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

PETITIONER'S INITIAL BRIEF

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INTRODUCTION

This case affords the Court the opportunity to finally decide that a spouse's pension benefits, earned during the marriage, constitute marital property subject to equitable distribution. The First District refused to consider Mr. Diffenderfer's vested pension as marital property, choosing instead to follow a Nebraska decision that has since been abandoned. In so doing, the First District:

(1) went against the overwhelming majority of decisions from other states;

(2) went against unanimous precedent from the four other Florida appellate districts; and

(3) stripped Mrs. Diffenderfer of her interest in the most valuable asset acquired by the parties during the marriage.

This brief will prove that pension benefits, like all other property earned and acquired during coverture, are a valuable marital asset that must be considered in the distribution of marital property. Four of Florida's appellate districts and the majority of other states have already reached this conclusion. The Court in this case must do no more than confirm what has become a national consensus.

STATEMENT OF CASE AND FACTS

Pat and Richard Diffenderfer were married for thirty years and raised four children, all now over the age of eighteen (TR 54-55). Mr. Diffenderfer started engineering school shortly after the marriage. Mrs. Diffenderfer cut short her college career and returned to nursing school to help meet expenses (TR 56-57). During her husband's engineering studies, Mrs. Diffenderfer worked as a part-time nurse and gave birth to two sons (TR 57). Upon graduation, Mr. Diffenderfer began work with the Federal Highway Administration.

Because her husband's job required frequent travel, Mrs. Diffenderfer worked only part-time during the marriage so she could care for the children. This, of course, restricted her nursing opportunities (TR 51). She made approximately $11,000 a year as a part-time nurse during the marriage. Recently, in order to pay for these divorce proceedings, Mrs. Diffenderfer was forced to return to full-time nursing, earning $23,000 yearly.

Serious medical problems make it doubtful that Mrs. Diffenderfer, now 53, will be able to continue a full-time nursing career. In 1961, Mrs. Diffenderfer underwent vein ligation surgery to relieve a severe varicose vein condition (TR 59-60). The surgery was followed by thirteen years of vein injections. Because prolonged standing aggravates the condition,

Dr. Pararo has recommended that Mrs. Diffenderfer limit her walking and standing (TR 155).

In 1964, Mrs. Diffenderfer had a radical mastectomy. Both ovaries were removed in order to lessen the chance of a recurrence of cancer (TR 51-52). The surgery left her traumatized, and because of the loss of hormone supply, it hurt her sexual relationship with her husband. The surgery has also made it difficult to lift or pull with her left side. Mrs. Diffenderfer's present job at Goodwood Manor requires her to stand for long periods and to lift patients (TR 58-60).

In stark contrast to his wife's bleak physical and financial prospects, Mr. Diffenderfer enjoys excellent health and substantial income (TR 171-172). He earns approximately $45,000 yearly in his federal position, four times more than the salary Mrs. Diffenderfer earned during the marriage (TR 248). Expert testimony established that Mr. Diffenderfer stands to earn over $618,000 during the remainder of his lifetime. Mrs. Diffenderfer stands to make no more than $186,400 (TR 251).

The Diffenderfers enjoyed a comfortable standard of living during the marriage. They were able to afford two homes, owned jointly. The marital residence at 1466 Lee Avenue is worth $119,500; the beach home on Alligator Point is worth $60,000. The parties also jointly owned a 2/3 interest in rental property in Autumn Woods.

But by far the most valuable asset of the marriage is Mr. Diffenderfer's federal pension. Expert testimony established that if Mr. Diffenderfer were divorced in 1983 and retired in February, 1984, he would receive approximately $737,000 in retirement benefits during his expected lifetime. The present value of those benefits is $297,000 (TR 243). This led economist Dr. Warren Mazek to remark: "It's a very good retirement system." (TR 244). A divorced wife, however, receives nothing under the plan (TR 243).

