IN THE SUPREME COURT OF FLORIDA
Tallassee, Florida

CASE NO. 65,714

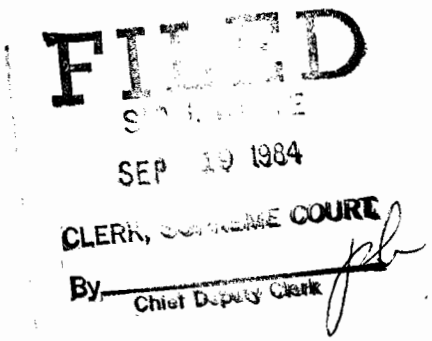
JAMES A. McSWIGAN,

Petitioner,

vs.

MAUREEN M. McSWIGAN,

Respondent.
_____/



RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CITATIONS

PREFACE

Petitioner/husband was the petitioner in the trial court and appellee in the Fourth District Court. Respondent/wife was the respondent in the trial court and appellant in the District Court. They are referred to herein as husband and wife.

The following symbols are used:

R: Record

A: Appendix

STATEMENT OF THE CASE

Wife accepts husband's statement of the case.

STATEMENT OF THE FACTS

Wife cannot accept husband's statement of the facts as it is one-sided and argumentative. Wife, therefore, presents her own statement.

Husband and wife, married on June 30, 1962, separated in October, 1978 (R 21, 33, 160, 161, 179). They have three children, Laura, 19, James, 18, and Joy 17 (R 21). The girls live with the wife and the son with the husband (R 21, 104). Wife is 42 years old and husband, 46 (R 104).

Wife has cardiac arrhythmia and no health insurance (R 119-120).

At the time of the marriage, wife was working as a secretary and husband was studying for the bar (R 31, 161, 200). Wife stopped working to become a homemaker and mother (R 31, 106). Husband became a partner in a law firm and was earning about $90,000/ year when he left in 1977 to move to Florida. He practices with Quarles and Brady in Palm Beach (R 23, 28, 222). He depicts himself as a destitute, nearly unemployed attorney with meager employment prospects. The record actually shows he is presently earning $60,000 per year with Quarles and Brady (R 37, 80).

Wife is currently attending Florida Atlantic University (R 159). She has a Bachelor of Arts in English and is studying for her masters in English which she hopes to complete in December, 1983 (R 45, 159-160, 199-200). She then wants to teach and can earn between $10,000 and $12,000 a year (R 160).

Wife's father, Maurice Connors, formed a corporation in which each of his seven children have an interest (R 110-111, 131). He sent wife approximately $500-$600 a year in dividends from the corporation and bought stock in her name

(R 110-111, 135). Wife liquidated her stock portfolio in 1974, and received between $6,500-$7,500 (R 115, 117, 136). According to wife, husband asked her to sell the stock because he wanted to invest the proceeds in local real estate (R 111-115). Husband denied this (R 64-65, 270). Her father sends her $100/month, which wife considers a loan and intends to repay (R 194).

After moving to Ashtabula in 1963, the parties rented a home for around one year (R 24, 164). They then bought a home at 821 Myrtle Avenue for $12,500 (R 24, 106-107, 164). Wife's father gave them the $2,500 downpayment (R 24, 131-132, 165). Around six years later, they sold the Myrtle Avenue house and used the proceeds as a downpayment for a $32,500 home at 2229 Walnut Blvd. (R 25, 107-109, 165-166, 271). They lived on Walnut Blvd. until they moved to Florida in 1977 (R 28).

Husband came down first and bought a condo in Fort Lauderdale in 1974 (R 27, 177). They put $10,000 down and took out a mortgage for the balance (R 27). They sold the condo in January, 1981 and realized $22,000, which they split equally (R 30, 177). Wife did account for the $11,000 she realized from the sale. She repeatedly said that her father invested it for her (R 182, 193). Husband

claims he spent his half of the condo proceeds on his family. The only amount substantiated in the record, though, is $3,000 he spent to buy wife a car (R 31, 223).

