IN THE SUPREME COURT OF FLORIDA

PATRICIA DIFFENDERFER, Petitioner, vs. RICHARD L. DIFFENDERFER, et al., Respondent.	)	CASE NO. 66,221 DCA CASE NO. AV-79

BRIEF ON BEHALF OF
THE FLORIDA CHAPTER OF THE AMERICAN
ACADEMY OF MATRIMONIAL LAWYERS, AS AMICUS CURIAE

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INTRODUCTION

The Florida Chapter of the American Academy of Matrimonial Lawyers submits this Brief, as amicus curiae, in support of the position that a trial judge should treat a spouse's entitlement to retirement benefits as a marital assets and therefore subject to equitable distribution, applying the same criteria for such distribution as is applied to all other marital assets.

The Florida Chapter of the American Academy of Matrimonial Lawyers takes no position with respect to any other issue raised in the appeal.

ARGUMENT

The District Court of Appeal, First District of Florida certified to this Court, as one of "great public importance", the question:

> HOW SHOULD A TRIAL JUDGE TREAT A SPOUSE'S ENTITLEMENT TO RETIREMENT BENEFITS IN FASHIONING AN EQUITABLE DISTRIBUTION OF PROPERTY IN DISSOLUTION OF MARRIAGE PROCEEDINGS?

This question is, in fact, one of great public importance to the citizens of the state of Florida because, in a large number of dissolution of marriage proceedings, retirement and pension benefits, together with the marital home, are the only significant assets of the parties.[1]

By judicial fiat this Court, in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), gave to the trial courts Florida the authority to equitably distribute assets acquired during the marriage regardless of who holds title:

> A judge may award lump sum alimony to insure an equitable distribution of property acquired during the marriage.

That decision was hailed in Colucci v. Colucci, 392 So.2d 577 (Fla. 3rd DCA 1981)

> [As a] shining example of the ability of the common law and common law judges to accomodate legal principles to meet the demands of fairness generated by changing social conditions and needs.

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[1]Golden, Lawrence J., Equitable Distribution of Property, §6.09 (Shepard's/McGraw-Hill 1983)

If retirement and pension benefits are in fact property accumulated during the marriage, then they should be subject to equitable distribution as are other marital assets.

The Florida Supreme Court Commission on Matrimonial Law, established April 1, 1982 by Order of the then Chief Justice of the Florida Supreme Court, has proposed an equitable distribution bill which as part of the definition of marital assets includes "vested and non-vested benefits, rights and funds acquired during the marriage of all retirement, pension, profit sharing, annuity and insurance plans and programs". The comments thereto include:

> While the Commission declined to enumerate every possible or conceivable asset and liability that could be included in the definition of "marital", it thought it advisable to spell out that "vested and non-vested benefits, rights and funds acquired during the marriage of all retirement, pension, profit sharing, annuity and insurance claims and programs" are those types of assets that are subject to equitable distribution. There appears to be a conflict in the decisions of various district courts of appeal as to whether or not same are includable and the setting forth of same as a marital asset in the statute settles that controversy. The proposed statute, as do the courts in many states around the country and recent Federal legislation recognizes that pension, profit sharing and retirement funds are economic resources acquired by virtue of the labors of one of the spouses which should be subject to equitable distribution.

The Commission report went on to state that:

> Without legislative intervention, by the adoption of an equitable distribution statute, other

> standards, guidelines and criteria must be developed on a case by case basis which will take years.

This Court now faces one of those cases. Since there is, at this moment, no such legislative intervention, this Court must decide the question of whether retirement and pension benefits accumulated during the marriage are subject to equitable distribution.

The American Academy of Matrimonial Lawyers respectfully submits that logic, reason and the principles of equity require that retirement and pension benefits be considered "marital assets" subject to distribution. As was stated by the California court in In Re: Marriage of Brown, 15 Cal.3d 838, 845, 544 P.2d 561, 565, 126 Cal. Rptr. 633, 637 (1976):

> [S]uch benefits "do not derive from the beneficence of the employer, but are properly part of the consideration earned by the employee." . . . Since pension benefits represent a form of deferred compensation for services rendered . . . the employee's right to such benefits is a contractual right, derived from the terms of the employment contract. Since a contractual right is not an expectancy but a chose in action, a form of property, . . . an employee acquires a property right to pension benefits when he enters upon the performance of his employment contract.

