

DA 8-31-88

IN THE SUPREME COURT  
STATE OF FLORIDA

DAVID J. WEISFELD,

Petitioner,

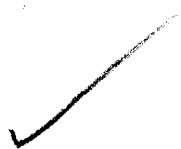
vs.

PAULINE S. WEISFELD,

Respondent.

) CASE # 71,579

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RESPONDENT'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Respondent, Pauline S. Weisfeld, was the Petitioner in the trial court, the Appellant in the District Court of Appeal, and will be referred to herein as Mrs. Weisfeld, or the Wife. The Petitioner, David J. Weisfeld, was the Respondent in the trial court, the Appellee in the District Court of Appeal, and will be referred to herein as Mr. Weisfeld, or the Husband.

Citations to the record on appeal will be designated by use of the symbol "R." followed by the appropriate page numbers, except that citations to the trial transcript will be designated by use of the symbol "T." followed by the appropriate page numbers. Citations to the Appendix attached to Petitioner's Initial Brief on the Merits, including the decision of the District Court, will be designated by use of the symbol "A.", followed by appropriate page numbers.

STATEMENT OF THE FACTS

The Petitioner's statement of the facts as contained in his Initial Brief on the Merits is so lacking in details that the Respondent tenders the following more complete description of the evidence of record in this cause.

Mrs. Weisfeld was 46 years of age at the time of the final hearing (T. 79). The parties were married on April 29, 1956 (R. 1), shortly after she graduated from high school (T. 79). She worked at various bookkeeping jobs during the marriage (T. 14-15, 18-19, 154-156), and later decided to pursue a career in art (T. 107-108) She took college courses from 1974 through 1980, and received her Bachelor of Arts degree from Florida International University in March, 1980 (T. 108).

Mr. Weisfeld was 51 years of age at the time of the final hearing (T. 10). He served in the armed forces for 2 years and was honorably discharged (T. 11). He earned his Bachelor of Science degree in psychology from City College of New York in June, 1958 (T. 11). He earned his Master of Science degree in psychology from the same institution in June, 1959 (T. 15-16), and earned his Doctoral degree in psychology from the University of Miami in 1974 (T. 32). While

pursuing his graduate degrees, he held various jobs and internships (T. 16-19, 24, 27, 29, 31-32), and after earning his degree, he became employed by Dade County's Department of Youth and Family Development earning approximately \$18,000.00 per year (T. 32-33). Sometime in 1976 or 1977, he opened a private psychology practice in addition to his county employment (T. 45), and by 1979 he was earning approximately \$30,000.00 per year from the county and an additional \$20,000.00 from his private practice (T. 33).

Mrs. Weisfeld suffers from asthma, high blood pressure, and hypertension, all of which require continuing medication and/or treatment. Because of her asthma condition, she must restrict any employment to an air-conditioned workplace. (T. 124-126) In addition she suffers from several other minor ailments including a diagnosed hearing loss (T. 125).

In January 1979, Mr. Weisfeld suffered an injury at his county job in an accident (T. 50, 54). Originally the injury was diagnosed as an ankle sprain (T. 51) but his condition did not improve. He continued to work for the county, taking sick leave as necessary, and to conduct his private practice (T. 52). In February 1980, he collapsed, and his condition then was diagnosed as being neurological for which corrective

surgery was necessary (T. 54-55). After undergoing the surgery in May of 1980, he was left paralyzed with no prognosis for recovery due to a spinal lipoma (T. 60-61, 227). He cannot walk, and probably never will (T. 229). In 1982 he had gall bladder surgery, and a heart attack (T. 100, 213, 345). He is under the care of a psychiatrist for extreme anxiety and depression related to, inter alia, his physical problems and marital stress, and is incontinent of urine and feces (T. 211 -213, 218 210).

