IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 65,714

JAMES A. McSWIGAN,

Petitioner,

- v -

MAUREEN McSWIGAN,

Respondent.
_____/

INITIAL BRIEF OF PETITIONER ON THE MERITS

William H. Pruitt
Pruitt & Pruitt
Suite 501, Flagler Center Bldg.
501 South Flagler Drive
West Palm Beach, FL 33401
(305) 655-8080

Attorneys for Petitioner

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PREFACE

Petitioner/husband was the petitioner in the trial court and was the appellee in the appellate court. Respondent/wife was the respondent in the trial court and the appellant in the appellate court.

These parties are referred to herein as "husband" and "wife".

The following symbols are used in this brief:

"R" - Original record on appeal.

"A" - Appendix to this brief filed simultaneously with this brief.

Additionally, exhibits introduced in evidence in the trial court are referred to as they were identified in the trial court.

STATEMENT OF THE CASE

On February 4, 1982, husband filed a petition for dissolution of marriage and other relief in the Circuit Court for Palm Beach County and wife, thereafter, filed an answer and counter-petition (R 293-294, 295-296). The case was heard by the trial court for two days - on September 7, 1982, and concluding on January 5, 1983 (R 3, 129). The chancellor below heard extensive testimony (R 1-292) as well as receiving and reviewing a number of exhibits during the time the case was heard. During the trial, counsel for both husband and wife presented arguments and suggestions to the court (R 9-16, 276-291).

On February 3, 1983, the trial court entered final judgment dissolving the marriage (R 318-323). The judgment ordered husband to pay wife rehabilitative alimony, child support and granted wife exclusive use of the marital residence for a period of at least seventeen (17) months following the date of judgment. Additionally, the court awarded wife a one-half (½) interest in an agreement between husband and an Ohio partner which provides for distribution of any money received by husband as the result of the sale of Ohio real estate owned by husband and his partner (R 319, 322).

The husband was further ordered to pay one-half (½) of the mortgage on the marital residence as well as one-half (½) of the major repairs thereto. Husband and wife were awarded one-half (½) interest each in the marital residence, subject to wife's right of exclusive possession for at least seventeen (17) months following the date of judgment and husband was ordered to assist wife in payment of her attorney's fees and costs. (R 321, 323). Both parties were ordered to pay certain outstanding debts. (R 321, 322).

The wife appealed to the District Court of Appeal, Fourth District.

In the district court, the wife claimed two errors by the trial court: failure to award permanent alimony and failure to award wife a one-half (½) interest in the Ohio properties owned by husband (A 10).

The basis for wife's appeal, according to the opinion filed by the Fourth District Court of Appeals, was stated by the court as follows:

> Maureen McSwigan appeals from a final judgment in dissolution proceedings on the basis that she has been shortchanged. (A 1).

Rejecting the wife's point on appeal that the lower court erred in awarding rehabilitative rather than permanent alimony, the court, however, reversed the final judgment and remanded to the trial court for further proceedings because the wife had not received a fair share of the assets:

> We do not hold here that rehabilitative alimony is unsuitable or inadequate. We hold that Maureen McSwigan did not receive upon termination a fair share of the assets of the marital partnership. (A 6).

Concerning distribution of assets by the trial court, the Fourth District Court of Appeals found that reasonable men could not disagree that the wife's share allotted by the trial court was a "pittance". (A 5). The appellate court further found that the wife had been shortchanged and reversed accordingly:

> Maureen M. McSwigan appeals from a final judgment in dissolution proceedings on the basis that she has been shortchanged. We agree and reverse. (A 1).
>
> It therefore seems clear to us that McSwigan does not come within the prohibition of Conner despite our finding that the wife has been "shortchanged". (A 7).

Professing doubt concerning its analysis of the holdings in two recent cases decided by this court as the basis of its reversal of the trial court, the Fourth District Court of Appeals certified two questions of great public importance to the Supreme Court as follows:

> 1. Whether appellate review of final judgments in dissolution of marriage proceedings as defined 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)?
>
> 2. Whether we have correctly interpreted and applied the holdings of Kuvin and Conner in this case?

On May 31, 1984, the Fourth District Court of Appeals denied husband's motion for rehearing.

On June 28, 1984, husband filed and served his notice to invoke discretionary jurisdiction of this Court pursuant to Rule 9.030(a)(2)(A)(v), Fla. R. App. P.

This case is now before the Supreme Court of Florida and this brief, on the merits, is filed in compliance with the briefing schedule ordered August 10, 1984.

