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APR 23 1984
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

CASE NO. 65,078

RONALD L. MARCOUX,

Petitioner,

vs.

CATHERINE M. MARCOUX,

Respondent.

District Court of Appeals, Fourth District

Case No. 83-361

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

On June 11, 1981, Respondent, herein, CATHERINE M. MARCOUX, (Petitioner in the trial court, Appellee/Cross-Appellant in the District Court, and hereinafter referred to as the Wife) filed a Petition for Dissolution of Marriage against the Petitioner herein, RONALD L. MARCOUX, (Respondent/Counter-Petitioner in the trial court, Appellant/Cross-Appellee in the District Court, and hereinafter referred to as the Husband) seeking, inter alia, a dissolution of the parties' marriage, custody of the parties' two minor children, lump sum alimony for an equitable distribution of marital assets, special equities, permanent periodic alimony and child support. (R-98-101)* Various and sundry motions, discovery and other pleading were filed and proceedings had thereon, none of which is germane to the issues involved in this appeal.

The facts of this case have been set forth with particularity by the Fourth District Court of Appeal in its "reluctant" per curiam affirmance (see Appendix). The following is nonetheless a brief review of the facts and evidence

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*References to the Record on Appeal will be identified as "R" with the page number following. References to the trial transcript will be designated as "TR" with the page number following relating to the originally numbered pages in the three volumes of the transcript.

elicited at the trial court and reviewed by the appellate court.

1. The parties were married on December 7, 1968, in Hollywood, Florida, and separated shortly before the Wife filed her initial Petition when the Wife requested the Husband to vacate their marital domicile. The Husband was 18 years old, and the Wife 17, at the time of marriage, and neither had any assets at the time. The parties had met in high school, and both have high school degrees only. They have two children, Ronald Marcoux, born July 2, 1969, and Tamara Ann Marcoux, born April 17, 1971.

2. The Wife worked miscellaneous jobs during the marriage, the last time as a bank teller for approximately seven months in 1977. The Husband began as a carpenter, and worked as such for seven years. He then met John Draughon, with whom he became a partner. Ultimately, in 1979, they incorporated their interior contracting business as a Florida corporation.

3. The Final Hearing in this matter was heard before the Court on May 10, 1982, June 7 and June 11, 1982. At the time of the Final Hearing, the Wife was 31 years old and in excellent health.

4. The parties had acquired, as a tenancy by the entirety, the marital residence, a four bedroom single family residence with swimming pool, with an agreed-upon

fair market value of $129,000.00, and encumbered by a mortgage with a principal balance of approximately $76,000.00, yielding a net equity of $53,000.00.

5. The Husband, in his own name, owned 50% of the issued and outstanding shares of stock in three inter-connected corporations, Draughon & Marcoux, Inc., Draughon & Marcoux Interior Contractors, Inc. and Draughon & Marcoux Investments, Inc. In addition, the Husband owned 1/3 of the outstanding shares of stock in Bella Vista Properties, Inc., its only asset being a four-unit apartment building.

6. The Wife's real estate appraiser valued the Bella Vista property at $160,000.00, and there was a mortgage outstanding in the sum of $6,000.00, yielding a net equity of $154,000.00, with the Husband's share therefore valued at $51,333.33.

7. Draughon & Marcoux Investments, Inc., is the fee simple owner of an undivided 1/3 interest in four parcels of unimproved realty, with an agreed fair market value of $176,000.00. The Husband's interest in the corporation is therefore $29,333.33.

8. Draughon & Marcoux Interior Contractors, Inc., has no value. The corporation is used only when non-unionized interior contracting services are required, and both parties recognized that the Husband's shares of stock in this corporation could not be independently valued from Draughon & Marcoux, Inc.

9. The parties differed widely in their appraisal of the fair market value of Draughon & Marcoux, Inc. The corporation began as a Subchapter S Corporation in fiscal year 1979, (ending September 30, 1979) and then converted, after year-end September 30, 1980, to a regular corporation. At the time of the Final Hearing, it had been in existence for three and one-half years. It was admitted that 1980 was the corporation's best year, due to business created through contacts of John Draughon, and that the corporation had had between 25 and 60 employees that year. However, it was undisputed that the interior contracting business in Broward County, Florida, had swiftly deteriorated after 1980, and the corporation only had four employees at the time of the Final Hearing, including John Draughon and Ron Marcoux.