At the time of the final hearing, the parties' two children were both emancipated (T. 4). During the course of the marriage, the parties had moved their household several times, and acquired and disposed of several residences (T. 17, 22, 26). By the time of the final hearing, they owned a home in Kendall as tenants by the entirety, with an appraised value of \$108,000.00. The home was then subject to approximately \$40,000.00 in mortgages, leaving an equity of approximately \$68,000.00 at the time of trial (T. 291). The second mortgage indebtedness was incurred in order to make improvements to the home so that Mr. Weisfeld could see his clients there and have the facilities necessary because of his paralysis (T. 43, 101-102). Mrs. Weisfeld moved out of the home in January, 1984,

several months after this litigation began, and Mr. Weisfeld has continued to reside there (T. 106).

At the time of the final hearing, Mrs. Weisfeld was earning \$1200.00 per month (gross) as a teacher at a private school (T. 113). She hoped to obtain a permanent teaching position in the public schools, and to obtain a master's degree to increase her income (T. 108-111, 115-116). She owned a 1981 automobile (T. 119), occasionally sells some of her art work and teaches weaving (T. 117), and has a small annuity from a former employer (T. 126-127). Her expenses exceed her income as augmented by her \$100.00 per week alimony payments (T. 114), she has accumulated various debts on her credit cards (T. 122, 124), has borrowed from family friends (T. 114, 203-207), and believes that she owes her trial attorney approximately \$10,000.00 (T. 114). According to Mrs. Weisfeld's testimony, she needs \$400.00 per month over and above the \$100.00 per week alimony payments to make ends meet, plus additional sums for clothing, tuition and household expenses (T. 270).

At the time of the final hearing, Mr. Weisfeld was receiving \$990.00 per month in disability payments from the State of Florida (T. 236), and earns approximately \$1300.00 per month from his private practice (T. 387). In addition, he was receiving interest from investments



in bonds and certificates of deposit amounting to approximately \$9300.00 per year (T. 245-254). Because of his physical condition, his private practice is limited to seeing 4,5,6, or less clients per week (T. 219-220), although Mrs. Weisfeld testified that she thought he was understating his cash income and the number of clients he is seeing, and that he sometimes saw 10 to 15 clients per week prior to the time that she moved out of the marital residence (T. 195 -196). Activities in his two checking accounts for the one year period prior to the final hearing reflected gross transactions in excess of \$95,000.00, with approximately \$6000.00 of that amount representing transfers from one bank account to the other (T. 338-340).

For three years prior to September, 1984, the parties received approximately \$650.00 per month in Social Security payments (T. 126, 255). At that time the benefits were terminated by the federal agency on the assumption that Mr. Weisfeld had returned to gainful employment, and at the time of the final hearing, he indicated that he was contesting the termination of benefits, but may be liable to the government for part or all of the benefits received (T. 255-256).

In May, 1981, Mr. Weisfeld received a settlement from Workers' Compensation with respect to his on the

job injury totaling \$150,000.00, of which \$100,000.00 was paid at that time, with \$10,000.00 yearly payments for 5 years commencing in January of 1982, (T. 61, 89-90). The two state warrants totaling \$100,000.00 were payable to Mr. Weisfeld individually (T. 61), and he invested the entire sum in five \$10,000.00 certificates of deposit and a \$50,000.00 bank repurchase certificate, with all of the items taken in the joint names of the parties (T. 62-63, 65). In August of 1981, the \$50,000.00 repurchase certificate was converted to 5 more certificates of deposit of \$10,000.00 each in the joint names of the parties (T. 65, 70).

In December of 1981, January and February of 1982, nine of the certificates of deposit were rolled over into new instruments titled to Mr. Weisfeld in trust for Mrs. Weisfeld (T. 65, 70-71). The interest from the certificates of deposit was paid into the parties' joint savings account and used for living expenses (T. 72). At a later date, some of the matured certificates of deposit were used to purchase municipal bonds in bearer form in Mr. Weisfeld's name alone (T. 74-75), and others were converted to new certificates of deposit in Mr. Weisfeld's name, and/or in trust for the parties' children (T. 75).