POINTS OF APPEAL

POINT I

WHETHER APPELLATE REVIEW OF FINAL JUDGMENTS IN DISSOLUTION OF MARRIAGE PROCEEDINGS AS DEFINED 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)?

POINT II

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

POINT III

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.

STATEMENT OF THE FACTS

Husband and wife were married June 30, 1962. (R 21). Although husband and wife were legally married until February 3, 1983, the date the trial court dissolved the marriage (R 318), the marriage was over after sixteen (16) years when husband and wife separated in October, 1978 (R 33).

Husband, age forty-six at the time of the final hearing, is a lawyer and is employed at the Palm Beach branch office of the law firm of Quarles & Brady (R 23, 28, 222). At the time of the final hearing, husband was earning a gross income of $60,000.00 per year (R 37, 80); his net income was $43,596.00 per year (Husband's Exhibit 1). Throughout the marriage, wife had no employment outside of the home (R 31). Husband and wife have three children, Laura, 19, James, 18, and Joy, 17 (R 21). At the time of the hearing, the girls lived with the wife and James, the son, lived with the husband (R 21, 104).

At the time of the marriage, wife was working as a secretary while husband studied for the bar (R 31, 161, 200).

In 1977, husband and wife moved to Florida where husband was employed as a salaried associate with the firm of Magill, Sevier and Reid; husband's salary dropped from approximately $90,000.00 a year, which he earned as a partner in the law firm of Warren, Young and McSwigan in Ashtabula, Ohio, to $30,000.00 a year as a salaried associate.

Husband and wife moved to Florida, from Ohio, primarily because of wife's feeling that the move would be beneficial to the family generally and herself particularly (R 25, 26). Husband reluctantly agreed to the move as he did not wish to leave his career in Ohio as an active partner in a law firm; the move was against his better judgment (R 25, 26). Husband, however, felt the move to Florida would be beneficial to his wife and finally decided to move to Florida (R 265).

The wife claimed she helped husband materially in his career and that she was a good wife and a good mother to the parties' three children (R 121-123). The husband denied these claims (R 67, 68, 70). While living with the wife following separation, the minor son of the parties used marijuana, drank and was almost expelled from Cardinal Newman High School (R40, 41). After coming to live with husband in May, 1982, the son was doing well in school, did not drink or smoke and had gone out for the swim team (R 41).

Wife, on a number of occasions during the marriage, threatened husband with violence and did physical violence to husband a number of times while they lived in Ohio and in Florida (R 35). Her violent nature led to her arrest and detention in the Lake Worth Women's Detention Center following an incident in April, 1981, in which she broke the windshield of husband's automobile with a hammer (R 262, 263). Husband and wife had many violent scenes and husband had feared wife since 1968 (R 264).

During the four (4) years husband and wife were separated, wife attended college; she graduated with honors receiving a B.A. in English, with a business minor (R 199). At the time of the final hearing, the wife was enrolled in a master's degree program at Florida Atlantic University and expected to receive her master's degree in December, 1983 (R 159, 160). She planned on teaching in college or high school when she received her master's degree (R 159, 160). Also, during separation, wife completed a real estate broker's course at Junior College, but she had not taken the licensing exam as of the time the case was heard in the lower court (R 199).

Prior to marriage, the wife had completed high school, attended some college and worked in Cincinnati as a secretary (R 162, 200).

Upon completion of her master's degree, wife expected her income range, as a starting teacher to be $12,000.00 a year (R 160). At the time of the hearing wife was in apparent good health although her initial brief in the appellate court below claimed she had cardiac arrhythmia. (A 11). The record did not support that claim and the wife herself made no real claim to such medical condition in the trial court; she presented no competent evidence, by way of expert testimony or otherwise, to establish that she had cardiac arrhythmia (R 199, 120). In the final judgment, the trial court specifically found the wife to be in good health (R 320).

During separation, husband paid all expenses of the family including mortgage payments of $760.00 per month and payments on debts owed to various companies due to wife's use of credit cards (R 35, 36, 195, 198). Husband further provided private, parochial education for his minor children and contributed for his nineteen (19) year old daughter to attend college (R 39). The expenses incurred by husband for his daughter, Joy, to attend high school, exceeded $4,000.00 per year (R 42).

Additionally, during separation, husband purchased all groceries for his children who then resided with his wife; he assumed this responsibility because of his children's complaints that they had no food (R 35, 36). These complaints were received even though husband was giving his wife the sum of $250.00 bi-weekly for expenses in addition to paying all bills, including credit cards and other expenses (R 35).