The Final Judgment awarded Mrs. Diffenderfer one-half of her husband's one-half interest in the marital home, together with exclusive use and possession as long as she lives there and remains single (App 7). The judge, however, divested her of her one-half interest in the beach house, ruling that the husband was entitled to a special equity by virtue of his personal contribution to its construction. Mrs. Diffenderfer lost the beach house despite the husband's admission that the funds used for the purchase of the land and the materials used for the construction of the house came from a joint account, and that Mrs. Diffenderfer assisted in designing and decorating the house (TR 127-128). The trial court also denied the wife permanent alimony, but awarded rehabilitative alimony in the form of a $261 first mortgage payment on the marital home. The court allowed Mrs. Diffenderfer to receive $180 a month in rent from the small apartment located on the property. Mrs. Diffenderfer was ordered

to pay $5,000 to her husband from a savings account and to surrender one-half of her Eastman Kodak stock.

Finally, the trial judge refused to consider Mr. Diffenderfer's retirement benefits as marital property. He limited his consideration to the amount of money Mr. Diffenderfer actually paid into the fund (TR 183-184).

The First District agreed that Mr. Diffenderfer's retirement benefits should not be considered a marital asset subject to equitable distribution, holding instead that the pension should be considered only as a source of payment of permanent periodic alimony (App 4). The Court admitted that its holding conflicts with decisions of the Second and Fourth Districts. Clarke v. Clarke, 443 So.2d 486 (Fla. 2d DCA 1984); Hurtado v. Hurtado, 407 So.2d 627 (Fla. 4th DCA 1981). The Court reversed with directions to award permanent periodic alimony instead of rehabilitative and to value the husband's special equity in accordance with Landay v. Landay, 429 So.2d 1197 (Fla. 1983). The Court also affirmed the award to the husband of the Eastman Kodak stock and $5,000 of the wife's savings account, but in all other respects remanded the cause for possible reconsideration.

Mrs. Diffenderfer brings this appeal to remedy the manifest error caused by the Court's refusal to consider vested retirement benefits as marital property.

I. Mr. Diffenderfer's Retirement Benefits Are a Marital Asset Subject to Equitable Distribution

During the Diffenderfer's 30-year marriage, the Federal Highway Administration deducted $119 from Mr. Diffenderfer's monthly salary and invested it in a pension plan. During those same 30 years, Mrs. Diffenderfer worked, helped care for the children, and did her best to be a faithful marriage partner. She did not amass a large pension because her husband told her that his pension "would be enough for the two of us" (TR 231-232). He was right. His vested and mature[1] pension is presently worth almost $300,000. The District Court committed grievous error when it refused to recognize Mrs. Diffenderfer's rightful interest in this the largest marital asset.

A. The Decisional Law From Both Outside and Inside Florida Supports the Consideration of Pension Benefits as Marital Property.

Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), teaches that upon dissolution the court must equitably distribute

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[1] A "vested" pension is one which cannot be forfeited if employment terminates before retirement. A "mature" pension is one where the employee has an unconditional right to immediate payment. See In re Marriage of Brown, 544 P.2d 561, 564 (Cal. 1976). Mr. Diffenderfer's benefits are fully vested (5 USC §8333(1)) and mature (5 USC §8226(a)).

the property acquired during the marriage to "ensure that neither spouse passes from prosperity to misfortune", and that "one spouse . . . not be 'shortchanged'". Id at 1204. The decision's essential premise is that both husband and wife are entitled to a fair share of all property earned during the marital partnership.

In view of this fundamental premise, vested pension benefits are surely a marital asset subject to equitable distribution. A pension is nothing more--nor less--than a form of deferred compensation. It is a type of "forced savings account" that upon vesting and maturation ripens into a substantially-appreciated asset. In the Diffenderfer's case, the husband's pension benefits are no different than if the parties had invested $119 monthly into stocks, bonds or annuities, rather than investing that sum in the pension. If that had occurred, Mr. Diffenderfer would be hard-pressed to now contend that the appreciated value of his General Motors' stock or municipal bonds is not marital property. Recently, the New York Court of Appeals ably described the true nature of a spouse's pension benefits:

> Whether the [pension] plan is contributory or noncontributory, the employee receives a lesser present compensation plus the contractual right to the future benefits payable under the pension plan. The value of those contractual rights will vary depending upon the number of years employed but where, as here, the rights are vested or where they are matured, they have an actuarially calculable value. To the extent that they result from employment time after marriage and before commencement of a matrimonial action, they are contract rights of value,

> received in lieu of higher compensation which would otherwise have enhanced either marital assets or the marital standard of living and, therefore, are marital property.

Majauskas v. Majauskas, 463 N.E.2d 15, 20-21 (N.Y. 1984) (emphasis supplied; footnotes omitted).