10. If the company were liquidated, both of the parties' accountants agreed that Ron Marcoux would receive only approximately $80,000.00 before taxes. This, the Husband argues, is the value of his interest, less taxes payable, in this corporation, which value was substantiated by the corporation's certified public accountant and the Husband's partner/co-stock owner. From this liquidation amount, the Husband, according to his accountant, would have to pay approximately $30,000.00 in income tax, leaving a net value of $50,000.00.

11. The Wife's accountant for the trial ultimately agreed that the corporation's book value was $160,000.00, but valued the business with good will at $585,000.00, concluding that the Husband's interest in the business was worth $292,500.00.

12. In addition to the marital residence and the Husband's business interests, the parties had accumulated only $5,000.00 in savings, which the Wife unilaterally withdrew immediately after the parties separated. This was despite the fact that the Husband continued to give her his paychecks from the business. The parties also owned furnishings and accessories in the marital residence which had been recently purchased, from 1979 through June 1, 1981, for a total purchase price when new of approximately $20,000.00. They owned other miscellaneous property, including automobiles, and the Husband's coin collection, but had not amassed any significant savings in either bank accounts or securities.

13. The total net value of all assets accumulated during the marriage, including the marital residence ($53,000.00), its furnishings ($20,000.00), the parties' savings ($5,000.00) and the Husband's various business holdings ($51,333.33 $29,333.33 $50,000.00 = $130,666.66) was $208,666.66.

14. The Final Judgment of Dissolution of Marriage, (R-297-300), dated November 22, 1982 (a full five months after the last day of Final Hearing) awarded, among other things, the Wife the marital residence and its furnishing and accessories, and $100,000.00 lump sum alimony payable at the rate of $10,000.00 per year with accumulated interest on the declining balance at the rate of 8% payable yearly, for 10 years. The Wife was therefore awarded $173,000.00, out of the total marital assets valued at $208,666.66, or over 82% of all the assets accumulated during the marriage. If the interest on the unpaid principal balance is added to this amount, the Wife will receive an additional $44,000.00 over the ten year period, for over 100% of all assets accumulated during the marriage.

15. The Husband's income throughout the marriage was, at times, insufficient to support the parties. During these periods, the Wife would work to supplement their income. After the Husband began his partnership with John Draughon, the parties' financial situation did improve. At its pinnacle in 1980, the Husband earned $160,000.00. This amount, as reflected on the parties' 1040 return, is deceptive. In 1980, Draughon & Marcoux, Inc., was a Subchapter S Corporation, and thus all its income had to be passed along to its shareholders. However, the corporation did not have sufficient funds to make this distribution of income and thus a

paper transaction was performed and Ron Marcoux received a check for $110,000.00 and immediately wrote a check back to the company for this amount. This was undisputed at Final Hearing. Thus, the parties' disposable income in 1980, their best year, was only approximately $50,000.00 before taxes. In actuality, the parties averaged a gross income of approximately $60,000.00 a year for 1979, 1980 and 1981. However, 1979 is also a deceptive year as approximately $13,000.00 is attributable to the sale of their prior home. At the time of Final Hearing, Draughon & Marcoux, Inc., could not even afford to pay salary, and the Husband and his partner were merely taking drawers against future salary. The Husband's accountant estimated the Husband's income for 1982 at approximately $40,000.00, (TR-407).

16. The parties never lived a lavish lifestyle. Their entertainment consisted of bowling and occasional nights out at The Sizzler Steak House or Denny's (TR-305). Prior to 1979, the Wife herself said the parties lived "modestly." (TR-305). They went on vacations by driving to the Smokey Mountains or New York, certainly not an extravagant or upper-income lifestyle.

17. Notwithstanding a marriage of only thirteen year duration, with modest income and standard of living, and the Wife 31 years of age in excellent health, the Final Judgment

Dissolving Marriage awarded the Wife permanent periodic alimony in the sum of $1,250.00 per month. The trial court also awarded the Wife $500.00 per month child support, ordered that the Husband continue certain life insurance policies, and ordered that the Wife have sole custody of the parties' minor children.