In November, 1977, they moved to West Palm Beach and bought a home at 8187 Nashua Drive (R 29). The home is encumbered with a $50-$55,000 mortgage and is worth, according to wife, $125-$130,000, according to husband, $100,000 (R 77, 229, 189, 215). The monthly payments, including taxes and insurance, average around $760 (R 31, 79). Since moving out of the marital home, husband has been living with another woman and pays no rent (R 56, 79, 81).

Husband and Ronald Kister jointly own several parcels of land in Ashtabula, Ohio. They have eleven vacant acres on Ohio Avenue. They bought a house on Bunker Hill in 1970 (R 245, 251). The mortgage payments are $158 per month and the home is rented for $155 per month (R 247). They additionally own property on West Avenue (R 250). In 1974, they purchased 5.32 acres on Benefit Avenue (R 50, 72, 89, 236-238). In 1979, they built two more buildings on the property, requiring second and third mortgages for $70,000 (currently $57,500) and $80,000 (currently $78,236), respectively (R 90-91, 229, 243). The buildings are all rented (R 48). The mortgages will all be paid off and the

property free and clear in ten to twelve years (R 90-92). Husband made no contention the funds to acquire any of these properties were from outside the marriage.

The Benefit Avenue property is titled in husband's and Kister's names and is subject to an "Agreement", dated October 1, 1974 (Husband's Exhibit #4; R 72, 238). The title is held "in survivorship", so that if either partner dies the other becomes full owner (R 272). Under the Agreement, the survivor must pay $5,000 to the decedent's estate (R 273). The Agreement further contains a right of first refusal in the event of a sale (R 272).

Wife did not find out that her name was not on the Ashtabula properties until August, 1982 (R 118, 176). Husband had told her the properties were investments for their retirement and the children's education (R 176). She signed and is fully responsible for all the mortgages encumbering these parcels (R 52, 55, 92, 176).

Husband depicts wife as a poor wife and mother and a violent, aggressive person. The trial court found that the wife was a homemaker and mother who "cared for the children ... and exerted a great deal of effort pursuing those 'social graces' in assisting her husband in his pursuance of

his legal career." (R 318-319). At one point in the trial husband did say wife was a poor mother (R 67, 68, 70). He later recanted this testimony, though, and stated:

> Q. Mr. McSwigan, did you have problems, martial problems back in Ohio prior, immediately prior to your move to Florida?
>
> A. Yes, we did.
>
> Q. Could you tell the court over what period of time?
>
> A. Well, it was -- as I said in my testimony before, it was since 1968, and I don't know how this business about bad motherhood got started. I think I lost my temper at the last hearing.
>
> She was a good mother, particularly up until 1968. Excellent mother....(R 264).

The problems which arose with the minor son related to his reaction to the separation and husband's drinking and were no reflection of wife's abilities as a mother. The two daughters are doing beautifully. Similarly, the car window breaking incident leading to wife's incarceration in April of 1981 was not a reflection of her violent nature, but the manifestation of the incredible pressures she was under at that time (R 209-211). Some cowboys had chased her son with a baseball bat the week before, her daughter had wrecked wife's uninsured car, and a wheel fell off her car while she was carpooling the girls to school (R 210). When husband

drove up to the house in a brand new car, it was more than she could take (R 211).

Contrary to husband's statements on page 8 of his brief, the parties didn't separate because of wife's "anger and violence". The husband left the wife around a year after they moved to Florida (R 179, 208). She didn't even know where he was living for a year and a half (R 180). While they were attending counseling sessions and supposedly trying to reconcile, husband was intentionally deceiving the wife and living with another woman (R 181). He's currently living with the same woman in her condominium and paying no rent (R 79).

As husband states on page 11 of his brief, wife did have about $5,000 in a savings account in her own name when they came to Florida. This money accumulated from the dividends her father sent her from the stocks he had invested in her name (R 133, 136, 175).