Respondent has argued previously that his pension should not be considered because it represents merely an expectation of future income. The assertion, however, misconceives the nature of a pension. The Diffenderfer pension will not be earned in the future; it was earned and acquired during the shared enterprise of marriage. Canakaris requires equitable distribution of assets acquired during the marriage, not merely those received during the marriage. 382 So.2d at 1202. The New Jersey Supreme Court agrees that equitable distribution is not limited to assets actually received during coverture:

> . . . the treatment of property under the equitable distribution laws cannot hinge solely upon whether the property is in the form of an asset or a right to receive future income.
>
> > A weekly wage represents income, but after its receipt the dollars on hand are an asset . . . . The equitable distribution provision is not concerned with income but with a person's assets in an economic sense on a date certain.
> >
> > The right to receive monies in the future [73 N.J. at 468, 375 A.2d

> 659] is unquestionably such an economic resource.
>
> If equitable distribution depended upon when the parties actually had received their money, then the distinction between an asset already in the bank and income to be paid in the future would be crucial. But the principles of equitable distribution justify its application not to money received during the marriage, but to money which in some way was acquired during the marriage . . .
>
> . . .
>
> [W]hen the right to receive pension monies is acquired during the marriage, as in this case, that property right should be equitably distributed regardless of when the pension matures and regardless of when the pension will be treated as income for tax purposes. The crucial fact is that Martin Kikkert earned his pension during the "shared enterprise" of his marriage. Fairness thereby entitled both him and his wife to their respective equitable shares.

Kikkert v. Kikkert, 438 A.2d 317, 319-320 (N.J. 1981) (Pashman, J., concurring)(emphasis in original). Accord, Loomis v. Loomis, 288 P.2d 235 (Wash. 1955); Kirkham v. Kirkham, 335 S.W.2d 393 (Tex.Civ.App. 1960).

Decisions from state courts in every part of the United States agree that a spouse's pension benefits are marital property. Perhaps the most eloquent is the Maryland decision in Ohm v. Ohm, 431 A.2d 1371 (Md.Ct.Spec.App. 1981). Because of the decision's clear reasoning and comprehensive research, Petitioner must quote extensively from it:

The overwhelming majority of the courts have determined, either expressly or by implication, that vested rights under a private or public pension plan, to the extent such rights were acquired during the marriage, are property subject to division upon dissolution. . . .

The rationale of these decisions is that retirement benefits are a form of deferred compensation or wage substitute and the right to receive such benefits, being contractual in nature, [is] a chose in action and thus, property. See, e.g. Van Loan v. Van Loan, 569 P.2d at 215-16; In Re Marriage of Hunt, 34 Ill.Dec. at 60-61, 397 N.E.2d at 516-17. In Rogers and Rogers, the Court of Appeals of Oregon stated:

> "[V]ested retirement rights are a valuable asset earned through contributions which would otherwise have been available to the parties during the marriage. Even where contributions have been made entirely by the employer, the courts have concluded that retirement benefits are a mode of employee compensation and as such are an earned property right of the marriage. As noted by the California Supreme Court in Brown, 544 P.2d at 566, 126 Cal.Rptr. at 638: over the past decades, pension benefits have become an increasingly significant part of the consideration earned by the employee for his services. As the date of vesting and retirement approaches, the value of the pension right grows until it often represents the most important asset of the marital community. * * * A division of * * * property which awards one spouse the entire value of this asset, without any offsetting award to the other spouse, does not represent an equal division of * * * property * * *.'"

(Footnote omitted). 609 P.2d at 880.

The courts have also noted the similarities between pension benefits and other sources of deferred income which are undisputably property, the New Jersey Supreme Court observing:

> "The right to receive monies in the future is unquestionably . . . 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, profitsharing and pensions are typical examples." Kruger v. Kruger, 375 A.2d at 662.

* * *

A significant number of jurisdictions have extended the reasoning set forth above so as to encompass nonvested pension rights as well. Generally, they have reasoned that while the nonvested nature of the pension may make its valuation difficult, it makes the right to receive the benefits no less property; thus they have rejected the characterization of such benefits as "expectancies" and have instead held them to be "contingent interest in property." In Re

Marriage of Hunt, 34 Ill.Dec. at 61, 397 N.E.2d at 517.