18. Subsequently, the Husband filed a Motion for ReHearing, or for Reconsideration of the Final Judgment of Dissolution of Marriage alleging, inter alia, that the trial court erred in awarding the Wife well over one-half of all assets accumulated during the marriage, interest on the pecuniary lump sum alimony award, permanent periodic alimony, and sole custody of the minor children to the Wife rather than shared parental responsibility. The Wife likewise filed a Motion for ReHearing.

19. On February 8, 1983, the trial court denied both parties' Motions for Re-Hearing, awarded the Wife's attorney $6,500.00 as attorneys' fees, $2,500.00 for the Wife's accountant's fees and $650.00 for her real estate appraiser, for a total of $9,650.00 to be paid by the Husband, as well as reserving jurisdiction to assess and award costs. It is from this Order that the Husband timely filed his Notice of Appeal.

20. Viewed in its entirety, the trial court's awards to the Wife required the Husband to pay to her in the first

year after the Final Judgment $15,000.00 permanent periodic alimony, $6,000.00 child support, $18,000.00 representing $10,000.00 of the lump sum award plus 8% interest, $9,650.00 in attorneys' fees and suit money, for a total payment on behalf of the Wife of $48,650.00. This sum does not even include the cost to the Husband of maintaining insurance for the benefit of the Wife and minor children, nor does it take into consideration the tax consequences to the Husband of the unequal division of the parties' assets.

All three members of the panel of the appellate court concurred that the Husband had been "shortchanged," and in so finding from a review of the record, the Court determined, pursuant to the scope of appellate review enunciated in Canakaris, infra, that the trial court abused its discretion. Nonetheless, the appellate court felt constrained by this Court's recent decisions to remedy an apparent abuse of trial court discretion, and certified the following question to this Court as one of great public importance:

> DO CONNER V. CONNER . . . AND KUVIN V. KUVIN . . . LIMIT THE SCOPE OF APPELLATE REVIEW ENUNCIATED IN CANAKARIS V. CANAKARIS . . .?

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

ARGUMENT

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)?

The Husband appealed the trial court's Final Judgment of Dissolution of Marriage (and Order denying both parties' Motions for Re-Hearing) and argued, inter alia, that the trial court abused its discretion in its "equitable distribution award", grant of permanent alimony (and the amount thereof) and in ordering the Husband to pay the Wife's attorney's fees and suit money. In essence, the Husband argued that he was "shortchanged", citing the now landmark decision of this Court in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), wherein it is stated:

> . . . a trial judge must ensure that neither spouse passes automatically from misfortune to prosperity or from prosperity to misfortune, and, in viewing the totality of the circumstances, one spouse should not be "shortchanged." (Id. at 1204.)

In consequence of this Court's decision in Canakaris, trial courts have a new vehicle for doing equity and justice between spouses when dissolving the "marital partnership." By ushering in the concept of equitable distribution of assets acquired during the marriage, no longer is it neces-

sary to prove need in order for a spouse to receive lump sum alimony, and assets can now be equitably apportioned based upon justification. Thus, the various options available to the trier-of-fact in resolving the division of marital assets and providing for necessary support were greatly expanded. However, it is equally clear from the Canakaris decision that the trial court's discretionary power, subject to the test of reasonableness, requires "logic and justification" for the result. Therefore, it was noted that all the remedies (options) to be considered by the trial court are interrelated and part of one overall scheme. "It is extremely important that they also be reviewed by appellate courts as a whole, rather than independently." (Id. at 1202.)[1]

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[1]Some commentators have argued that this Court's decision in Canakaris has placed new limits on the scope of appellate review, and at least one District Court has concurred in this viewpoint; thus, in Zediker v. Zediker, 444 So.2d 1034 (Fla. 1st DCA 1984), the Court opined:

> In addition to re-defining and expanding the various options available to the trier-of-fact in resolving such questions, Canakaris also enlarged the trial court's discretion over such matters, while concomitantly narrowing the scope of appellate review by adopting the "reasonableness" test of abuse of discretion. (Id. at 1037; emphasis in original).