By the time of the final hearing, Mr. Weisfeld had

12 bonds, each with a face value of \$5000.00 (T. 234, 244-245), and 4 certificates of deposit of \$10,000.00 each, two each in trust for each of the parties' two children (T. 256). He also owned a 1979 Cadillac automobile purchased in 1979 for \$12,000.00 (T. 57-58). In addition, he owned approximately \$60,000.00 in life insurance policies on his life (T. 297-298), and Mrs. Weisfeld owned one \$35,000.00 policy on his life which had lapsed (T. 354-356). Mr. and Mrs. Weisfeld were both named parties Plaintiff in an action for medical malpractice relating to his May, 1980 surgery which resulted in his paralysis (T. 324).

According to Mr. Weisfeld, he did not intend to make a gift to his wife when he converted the proceeds of his Workers' Compensation award to assets titled jointly, but did so because of his physical condition in order to avoid probate of those funds in the event he should die (T. 341-343). Other than his own testimony that the purpose of the award was to compensate him for current and future medical expenses, (T. 72, A. 17) there was no evidence as to the purpose of the award.

According to Mrs. Weisfeld, the Workers' Compensation award was to compensate for Mr. Weisfeld's lost earning power, and she understood the funds were to be family assets, to be used as all other available

funds for the support of the family (T. 167-168). In addition, she stated that the parties initially discussed the fact that the monies were to be placed in certificates of deposit until further research revealed better investment opportunities, but that there was no discussion of how the certificates of deposit would be titled, and that Mr. Weisfeld never told her that the funds were his separate property (T. 90-91). It was her understanding that the yearly payments would be paid to her in the event that Mr. Weisfeld died prior to the receipt of any scheduled payment.

After Mr. Weisfeld's surgery, he was hospitalized for 8 months, and Mrs. Weisfeld spent long hours at the hospital attending him while also working and taking care of the children (T. 92) She also took care of closing Mr. Weisfeld's business office (T. 93). Throughout the marriage, the earnings for both parties were deposited into joint accounts (T. 82).

At the final hearing, Mrs. Weisfeld testified that there was approximately \$30,000.00 worth of furniture, art work, art and weaving supplies, and other personal property still in dispute despite an attempt prior to trial to resolve all of those issues (T. 87, 129-145, 149-152, 157-162).

STATEMENT OF THE CASE

Mrs. Weisfeld filed her Petition for Dissolution of Marriage and for Injunctive Relief on June 21, 1983 (R. 1-3). Her Petition alleged that the marriage of the parties was irretrievably broken, that the two children born of the marriage were then over the age of 18 years, that she was in need of support for herself together with an award of attorney's fees and costs, and that the Husband was able to provide spousal support. In addition, the Petition contained a general demand for equitable relief. In her Petition for Injunctive Relief, she alleged that Mr. Weisfeld had begun to transfer or dispose of jointly held assets in order to deprive her of her interest therein, and asked the Court to restrain such acts.

On July 6, 1983, Mr. Weisfeld filed his Answer to the Petition and consolidated Counter-Petition for Dissolution of Marriage (R. 6-8). In his pleadings, he denied the allegation that the Wife needed spousal support and that he was able to provide it. He also alleged that the parties acquired certain real property during the marriage, that he had received certain monies as a settlement of claims relating to an incident which

ultimately rendered him a paraplegic, severely limiting his ability to work, and that those monies had been applied to make certain improvements to the marital home and acquire liquid assets. The Husband demanded support in the form of an award of attorney's fees and costs, and a special equity in the marital home and the liquid assets of the parties.

On July 13, 1983, the trial court entered a temporary restraining order requiring the parties not to harass one another or deplete any marital assets (R. 9). On July 28, 1983, Mrs. Weisfeld answered the Counter-Petition by denying the allegations relating to the Husband's claim for special equity and support (R. 11). On November 16, 1983, the trial court entered an order granting temporary support to Mrs. Weisfeld and requiring Mr. Weisfeld to pay the sum of \$100.00 per week as temporary support (R. 27). On February 13, 1984 the Wife moved to amend her Petition by including therein a claim for partition of the jointly held marital residence (R. 39-40), and on February 28, 1984, the trial court entered its order granting that amendment (R. 42).

