IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

Case No. 74,419

WILLIAM deFOREST THOMPSON,

Petitioner/Appellant,

vs.

TOBITHA THOMPSON,

Respondent/Appellee.

RESPONDENT'S ANSWER BRIEF ON CERTIFIED QUESTION

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PREFACE

This is a petition for review of a question certified by the Fourth District Court of Appeal to be of great public importance. Petitioner was the Appellant/Husband and Respondent was the Appellee/Wife in the District Court. Petitioner will be referred to as the husband and Respondent as the wife.

The following symbols will be used:

(R) - Record on Appeal,
(AA) - Appendix of the Respondent/Wife.

STATEMENT OF THE CASE

The wife cannot accept the husband's statement of the case as it is argumentative. Accordingly, the wife provides the following:

The wife filed a petition seeking dissolution of marriage and other relief in the Circuit Court for Palm Beach County (R 436-41). Husband filed a counter-petition and amended counter-petition (R 444-46, 484-87). The court entered its final judgment determining the custody, alimony, and other issues on April 17, 1987 (R 779-81). The husband filed a notice of appeal on May 13, 1987 (R 783). On July 7, 1989, the Fourth District Court of Appeal filed its opinion affirming the final judgment (A 1-4). The District Court determined that there was no reason to conclude that the trial court had factored in good will value for the husband's professional association when making the property

distribution, but certified the following question as being one of great public importance:

> IN MARRIAGE DISSOLUTION PROCEEDINGS TO WHICH AN OWNER OF A PROFESSIONAL ASSOCIATION IS A PARTY, MAY THE VALUE OF PROFESSIONAL ASSOCIATION'S GOOD WILL BE FACTORED IN IN DETERMINING THE PROFESSIONAL ASSOCIATION'S VALUE?

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IN MARRIAGE DISSOLUTION PROCEEDINGS TO WHICH AN OWNER OF A PROFESSIONAL ASSOCIATION IS A PARTY, MAY THE VALUE OF THE PROFESSIONAL ASSOCIATION'S GOOD WILL BE FACTORED IN IN DETERMINING THE PROFESSIONAL ASSOCIATION'S VALUE?

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POINT VI

THE AWARDS ARE NOT EXCESSIVE AND DO NOT CONSTITUTE PUNISHMENT FOR THE HUSBAND'S ADULTERY.

STATEMENT OF THE FACTS

Several statements in the statement of the facts are incomplete or inaccurate and require clarification.

During the first four years of the marriage while the husband was in school, the wife worked and gave her entire paycheck to the husband (R 86-87). She taught school, cared for the home, and cared for their son while the husband went to law school (R 87). The wife stopped working when the husband graduated from law school and has not worked outside the home since then (R 91, 377-78). Throughout the marriage, the wife was an excellent wife and mother, thoroughly devoted to her family (R 65-66, 71, 73, 76-77, 89). The marriage broke up when the husband began having an affair with the wife's best friend in early 1982 (R 85, 132, 374).

The seven year old Mercedes which the husband drives is worth, according to him, $35,000 (R 582). The husband's editorializing regarding payments to the wife during their separation is improper. The wife did not "claim" that the husband paid certain expenses during the separation; rather, the husband admitted the payments (R 347-51). These items, indicated by asterisks on the wife's financial affidavit, total $3,169 a month, without considering income taxes paid by the husband, income tax preparation fees, and miscellaneous expenses for their daughter (R 15, 93-94, 115, 598-600, 650-55, 669). The husband's P.A. purchased the wife's Jaguar and the daughter's sports car (R 240).

The husband claims that he borrowed $125,000 from his P.A. for income taxes in 1986 (R 236-39, 344). Curiously, Kevin O'Brien, the husband's "partner" borrowed $125,000 from the P.A. at the same time (R 334-35). The wife's expert CPA, Mary Van Lennup Plum, testified that she would find it unusual if the husband had to borrow $125,000 to pay income taxes because the P.A. had large cash reserves at that time (R 56).

Pages 7-8 of the husband's brief contain his calculation and evaluation of the marital assets. Many of his figures, however, whether shown as representing the wife's valuation or the husband's valuation, are incorrect. Presumably, in the instances where the husband states, "no evidence", he is assuming that the other party will accept the evaluation given. The wife would agree to that.