The trial court dissolved the marriage, determined custody, awarded wife $50 per week child support for Joy, allocated the parties' respective debts, awarded wife exclusive possession of the marital home until Joy graduates from high school (which has now occurred), at which point

wife has 60 days to vacate, a one-half interest in the Benefit Avenue agreement as lump sum alimony, $1,000 per month rehabilitative alimony for 18 months, and "some assistance" with her attorney's fees and costs (R 321-323). The parties split the mortgage payments and major repairs on the marital home, with wife paying all ordinary maintenance expenses (R 322).

The Fourth District reversed the final judgment and remanded to the trial court "for a determination of the amount and nature of the wife's entitlement based upon her contribution to the marital partnership."

ARGUMENT

POINT I

WHETHER APPELLATE REVIEW OF FINAL JUDGMENTS IN DISSOLUTION OF MARRIAGE PROCEEDINGS AS DEFENDED AND EXPLAINED IN CANAKARIS, 382 So.2d 1197 (Fla. 1980), HAS BEEN FURTHER RESTRICTED BY THE HOLDINGS IN CONNER, 439 So.2d 887 (Fla. 1983), AND KUVIN, 442 So.2d 203 (Fla. 1983)?

Wife agrees with husband that Conner and Kuvin did not further restrict appellate review as defined and explained in Canakaris.

POINTS II and III

WHETHER THE COURT HAS CORRECTLY INTERPRETED AND APPLIED THE HOLDINGS OF KUVIN AND CONNER IN THIS CASE?

IN REVIEWING THE ACTIONS OF THE TRIAL JUDGE, THE DISTRICT COURT ERRED BY IMPROPERLY RE-EVALUATING THE EVIDENCE BEFORE THE TRIAL JUDGE, BY FAILING TO CORRECTLY ANALYZE WHETHER THE TRIAL JUDGE ABUSED HIS DISCRETION AND IN SUBSTITUTING ITS JUDGMENT FOR THAT OF THE TRIAL JUDGE.

Because Points II and III are interrelated wife has consolidated her response to husband's separate points.

The District Court did not, as husband contends, reject wife's argument that she was entitled to permanent rather than rehabilitative alimony. The District court reversed the final judgment in its entirety, leaving the ultimate

disposition of all issues, including alimony, to the trial court on remand.

The District Court's reversal on pages 7-8 of its opinion directed the trial court to remand to determine the amount and nature of wife's entitlement based upon her contribution to the marriage. As this Court noted in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), on page 1202 of its opinion:

> While permanent periodic alimony is most commonly used to provide support, in limited circumstances its use may be appropriate to balance such inequities as might result from the allocation of income-generating properties acquired during the marriage. Patterson v. Patterson, 315 So.2d 104 (Fla. 4th DCA 1975). (Emphasis added)

Thus, permanent alimony is a viable alternative available to the trial court on remand in distributing the marital assets. The remedies available to a trial judge are interrelated and, therefore, should "be reviewed by the appellate court as a whole, rather than independently." Canakaris v. Canakaris, supra.

The District Court concluded on page 5 of its opinion that, "the share allotted to Maureen McSwigan from the partnership assets accumulated over twenty years is 'a

pittance'. The overall award was so low as to constitute an abuse of discretion.

Husband candidly recognizes on page 15 that this Court did not, in Conner, restrict appellate review under Canakaris. As this Court stated on page 1204 of Canakaris:

> ... [A] dissolution award should be sufficient to compensate the wife for her contribution to the marriage.
>
> We recognize that a trial court need not equalize the financial position of the parties. However, 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'. Brown v. Brown (Emphasis added)

Husband's contention that the District Court cannot review an award on "shortchanged" grounds ignores the entire thrust of Canakaris, namely, to equitably compensate a wife for her contributions to the marriage.

