IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 65,714

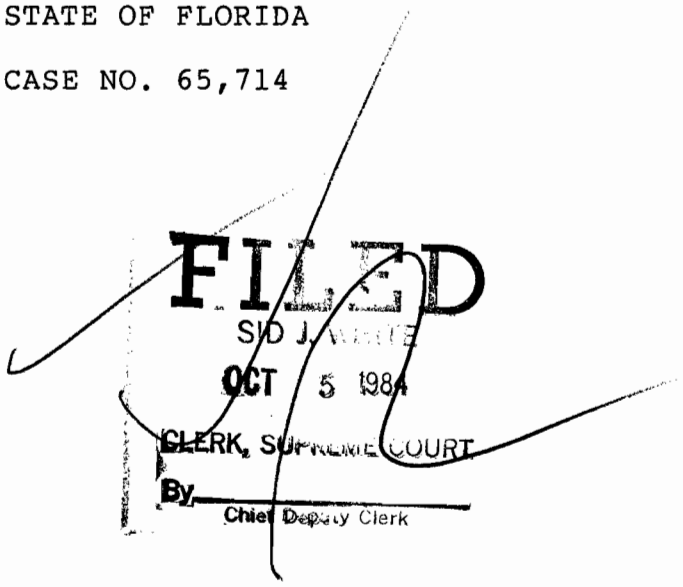
JAMES A. McSWIGAN,

Petitioner,

- v -

MAUREEN McSWIGAN,

Respondent.
_____/



PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

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 intial brief of petitioner.

REBUTTAL ARGUMENT

Wife's brief fails to analyze the actions taken by the chancellor, unfairly makes arguments and statements which ignore the evidence and fails to address the unsettling problems which are generated by the opinion of the District Court.

For example, wife erroneously argues the agreement concerning the Ohio property is worthless. The evidence before the chancellor clearly established that the Ohio property, which is the subject of the agreement, is heavily mortgaged, with modest present value. Wife spent considerable time and effort at trial to demonstrate to the chancellor that the value of the Ohio property would increase and be, someday, very valuable. The agreement will, accordingly, be of value, someday. If the property is sold, wife receives one-half of husband's share of the proceeds. If the property increases in value, the agreement must be revised by husband and his partner to provide a payoff that will, according to wife, someday, reflect great value. By his wise decision, the chancellor insured that wife receives one-half (½) of whatever amount husband may ever receive by virtue of the agreement.

Wife claims that the Benefit Avenue property is only one of many Ohio properties. In the same breath, her brief indicates there are three (3) other properties; presumably the word "many" is used to described "three(3)." The chancellor heard unrebutted evidence at trial which established that the "many" properties owned by husband were worthless and not subject to any buy-sell agreement (R 257,258).

The chancellor, in ordering that wife take a one-half (½) interest in husband's share of the agreement acted reasonably and wisely. The chancellor might have attempted another solution but the action he took in solving the problems of husband's ownership of the Ohio property is clearly not unreasonable. At most it can be said that reasonable men might differ with the chancellor by suggesting alternate solutions.

Further, wife, in her brief, denies the very language of the District Court's opinion when she argues that the District Court did not approve the chancellor's award of rehabilitative alimony, both in nature and amount. The District Court clearly set forth its findings concerning this award as follows:

> We do not hold here that rehabilitative alimony is unsuitable or inadequate...(A 6)

It would appear that wife wishes to exclude from consideration and review of this case any holding by the District Court which might be even slightly favorable to husband's position

despite the fact that the District Court, overall, found entirely in wife's favor.

Further, wife, at page 14 of her brief, indicates husband accumulated Ohio properties, "none of the funds for which came from outside the marriage." The record is clear that husband acquired the properties without payment of any funds; his Ohio partner appeared at trial and confirmed husband's assertion that no funds at all were advanced to purchase the property despite wife's efforts to show otherwise. (R 236, 240, 270). (Emphasis added)

In fact, wife under oath, before the chancellor, testified that husband had "purchased" the Ohio property in 1974 after requesting wife to cause stock owned by her to be sold. (R 114, 115). The proceeds of the stock sale, according to wife, were then delivered to husband, presumably to pay for the Ohio properties (R 115-117).

The chancellor, who heard and observed wife testify properly made no finding that any of wife's funds, or joint marital funds, were used by husband to buy the Ohio property. In fact, the chancellor found that"all efforts of the wife to create a special equity in personal or real property failed."(R318). It is unfair for wife to keep infering before this Court that any funds, marital or otherwise, were used in buying the Ohio property.

Most importantly, wife's argument makes no real analysis of the trial judge's actions to determine if reasonable men might disagree with the result reached in the trial court. Instead, wife relies on statements such as those of Judge Letts, a member of the panel who decided this case in the District Court, who concludes in Marcoux v. Marcoux, 445 So. 2d 711 (Fla. 4th DCA 1984) that it is an abuse of discretion for a judge to "award an incorrect amount to the wife or cheat the husband..."

The duty of the trial judge is to make his best effort to do equity between the parties to a dissolution proceeding. Respectfully, the statement by Judge Letts does not lend itself to the solution of the difficult task faced by chancellors in dissolution cases.

Within the meaning and purpose of the concept of "equity", who is in a better position to judge what is equitable? Can any legitimate claim be made that a veteran trial judge, sitting as chancellor in this case, is not in a better position to do equity between the parties than is the District Court? Is there any reasonable basis to conclude that the chancellor below has cheated the wife in reaching his decision?

Wife, in the District Court, and in this Court, dodges and sidesteps an analysis of the chancellor's actions below. In the District Court, she argued that she was entitled, as a matter of

law, to permanent alimony based upon the clearly erroneous doctrine of Wagner v. Wagner, 383 So. 2d 987 (Fla. 4th DCA 1980). She even went so far as to claim that the "reasonableness test" set forth in Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980) did not govern the District Court's review of this case:

> As this court held in Wagner v. Wagner, supra, 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. The circumstances here require permanent alimony and the trial court erred in not awarding it. (A 12)

Similarly, now, in this court, wife urges judicial approval and acceptance of the concepts of a party to a dissolution having been "shortchanged" or "cheated" by a chancellor who has awarded what is, in the opinion of the District Court, a "pittance" to one of the parties. Wife asserts the District Court's opinion of the evidence be exchanged for that of the chancellor's without advancing any reason for the substitution, except that reasonable men cannot come to any conclusion but that wife has been "short-changed." Wife's argument does not require an analysis of the chancellors action's, only the making of a conclusion or opinion. It is submitted that this Court has never intended such substitutions be made.

It is respectfully submitted that the doctrines of Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980) as reaffirmed by Kuvin v. Kuvin, 442 So. 2d 203 (Fla. 1983), and Conner v. Conner, 439 So. 2d 887 (Fla 1983), should not be discarded by this Court by

approval of the dangerous concepts which were approved by the District Court. To do so, it is respectfully submitted, would be to do nothing less than to approve a barrage of appeals in dissolution cases and to encourage district courts to substitute their judgment for that of the chancellor in such cases.

CONCLUSION

Husband respectfully urges 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.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by hand delivery, this 1st day of October, 1984, to:

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