> We are persuaded that the correct rule is that the right to receive retirement benefits under a private or public employees pension plan, whether or not vested, matured, or contributory, is property and that, if acquired during the marriage, it constitutes marital property within the meaning of [Maryland's equitable distribution law].

Id. at 1374-1375 (citations omitted).

With equally forceful reasoning, the courts of New York, New Jersey, Michigan and California have found pension benefits to be marital property. Majauskas v. Majauskas, 463 N.E.2d 15 (N.Y. 1984); Kikkert v. Kikkert, 427 A.2d 76 (N.J.Super.Ct.App.Div.), aff'd, 438 A.2d 317 (N.J. 1981); Hutchins v. Hutchins, 248 N.W.2d 272 (Mich. 1977); In Re Marriage of Brown, 544 P.2d 561 (Cal. 1976).

For the Court's reference, and to demonstrate the overwhelming consensus of opinion on the issue, the following is a list of state decisions holding that pension benefits must be included as marital property[2]:

Alaska: Malone v. Malone, 587 P.2d 1167 (Alaska 1978).

Arizona: Van Loan v. Van Loan, 569 P.2d 214 (Ariz. 1977); Miller v. Miller, 683 P.2d 319 (Ariz. Ct. App. 1984).

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[2]Not all states have explicitly ruled on the issue. This writer is aware of only 5 states, Alabama, Indiana, New Hampshire, Oklahoma and South Carolina, that hold that pension benefits are not marital property.

Arkansas: Day v. Day, 663 S.W.2d 719 (Ark. 1984).

California: In Re: Marriage of Brown, 544 P.2d 561 (Cal. 1976).

Delaware: Robert C.S. v. Barbara J.S., 434 A.2d 383 (Del. 1981).

Georgia: Gilbert v. Gilbert, 442 So.2d 1330 (La. Ct. App. 1984) (Applying Georgia law).

Hawaii: Linson v. Linson, 618 P.2d 748 (Hawaii 1980); Wallace v. Wallace, 677 P.2d 966 (Hawaii Ct. App. 1984).

Idaho: Shill v. Shill, 599 P.2d 1004 (Idaho 1979).

Illinois: In Re: Marriage of Hobbs, 442 N.E.2d 629 (Ill. 1980); In Re: Marriage of Campise, 450 N.E.2d 1338 (Ill.App.Ct. 1983).

Iowa: In Re: Marriage of Schissel, 292 N.W.2d 421 (Iowa 1980).

Kentucky: Owens v. Owens, 672 S.W.2d 67 (Key. Ct. App. 1984).

Louisiana: Simms v. Simms, 358 So.2d 919 (La. 1978).

Maryland: Ohm v. Ohm, 431 A.2d 1371 (Md. Ct. Spec. App. 1981).

Massachusetts: Dewan v. Dewan, 455 N.E.2d 1236 (Mass. App.Ct. 1983).

Michigan: Hutchins v. Hutchins, 248 N.W.2d 272 (Mich. 1976); Hatcher v. Hatcher, 343 N.W.2d 498 (Mich.Ct.App. 1984).

Minnesota: Jensen v. Jensen, 276 N.W.2d 68 (Minn. 1978).

Missouri: Kuchta v. Kuchta, 636 S.W.2d 663 (Mo. 1982).

Montana: In Re: Marriage of Kecskes, 683 P.2d 478 (Mont. 1984).

Nebraska: Kullbom v. Kullbom, 306 N.W.2d 844 (Neb. 1981); Taylor v. Taylor, 348 N.W.2d 887 (Neb. 1984).

New Jersey: Kikkert v. Kikkert, 427 A.2d 76 (N.J. Super.Ct.App. Div. 1981), Aff'd 438 A.2d 317 (N.J. Super.Ct.Ch.Div. 1981); Di Pietro v. Di Pietro, 443 A.2d 244 (N.J. 1982).

New Mexico: Walentowski v. Walentowski, 672 P.2d 657 (N.M. 1983).

New York: Majauskas v. Majauskas, 463 N.E.2d 15 (N.Y. 1984); McDermott v. McDermott, 474 N.Y.S.2d 221 (N.Y.Sup.Ct. 1984)

North Dakota: Keig v. Keig, 270 N.W.2d 558 (N.D. 1978).