Husband's net income, at the time of the final hearing, was approximately $3,633.00 per month or $43,596.00 per year. His income was insufficient to meet his own living expenses and the expenses he was paying to maintain his family (R 37, Husband's Exhibit 1).

In fact, husband's expenses exceeded his income to the extent that he was not able to afford to pay rent for himself (R 79, 81, Husband's Exhibit 1). At the time of the final hearing, husband was living with his son and a woman in her condominium. (R 79). He was unable to pay rent to the woman, although he had obligated himself to do so. (R 79, 81).

When she moved to Florida with her husband, wife had slightly less than $5,000.00 in her own savings account, despite her claims that she had turned over all of her money to her husband in Ohio (R 175). Wife failed to account for this amount of savings (Wife's Exhibit 14) in her amended financial affidavit or in her testimony below.

Additionally, wife did not account for disposition of $11,000.00 she realized from the sale of a Fort Lauderdale condominium which had been purchased and paid for by husband (R 27, 30).

Wife at first claimed that she only had about one-half (½) of the $11,000.00 left over (R 182). Her father, however, had helped her invest the entire $11,000.00 in a public utility, Toledo Edison, for income (R 140, 192). Wife later, before the trial court, admitted to the investment made with her father's help (R 192).

Wife further admitted the investment should have been listed in her financial affidavits (R 193). The wife's amended financial affidavit also failed to list any income from the utilities stock purchased with the help of her father (Wife's Exhibit 14).

Husband had used all of the $11,000.00 he realized from the sale of the Fort Lauderdale condominium to pay outstanding bills, primarily incurred by his wife, to purchase a car for his wife and to settle a damage claim against his wife and daughter (R 30, 31, 222, 223).

The trial court heard evidence that, following the move to Florida and after twenty-one (21) years of law practice, husband is only a salaried associate who has been employed by a law firm for about two (2) years (R 37). At the time of the hearing, the forty-six (46) year old lawyer faced an uncertain future; he had no written employment agreement with his employer, and his employment was dependent on how well his employer's office did (R 274). At the time of the hearing, the office was not doing too well (R 274).

The wife presented no real evidence of any standard of living, let alone a high standard. She indicated to the trial court that her personal needs were for lunch money and tuition (R 187).

The husband is one-half (½) owner of several parcels of real estate located in Ashtabula, Ohio, a deeply depressed area (R243, 244). The properties are without market value (R 257, 258).

The Benefit Avenue property is titled in the names of husband and his Ohio partner with right of survivorship (R 272). The agreement between the husband and his partner governs the right of sale of each partner's interest in the property. Each partner is powerless to sell his interest in the property without first offering to sell his interest to the other partner (R 273).

Wife attempted to prove she had contributed financially to the purchase of the Ohio real estate owned by husband and Ronald R. Kister, husband's Ohio partner, and known as the "Benefit

Avenue" property. Husband denied her claimed contribution. His partner appeared at trial and established that the wife had not contributed financially to acquisition of the Benefit Avenue property (R 236-240, 270).

In fact, the Benefit Avenue property was acquired by husband and his partner without funds being advanced by either (R 236-240, 270).

Although the wife signed Ohio mortgages securing the debt incurred by husband and his partner in acquiring and improving the Benefit Avenue property, she did so only because Ohio has a dower statute which requires a spouse to sign all mortgages (R 273). Wife made no claim, and offered no proof below, that she was liable on the notes and resulting debts secured by the mortgages.

Since acquisition of the Benefit Avenue property, husband and his partner have, yearly, been required to advance funds to maintain the property; to date, advancements have totaled over $11,000.00, including $3,850.00 advanced by husband since separation (R 241). Wife has made no contributions at anytime to maintain this property, or any other property owned by husband and his Ohio partner (R 270).

Wife's father, a successful, retired real estate broker, formed a corporation in 1962 and gave each of his children five percent (5%) of the corporation (R 110). Although the wife had

not worked during the marriage, her father had periodically sent her sums of money, ranging from $500.00 to $600.00 per year (R 32, 135).

At the time of the hearing, since January, 1981, wife's father sent to wife $100.00 per month for a total of approximately between $1,500.00 and $2,000.00 (R 136, 137).

Wife's amended financial affidavit filed in the trial court failed to list any income provided by her father (Wife's Exhibit 14). Wife further admitted that she had failed to list any income in her amended financial affidavit (Wife's Exhibit 14) despite her father's previous testimony that he had sent her $100.00 per month since January, 1981 (R 136, 137, 194).

At the time of the hearing, husband and wife were the joint owners of the marital home valued between $100,000.00 and $130,000.00, encumbered with a mortgage of approximately $50,000.00 (R 77, 229, 189, 215).