The parties engaged in various pre-trial motions and discovery, and, ultimately, the case was tried to the Court on November 19, 20, and 21, 1984 (T. 1- 400).

Subsequent to the trial, the parties engaged in various motions to hold each other in contempt (R. 107-141). Almost 19 months later, on June 18, 1986, the trial court rendered its Final Judgment of Dissolution of Marriage (R. 201-207, A. 1-7), granting a dissolution of the marriage. In the Findings of Fact included within the Final Judgment, the trial court found that the parties were married to one another on April 29, 1956, that both of their children were emancipated prior to the filing of the Petition, that both parties satisfied the residency requirements of Florida Law, and that the marriage of the parties was irretrievably broken.

The trial court made additional findings of fact which included references to the relief claimed by the parties, their assets, and the Workers' Compensation settlement (R. 203-205). In the Final Judgment, the trial court concluded, as a matter of law, that it had jurisdiction of the parties, that the marriage was irretrievably broken, and that it should be dissolved. The trial court also directed that the Husband pay the sum of \$100.00 per week as rehabilitative alimony for a period of two years from the date of the decree, that the parties each bear their own costs, and awarded Mrs. Weisfeld \$5000.00 as attorney's fees.

The trial court declined to award either spouse's

interest in the marital home to the other, but granted Mr. Weisfeld exclusive possession of the home "...subject to his death, remarriage, or cohabitation with a female." (R. 206). The final judgment required Mr. Weisfeld to make all payments on account of the expenses associated with the property, and granted him a credit for one half of all of those payments "...at the time of eventual sale," (R. 206, A. 6). The trial court held that Mr. Weisfeld was entitled to all of the bonds and certificates of deposit, and found that "...these monies were derived as the result of the injuries the Husband sustained and cannot, by any stretch (sic) of the imagination, be considered marital assets, but belong to the Husband alone." (R. 206, A. 6) In addition, the trial court ruled that Mr. Weisfeld would "retain" all of the personal property, furniture and furnishings remaining in the marital home (R. 206, A. 6).

The trial court also found that the parties had acquired an insurance policy with a cash surrender value of \$1225.00, and that Mr. Weisfeld, by design or neglect, had allowed the policy to lapse. The trial court declined to order him to pay Mrs. Weisfeld the cash surrender value, but ordered him to assist in reinstating the policy including making any payments due prior to the final hearing. (R. 203, 206).



Both parties timely moved for a rehearing (R. 176-178, 179-180), and on July 11, 1986, the trial court entered its order denying both motions for rehearing. (R. 208) On August 11, 1986, the Petitioner filed her Notice of Appeal (R. 197), and on August 20, 1986, the Respondent filed his Notice of Cross Appeal (R. 198).

After the filing of briefs and oral argument, the Third District Court of Appeal entered its written opinion reversing the final decree on September 8, 1987. (A. 8-15). In its opinion, the appellate court held that the trial court erred in holding that the Workers' Compensation award was not a marital asset subject to equitable distribution, that the award of attorney's fees to Mrs. Weisfeld was fatally defective for lack of evidence, and that the trial court erred in awarding exclusive possession of the marital residence to the Husband.

Thereafter, Mr. Weisfeld filed motions for rehearing and rehearing en banc, both of which were denied by the District Court on November 9, 1987 (R. 217). Subsequently, Mr. Weisfeld file his Petition for Certiorari to this Court, and these proceedings ensued.

SUMMARY OF ARGUMENTS

The decision of the District Court holding that the Petitioner's Worker's Compensation Award constituted marital property subject to equitable distribution was correct and should be approved by this Court.

The decision of the District Court holding that the trial court erred in awarding exclusive possession of the entireties property to Mr. Weisfeld should also be approved. The entire cause should be remanded to the trial court in accordance with the opinion of the District Court.

I.