In the case at hand, after reviewing the facts and record on appeal, all three justices of the Fourth District Court of Appeal found that the Husband had been shortchanged. Nonetheless, Justices Beranek and Hersey concluded:

> . . . we must reluctantly affirm because of the recent Supreme Court decision in Conner v. Conner, 439 So.2d 887 (Fla. 1983). That case holds that a determination that a party has been "shortchanged" is an issue of fact and not one of law and that a District Court exceeds its scope of appellate review in making such a determination. To the same effect is the most recent case of Kuvin v. Kuvin, . . . where the Supreme Court reversed the Third District Court of Appeal based on the test of whether the judgment is supported by competent evidence. In doing so the Supreme Court noted that the role of the trial court is to determine alimony based on ability of the husband, need of the wife, and "the best interests of the parties." If our scope of review does not encompass a review of the facts to determine that a party has been short-changed, then we question our role in dissolution cases. (9 FLW 479; emphasis added).

Justice Letts concurred in the decision to certify the question herein and in the belief that the Husband was "shortchanged", but in any event would have reversed the trial court. He recognized, however, the limitation on the scope of appellate review seemingly set forth in the Conner and Kuvin decisions, noting that, in his words, "the Canakaris-Conner-Kuvin triology has collectively put the

District Courts on notice that the judgments of trial judges are all but irreversible in domestic cases."[2]

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[2]It is interesting to note that in an opinion filed the same same day the Fourth District Court, consisting of a different panel (with the opinion written by the trial judge in the case sub judice sitting as Adjunct Justice) did not feel so constrained by the Conner and Kuvin decisions, and reversed the trial court award of lump sum alimony to the wife, finding it error (and, apparently, an abuse of discretion) not to award her permanent periodic alimony; Marshall v. Marshall, ___ So.2d ____, Case No. 82-1820 (Fla. 4th DCA February 29, 1984), 9 FLW 480. Justice Letts specially concurred in the modification of the lower court judgment, but, citing Canakaris, Conner and Kuvin, supra, opined:

> [O]ur Supreme Court has, at least arguably put the District Courts on notice that the decisions of trial judges in domestic cases are all but irreversible. The statement in Canakaris that an abuse of discretion only occurs when "no reasonable man would take the view adopted by the trial court," Id. 1203, is chilling, but not necessarily dispositive, because any district court panel supposedly composed of three "reasonable" men can take the position that no reasonable man would have done what the unreasonable trial judge did. However, the statement in Conner that if one party or the other is "shortchanged [that] is an issue of fact and not one of law" and therefore within the trial court's discretion is a horse of quite another color. The two sizable dictionaries in my office define "short-change" as the giving of less than the correct amount or cheating. If a trial judge awards an incorrect amount to the wife or cheats her, surely that is an abuse of discretion. I certainly hope so. (9 FLW at 481.)

The Fourth District Court's interpretation of the Conner and Kuvin decisions is understandable based upon their apparent conflict with the scope of appellate review enunciated in Canakaris. In Canakaris, supra, this Court quoted with approval from Justice Cardozo's treatise, "The Nature of Judicial Process":

> The judge, even when 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. (Id. at 1203.)

As noted by Justice Cardozo and this Court, the exercise of discretion must be tempered and disciplined. In furtherance of this, Justice Overton opined, "Judges dealing with cases essentially alike should reach the same result." (382 So.2d at 1203.) In so stating, this Court quoted with approval the test for review of a judge's discretionary power set forth in Delno v. Market Street Railway Company, 124 F.2d 965 (9th Cir. 1942):

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused

> only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. (Id. at 967.)

Thus, the scope of appellate review was stated to be the application of the "reasonableness test."

The discussion in Canakaris, therefore, on the judicial discretion of trial judges, and appellate review thereof, while maybe "chilling," certainly does not foreclose appellate review. In fact, how else can the "reasonableness test" be applied except through appellate review? And, since the remedies employed by the trial courts are part of one overall scheme requiring logic and justification, there is, and must be, appellate review of the facts and evidence. If, in such review, an appellate court finds, based upon the totality of the circumstances (i.e., the facts and evidence), albeit with great deference to the superior vantage point of the trial judge, that one party has been "shortchanged," then the reasonableness test enunciated in Canakaris has been met and the appellate court is empowered to provide a remedy.