The marital home, and the Ohio property owned by the husband and his Ohio partner, were the only real assets of any consequence resulting from the marriage of husband and wife.

ARGUMENT

POINT I

WHETHER APPELLATE REVIEW OF FINAL JUDGMENTS IN DISSOLUTION OF MARRIAGE PROCEEDINGS AS DEFINED 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).

Husband respectfully suggests that the answer to the first question certified to this court by the district court is a clear "no."

It should be noted that the framing of this question is puzzling. The district court couches the question in terms of review of the "final judgment" (the result) rather than in terms of the review of the actions taken by the trial judge in reaching the final result and judgment. It is respectfully submitted that the concept of "review of the final judgment" in dissolution of marriage cases is a concept that may lead appellate courts astray and increase the danger of an appellate court substituting its judgment for that of the trial judge in violation of the mandates of Shaw v. Shaw 334, So. 2d, 13 (Fla. 1976). With respect, it is further submitted that the appellate court's function in review

of dissolution of marriage cases should be bottomed on a concept of "review of the actions taken by the trial judge" based on the record before him at the time of the trial, mindful of his superior vantage point to "best determine what is appropriate and just because only he can personally observe the participants and the events of the trial." Canakaris v. Canakaris, 382, So. 2d 1197 at 1202 (Fla. 1980).

This court's landmark decision in Canakaris, sets forth in clear, plain and concise language, the basic, specific guidelines by which an appellate court may properly review orders of the trial judge in dissolution of marriage cases. Indeed, a separate section of the opinion entitled "Judicial Discretion of the Trial Judge", is devoted to reminding the appellate courts of this state of the difficulty faced by trial judges in deciding dissolution cases, and the discretionary authority that should be accorded trial judges in order to do equity between the parties. Canakaris, 382 So. 2d 1202 (Fla. 1980).

This court in Canakaris reaffirmed the principles of discretionary powers of trial courts and, specifically, approved the "reasonableness" test to be used by an appellate court to determine whether the trial judge abused his discretion in attempting to do equity between the parties.

Not only did this court clearly define the broad discretion that must be accorded trial judges in dissolution cases, it similarly recognized that appellate courts are not to

be foreclosed from all review of a trial courts action's in dissolution cases:

> The trial court's discretionary power is subject only to the test of reasonableness, but that test requires a determination of whether there is logic and justification for the result. The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Canakaris, supra, at 1203.

It is respectfully submitted that the pronouncements of Canakaris are no way restricted by the cases of Conner v. Conner, 439, So. 2d, 887 (Fla. 1983), and Kuvin v. Kuvin, 442, So. 2d, 203 (Fla. 1983). Indeed, both Conner and Kuvin merely reaffirm the basic principles of appellate review of a trial judge's actions in dissolution of marriage cases.

In the Conner case, this court disapproved of the district court's determination that a party had been "shortchanged". This court felt such a determination was an issue of fact and, on the facts before it, the district court exceeded the scope of appellate review. On reading the Conner opinion, one would conclude that this court discouraged the appellate use of a finding that a party to a dissolution had been "shortchanged."

Conner, also, clearly re-affirms the holdings of Shaw v. Shaw, 334, So. 2d, 13 (Fla. 1976). In Canakaris, as previously noted above, this court spent considerable time and effort to re-establish the holdings and concepts of Shaw even though Shaw was not specifically cited in Canakaris.

The Kuvin case, again, is a clear re-affirmation of the Canakaris "reasonableness" test which is to be used by appellate courts in their review of actions taken by trial judges in deciding dissolution cases. Additionally, this court again approved Shaw's mandate that the appellate court should not substitute its judgment for that of the trial judge in dissolution cases.

In Kuvin, this court held that the trial judge had not abused his discretion, but that the appellate court, in reviewing Kuvin, had erred in substituting its judgment for that of the trial judge.

In summary, it is, again, respectfully submitted that Conner and Kuvin in no way further restrict appellate review of final judgments in dissolution of marriage cases, in light of Canakaris.

ARGUMENT

POINT II

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

Husband respectfully submits that the district court correctly interpreted and correctly applied part of the Kuvin holding to this case:

> We have no hesitancy in distinguishing McSwigan from Kuvin. We do not hold here that rehabilitative alimony is unsuitable or inadequate. We hold that Maureen McSwigan did not receive upon termination a fair share of the assets of the marital partnership. In our view Kuvin does not overlap an inquiry of this nature. (A 6).