THE DISTRICT COURT CORRECTLY DETERMINED THAT THE  
APPELLEE'S WORKERS' COMPENSATION AWARD  
CONSTITUTED MARITALE PROPERTY SUBJECT  
TO EQUITABLE DISTRIBUTION

The Petitioner argues that his Workers' Compensation award is not marital property subject to equitable distribution, and, that the trial court's Final Judgment should be reinstated. In tendering this argument, the Petitioner ignores the record established at the trial of this matter, and the well-reasoned opinion of the District Court below. The Respondent contends that the District Court panel was correct in determining that the analytical approach should apply and that the Final Judgment should be reversed because it fails to equitably distribute the parties' assets.

The Petitioner's factual contention that the purpose of his Workman's Compensation award was to compensate him for current and future medical expenses is based on nothing more than his own self-serving testimony. There was nothing else in the record to demonstrate that the award was not for lost wages and past medical expenses. The bulk of the award was received in 1981, long prior to the commencement of this

divorce litigation. It is obvious that, to the extent the award was meant to compensate for current medical expenses, if any, those expenses were incurred by the parties jointly in the period after its receipt and prior to the litigation.

In the instant case, Mr. Weisfeld received his \$150,000.00 Workers' Compensation award due to the injuries he suffered on the job in 1979. The record demonstrates that most of the award had been received prior to the final hearing, and that the initial lump sum award of \$100,000.00 was used to purchase certificates of deposit and a bank repurchase agreement in the names of the parties jointly. Moreover, the interest from these investments was placed into the parties' joint bank account and used for ordinary family expenses. Subsequently, Mr. Weisfeld converted some of the certificates of deposit into new certificates in his name in trust for Mrs. Weisfeld, and then used some of those assets to acquire municipal bonds in his name alone, while converting other certificates of deposit into new certificates in his name alone and/or in trust for the parties' children.

In Antonini v. Antonini, 473 So.2d 739 (Fla. App. 1 DCA, 1985), rev. denied 484 So.2d 7 (Fla. 1986), the appellate court affirmed the trial court's denial of the

wife's claim of a special equity in a sailing vessel purchased with funds derived from her settlement of a personal injury claim. Because the settlement proceeds were combined with other joint funds to purchase a certificate of deposit in the parties joint names which was later used to purchase the boat, the court concluded that the settlement proceeds had lost their separate identity for the purposes of the special equity analysis.

The District Court's analysis of how other jurisdictions have treated personal injury and workers' compensation awards upon dissolution is complete, well-reasoned and persuasive. The analytical approach recommended by the District Court is both logical and fair in granting to both spouses a fair share of any recovery for personal injury and should be adopted by this Court. However, the result is equally supported by the logic of the Antonini, supra, decision, since the record clearly demonstrates that the initial lump sum payment was placed in jointly held assets.

The essence of the issue in this case revolves around the trial court's failure to equitably distribute the assets of the parties. As the District Court noted in its opinion, Mrs. Weisfeld was shortchanged by the trial court's disposition of the cause, because it

permits "... Mr. Weisfeld to continue to live in the same life-style which he enjoyed during his marriage, while Mrs. Weisfeld's life-style is severely curtailed."  
(A. 14)

The Petitioner argues that it is "...an exercise in judicial futility to remand this cause to the trial court ..." The Respondent submits that this argument is untenable because it is based on facts not in the record. In essence, the Petitioner urges this Court to rule on a set of conjectured facts and conduct a trial de novo. The reality reflected in the record demonstrates that the trial court was wrong as a matter of law in assuming that no portion of the Workman's Compensation award could be marital property subject to equitable distribution.

In Freeman v. Freeman, 468 So.2d 326 (Fla. App. 5 DCA, 1985), the Fifth District Court of Appeal held that a private disability pension was not marital property subject to equitable distribution. In reversing an award of an interest in the pension to the uninjured spouse, the Freeman, court noted that the private disability pension "... is designed to compensate an employee for lost earnings and injuries (including pain and suffering) sustained on the job." 468 So.2d at 328

The Respondent argues that the Freeman, supra,

decision should be disapproved to the extent that it holds that wages lost during the marriage can never be marital property subject to equitable distribution. The decision by the Third District Court of Appeal in the instant case is not in conflict with Freeman, supra, with respect to awards for pain and suffering. However, based on the facts of particular cases, the trial courts of our state should be appropriately guided by adoption of the analytical approach. The Freeman, supra, theory, that even lost wages can not be marital property is illogical in the sense that recovery of monies which would have been shared jointly are allocated solely to one spouse.