Conspicuously absent from the trial was the husband's accountant, Gary Horowitz, who prepared all of the financial statements for the P.A. and the husband personally. None of the husband's experts testified to the value of his firm. The only evidence on that issue came from the wife's experts and Horowitz's financial statements. The husband's other experts testified only to the value of his tax shelters and limited partnerships.

In valuing the marital home, the husband ignored his stipulation that the home had an appraised value of $330,000, less

a $138,712 mortgage, for a $191,288 net value (R 52). The home, built in 1979, needs extensive repairs (R 97).

The Charleston (Boca) townhouse is encumbered with a mortgage and accrued unpaid interest on that mortgage (in favor of the wife's parents), the total of which exceeds the equity in the home (R 15, 23-26, 99, 101, 104-05). The final judgment made the wife responsible for the mortgage (R 781). The wife's mother agreed to forgive the debt if the parties returned the property, which the wife agreed to do (R 104-05, 122).

As with the furniture in the marital home, the husband claimed the furniture in his townhouse is worth only $2,000 and cites R 457 of the record as supporting that. No such information appears at that page; the husband listed the value of the furniture and furnishings in his townhouse in his pre-trial stipulation as "unknown" (R 504).

The most egregious misrepresentations occur in the husband's characterization of Mary Van Lennup Plum's valuations for his limited partnerships and tax shelters. In each instance where the husband states that Mrs. Plum had "no opinion," she had in fact applied a value to each of the items based on cost. The husband argues that her cost valuation is irrelevant since it is not indicative of present value. His own stockbroker, however, Whitfield Pressinger, testified that all of Dean Witter's records

list the investments at their original cost and, for that reason, it is almost impossible to determine any other value (R 186, 201). Additionally, the values which the husband attributes to these tax shelters and investments are suspect.

Taking each separately, the husband obtained Clinton Street Limited Partnership in October of 1984 (R 183-84). The total cost of the partnership was about $450,000 of which the husband has paid about $160,000 (R 190-92). Because of changes in the tax laws, Mr. Pressinger felt that Clinton Street investment is worth $11,000, even though the husband had substantial tax benefits from it for three years (R 184, 213).

Equus Investments is a stock limited partnership set up for a leveraged buy-out which the husband purchased in October of 1984 for $50,000 (R 185-86). Dean Witter had a list of people interested in selling their shares in Equus. Those offers ranged from $940 to $1200 per unit (R 186). Based on those offers, Mr. Pressinger felt that even though the underlying assets are worth more, a buyer would not be willing to pay more than $900 per unit (R 186, 202). The parties have 50 shares in Equus Investments for a total present value of approximately $45,000 (R 202).

NPI Plant Research is a tax shelter the parties purchased in January of 1984 for $50,000 and had received almost 90% of their total investment in tax write-offs (R 187). Based on speculation,

Mr. Pressinger felt that the NPI Investment was worth less than its original cost (husband had invested $42,000). In his opinion, NPI is presently worth about $20,000 (R 187-88, 203, 205).

Capital Realty is a tax shelter which came into being in August of 1982 (R 88). The parties purchased 30 units at $1,000 each for an original investment of $30,000 (R 189). The last time a unit was sold was at $275 a unit, causing Mr. Pressinger to believe that the investment was worth $8,250 (R 189, 196-97). He admitted, however, that he did not know the fair market value of a Capital Realty unit (R 198-99).

SLM Entertainment Limited is a limited partnership which came into being in 1983 in which the husband invested $30,000 (R 190). Mr. Pressinger felt the husband's total interest was now worth $3,000, based on an offer to purchase that had expired in late December of 1985 to buy the interest at 10 cents on the dollar (R 190). The only basis for his valuation was this refused offer (R 205-06).

B & D is a duplex which the husband purchased in Charleston, South Carolina in which he owns a one-third interest (R 295). The debt exceeds the equity and the husband claimed a cost of sale of approximately $10,000 (R 295). Consideration of this cost of sale is improper since it is purely speculative.