Thus, the district court approves the rehabilitative alimony awarded by the trial judge and rejects the argument of the wife before the district court. In the district court, the wife, concerning the award of periodic alimony by the trial judge, argued as follows:

> As this court held in Wagner v. Wagner, 383, So. 2d, 987 (Fla. 4th DCA 1980), the classification of alimony as rehabilitative rather than permanent presents a question of law and is not a matter of discretion; consequently, review is not governed by the Canakaris "reasonableness" test. (A 12).

The district court, in deciding this case, obviously realized that its previous holding in Wagner, that classification of alimony as rehabilitative rather than permanent, is a question of law, was clearly erroneous. The Kuvin decision makes the error of such a holding even more apparent than does Canakaris.

The district court clearly, then, followed part of the holding of Kuvin by refusing to hold with the wife's claim that, as a matter of law, and not subject to the reasonableness test, the trial judge improperly awarded rehabilitative alimony.

However, the district court failed to follow Kuvin's reaffirmation of Canakaris with regard to the manner and scope of review of the trial judge's discretionary actions.

Regarding interpretation and application of Conner to this case, with respect, the district court most assuredly misinterpreted Conner and incorrectly applied its holding by its opinion in this case.

Conner clearly established that the finding that a party to a dissolution of marriage trial had been "shortchanged" is a finding of fact, not law, to be made by the trial judge.

However, contrary to that specific mandate by this court, the district court below in this case, specifically found that the wife had been "shortchanged". Indeed, the finding that the wife had been "shortchanged" was further claimed by the district court to have been the very basis for the wife's appeal of the final judgment entered by the trial judge:

> Maureen McSwigan appeals from a final judgment in dissolution proceedings on the basis that she has been shortchanged. We agree and reverse. (A 1).

With respect, the district court then proceeded, in its opinion, to use the "shortchange" concept and to find as a basis for re-evaluating the record testimony and evidence, allowing it to ultimately, improperly substitute its judgment for that of the trial judge.

Respectfully, the district court, by its announcement that the wife appealed on the "basis that she had been 'shortchanged'", and the subsequent finding that she had been "shortchanged", glaringly seems to ignore this court's specific holding in Conner; the concept of a party being "shortchanged is a question of fact to be determined by the trial judge and not to be determined by the district court. By fair implication, the claim of being "shortchanged" cannot be a proper basis for appeal of dissolution of marriage awards.

Husband respectfully suggests that, to allow the district court's pronouncement of a party's appeal on the basis of a claim of being "shortchanged", and to allow appellate inquiry into the fact question of a party having been "shortchanged", would open the judicial floodgates to a swollen river of appeals throughout this state by parties claiming they had been "shortchanged" in dissolution of marriage cases. Further, one can only begin to imagine the inconsistent results throughout appellate districts

of this state if the concept of "having been shortchanged" is introduced into the mainstream of appellate review.

In summary, it is respectfully submitted that this court find that the district court, with the exception of its approval of rehabilitative alimony in accordance with Kuvin, did not correctly interpret or apply the holdings of Kuvin and Conner in this case.

ARGUMENT

POINT III

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.

Respectfully, the district court, in its haste to conclude that wife had been "shortchanged", after examining the final judgment entered in this case, failed to properly analyze the actions of the trial judge in light of his superior vantage point as the chancellor presiding over a proceeding in equity. It is submitted that the principles evolved from the holding of Shaw, Canakaris, Conner and Kuvin were basically ignored by the district court in its rush to judgment.

It is respectfully submitted that in reviewing this case, the district court has indeed committed the act of substituting its judgment of the record facts, by re-evaluation of the record, for the judgment of the trial judge who heard the case. It has, in order to justify the re-evaluation and substitution of judgment, even made findings of fact in its opinion which should not be considered as the operative facts of this case. In some instances, the trial judge's findings are

contradicted by the district court, an act of ultimate interference by the appellate court with the trial judge.

For example, the district court, in its opinion, makes a "finding" that the husband was earning $60,000.00 per year at the time of the hearing and, based on the fact that he had earned in excess of $90,000.00 per year in Ohio (after practicing there for fifteen (15) years), concludes the husband has the "potential to substantially increase his income." The trial judge made no such finding. The trial judge heard the testimony from a forty-six (46) year old lawyer who was, at age forty-six (46), only a salaried associate, working without an employment contract in a law office not doing well at the time of the hearing (R 37, 274). His net spendable income of $43,596.00 per year was less than his expenses and he was sinking deeper in debt with the passage of time (Husband's Exhibit 1). The district court predicts a rosey picture for husband and substitutes that rosey picture for the reality reviewed by the trial judge. The trial judge had a reasonable basis to conclude that husband's future was not as pictured and predicted by the district court. At no time does the district court mention the plight of the husband and it apparently failed to consider that the husband was unable to pay his family expenses, let alone his own, out of his net salary of $43,596.00 per year.