Ohio: Bohnlein v. Bohnlein, 463 N.E.2d 666 (Ohio 1983).

Oregon: Bogh and Bogh, 666 P.2d 1375 (Ore. Ct. App. 1983).

South Dakota: Hansen v. Hansen, 273 N.W.2d 749 (S.D. 1979).

Texas: Cearley v. Cearley, 544 S.W.2d 661 (Tex. 1976).

Utah: Woodward v. Woodward, 656 P.2d 431 (Utah 1982).

Washington: In Re: Marriage of Jacobs, 579 P.2d 1023 (Wash. 1978).

Wisconsin: Pinkowski v. Pinkowski, 226 N.W.2d 518 (Wis. 1975).

Four of Florida's appellate districts are in line with this consensus. In the most recent Florida decision, Clarke v. Clarke, 443 So.2d 486 (Fla. 2d 1984), the Second District held the following:

> The husband's second contention is that his vested pension plan should not have been considered by the trial court in making the equitable distribution. We disagree. . . . [I]n viewing the value of the pension plan as security for the future of a husband who has good income-producing ability and other assets in reserve, we cannot say that the trial court abused its discretion. Under that view, the pension plan, the right to the great bulk of which was built up during the nineteen-year marriage, is similar in nature

> to other assets held for the future. We also note that the husband's rights to the pension plan in this case are vested, in contrast to Aylward.

Id. at 487. The Third, Fourth and Fifth Districts hold the same. Colucci v. Colucci, 392 So.2d 577 (Fla. 3rd DCA 1980); Hurtado v. Hurtado, 407 So.2d 627 (Fla. 4th DCA 1981); Cowan v. Cowan, 389 So.2d 1187 (Fla. 5th DCA 1980). Notably, in a decision rendered only weeks before the decision under review, the First District appeared to hold in dicta that "a trial court may deem a spouse's vested interest in a pension and profit sharing plan as an asset to be taken into consideration when fashioning a dissolution plan." Bean v. Thibault, 455 So.2d 508 (Fla. 1st DCA 1984).

B. The First District's Consideration of the Pension as a Source of Periodic Alimony Contravenes the Principals of Equitable Distribution.

Although the First District rejected the notion that Mr. Diffenderfer's pension was marital property, the Court did consider it as a source from which permanent periodic alimony could be paid (App 4). While perhaps superficially appealing, the Court's approach misapplies the concept of equitable distribution so carefully articulated in Canakaris.

Under the doctrine of equitable distribution, lump sum alimony is not restricted to "instances of support or vested property interests." Canakaris, 382 So.2d at 1201. To the

contrary, equitable distribution contemplates that a spouse be awarded--typically in lump sum form--his or her fair share of all property acquired during the marital partnership:

> The purposes of equitable distribution differ from those of alimony and child support. Alimony and child support can help maintain the income of both parties at a certain level over time by using one party's income to support the other. However, the primary purpose of marital property distribution laws is not to compensate for changes in the parties' fortunes after they have separated, but to achieve a fair distribution of what the parties "lawfully and beneficially acquired" while they were together.

Kikkert, 438 A.2d at 320 (emphasis added). Permanent periodic alimony, on the other hand, is typically limited to providing the needs and necessities of life to a former spouse . . ." Canakaris, 382 So.2d at 1201. Moreover, permanent periodic alimony terminates upon death or remarriage. Id at 1202; In Re Estate of Freeland, 182 So.2d 425 (Fla. 1966).

In confining Mr. Diffenderfer's pension solely to a source of periodic alimony, the District Court deprived Mrs. Diffenderfer of her fair share of the marital estate. As the decision now stands, Mrs. Diffenderfer has no right to present enjoyment of any portion of the $300,000 pension. Yet Mr. Diffenderfer can retire at any time, take a job in the private sector, and still collect almost $25,000 in yearly pension benefits. Because her entitlement to periodic alimony is limited