Vision Four, Inc. is a venture which operates a Sonny's Barbecue franchise in Georgia (R 257-58, 296). The husband has invested over $80,000 in the venture and, at the time of trial, had agreed to pay an additional $200 a month for the next six months (R 257-58). The husband's expert, Mr. Perralla, testified that Vision Four, Inc. had no value (R 296).

TLC-200 Limited Partnership is a partnership corporation which owns the husband's condominium office building (R 296). Mr. Perralla ascribed a value of zero to this, also (R 296).

The husband reduced the value of his pension and profit sharing by some nebulous figures for taxes and penalties. There is no evidence in the record to support the figures used by the husband. Further, this reduction was improper since the court awarded the wife no interest in the pension and profit sharing plans; therefore, withdrawal of funds is unnecessary. If the court had chosen to award the wife an interest in the pension and profit sharing, it could have done so through a Qualified Domestic Relations Order (QDRO) which would have avoided penalties and taxes (R 34-35).

Regarding the figures for his office condominium, the husband used a mortgage balance as of December 31, 1985, while Mrs. Plum used the current balance of $977,459 (R 479, 659, 661). The husband's figure for the value of his P.A. is totally unsupported.

If he chooses to use the $100,000 book value indicated in his financial statement of December 31, 1985, he should also include the loan receivable due the P.A. of $125,000, and the $477,000 in outstanding accounts receivable (R 356). The husband conceded the accounts receivable constitute an asset for accounting purposes (R 357). He estimated that he would be unable to recover about 1/3 of the outstanding receivables (R 358). None of the husband's experts testified to the value of the firm. The husband produced no evidence to refute the valuations of the wife's experts.

The husband's P.A. is housed in an office condominium that he purchased in 1986 for $647,000 (R 254-55). He paid $400,000 for improvements in the woodwork and has an additional $300,000 in portable equipment in the building (R 255, 355). The wife's expert, Weston Darbey, testified that the husband's P.A. is paying an excessive amount of rent each month (R 147-48).

The following chart depicts the net marital assets prior to dissolution (after making the adjustments mentioned on pages 5-9 herein):

ASSETS	WIFE'S VALUATION		HUSBAND'S VALUATION
Marital Home	$191,288.00		$191,288.00
Marital Furniture	6,200.00		6,200.00
Mercedes	35,000.00		35,000.00
1984 Jaguar	22,800.00		22,800.00
Georgia Vacation Home	119,932.00		119,932.00
Georgia Furniture	200.00		200.00
Georgia Boat	2,000.00		2,000.00
Office Condominium	22,541.00		9,800.00
Charleston Boca	- 0 -	*	- 0 -
Ft. Lauderdale Townhouse	49,500.00		49,500.00
Ft. Lauderdale Furniture	19,900.00		2,000.00
South Carolina Duplex (B & D)	- 0 -		- 3,333.00
Capital Realty	30,000.00		8,250.00
SLM Entertainment	30,000.00		3,000.00
NPI Plant Research	42,236.00		20,000.00
Equus	50,000.00		45,000.00
Clinton Street	53,196.00		- 11,000.00
TLC	12,000.00		- 0 -
Visions Four, Inc.	60,000.00		- 0 -
Avalon	- 0 -		- 0 -
Pension/Profit Sharing	192,167.00	**	131,600.00
IRA	4,335.00		4,335.00
P.A. Loan Receivable	48,820.00	(R 659,661)	48,820.00
P.A.	981,640.00	***	100,000.00
Cash (including Sun Bank cash and CD)	75,653.00		35,780.00
Jewelry	5,000.00		9,300.00
Total	$2,054,408.00		$830,472.00

* Excluding accrued interest on Charleston Boca townhouse because the wife's mother agreed to forgive the debt if the property is returned, which the wife agreed to do.

** $242,167 pension & profit sharing less the husband's $50,000 loan.

*** Valuations of the wife's experts ranged from $910,281 - 1,063,000; therefore, the wife has used a mid-range value of $981,640 (as the husband did in his brief).

Using the wife's figures, the husband received 61.27% of the net marital assets following dissolution.