Further, in its opinion, reversing the trial judge, the district court states that the wife has a potential of earning

$10,000.00 to $12,000.00 per year as a teacher. The trial judge heard testimony that the wife had returned to college during the four years husband and wife were separated and earned a bachelor's degree with honors in English (R 199). At the time of the hearing, she was close to obtaining a master's degree in English and expected to graduate in December, 1983 (R 159). In answer to a question as to her income range when she graduated and started teaching, wife testified before the trial judge that a junior college was paying $12,000.00 per year and two local high schools were paying between $10,000.00 and $12,000.00 per year (R 160). Based on the testimony and evidence before him, the trial judge found the wife would be able to obtain a starting salary of approximately $12,000.00 per year (R 320). The district court, in its opinion, writes wife had the "potential" to earn $10,000.00 to $12,000.00 per year as a teacher. A fair interpretation of this statement is that the wife, when working at full potential, will never be able to realize more than $10,000.00 to $12,000.00 per year. Obviously, the trial judge concluded, based on his observation of the wife and after listening to her testify, that she would only be starting at $12,000.00 per year; equally obvious to him or any reasonable person was the conclusion that in the future, she would have greater earning potential than $10,000.00 to $12,000.00 per year. (Emphasis added)

Of course, the trial judge also knew from listening to the testimony and reviewing the evidence, that during separation, the husband spent all of his savings and incurred debts to the extent that his monthly expenditures exceeded his net, spendable income (R 37, Husband's Exhibit 1), and, at the time of the hearing, husband was not even able to pay rent for himself (R 79, 81, Husband's Exhibit 1).

The district court further made a "finding" that the wife would be able to retain only $12,270.00 from the amount of rehabilitative alimony she was to realize from the trial judge's decision. In computing this amount, the district court ignored what the trial judge knew from listening to the testimony at the hearing - a substantial portion of the wife's obligations ($2,000.00) was owed to her father, the same man who had given his daughter an interest in a corporation and who had paid her $100.00 per month during the separation period (R 32, 135-137). Further, the wife had at least $5,500.00 left over from her share of the sale of the Fort Lauderdale condominium. Additionally, the wife testified before the trial judge that she had $5,000.00 in her savings account when husband and wife moved to Florida (R 175), although she in no way accounted for this sum of money in her testimony before the trial judge or in her amended financial affidavit (Wife's Exhibit 14). The $5,000.00 had been sent to wife by her father before husband and wife moved to Florida (R 175). Assuming wife repaid her own father the

$2,000.00 she said she owed him, the wife would have at least $5,500.00 and $5,000.00 (without interest computed) for a total of $10,500.00, in cash, in addition to whatever she realized from periodic rehabilitation alimony payments.

Husband, on the other hand, was left with a total of, at least, $11,426.00 in fixed debts with only $1,900.00 remaining from his share of the sale of the condominium, having spent the balance on a car for his wife and other family expenses. (R 319-321).

In reading the decision of the district court, most lawyers or judges might reasonably conclude that the appellate court couched the opinion and its "findings" as an advocate would do in arguing in support of the advocate's opinion. These "findings" of the district court simply do not reflect the reality of the testimony and evidence reviewed by the trial court in this case. They similarly do not fairly reflect the trial judge's findings after the trial judge had undergone the total experience of listening to witnesses testify on direct and cross-examination, observing the witnesses while they testified, listening to suggestions and arguments of counsel and examining exhibits introduced by the parties into evidence.

In holding that "Maureen McSwigan did not receive upon termination a fair share of the assets of the marital partnership" (A 6), the district court made another "finding" not supported by the evidence and in direct conflict with the trial

judge's findings and the evidence. As lump sum alimony, the trial judge awarded wife one-half (½) of husband's interest in an agreement between husband and his Ohio partner concerning the sale of property owned by husband and his partner. The court characterizes the agreement in which the wife was awarded one-half (½) of husband's interest, as "a nebulous agreement which may return her zero dollars." (A 3)

Aside from the fact that the agreement (Husband's Exhibit 4) is very clear, detailed and certainly not "nebulous", the award to the wife of one-half (½) of husband's interest was a reasonable solution to the problem the trial court had in awarding the wife some potential monetary award which might be realized from the sale of the Ohio property. Again, it is submitted, the district court, in its rush to find the wife had been "short-changed" and received only a "pittance" from the trial judge, seems to have failed to examine the record of the testimony and evidence presented to the trial judge at the time of the hearing.