to need, Mrs. Diffenderfer will not be able to enjoy the greatly-appreciated value of the pension. Mr. Diffenderfer is not so limited; he will be able to enjoy the full value of an asset that has appreciated 700% during the marriage. Mrs. Diffenderfer will lose all rights to the pension when she dies or remarries. Mr. Diffenderfer, however, will be able to share it with a second wife or devise it to his heirs in the form of survivor benefits. Indeed, if Mr. Diffenderfer were to die before retirement, Mrs. Diffenderfer would be stripped of any claim to the pension, a possibility that in other cases has caused concern among Florida district courts. Colucci v. Colucci, 392 So.2d 577, 580 (Fla. 3rd DCA 1980); Nusbaum v. Nusbaum, 386 So.2d 1294, 1295-96 (Fla. 4th DCA 1980). In sum, Mrs. Diffenderfer's restricted access to the parties' pension through the vehicle of periodic alimony is unfair and contrary to the principles of equitable distribution. Accord, Pinkowski v. Pinkowski, 226 N.W.2d 518, 522 (Wis. 1975). See also Hurtado, 407 So.2d at 630; Cowan, 389 So.2d at 1188-1189.

In order to effectuate a truly equitable distribution in this case, the Court must remand with directions to include the $300,000 pension as part of the martial estate, and it must further direct that Mrs. Diffenderfer be awarded lump sum alimony in an amount sufficient to account for all marital assets--including the pension. This does not mean that the trial judge must actually apportion the pension benefits as they are

received. Happily, the parties own enough property to enable the judge to make an offsetting award of some of that property to Mrs. Diffenderfer. For example, the judge could award as lump sum alimony all of Mr. Diffenderfer's equity in the marital home and in the beach house. Since that would still not be enough to provide Mrs. Diffenderfer with her fair share of the estate, the judge could couple this award with a direction that Mr. Diffenderfer pay his wife's attorney's fees. Such a flexible lump sum award would avoid the continuing entanglement of the divorced parties that would otherwise result if Mrs. Diffenderfer were forced to claim her share to the pension through permanent periodic alimony. See Ohm v. Ohm, 431 A.2d at 1378-79, 1380; Rogers and Rogers, 609 P.2d 877, 882-83 (Ore. 1980).

Lest there be any doubt that the First District erred on the pension issue, this Court should note that the underlying basis of the decision has been invalidated. In holding that a pension is not marital property but rather merely a source of periodic alimony, the Court adopted the 1980 Nebraska decision in Witcig v. Witcig, 292 N.W.2d 788 (Neb. 1980). The Court, however, overlooked the important fact that just months after the Witcig decision, the people of Nebraska passed a law mandating that pension benefits be included as marital property. Neb. Rev. Stat. §42-366(8) (Cum. Supp. 1980). Thus under current Nebraska law, pension benefits are subject to equitable distribution. Kullbom v. Kullbom, 306 N.W.2d 844 (Neb. 1981); Taylor v. Taylor,

348 N.W. 2d 887 (Neb. 1984). This Court should rectify the First District's error and direct that Mrs. Diffenderfer be awarded her fair share of the marital estate through lump sum alimony.[3]

II. Though it Erred in Limiting the Husband's Pension to an Aspect of Permanent Periodic Alimony, the First District Was Nonetheless Correct in Holding That Mrs. Diffenderfer is Entitled to Permanent Periodic Alimony.

Apart from its ruling on the pension issue, the district court correctly held that Mrs. Diffenderfer is entitled to permanent periodic alimony. Petitioner agrees that this is not a case where rehabilitative alimony is sufficient. Mrs. Diffenderfer has already reached her full economic potential and thus has no need for additional training. See Canakaris, 382 So.2d at 1202; Kuvin v. Kuvin, 442 So.2d 203 (Fla. 1983). Indeed, the facts unfortunately reflect that her economic potential can only decline because of her health.

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[3]Petitioner should also note, if only in passing, that the trial court erred in considering only that portion of the pension that Mr. Diffenderfer actually paid in (approximately $44,000). This, of course, ignores the substantial appreciation that the pension plan has enjoyed. Courts from various jurisdictions agree that this is an inappropriate method of valuing vested pension benefits. Dewan v. Dewan, 455 N.E.2d 1236 (Mass. 1983); Mimms v. Mimms, 634 P.2d 259 (Ore. App. 1981); Copeland v. Copeland, 575 P.2d 99 (N.M. 1978); Phillipson v. Bd. of Admin. Public Employee Retirement System, 473 P.2d 765 (1970).

