiar principle stated by this Court in Shaw v Shaw, 334 So.2d 13 (Fla. 1976) that, absent an abuse of discretion, it is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the evidence from a cold record. In fact, this Court in Conner cited Shaw v Shaw just after it made the statement now causing all this confusion. This Court in Conner did not intend to limit the standard of review enunciated in Canakaris. In fact, this Court stated in Conner; ". . . the property distribution should be considered in light of this Court's opinion (issued after the decision of the trial court) in Canakaris v Canakaris, 382 So.2d 1197

(Fla. 1980)."

The same is true of this Court's opinion in Kuvin v Kuvin, supra. That opinion did not announce a new rule eliminating appellate review over equitable distribution orders. In fact, in Kuvin also this Court cited Canakaris, supra, and stated that there is appellate review over even a discretionary act but the appellate court must "apply the 'reasonableness' test to determine whether the trial judge abused his discretion." In Kuvin this Court merely concluded that it could not be said no reasonable person would take the view adopted by the trial judge, therefore there was no abuse of discretion and the District Court erred by substituting its own judgment for a discretionary call by the trial court which still fell within the range of reasonablensss.

Although this Court stated at one point in Conner, supra, that the issue of whether one party has been shortchanged is an issue of fact and not one of law, we do not believe this Court intended to depart from prior law holding that an appellate court does have jurisdiction to review the facts and intercede if one spouse has been so utterly shortchanged that it constitutes an abuse of discretion beyond the range of reasonableness in the opinion of the appellate court. In other words, even after Kuvin and Conner, supra, it is still a matter of degree.

It is a generalprinciple in Florida that the exercise of a discretionary act by a trial judge, although presumed

to be lawful, is always subject to appellate review in order to determine whether there was an abuse of discretion. See 3 Fla.Jur2d, Appellate Review §328.

In fact, this state has always recognized the right to appeal as being a right guaranteed by our state constitution. Eg. Robbins v Cipes, 181 So.2d 521 (Fla. 1966); Crownover v Shannon, 170 So.2d 299 (Fla. 1964); Helker v Gouldy, 181 So.2d 536 (Fla. 3d DCA 1966).

Just thirty days after the Fourth DCA certified the question to this Court in Marcoux, the Fifth DCA harmonized Kuvin and Conner with Canakaris and cited all three together for the proposition that an appellate court may still review the facts in evidence to determine whether the trial court's alimony award and equitable distribution appears to fall within the bounds of judicial discretion accorded to trial courts in dissolution cases. Morris v Morris, ___ So.2d ___ (Fla. 5th DCA Case No. 82-1492, opinion filed March 29, 1984) [1984 FLW 728]. Although the Fifth DCA affirmed the trial court, it did so after exercising its proper scope of appellate review to determine whether there was an abuse of discretion.

We believe the Fifth DCA is correct since Kuvin, Conner and Canakaris can all be harmonized. Kuvin and Conner simply applied the general principles stated in Canakaris. They do not independently create a further limitation on the already narrow scope of appellate review over an equitable distribution order.

In the present case the Fourth DCA incorrectly interpreted Conner to hold that a District Court exceeds its scope of appellate review in making a determination whether one party has been shortchanged. That is incorrect. This Court in Conner simply held that, under the facts of that case the District Court exceeded its scope of review when it reversed the trial court's award because it did not fall beyond the range of reasonableness. That is not true in every case and apparently the Fourth DCA in the present case believed that the husband had been shortchanged and would have been inclined to find an abuse of discretion but was still reluctant to intercede because of its interpretation of the language this Court used in Conner. This Court should clarify this so that the Fourth District need no longer question its own role in dissolution cases.

Accordingly, the Fourth District Court has certified the question whether Conner and Kuvin limit the scope of appellate review enunciated in Canakaris. This Court should answer the certified question in the negative, quash the Fourth DCA's "reluctant affirmance" and remand the case back to the Fourth DCA for further consideration under the principles enunciated in Canakaris.

CONCLUSION

This Court should answer the certified question in the negative, quash the Fourth DCA's "reluctant affirmance" and remand the case back to the Fourth DCA for further consideration under the principles enunciated in Canakaris, supra.

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy of the foregoing has been furnished, by mail, this 16th day of April, 1984, to: GARY RUDOLF, ESQ., P. O. Box 14098, Ft. Lauderdale, FL 33302; WILLIAM L. ZIMMERMAN, ESQ., 2745 E. Atlantic Blvd., Pompano Beach, FL 33062; and BRENDA M. ABRAMS, ESQ., 9400 S. Dadeland Blvd., Penthouse 10, Miami, FL 33156.

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