This Court's decision in Conner, supra, however, appears to restrict appellate review and eliminate the reasonableness test. The first District Court reviewed trial court's awards and the record on appeal, and concluded:

> In view of the parties' long marriage and the admitted contributions the wife made to this marriage, we find that the wife has been "shortchanged."[3]

This Court accepted jurisdiction of the matter based upon a conflict between the First District Court's opinion and the decision of the Florida Supreme Court in Shaw v. Shaw, 334 So.2d 13 (Fla. 1976). Although agreeing with the First District's holding that the property distribution should be considered in light of the dictates in Canakaris, supra, which was rendered approximately four months after the trial court's final order, the per curiam decision in Conner v. Conner, 439 So.2d 887 (Fla. 1983) stated:

> Nonetheless, 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. Shaw v. Shaw. (Id.)

The fact this Court cited its prior opinion in Shaw v. Shaw, 334 So.2d 13 (Fla. 1976), for support of the quoted passage is, arguably, restricting and limiting the scope of review enunciated in Canakaris. In Shaw, this Court proclaimed:

> 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

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[3]Conner v. Conner, 411 So.2d 899, 901 (Fla. 1st DCA 1982).

> record on appeal before it. . . . 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.)

If the appellate court cannot review the evidence and record that formed the basis of the judgment of the trial court, then the Husband, herein, submits that there can be no appellate review of discretionary findings of fact by trial judges. The "reasonableness test" of review would, accordingly, be abrogated.

This conflict regarding the implementation of appellate review was further augmented in Kuvin v. Kuvin, 442 So.2d 203 (Fla. 1983). Although this Court reviewed the record to determine if there was "competent evidence" to support the trial judge's determination, and found that reasonable persons could differ as to the propriety of the trial court's actions, Shaw was again cited for the proposition that the appellate court cannot re-evaluate the evidence.

Since so many of the issues to be decided in a dissolution of marriage action are based upon doing equity between the spouses, the trial judge must employ reasoned discretion. While this discretion is broad, it is not unlimited. As noted by the Fourth District Court in Upstill v. Upstill, 435 So.2d 979 (Fla. 4th DCA 1983):

> The broad discretion to which Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), refers does not eliminate a close, surgical analysis of the parties' accumulated assets, which analysis must include concern for the substantial relationship between each asset and its basic root or origin. (Id. at 980).[4]

If the scope of appellate review in a dissolution of marriage action does not encompass a review of the facts to determine if a party has been shortchanged, then appellate review is illusory. Such a tenet is then violative of the Constitution of the State of Florida which guarantees the right of appeal.[5]

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[4]In a footnote to the quoted passage, the court admonished attorneys regarding their obligation to provide the trial court with an analysis of the parties' assets, including their value and origin. This author would respectfully suggest that this Court adopt a requirement, similar to Rule 52, of the Federal Rules of Civil Procedure, that the trial courts make specific findings of fact with respect to all financial aspects, including the value of the marital assets and, where support is in issue, the needs and abilities of the parties to comply therewith. Such a requirement would mitigate against an appellate court reversing a logical and just discretionary ruling of a trial court, and substituting its judgment for that of the trier-of-the-facts.

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[5]Art. V, Sec. 4; Art. V, Sec. 3, Florida Constitution; see, also, Robbins v. Cipes, 181 So.2d 521 (Fla. 1966).

CONCLUSION

If, as is now opined in the case at bar, an appellate court cannot independently review the discretionary judgments of the trial courts, then the warning in Canakaris that a trial judge must ensure that neither spouse is short-changed is dicta, and the test of reasonableness visionary and without substance. This, the Husband argues, is not the import of this Court's decisions in Conner and Kuvin,[6] and the certified question should be answered in the negative with this cause remanded to the Fourth District for further consideration consistent with the Canakaris principles.

Respectfully submitted,

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[6]The First District obviously does not view the Conner decision as limiting the scope of appellate review, and, although mindful of its admonitions, applied the "reasonableness" test and reversed the trial court in Shurtleff v. Parker, 440 So.2d 617 (Fla. 1st DCA 1983).

CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof was served by U.S. mail, postage prepaid, upon William I. Zimmerman, Attorney for Respondent, 2745 East Atlantic Boulevard, Pompano Beach, Florida 33062, Brenda M. Abrams, Esq., 9400 So. Dadeland Boulevard, Penthouse 10, Miami, Florida 33156, Richard A. Kupfer, Esq., P. O. Box 3466, West Palm Beach, Florida 33402, and Melvyn B. Frumkes, Esq., 100 No. Biscayne Boulevard, Suite 1607, Miami, Florida 33132, this 18th day of April, 1984.

Gary L. Rudolf, Esquire