The real property, located in the State of Ohio, which is the subject matter of the agreement, is titled in the name of husband and his partner, in survivorship, pursuant to Ohio law. Both the nature of the title and the agreement between partners make a transfer of all or any part of each parties' interest in the real property impossible. Title to the real estate and execution of the agreement occurred in 1974.(Husband's Exhibit 4)

Further, complicating the matter of making an award to wife of an interest in the Ohio property was the fact that husband and his partner still owed $176,000.00 on the property. The evidence was clear that, since 1974, husband and his partner had not been able to meet all expenses, including mortgage payments, incurred in connection with the ownership of the properties. In fact, each year, since 1974, both husband and his partner had been required to advance money to cover yearly expenses that exceeded income realized from rentals of the property. As of the date of the hearing, husband had advanced a total of $5,702.00 for such additional expenses (R 241). Although the wife signed Ohio mortgages securing the debt incurred by husband and his partner in acquiring and improving the Ohio property, she did so only because Ohio has a dower statute which requires a spouse to sign all mortgages (R 273). Wife made no claim and offered no proof in the trial court that she was liable on the notes and resulting debt secured by the Ohio mortgages.

The trial judge made a reasonable decision to give the benefit of the agreement to the wife without burdening her with potential exposure to further debt. Additionally, the trial judge, mindful of the legal problems inherent as a result of Ohio real property law and resulting from the 1974 agreement, did what he thought was most likely to succeed; he awarded the wife an interest in the agreement. Mindful further of testimony presented by the wife that the Ohio property would someday be of

value and would someday, hopefully, not be encumbered with debt, (R 83-103), the trial judge's award is most reasonable and obviously made by the trial judge after thoughtful reflection.

It is conceded that reasonable men might have reached another method of making the award. However, to say that the trial judge abused his discretion by taking judicial action that was arbitrary, fanciful or unreasonable is simply not supported by the evidence. Respectfully, such conclusion is most assuredly not supported by a naked opinion that the trial judge awarded the wife "an interest in a nebulous agreement which may return her zero dollars".

It is interesting to note that the district court, in its opinion, never made an actual, direct finding that the trial judge abused his discretion with regard to this award.

The district court stated only that reasonable men could not disagree that the share allotted to wife by the trial judge was a "pittance". (A 5). No where in the district court's opinion is a proper analysis of the trial judge's actions undertaken. The district court rather chooses only to criticize the end result reached by the trial judge.

It is respectfully submitted that the district court of appeal, in this case, has ignored the mandates clearly stated by this Court in Shaw v. Shaw, 334 So. 2d 13 (Fla. 1976):

> It 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 judgement for that of the trial court through re-evaluation of the testimony and evidence from the record on appeal before it. The test as pointed out in Westerman, supra, is whether the judgment of the trial 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. Shaw, 334 So. 2d at 16.

Shaw has been reaffirmed many times such as in Herzog v. Herzog, 346 So. 2d 56 (Fla. 1977):

> Generally, in appellate proceedings, the trial court's findings of fact are shielded from attack and are clothed with a presumption of validity. Even if the appellate court disagrees with the trial court and would have reached a different conclusion had it been in the shoes of the trial court, barring a lack of substantial evidentiary support for the findings of the trial court, the judgment should be affirmed. Herzog, 346 So. 2d at 58.

This court in the landmark decision of Canakaris, again reminded the courts of Florida, both trial and appellate, that "the trial judge can ordinarily best determine what is appropriate and just because only he can personally observe the participants and the events of the trial." Canakaris, 382 So. 2d at 1202.

With respect , it is submitted that the District Court of Appeal for the Fourth District has forgotten the mandates of

this court and clearly substituted the appellate court's judgment for that of the trial court through re-evaluating the testimony and evidence from the record on appeal before it. Even the latest pronouncements of this court in Kuvin v. Kuvin, 442 So. 2d 203 (Fla. 1983) and Conner v. Conner, 439 So. 2d 887 (Fla. 1983) have not, in this case, deterred the district court from disregarding the mandates of this court, proscribing usurpation of the responsibilities, rights and duties of trial judges who sit in judgment of marital cases.

In Conner, this court makes it clear that "the determination that a party has been 'shortchanged' is an issue of fact and not one of law..." Conner, 439 So. 2d at 887.