Rather, this is a case where permanent periodic alimony should be awarded in conjunction with lump sum alimony. Pat and Richard Diffenderfer were married for 30 years and enjoyed a high standard of living. Richard continues to earn a substantial income and is in top physical conditiion. Pat, on the other hand, has always looked to her husband for financial support--a dependence that will likely increase in view of her deteriorating physical condition. Because Richard can afford it and Pat needs it, the Court was correct in awarding permanent periodic alimony. See Canakaris; Brown v. Brown, 300 So.2d 719 (Fla. 1st DCA 1974); Disner v. Disner, 423 So.2d 473 (Fla. 1st DCA 1982); Stiff v. Stiff, 395 So.2d 573 (Fla. 2d DCA 1981); Colucci v. Colucci, 392 So.2d 577 (Fla. 3rd DCA 1980).

The direction to award periodic alimony should be affirmed for the additional reason that, under limited circumstances, periodic alimony can be used to help effectuate an equitable distribution of marital assets. Canakaris at 1202. Thus, if on remand the judge should find that a lump sum award of Mr. Diffenderfer's equity in the marital home and beach house is insufficient to offset Mrs. Diffenderfer's interest in the federal pension, he might choose to award periodic alimony as a partial offset along with an award of lump sum alimony. At all events, the facts prove that Mrs. Diffenderfer is entitled to permanent periodic alimony.

III. Mr. Diffenderfer is Not Entitled to a Special Equity in the Beach House.

While the district court properly reversed the ruling that Mr. Diffenderfer was entitled to a special equity in the beach house, it did so for the wrong reason. The First District remanded the issue and directed that the special equity be valued in accordance with Landay v. Landay, 429 So.2d 1197 (Fla. 1983), thus appearing to hold implicitly that a special equity was proper. The court erred as a matter of law.

Mr. Diffenderfer claims a special equity in the beach house because he helped build it with the assistance of a friend and hired laborer. In an almost identical case, however, this Court held that such efforts were insufficient to establish a special equity. In Duncan v. Duncan, 379 So.2d 949 (Fla. 1980), the trial court awarded the husband a special equity in a second home because of his contribution to its construction. The trial court based its ruling on these findings:

> [T]he husband has a special equity in this residence based on the fact that he participated in the construction of the same by laying the bricks, digging the trenches, preparing the blue prints, hiring the carpenter and brick laying sub-contractors, over-seeing their work at least once a week for several months by traveling from Pensacola, Florida, to Opp, Alabama and by buying and hauling to the job site the various building materials. Further, the Court finds that all of the money which went into this home was derived from the salary and wages of the husband and the home was built with the permission of the wife, for

> the husband's mother and father, who have resided there since its completion in 1960.

Id. at 951. This Court reversed, holding that "we must reject the finding that the efforts of the husband in constructing the improvements on the Alabama property constituted a 'special equity'". Id.

Mr. Diffenderfer has a far less compelling claim to a special equity than did Mr. Duncan. Mr. Diffenderfer admits that the beach property was titled in the joint names of the parties, and that the home was intended to be the couple's beach house for recreational purposes. The money spent to purchase the lot, construction materials and labor came from the parties' joint accounts(TR 129). Indeed, the facts reflect that the family sacrificed vacations and other luxury items in order to develop the beach property (TR 68). Equally important, Mrs. Diffenderfer made significant contributions to the beach house. She located the lot (Lot 64) upon which the house was built, and assisted in the interior designing, painting, decorating and accessory selection for the home (TR 128).

Canakaris directs that "[d]ifferent results reached from substantially the same facts comport with neither logic nor reasonableness." Id. at 1203. If the facts of this case are compared with those in Duncan, the Court must conclude that Mr. Diffenderfer is not entitled to a special equity in the beach house.

IV. The District Court's Ruling on the Eastman Kodak Stock, Savings Account and Attorney's Fees Must be Remanded for Reconsideration.

Petitioner submits that the First District's ruling on the Eastman Kodak stock, the wife's savings account and the payment of attorney's fees was clearly erroneous. Because Mrs. Diffenderfer's mother gave her the Eastman Kodak stock, it was not marital property subject to equitable distribution. See Ball v. Ball, 335 So.2d 5 (Fla. 1976). With regard to the savings account, since Mrs. Diffenderfer deposited a portion of her paycheck into that account over many years, and Mr. Diffenderfer had never deposited or withdrawn money from the account, the parties obviously agreed that the account was to be Mrs. Diffenderfer's separate asset. As to attorney's fees, the gross disparity between the parties' annual income demonstrates that Mr. Diffenderfer is in a far better financial position than his wife to pay her attorney's fees. See Canakaris at 1205.

