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 REPLY BRIEF

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In the Respondent's Answer Brief, the Wife agrees with the Husband that this Court should answer the certified question in the negative. Nonetheless, the Wife would have this Court affirm the Fourth District Court of Appeal decision, sub judice, based upon the reasonableness test of review. In other words, the Wife suggests that there is substantial competent evidence in the record below to sustain the trial court's awards. This, however, is not what the Fourth District opinion reflects, as all three judges found from a review of the evidence, although conflicting, that the Husband was shortchanged, and implicitly found that the record on appeal did not contain substantial competent evidence to support the trial court's various awards to the Wife.

As noted by the Court below, the crux of this case is whether or not the corporation in which the Husband had a one-half interest had goodwill value. After reviewing the evidence, the appellate court concluded:

> This corporation was essentially a small closely held personal service business and we doubt its substantial goodwill value. However, we cannot conclude that it had no such value as a matter of law as the trial judge certainly heard conflicting evidence on this subject. (See, Appendix to Petitioner's Initial Brief).

Based upon their interpretation of the import of Conner v. Conner, 439 So.2d 887 (Fla. 1983), and Kuvin v. Kuvin, 442 So. 2d 203 (Fla. 1983), the Fourth District Court of Appeal majority found that they could not apply the reasonableness standard of review to reverse the trial court. Simply put, they interpreted the above-named cases to mean that if there is any evidence in the record, as opposed to substantial competent evidence, then the appellate court exceeds its scope of review when it determines that party had been shortchanged in a dissolution case.

While the Husband submits that it is only necessary for this Court to answer the certified question in the negative and remand the matter to the Fourth District Court of Appeal for further consideration consistent with the Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980), principles, the Wife suggests that the trial court awards must be affirmed based upon a finding of substantial competent evidence. However, a review of the record below indicates that the Wife did not present substantial competent evidence supporting her position that the Husband's corporation had a goodwill value. The only evidence the Wife presented on this issue was the testimony of her accountant for trial, who admitted sixty to seventy percent of his income is derived from being a witness in matrimonial matters. (TR-75).

In the case at bar, the Wife's accountant based his evaluation on only three years of past earnings (the business only

being in existence for three years) and not at lease five years as suggested by the Internal Revenue Service (TR-383-384). In addition, he testified that he did not remove any of the fiscal year figures from his evaluation as he found none of them to be abnormal (TR-304). Yet, under cross-examination, the Wife's accountant testified that the business in 1980 had a gross revenue, inclusive of compensation before tax, of $350,000.00, and only $29,000.00 of gross revenue (inclusive of compensation) in 1981 (TR-385). Unquestionably, 1980 was the business' best year, as well as the best year for the Husand and Wife financially. Nonetheless, common sense would necessitate that this one year be discounted in evaluating the business, the same way a purchaser of the business would discount it, as market conditions had sharply worsened and declined after that year; (see argument in Appellant's Initial Brief and Reply Brief filed in the Appeal to the Fourth District Court).

Furthermore, the Wife's accountant did not project the impact of the economic conditions on the interior contracting business in South Florida (TR-379), he did not base it on the national economy in general (TR-379), and he did not project future earnings (TR-387). Instead, he simply plucked a multiplier of five virtually out of the air and "capitalized earnings."

The corporation's accountant, on the other had, who represents an average 25 construction firms a year (TR-176), testified that the Husband's interest in the corporations was approximately $80,000.00, (TR-189). As he noted, "If there is anybody other than Mr. Draughon that is interested (in purchasing the Husband's shares of stock), I would say he would not get a good will item at all." (TR-195). Furthermore, if the corporation was liquidated, the accountant observed that the Husbsnd's loans from the corporation (draws) would result in constructive income and he would have a tax liability of $35,000.00 (TR-208-209).

John Draughon, the Husband's partner, stated that 1980 was an outstanding year for the corporation because they obtained guaranteed profits and overhead contracts, "whereas most jobs we take are bid jobs, and you can pick up a number and hope to profit." (TR-232). He noted that the company did not currently have any "cost plus" contracts, observing, "During the year 1980, when construction was very intense, it was easy to get a time and material job, where is (sic) now there are none existent." (TR-235). He also testified that in 1980 the company had an average of 40 employees (TR-235), whereas at the time of trial they had 4 employees, including he and Ron Marcoux. Furthermore, the companies were currently running a $4,500.00 per month loss. (TR-236). All of this testimony was uncontradicted at the Final Hearing.

It is also interesting to note that while the trial judge was initially inclined to award the Wife only rehabilitative alimony, he was pursuaded by the Wife that she was entitled to permanent alimony, in part, due to reliance on the Third District Court opinion in Kuvin v. Kuvin, 412 So.2d 900 (Fla. 3d DCA 1982); (see, Final Argument, R-312-25).

In total, it is apparent that the trial court misinterpreted the legal effect of the evidence as a whole. The testimoney of the Wife's "expert," standing alone, was insufficient as a matter of law to overcome the unimpeached testimony of the business principals, and its accountant. Furthermore, while the general admonition to the appellate courts is to defer to the superior vantage point of the trial judge in weighing the demeanor of the witnesses, where, as here, there is more than a five month hiatus between the last day of final hearing and the rendering of a Final Judgment, it is clear that the trial judge lacked such an advantage. In fact, the Husband opines that the Fourth District Court of Appeal stood in a superior vantage point as it had the entire transcript and record before it. The trial court, on the other hand, had to request the parties to file final arguments and memorandums to refresh its recollection of the case.

Finally, the Husband respectfully directs this Court's attention to the continuing uncertainty raised by its decisions

in Conner and Kuvin. Thus, in McSwigan v. McSwigan, ____ So.2d____ (Fla. 4th DCA Case No. 83-450, opinion filed May 2, 1984) (9 FLW 997), the Fourth District Court of Appeal felt constrained to reverse the trial court award to the wife of a mere "pittance" of the marital assets, although finding that no reasonable person could disagree that the wife was short-changed, and certified the same question to this Court as in the case sub judice. Likewise, the Second District Court of Appeal strove to find supporting precedent in the law, other than in finding that the trial court "shortchanged" the wife, in order to reverse an apparent "cheating" or giving of less than a fair amount of assets accumulated during the marriage, in Haney v. Haney, ____ So.2d ____ (Fla.2d DCA Case No. 83-153, opinion filed April 18, 1984) (9 FLW 912).

Accordingly, it is clear that this Court needs to clarify the role of the appellate courts in dissolution matters, answer the certified question in the negative, and remand this cause to the Fourth District Court of Appeal for further consideration consistent with the principles of Canakaris.

Respectfully submitted,

ENGLISH, McCAUGHAN & O'BRYAN

By: Gary L. Rudolf
Gary L. Rudolf

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, Cynthia L. Greene, Law Offices of Melvin B. Fumkes, P.A., 100 North Biscayne Boulevard, Miami, Florida 33132, Richard A. Kupfer, Esq., P. O. Box 3466, West Palm Beach, Florida 33402, and Evan Langbein, Esq., 908 City National Bank Building, 25 West Flagler Street, Miami, Florida 33130, this 4th day of June, 1984.

Gary L. Rudolf, Esquire