In the instant case, the record demonstrates that the parties pooled their incomes and liabilities, as most married couples do. Under the analytical approach adopted in the opinion below, those aspects of a recovery for personal injury which represent the separate property of one spouse, such as pain and suffering, or loss of consortium, would be allocated to that spouse, while those portions of the recovery which represent joint property, such as lost wages, are to be considered marital property subject to an appropriate scheme of equitable distribution. This approach to the problem seems eminently fair to both spouses, while the

Freeman, supra, theory could easily result in an inequitable distribution of marital assets. Accordingly, this Court should decline to grant its Writ of Certiorari and should approve the decision of the District Court in this cause.



II.

THE DISTRICT COURT CORRECTLY DETERMINED THAT THE  
TRIAL COURT ERRED IN GRANTING THE PETITIONER  
EXCLUSIVE POSSESSION OF THE MARITAL HOME

The Petitioner argues that the trial court's award of exclusive possession of the marital home should be reinstated because it is equitable and just under the circumstances. The Petitioner quotes at length from Duncan v. Duncan, 379 So.2d 949 (Fla. 1980) on this issue, but ignores the predicate required by Duncan, that

"...exclusive possession of property subject to disposition in a dissolution proceeding should either be directly related to the obligation to pay support or be temporarily necessary to prevent reduction in the value of the subject property." 379 So.2d at 952 (Emphasis supplied)

Contrary to the thrust of Petitioner's argument, the succeeding language in the opinion, requiring that the award be equitable and just under the circumstances, does not qualify the above-quoted language so as to provide an independent basis for awarding exclusive possession of entireties property.

In the Final Judgment below, the trial court declined to award either party's interest in the marital

home to the other or to partition the home, but granted Mr. Weisfeld exclusive possession of the premises for an indefinite period, conditioned upon the possession ending in the event that he died, remarried or cohabited with another woman. The District Court found that the exclusive possession award was fatally flawed on this record, even though the purpose was admirable, because it could not meet the direct connection to support liability required by Duncan, supra.

The Respondent contends that Mr. Weisfeld's physical condition and the improvements made to the home in order to accomodate his needs and facilitate his private practice justify his remaining in the home. However, the disposition ordered by the trial court is improper because it does not balance the equities between the parties, does not equitably distribute the parties' assets, and deprives the Petitioner of her interest in the home for an indefinite period without any compensation.

In the instant case, reduction in value of the property had nothing to do with the award, and the parties' children were emancipated prior to the dissolution. In addition, the award could not be justified as an incident of spousal support, since there is nothing in the record upon which to base the

conclusion that Mr. Weisfeld was in need of support from Mrs. Weisfeld or that she was able to support him. While his special needs are readily apparent, it is impossible to say on this record that she is liable for his support when the facts demonstrate clearly that she is not totally self-supporting, the trial court implicitly found her in need of support and Mr. Weisfeld able to pay the alimony, and her one half interest in the marital home was determined to be her only material asset.

As this Court stated in Duncan, supra, a grant of exclusive possession of property "... must serve a special purpose." 379 So.2d at 952, and the crucial question "... is whether the award is equitable and just given the nature of the case." 379 So.2d at 952. In the instant case, the special purpose to be served is obvious, but the Appellant contends that the award is not just or equitable due to the totality of the circumstances. The evidence adduced at trial demonstrated plainly that Mr. Weisfeld was in possession of assets greatly exceeding Mrs. Weisfeld's equity in the home, and that she was not the cause of Mr. Weisfeld's physical disabilities. The trial court's well-intentioned attempt to accomodate Mr. Weisfeld's physical difficulties by granting exclusive possession

was not equitable under the circumstances because Mrs. Weisfeld's interest in the home is her only asset, and the award of indefinite exclusive possession to Mr. Weisfeld obviously deprives her of the use of that asset.