In Kuvin, in discussing the district court's decision reversing the trial judge's award of rehabilitative alimony, this court again re-affirmed the superior position of the trial court to view the entire case and reach a reasonable decision:

> After careful review of the record, and mindful of the trial court's superior vantage point, we cannot say that no reasonable person would take the view adopted by the trial court. Rather we find that reasonable persons could differ as to the propriety of the trial court's action. We therefore find no abuse of discretion. The district court erred in substituting its judgment for that of the trial court. Kuvin, 442 So. 2d at 205.

Respectfully, the district court in this case made no effort to analyze the record. Instead, it jumped to the conclusion of fact that wife had been "shortchanged." The district court then

justified its finding that the wife was "shortchanged" by making an unsupported statement, based on an unjustified re-evaluation of the record, that the share allotted to wife was a "pittance" (A 5). The appellate court then makes the further, unsupported statement, based on an unjustified re-evaluation of the record, that "reasonable men could not disagree as to this characterization" (A 5). At no time did the district court analyze the record to determine what the trial judge attempted to do. Again, in its opinion, the district court makes no direct statement or finding that the trial judge abused his discretion. Only the findings that the wife was "shortchanged" and received a "pittance" are set forth in support of the unwarranted, ultimate conclusion that the trial judge's actions were unreasonable.

Not only has the district court introduced the standard of "shortchanged" into the mainstream of appellate review by this decision, it has now introduced the standard of whether or not an award is a "pittance" into that mainstream.

It is submitted that among many other concepts, there must be order, reason and some sense of certainty, consistency and predictability in the law governing marital dissolutions. This court in Shaw, Canakaris, Kuvin, and Conner has mandated those concepts. As in this case, each of these landmark decisions involved appellate court interference with chancellors and a substitution of the appellate court's judgment for that of the chancellor.

Respectfully, the district court by introducing the concepts of "shortchanged" and "pittance" has opened the door to chaotic, uncertain, inconsistent and unfair appellate review. The law's objectives of order, reason, consistency, certainty and fairness are ill-served by such concepts, particularly as used by the appellate court in this case to justify usurpation of the chancellor's responsibility in dissolution cases.

Ironically, the district court has already, itself, demonstrated the inconsistency and uncertainty which will result from appellate court findings that a party to a dissolution case has been "shortchanged" by deciding the case of Marcoux v. Marcoux, 445 So. 2d 711 (Fla. 4th DCA, 1984); in that case the court reluctantly affirmed the trial court because of Conner and Kuvin, despite the fact that it found the husband to have been "shortchanged". The district court (in fact, the same panel of the district court) reached the exact opposite result in Marcoux than that reached in this case even though it found a party in each case had been "shortchanged". There was, however, a dissent and the dissenting judge in Marcoux, while admitting in his dissenting opinion, that "...I might be skating on very thin ice.", believed the "shortchange" doctrine to be viable despite Canakaris, Conner, and Kuvin, and thought the trial judge should be reversed. Marcoux, 445 So. 2d at 713.

With respect, it is difficult to understand how the same panel of the same district court can follow the mandates of this

court and affirm a "shortchange" case such as Marcoux and then, several months later, reverse the case sub judice for the reason that one of the parties was "shortchanged."

In summary, the district court, by improperly re-evaluating the evidence in this case has improperly substituted its judgement for that of the trial judge. The record disclosed ample, competent evidence to support the decision of the chancellor. The chancellor, under all the circumstances, after presiding at trial, acted most reasonably. The district court failed to properly apply the law of Shaw, Canakaris, Conner and Kuvin in its review of the actions taken by the trial judge below.

It is respectfully urged that this court reverse the decision of the District Court of Appeal for the State of Florida, Fourth District, below and reinstate the judgment of the trial court.

PRUITT & PRUITT

WILLIAM H. PRUITT
Suite 501, Flagler Center Bldg.
501 South Flagler Drive
West Palm Beach, FL 33401
(305) 655-8080
Attorneys for Petitioner

CONCLUSION

Husband urges that the Supreme Court of Florida make the following judgments in this case:

1. That the first question certified by the District Court of Appeal of the State of Florida, Fourth District, be answered as follows: NO;

2. That the second question certified by the District Court of Appeal of the State of Florida, Fourth District be answered as follows: YES, except as to the district court's holding concerning rehabilitative alimony as argued herein supra.

3. That the decision of the District Court of Appeal of the State of Florida, Fourth District, be reversed with instructions that the final judgment as entered by the trial court below be reinstated in full.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by hand delivery, this 7th day of August, 1984, to:

JANE KREUSLER-WALSH and
LARRY KLEIN
Suite 201, Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401

PRUITT & PRUITT

William H. Pruitt

WILLIAM H. PRUITT
Attorneys for Petitioner