Canakaris held, as the language of this court set forth above demonstrates, that a spouse should not be shortchanged by the trial court. There is only one logical conclusion which can be drawn from that language. If a spouse is shortchanged by the trial court, the appellate court should reverse. In Conner this court stated on page 887:

> We agree with the First District's holding that 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). 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.... (Emphasis added)

Husband goes on for pages under Point III of his brief regarding alleged factual inconsistencies between the final judgment and the District Court's opinion. This case does not involve factual disputes; consequently, Shaw's competent evidence test does not apply. Nor, unlike Conner, does it involve a dispute regarding the amount of alimony awarded. The point here is that Maureen McSwigan did not receive a fair share of the marital assets. The Fourth District correctly recognized this distinction on page 7 of its opinion below:

> A reviewing court is not preempted from finding that one spouse has been shortchanged where the trial court has applied an incorrect rule of law. Canakaris, 382 So.2d at 1202. The foregoing analysis compels the same conclusion where the trial court has refused to make an award of alimony where such an award is mandated either in the form of support based upon need, ability to pay, and the best interests of the parties, or as an element of equitable distribution where the spouse is entitled to a share of the assets of the marital partnership upon termination.

Following a twenty-year marriage during which wife devoted herself to her husband and their three children, she was left with rehabilitative alimony of $1000/month for 18 months ($18,000) and lump sum alimony of one-half interest in husband's one-half interest in an agreement pertaining to the Benefit Avenue properties. She was required to assume sole liability for $4,500 in debts and $1,230 in joint obligations ($5,730 total). Due to restrictions inherent in the title to the Benefit Avenue property, wife's interest as established by the award is worth nothing unless she survives husband's partner.

Even worse, the Benefit Avenue property is only one of many Ohio parcels. The husband and his partner own 11 acres on Ohio Avenue, a house on Bunker Hill, and property on West Avenue, as we set forth on page 4. The trial court only gave her a questionable interest in the Benefit Avenue property and nothing in the other properties, notwithstanding that these properties were all acquired with funds generated during the marriage and wife is on the mortgages.

The Fourth District's opinion comports with the dictates of Canakaris, Conner and Kuvin. The appellate court, did not, as husband claims, reevaluate the evidence.

The evidence is not disputed. The District Court neither "introduced the standard of 'shortchanged'" nor "introduced the standard of ... 'pittance' into the mainstream" of appellate review (Petitioner's brief p.33). As Judge Letts stated in his dissenting opinion in Marcoux v. Marcoux, 445 So.2d 711, 713 (Fla. 4th DCA 1984):

> If a trial judge awards an incorrect amount to the wife or cheats the husband, surely that is an abuse of discretion, the result of which no reasonable man would adopt... .

The following facts are undisputed in the present case. The husband makes $60,000 per year. Wife, onces she completes her education, can earn $10,000 to $12,000 per year as a teacher. The husband accumulated various parcels of property in Ohio during the marriage, none of the funds for which came from outside the marriage. After 20 years of marriage, the wife was given $1,000 per month alimony for 18 months and a questionable interest in 1 of several of the Ohio parcels of land.

The Fourth District concluded that the trial court gave the wife only a "pittance" of the marital assets and that reasonable men could not disagree with that conclusion. The Fourth District did not exceed the proper bounds of appellate review in reversing the judgment of the trial court.

CONCLUSION

Conner and Kuvin do not restrict appellate review beyond the ambits of Canakaris. The District Court properly applied Conner and Kuvin to this case, and its opinion should be affirmed.

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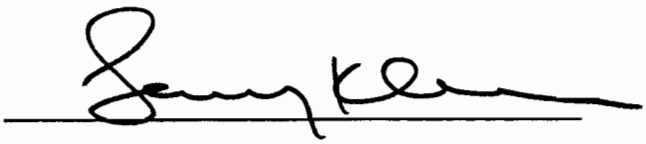
By 
LARRY KLEIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy hereof has been furnished, by mail, this 17th day of September, 1984, to PRUITT & PRUITT, Suite 501, Flagler Center, 501 S. Flagler Drive, West Palm Beach, FL 33401.



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