

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

FILED

CLERK SUPREME COURT

APR 11 1985

CLERK SUPREME COURT
[Signature]

PETITIONER'S REPLY BRIEF

CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.
Cynthia S. Tunnickliff
George N. Meros, Jr.
410 Lewis State Bank Bldg.
P.O. Drawer 190
Tallahassee, Florida 32302
(904) 224-1585

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS..... ii

INTRODUCTION..... 1

ARGUMENT..... 2

 A. Pension Benefits Earned During
 The Marriage Are Marital Assets
 Subject to Equitable Distribution..... 2

 B. In Reversing The Trial Court,
 The District Court Properly Applied
 The Standard Of Review In Canakaris,
 Conner and Kuvin..... 5

 C. By His Silence, Respondent Concedes
 The Validity Of Petitioner's
 Argument On The Remaining Issues..... 5

CONCLUSION..... 6

TABLE OF CITATIONS

<u>Case</u>	<u>Page</u>
<u>Aldrich v. Aldrich,</u> 163 So.2d 276 (Fla. 1964).....	1
<u>Brown v. Firestone,</u> 382 So.2d 654 (Fla. 1980).....	2
<u>Canakaris v. Canakaris,</u> 382 So.2d 1197 (Fla. 1980).....	2,5
<u>Commerce National Bank of Lake Worth v.</u> <u>Safeco Ins. Co.,</u> 284 So.2d 205 (Fla. 1973).....	4
<u>Conner v. Conner,</u> 439 So.2d 887 (Fla. 1983).....	5
<u>Grapin v. Grapin,</u> 450 So.2d 853 (Fla. 1984).....	1,2
<u>Kuvin v. Kuvin,</u> 442 So.2d 203 (Fla. 1983).....	5
<u>McClung v. McClung,</u> 10 FLW 758 (Fla. 2d DCA Mar. 22, 1985).....	1
<u>Marcoux v. Marcoux,</u> 10 FLW 120 (Fla. Feb. 14, 1985).....	5
<u>Ohm v. Ohm,</u> 431 A.2d 1371 (Md. Ct. Sp. App. 1981).....	2
<u>Walter v. Walter,</u> 10 FLW 118 (Fla. Feb. 14, 1985).....	1,2

INTRODUCTION

Respondent takes a novel tack in his 3-page responsive argument. Rather than addressing the five legal issues on appeal, Respondent asks the Court to hold that a trial court may reject an accepted principle of law to "do equity" between the parties in a dissolution proceeding.

This novel request must, of course, be rejected. Trial judges in the past have tried to "do equity" by such means as ordering support for a child who has reached majority but who is not dependent, or by ordering post-mortem alimony. But because their efforts were contrary to accepted principles of domestic law, the Court had no choice but to reject them. Grapin v. Grapin, 450 So.2d 853 (Fla. 1984); Walter v. Walter, 10 FLW 118 (Fla. Feb. 14, 1985); Aldrich v. Aldrich, 163 So.2d 276 (Fla. 1964); McClung v. McClung, 10 FLW 758 (Fla. 2d DCA Mar. 22, 1985). Indeed, a court can never do equity by refusing to apply the law. Such action is, by its very nature, inequitable and unjust.

Unfortunately, Mr. Diffenderfer's calculated effort to recharacterize the facts cannot even be described as novel. He has chosen to pass over the merits of the case and rely instead upon inaccurate and often ugly allegations.

Petitioner will leave Mr. Diffenderfer to travel this low road by himself. The real facts are recited in the district court decision. Petitioner is not ashamed of them.

Mrs. Diffenderfer asks only that the law applied to her be the same as that applied in all other parts of Florida and in the nation. If it is so applied, the Court must hold that vested pension benefits are subject to equitable distribution.

ARGUMENT

A. Pension Benefits Earned During The Marriage Are Marital Assets Subject To Equitable Distribution.

In his answer brief, Respondent never contests the fundamental proposition advanced by Petitioner in this appeal, namely, that "vested rights under a private or public pension plan, to the extent such rights were acquired during the marriage, are [marital] property subject to division upon dissolution." Ohm v. Ohm, 431 A.2d 1371, 1374 (Md. Ct. Sp. App. 1981). The omission is not surprising. The decisional law in this state and in almost every other jurisdiction overwhelmingly supports Petitioner's position. See Initial Brief at pages 6-15.

Respondent's alternative approach, that trial courts may refuse to apply the law to "do equity," flies directly in the face of our legal system. This Court has made clear that governmental officers--including the Governor--cannot refuse to apply the law, even if their intentions are good. Brown v.