The award of exclusive possession to Mr. Weisfeld is also erroneous because it fails to compensate Mrs. Weisfeld for being deprived of the use and enjoyment of her only material asset. In Cone v. Cone, 449 So.2d 867 (Fla. App. 5 DCA, 1984), the Fifth District Court of Appeal specifically noted that a joint owner of property is entitled to reimbursement for the use value of his or her interest in the property where, as here, the party out of possession does not have a legal duty to support the occupant. In Schein v. Schein, 448 So.2d 16 (Fla. App. 3 DCA, 1984), the Third District Court of Appeal also recognized that it is not appropriate to award one spouse rent-free possession of the marital residence in the absence of a duty to support the occupant and remanded the cause for a determination of the amount of rent to be paid by the party in possession.

In the case at bar, reimbursement alone would not have cured the error in awarding exclusive possession to Mr. Weisfeld because the facts clearly demonstrated Mrs. Weisfeld's need for support in the present and the

foreseeable future, whereas the award of exclusive possession has no specific termination date. Unlike an award of exclusive possession as an incident of child support, which will terminate at a particular date when the children reach their majority, the award in this case is indefinite. Moreover, the Final Judgment left Mrs. Weisfeld with no other assets, so that she would never accumulate any material assets to purchase a new home or provide for retirement, even if she received compensation for the rental value of the former marital home.

In the instant case, the Respondent contends that the above-mentioned problems attendant to awarding Mr. Weisfeld exclusive possession of the former marital home could have been avoided by awarding Mrs. Weisfeld's interest in the home to Mr. Weisfeld as lump sum alimony, and compensating Mrs. Weisfeld by an award of cash as lump sum alimony in an amount sufficient to compensate her for her share of the equity in the home and to equitably distribute the marital assets.

A careful review of the record will demonstrate that no other disposition of the matter makes any sense because Mr. Weisfeld's special needs do not support a partition order, and Mrs. Weisfeld's relative lack of assets and earning power do not support an award of

alimony to Mr. Weisfeld. Since an award of exclusive possession of the marital home cannot be justified in this case, Duncan, supra, the only practical way to keep Mr. Weisfeld in possession of the premises which have been adapted to his special needs, and to avoid partition, is to order reciprocal lump sum alimony awards. The District Court opinion recognizes this possible result implicitly (A. 14-15) and should be approved.

## CONCLUSION

The decision of the District Court reversing the trial court's determination that no part of Mr. Weisfeld's Workers' Compensation award could be considered marital property was correct and well-reasoned. The analytical approach to determining whether recoveries for personal injury or from Workers' Compensation are marital property subject to equitable distribution is the majority rule in other jurisdictions and reflects a fundamental fairness to both spouses while requiring proof of appropriate facts and equities. This issue is certain to arise in a significant number of dissolution actions throughout our state, so that clarification of the law is essential. The holding of the District Court should be approved because it provides specific guidance to our trial courts without disturbing the traditional powers of the fact finder and chancellor to address the equities of the specific cause in distributing property upon dissolution.

The District Court's reversal of the exclusive possession award should likewise be approved. To do otherwise would be to recede from the direct connection

to a support obligation required by Duncan, supra. The exclusive possession award in this case is intimately related to the equitable distribution issue and remand to the trial court is the only appropriate remedy. As the District Court distinctly hinted (A. 14-15), reciprocal lump sum alimony awards placing Mr. Weisfeld in control of the marital home and compensating Mrs. Weisfeld for her equity therein would be a fairer disposition of the cause.

Based on the foregoing reasons and authorities, the Respondent urges this Court to deny the Petition and approve the decision of the District Court entered below.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the Respondent's Initial Brief On The Merits has been mailed to Maurice J. Kutner, Esq., at 28 West Flagler Street, 12th Floor, Roberts Building, Miami, Florida 33130, on this 17 day of June, 1988.

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