Next, the husband contests the wife's financial affidavits solely because they depicted increases. The husband presented no evidence at trial to challenge the figures in the wife's affidavits except to show that they had increased. Mary Van Lennup Plum prepared the financial affidavits with the wife's assistance, using cancelled checks and bills (R 53). The first financial affidavit filed in November of 1985 omitted nearly all of the items the husband was paying which, by his own admission, totaled at least $3,000 per month without considering tax consequences (R 129-30, 347-51). Adding those expenses to the first affidavit expenses of $7,550 per month yields more actual expenses than those portrayed in the April, 1987 affidavit. The husband's financial affidavit (R 468-74) listed the following as his expenses:

Housing Expense	$ 2,425.00
Other Real Estate Owned (Mortgage and Taxes)	16,231.00
Food and House	375.00
Children	2,766.00
Personal Expense (Including $6,000 alimony and $2,000 attorney's fees)	9,370.00
Insurance	242.00

These items total $31,409.00/month or, excluding the alimony and attorney's fees, $23,409 a month, a far cry from the monthly expenses he claims in his brief of $7,178/month. His brief totally neglects to include the category for "other real estate owned."

Regarding the parties' standard of living, the husband states that from 1981 through 1983 he "consistently made" about $2,000 to $2,500 a week (Petitioner's brief pages 10-11). The husband was drawing that amount from his practice; however, as his year-end figures indicate, he also received bonuses each year. The P.A. pays out as much salary as it can to the husband to reduce income taxes to the P.A. (R 45). Further, the husband received sizeable pension contributions and fringe benefits each year. In 1987, the husband continued to draw $3,000/week (the husband's brief mistakenly states $3,000/month). In the first few months of 1987, the P.A. grossed $970,736 (R 8, 10, 56). In addition, the P.A. received $60,000 in January, 1987, bringing the gross income for the first four months of 1987 to over one million dollars (R 57). At the time of trial, the husband had $641,000 in his trust account from a case he had recently settled on a 40 percent contingency fee (R 359-60). He had to pay the referring lawyer a one-third referral fee and he expected to keep the rest (R 359-60).

Attorney Al Cone, called as an expert witness for the husband, testified that a lawyer with the sort of income stream that the husband's P.A. has been averaging is doing numerically better each year than the prior year even in the face of tort reform (R 279-80). Mr. Cone stated that if the husband grossed a million dollars for the first four months of 1987, he is doing pretty well (R 281). Mr. Cone further stated that the husband's earning stream indicated that the P.A. was experiencing no adverse effects from

tort reform (R 281). Mr. Cone indicated that tort reform has had no quantifiable adverse effect on his firm, either (R 284). The husband testified that he has several cases pending which he considers have the potential of being major cases (R 358).

The amount the husband chooses to pay himself each week, $3,000, is not determinative of anything since he determines what his wages will be (R 56). The evidence supports Mrs. Plum's testimony that the husband's income over the past three years has averaged $595,532 per year (R 8-10). On top of that, he received fringe benefits totalling $89,731 a year (R 11). Additionally, he received pension and profit sharing contributions (R 19).

SUMMARY OF ARGUMENT

The parties were married 25 years and have two children, one of whom is a minor. The wife has not worked outside the marital home in the last 20 years. As the District Court found:

> [T]he former wife acted during four early years of this twenty-three year marriage simultaneously as mother, housekeeper, and substantial economic provider, while the husband completed his collegiate and legal education. Thereafter she bent her energies primarily to a career as wife and mother, managing the household and rearing the parties' children. Upon becoming a member of the bar, the husband, after a more or less average start insofar as level of professional earnings is concerned, has, in the last several years, developed an impressively lucrative plaintiff's practice in personal injury and medical malpractice cases.

The District Court affirmed the final judgment, holding that the property distribution was not lopsided in favor of the wife, that the amount of permanent periodic alimony was in line with the husband's voluntary payments during the parties' separation and with the wife's needs and the former husband's ability to pay, and that the lump sum alimony, payable over the several years, could be perceived as recognition of the former wife's "extraordinary part in making the husband's successful professional career possible." Using the wife's valuations for the marital assets, the husband received 61.27% of the net marital assets following dissolution.

