IN THE SUPREME COURT OF THE
STATE OF FLORIDA

CASE NO. 65,078

RONALD L. MARCOUX, :

Petitioner, :

vs. :

CATHERINE M. MARCOUX, :

Respondent :

_____ :

BRIEF ON BEHALF OF THE FAMILY LAW SECTION OF THE FLORIDA BAR AS AMICUS CURIAE

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INTRODUCTION

The Family Law Section of the Florida Bar submits this brief, as amicus curiae, in support of the position that the decisions of this Court in Conner v. Conner, 439 So.2d 887 (Fla. 1983) and Kuvin v. Kuvin, 442 So.2d 203 (Fla. 1983) do not limit the scope of appellate review.

The Family Law Section takes no position with respect to any other issue raised by the parties herein and submits this brief on its own behalf as distinguished from the Florida Bar as a whole.

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)?

In Marcoux Judge Gavin Letts, dissenting, opined:

> [I]t appears that the Canakaris-Conner-Kuvin trilogy has collectively put the District Courts on notice that the judgments of trial judges are all but irreversible in domestic cases.

If the Marcoux interpretation of Conner and Kuvin is correct, if the question of whether a party has been "short-changed" cannot be answered by the appellate courts, then Judge Letts is equally correct; final judgments in dissolution cases will be virtually irreversible and the trial courts will have no standard against which to exercise their discretion.

The term "short-change", since this Court's ruling in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), has become, as it should be, not merely a "factual question" but, rather, a legal standard. The issue of whether a party has been "short-changed" by a dissolution judgment is the gauge against which the trial court's exercise of discretion is measured. If the lower court's ruling "short-changes" a party then, by definition, that party has been "given less than the correct amount or cheated". To be sure, no "reasonable man" would agree that such a result is proper and, therefore, the decision of the trial court, in the words of this Court in Canakaris, "fails to satisfy the test of reasonableness". Thus, quite simply, whether or not a party has been "short-changed" is

a question of whether the trial court applied the correct legal standard in the exercise of its broad discretion.

Who, however, is to set this standard? If the appellate courts cannot - if "short-changed" is a "factual question" not subject to review - then there is no limitation upon the lower court's discretion and, ultimately, without limitation there is no law.

This Court has, at other times and in other areas of the law, determined that the discretion of the trier of fact - be it judge or jury - is subject to the imposition of reasonable standards.

By way of example, in a civil trial as to liability and damages the plaintiff presents his case to the trier of fact who must make a determination based upon the testimony and evidence. That determination, as in a dissolution case, comes to the appellate court clothed with the presumption of correctness. Yet, despite this presumption, it is nevertheless subject to review and, indeed, it has been held that it is the "duty" of the appellate court to so review. In Renuart Lumber Yards v. Levine, 49 So.2d 97 (Fla. 1950) this Court held:

> It is not the function of this court to substitute its judgment for that of a jury or circuit court but it is the duty of this court to review the evidence and if we find that a verdict or judgment is, as a matter of law, without sufficient evidence to support it, it is our duty to set it aside or order a remittitur. (Id. at 99)

In Griffis v. Hill, 230 So.2d 143 (Fla. 1969) this Court again so held:

> We reiterate that a verdict for grossly inadequate damages stands on the same ground as a verdict for excessive or extravagant damages and that a new trial may be as readily granted in the one case as the other. Moreover, we did not mean by the language employed in any of our prior decisions or the results therein that neither the trial court nor

> the district court is precluded from disturbing a verdict which as an end result is so grossly inadequate that it shocks the conscience of the court.
>
> * * *
>
> The test to be applied in determining the adequacy of a verdict is whether a jury of reasonable men could have returned that verdict. This test is simply stated but may be difficult to apply in a particular case. We are aware of the difficulties and frustrations courts experience in the search for the mythical jury of reasonable men. The appellate court must be ever alert against the temptation to substitute its "verdict" for that of the jury. On the other hand, we must not refuse to act to relieve the injustice of either a grossly inadequate or excessive award. (Id. at 145)

A domestic case is, to this extent, identical to a civil trial case. Whether a party has been "short-changed" is not an issue of fact but rather a result, comparable in every way to a "grossly inadequate" or "excessive verdict". If it is the "duty" of the appellate courts to relieve a civil trial litigant of the burden of such an unjust result it is equally their "duty" to relieve a domestic litigant of the same burden.