Likewise, the New Jersey court, in Kruger v. Kruger, 73 N.J. 464, 468-69, 375 A.2d 659, 662 (1977) stated:

> The right to receive monies in the future is unquestionably such an economic resource. In most

> situations its present dollar value can be computed . . . . No one would quarrel with the proposition that the recipient of a life estate created by a testamentary or inter vivos trust owned a valuable asset which would be subject to equitable distribution. So, too, if one purchased or acquired an insurance annuity which paid a weekly sum certain to the beneficiary for life, the right to collect those funds would also be considered property subject to distribution. There are many different types of employee benefits, which employees or former employees receive, which everyone would readily admit are assets that have been acquired during employment. Deferred compensation, stock options, profit-sharing and pensions are typical examples.

Thus, retirement benefits are acquired by virtue of services of an employee compensation for which would otherwise have been utilized by the marital partners during the marriage to purchase other assets. Those other assets unquestionably would be subject to equitable distribution. Why then, not retirement or pension benefits?

The sole answer to the question "why not" appears to be the decision of Witcig v. Witcig, 292 N.W. 2d 788 (Neb. 1980), relied upon by the District Court of Appeal, First District. Apparently the rationale for the court's position in Witcig was the "problems inherent in the determination of the value of pension interests and the contingent nature of such interests". However, such is no reason for refusing to consider such benefits as marital assets as the value of same in every state that recognizes such benefits as marital assets is repeatedly

determined. However, even more so now, same should not be a deterent particularly because of the adoption by Congress of the Retirement Equity Act of 1984 which abrogates the spendthrift restrictions against assigning to the non-employee spouse the retirement benefits of the employee spouse, not only for the purposes of alimony and child support, but also for purposes of property distribution under a qualified domestic relations order ("QDRO"). The QDRO may require that payments begin to the non-employee spouse after the employee reaches the plan's earliest retirement age in any form in which the benefits could be paid to the participant. This can then be in lieu of the valuation of the benefits; however, if benefits are valued then same can be utilized by the trial court as an offset against other assets.

CONCLUSION

Before Canakaris, the trial courts of this state had available to them in dissolution of marriage proceedings the remedies of lump sum alimony (for support), permanent periodic alimony, rehabilitative alimony, child support, a vested equity in property and an award of exclusive possession of property. Canakaris gave trial judges the authority to equitably distribute property acquired during the marriage by the vehicle of lump sum alimony.[2] would be inequitable to exclude from that power the ability of a court to distribute what in many cases may be the most significant asset of the parties, the retirement benefits.

Respectfully submitted,

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[2] Tronconi v. Tronconi, No. 63,368 (Fla. Jan. 24, 1985)

CERTIFICATE OF SERVICE

WE CERTIFY that a copy of the foregoing was served by mail upon CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A., Attorneys for the Petitioner, Post Office Drawer 190, Tallahassee, Florida 32302 and upon RIVERS BUFORD, JR. and KEITH J. KINDERMAN, Attorneys for Respondent, Post Office Box 647, Tallahassee, Florida 32302 this 12th day of February, 1985.

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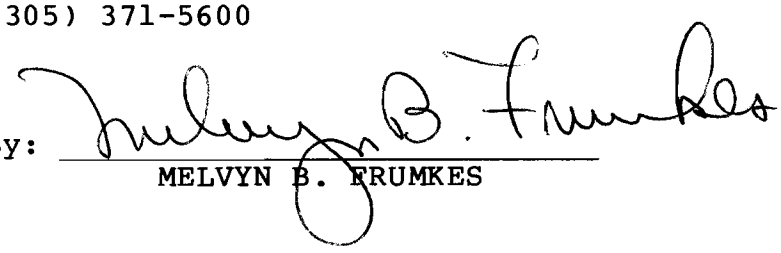
By: 
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