Firestone, 382 So.2d 654, 668 (Fla. 1980) ("The governor cannot act unconstitutionally to remedy a perceived unconstitutional act of the legislature"). If a trial judge wants to do equity, he must do so within the confines of accepted legal principles--not outside of them. See Grapin v. Grapin, supra; Walter v. Walter, supra.

At the very least, Respondent misperceives the rule of law advanced by Petitioner. He confuses the critical distinction between the initial classification of property as marital assets with the ultimate disposition of those marital assets by the trial judge. (See Resp. Br. at p. 10). Petitioner does not ask the Court to create a rule of law concerning the ultimate disposition of pension benefits. To the contrary, Petitioner asks only that the Court embrace the accepted principle that pension benefits, earned during the shared enterprise of marriage, be classified as marital property subject to equitable distribution. The disposition of that marital property will, of course, remain within the discretion of the trial judge. Canakaris v. Canakaris directs that a judge must ensure "an equitable distribution of property acquired during the marriage". 382 So.2d at 1197, 1201 (Fla. 1980) (emphasis added). That cannot be accomplished if the most valuable marital asset is excluded from the outset.

Respondent suggests further that the facts reflect that the trial judge "did equity" in his treatment of Mr.

Diffenderfer's retirement benefits. He does not cite to the record in support of his assertion, but rather relies upon the dissent. He forgets, however, that the dissent did not prevail in this case. "By definition, a dissent contains information, interpretations or legal analysis which has been rejected, in whole or in part, by the majority." Commerce National Bank of Lake Worth v. Safeco Ins. Co., 284 So.2d 205, 207 (Fla. 1973).

The majority found either that the trial court misapplied the law in refusing to consider the pension benefits as marital property, or that the court did not adequately explain its treatment of the pension benefits. In stark contrast to Respondent's assertion, the majority found that the court failed to do equity on the pension issue. Respondent is bound by those facts: "When facts and testimony are set forth in a majority opinion, they are assumed to be an accurate presentation upon which the judgment of the court is based." Commerce National Bank, id at 207.

In sum, the court below rejected the principle that pension benefits earned during the marriage are marital assets subject to equitable distribution. The cause must therefore be reversed.

B. In Reversing The Trial Court,
The District Court Properly
Applied The Standard Of Review
In Canakaris, Conner And Kuvin.

The district court reversed the trial court judgment on the basis of the standard of review enunciated in Canakaris, but expressed concern that Conner v. Conner, 439 So.2d 887 (Fla. 1983) and Kuvin v. Kuvin, 442 So.2d 203 (Fla. 1983), had limited its review powers. (App 3, Pet. Br.)

Petitioner and Respondent agree that the question of the proper standard of review has now been resolved. In Marcoux v. Marcoux, 10 FLW 120 (Fla. Feb. 14, 1985) and Walter v. Walter, 10 FLW 118 (Fla. Feb. 14, 1985), this Court confirmed that Canakaris remains good law. Accordingly, the district court applied the appropriate standard of review in its decision.

C. By His Silence, Respondent Concedes
The Validity of Petitioner's
Argument On The Remaining Issues.

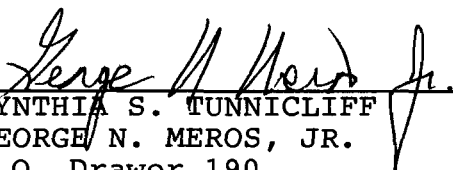
The Court should note that Respondent does not devote a word to the three other issues on appeal. His silence must be taken as a concession that Petitioner's argument on those issues is meritorious.

Petitioner has met her burden on these issues. Respondent has not even tried to overcome her showing. Petitioner should therefore prevail on those issues.

CONCLUSION

As tacitly admitted by Respondent, the law of Florida holds that pension benefits earned during the marriage are marital property subject to equitable distribution. This cause must be reversed and remanded so that the trial court may, for the first time, make an equitable disposition of all marital assets.

CARLTON, FIELDS, WARD, EMMANUEL,
SMITH & CUTLER, P.A.

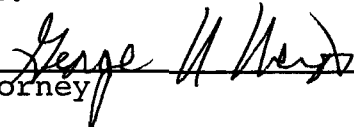


CYNTHIA S. TUNNICLIFF
GEORGE N. MEROS, JR.
P.O. Drawer 190
410 Lewis State Bank Bldg.
Tallahassee, Florida 32302
(904) 224-1585

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by regular U.S. Mail this 11th day of April, 1985, to: KEITH J. KINDERMAN, ESQUIRE, 823 Thomasville Road, Tallahassee, Florida, Counsel for Respondent, and MELVIN B. FRUMKES, ESQUIRE, 100 N. Biscayne Blvd., Suite 1607, New World Tower, Miami, Florida 33132.



Attorney