With perhaps prescience that this Court's pronouncements in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980) would be revisited, and undoubtedly with full knowledge that it is, indeed, the duty of the appellate courts to establish reasonable standards for the exercise of discretion, Judge Daniel Pearson wrote a dissent in Capps v. Capps, 392 So.2d 581 (Fla. 3d DCA 1980):

> [T]he words "Canakaris v. Canakaris" are not talismans in the presence of which the right of divorce litigants fade away and disappear. This noteworthy decision, which is slowly, surely and mistakenly being read to mean all things to all people, does not authorize a trial court to resolve as it pleases the financial aspects of

> broken marriages; does not require us to place our imprimatur on whatever outcome occurs in a dissolution proceeding; and, in the present case, does not sanction an award to the wife of mere rehabilitative alimony when permanent alimony is required.

In this case, the District Court of Appeal perceived a change in the law wrought by Conner v. Conner, because of this Court's cryptic statement that "...the determination that a party has been "short-changed" is an issue of fact and not one of law,..." (439 So.2d 887). The Conner case reached this Court on conflict jurisdiction with Shaw v. Shaw, 334 So.2d 13 (Fla. 1976), which itself arrived in the Court on conflict with Westerman v. Shell's City, 265 So.2d 43 (Fla. 1972). In Shaw, the Court said:

> [I]t is clear that the function of the trial court is to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor and credibility of the witnesses appearing in the cause. It is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the testimony and evidence from the record on appeal before it. The test, as is pointed out in Westerman, supra, is whether the judgment of the lower court is supported by competent evidence. Subject to the appellate court's right to reject "inherently incredible and improbable testimony or evidence", it is not the prerogative of an appellate court, upon a de novo consideration of the record, to substitute its judgment for that of the trial court. (Id. at 16)

In reality, this Court in Conner did nothing more than reiterate its dictum in Shaw.

The dichotomy between "questions of fact" and "questions of law" is not a simple one. In a domestic case, the difference may be largely semantic, and the distinction between a fact question or a law question may be whether a result appears to depart from reason,

as, for example, the Canakaris test of reasonableness. If the appellate court thinks so, it reverses on a legal point, specifically, abuse of discretion. If, on the other hand, the court is satisfied that a fair, reasoned, conscientious result has been achieved, then an affirmance on the fact question is mandated, namely that competent substantial evidence supports the result.

Nothing in Conner, Kuvin, Canakaris, or Shaw, as Judge Letts correctly observed in his dissent, limits an appellate court from reviewing both facts and law in domestic cases. Each case merely cautions appellate judges not to roam freely when questions of credibility or demeanor are involved and to view the record with circumspection when evidentiary issues are presented. However, Shaw clearly states some "incredible and improbable" facts may be rejected at the appellate level, and the touchstone remains "competent substantial evidence."

It is difficult to understand how the District Court of Appeal in this case concluded that Kuvin limited the scope of appellate review enunciated in Canakaris. This Court found conflict in Kuvin based on its decision in Canakaris. It quoted at length from Canakaris in Kuvin. Nothing in either Conner or Kuvin signifies a retreat from Canakaris. In Canakaris, this Court expressed as much concern about arbitrary and unreasonable decision making at the trial level as it did about unwarranted incursion into the trial court's prerogatives at the appellate level. Quoting the philosophy of Cardozo, this Court and said:

> [T]he trial court's discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent

> manner. Judges dealing with cases essentially alike should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness... (Id. at 1203)

Nothing would breed greater disrespect nor cynicism directed at the courts than an appellate court system that merely rubber stamped every trial court level ruling in domestic cases. The law in this state has witnessed explosive change in domestic relations law. The Canakaris decision manifests that fact. Appellate courts should be encouraged to explore needed new horizons in domestic cases in the more deliberate atmosphere of the appellate process. Changing social mores and economic climate require an appellate judiciary that is not timid in its approach to domestic cases. Sometimes law changes between trial level and appellate determinations. Appellate courts must review domestic cases like all other cases, mindful of its duty to the litigants, the Bench and Bar, and ultimately to the betterment of society in general and the legal system in particular.

CONCLUSION

Based upon the foregoing argument and authorities, the Family Law Section of The Florida Bar, as amicus curiae, respectfully submits that the decision of the Fourth District Court of Appeal on review herein must be reversed and this Court must clarify and make known the role of the district courts of appeal in the review of dissolution of marriage cases.

Respectfully submitted,

THE FAMILY LAY SECTION OF
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing Brief on Behalf of the Family Law Section of the Florida Bar as Amicus Curiae was furnished, by mail, this 18th day of April, 1984 to William I. Zimmerman, Attorney for the Respondent and to Gary L. Rudolf, Attorney for the Petitioner.

BY: _____
CYNTHIA L. GREENE