The Court, however, need not reach these issues. Because the cause must be remanded for an award of permanent periodic alimony (as directed by the First District), and because it must also be remanded for an award of lump sum alimony which takes into consideration the federal pension as marital property, the trial court's redistribution of marital assets will likely affect the stock, savings account and award of attorney's fees. Hence, the trial court should be permitted to revisit these

issues to fully effectuate an equitable distribution. Conner v. Conner, 439 So.2d 887 (Fla. 1983).

V. In the Recent Vandergriff Decision, The Court Settled the Question of the Proper Standard of Review in Dissolution Cases

The First District expressed concern as to whether Conner v. Conner and Kuvin v. Kuvin had limited the scope of appellate review in dissolution cases (App3). The Court recently resolved this question in Vandergriff v. Vandergriff, 456 So.2d 464, 466 (Fla. 1984), holding that "as Canakaris makes clear, the standard of review is whether the trial judge abused his discretion and the test is whether any reasonable person would take the view adopted by the trial judge."

The court below did not contravene this standard of review. Regarding the key issue in this case, the treatment of the federal pension, the Court reviewed the trial judge's ruling with some scrutiny because it could not determine how the judge dealt with the pension benefits (App 4). The court faithfully followed the law in doing so. Canakaris points out that the test of trial court discretion

> 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.

Id. at 1203. Since it could not determine whether the trial judge's ruling on the pension benefits was logical or consistent, the district court properly reviewed the issue.

The lower court properly reviewed the Final Judgment for another, more basic reason. Canakaris does not confer discretion upon a trial judge to err as a matter of law:

> Where a trial judge fails to apply the correct legal rule . . . the action is erroneous as a matter of law. This is not an abuse of discretion. The appellate court in reviewing such a situation is correcting an erroneous application of a known rule of law.

Id. at 1202 (emphasis in original). Although the district court was confused as to how the trial court dealt with the pension issue, a close review of the record reveals that the judge held as a matter of law that he would consider only the amount of money paid into the pension fund by the husband. When Petitioner's counsel started to inquire as to the federal pension, Respondent's counsel objected to any testimony on the issue (TR 177-183). The Court's ruling was unequivocal:

> THE COURT: The Court is going to allow you to take testimony as to the amount, if he knows it, that he's put in [the pension fund]. (TR 183).

The Court confirmed its ruling just moments later:

> BY MS. COOK:
>
> Q Mr. Diffenderfer, isn't it true that upon retirement the Federal Government

> matches funds to whatever you set aside and it's based upon the percentage computation of your last highest three-year salary? Is that not how your benefits --
>
> MR. KINDERMAN: Excuse me, I think, Judge, I believe you ruled that she can inquire as to how much the man put into that retirement fund over the years and nothing else. He's testified and he can't testify --
>
> THE COURT: That was the ruling of the Court to be a marital asset at this time.

(TR 184; 242). Although the court permitted some additional testimony, it was received essentially as a proffer (TR 247). As earlier pointed out in this brief, the court's consideration of only those monies paid into the fund was legal error. Dewan v. Dewan, 455 N.E.2d 1236 (Mass. 1983). See also the cases cited in footnote 3, page 19. Canakaris commands that this type of legal error be corrected on appeal.

This Court's reversal of the district court's ruling on the pension issue is proper for precisely the same reason. The brief has exhaustively detailed how, as a matter of law, pension benefits must be considered marital property. The lower court's failure to abide by this rule requires correction on remand.

CONCLUSION

Mrs. Diffenderfer should not be deprived of her rightful share to the largest marital asset by a rule of law that has been abandoned by almost every court in the country.

Petitioner respectfully urges this Court to join the national consensus and hold that pension benefits are marital property subject to equitable distribution. If it does, this cause must be remanded for a truly equitable award of lump sum and permanent periodic alimony to Mrs. Diffenderfer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing pleading has been furnished by regular U.S. Mail this 4th day of January, 1985, to KEITH J. KINDERMAN, ESQUIRE, P.O. Box 674, Tallahassee, Florida 32302

Attorney