In so holding, the District Court held, "There is no compelling reason to conclude that the trial court factored in the value of the husband's professional association's good will in making the property distribution." Nevertheless, the District Court certified the question of whether the good will value of a professional association may be considered in determining the professional association's value in marriage dissolution proceedings as a question of great public importance.

This Court, in its discretion need not decide the certified question because, as the opinion of the District Court indicates, the outcome here cannot be affected by this Court's resolution of the goodwill issue since the record does not demonstrate that the trial court included goodwill in its valuation of the husband's law

firm in making the property distribution. Alternatively, if this Court determines that an answer to the certified question is appropriate, the scope of review should be limited to resolution of the certified question rather than de novo review of the entire case, in recognition of the District Court's function as a court of final jurisdiction where resolution of the certified question cannot affect the outcome of the case.

The District Court properly affirmed the trial court's property distribution which the evidence amply supports. The evidence further supports the amount of permanent alimony and attorney's fees awarded. The husband has failed to demonstrate the requisite abuse of discretion.

POINT I

IN MARRIAGE DISSOLUTION PROCEEDINGS TO WHICH AN OWNER OF A PROFESSIONAL ASSOCIATION IS A PARTY, MAY THE VALUE OF THE PROFESSIONAL ASSOCIATION'S GOOD WILL BE FACTORED IN DETERMINING THE PROFESSIONAL ASSOCIATION'S VALUE?

At the outset, the wife suggests it is unnecessary to determine the certified question in this case. While the wife does not dispute that the goodwill issue is one of great public importance, an answer to the certified question is unnecessary here since, as the Fourth District held, "There is no compelling reason to conclude that the trial court factored in the value of the husband's professional association good will in making the property

distribution." Thompson v. Thompson, 546 So.2d 99, 100 (Fla. 4th DCA 1989). While it is within the province of the District Court to determine whether a question is one of great public importance insofar as vesting jurisdiction in this Court, once jurisdiction attaches, it is the function of this Court to determine whether an opinion is justified or required. Novack v. Novack, 195 So.2d 199 (Fla. 1967). Since an answer to the certified question cannot affect the result in this case, an opinion by this Court is neither justified nor required. Alternatively, if this Court determines that an answer to the certified question is appropriate, the scope of review should be limited to resolution of the certified question, rather than a de novo review of the entire case, in recognition of the District Court's function as a court of final jurisdiction where resolution of the certified question cannot affect the outcome of the case. Trushin v. State, 425 So.2d 1126 (Fla. 1982).

Marital property encompasses those assets which have been created by the parties' work efforts, services, or earnings. Turner v. Turner 529 So.2d 1138 (Fla. 1st DCA 1988); Wright v. Wright, 505 So.2d 699 (Fla. 5th DCA 1987). The essential criterion is whether a right to the benefit or asset has accrued during the marriage. Buttner v. Buttner, 484 So.2d 1265 (Fla. 4th DCA 1986), rev. denied, 494 So.2d 1149 (Fla. 1986). The prevailing view among the majority of jurisdictions that have considered the issue is that the goodwill of a professional practice is a marital asset,

subject to evaluation, which should be considered in a divorce proceeding.

The following list illustrates that the majority of jurisdictions which have considered the issue hold that the goodwill of a professional practice is an asset with a calculable value, available for distribution in marriage dissolution proceedings:

Hunt v. Hunt, 698 P.2d 1168 (Ak. 1985)
Mitchell v. Mitchell, 732 P.2d 208 (Ariz. 1987)
Fenton v. Fenton, 184 Cal.Rptr. 597, 134 Cal.App.3d 451 (Cal.App. 1st Dist. 1982)
Wright v. Wright, 469 A.2d 803 (Del.Fam.Ct. 1983)
In re Marriage of Rubinstein, 145 Ill.App.3d 31, 495 N.E.2d 659 (Ill.App. 2d Dist. 1986)
Heller v. Heller, 672 S.W.2d 945 (Ky.App. 1984)
Kowalesky v. Kowalesky, 148 Mich.App. 151, 384 N.W.2d 112 (1986)
Roth v. Roth, 406 N.W.2d 77 (Minn.App. 1987)
In re Marriage of Hull, 219 Mont. 480, 712 P.2d 1317 (1986)
Dugan v. Dugan, 92 N.J. 423, 457 A.2d 1 (1983)
Stern v. Stern, 66 N.J. 340, 331 A.2d 257 (1975)
Mitchell v. Mitchell, 104 N.M. 205, 719 P.2d 432 (1986), cert. denied, 104 N.M. 84, 717 P.2d 60 (1986)
Hertz v. Hertz, 99 N.M. 320, 657 P.2d 1169 (1983)
Nehorayoff v. Nehorayoff, 108 Misc.2d 311, 437 N.Y.S.2d 584 (1981)
Poore v. Poore, 75 N.C.App. 543, 331 S.E.2d 266 (1985), rev. denied, 314 N.C. 543, 335 S.E.2d 316 (1985)
Jondahl v. Jondahl, 344 N.W.2d 63 (N.D. 1984)
Matter of Marriage of Reiling, 66 Or.App. 284, 673 P.2d 1360 (1983), rev. denied, 296 Or. 536, 678 P.2d 738 (1984)
Casey v. Casey, 289 S.C. 462, 346 S.E.2d 726 (S.C.App. 1986), cert. granted in part, 291 S.C. 284, 353 S.E.2d 287 (1987)
Fait v. Fait, 345 N.W.2d 872 (S.D. 1984)
Geesbreght v. Geesbreght, 570 S.W.2d 427 (Tex.Civ.App. 2d Dist. 1978)
Sorensen v. Sorensen, 769 P.2d 820 (Utah 1989)
Hall v. Hall, 103 Wash.2d 236, 692 P.2d 175 (1984)

In re Marriage of Lukens, 16 Wash.App. 481, 558 P.2d 279 (1976)

The following jurisdictions hold that goodwill should be considered on a case by case basis, with determination depending upon whether it is salable or marketable:

Antolick v. Harvey, 761 P.2d 305 (Ha.App. 1988)
Prahinski v. Prahinski, 75 Md.App. 113, 540 A.2d 833 (1988), cert. granted, 313 Md. 572, 546 A.2d 490 (1988)
Hanson v. Hanson, 738 S.W.2d 429 (Mo. 1087)
Taylor v. Taylor, 222 Neb. 721, 386 N.W.2d 851 (1986)

The following jurisdictions have refused to consider the goodwill of a professional practice for any purpose in marriage dissolution proceedings:

In re Marriage of Nichols, 43 Colo.App. 383, 606 P.2d 1314 (1979)
Moebus v. Moebus, 529 So.2d 1165 (Fla. 3d DCA 1988), rev. denied, 539 So.2d 475 (Fla. 1989)
Powell v. Powell, 231 Kan. 456, 648 P.2d 218 (1982)
Depner v. Depner, 478 So.2d 532 (La.1st Cir. 1985), cert. denied, 480 So.2d 744 (La. 1986)
Carter v. Carter, 616 S.W.2d 543 (Mo.App. 1981)
DeMasi v. DeMasi, 530 A.2d 871 (Pa. 1987)
Smith v. Smith, 709 S.W.2d 588 (Tenn.App. 1985)
Nail v. Nail, 486 S.W.2d 761 (Tex. 1972)
Holbrook v. Holbrook, 103 Wis.2d 327, 309 N.W.2d 343 (1981)

The husband claims that there are three Florida cases on goodwill and ignores the most recent statement from this Court, Swann v. Mitchell, 435 So.2d 797 (Fla. 1983). While Swann involved a car dealership and not a professional association dependent upon the personal services of the person involved, the holding and

rationale are applicable here. Swann held that the goodwill of a professional practice should be considered in valuing that practice. In so holding, this Court stated as follows on page 800 of the opinion:

> [T]he goodwill of a law firm has been held to be an improper subject of a sale, for ethical reasons, yet subject to evaluation as a valuable asset of the firm for other purposes. Geffen v. Moss, 53 Cal.App.3d 215, 125 Cal.Rptr. 687 (1975); Stern v. Stern, 66 N.J. 340, 331 A.2d 257 (1975). The goodwill of a professional practice has been held to be community property subject to division in a marriage dissolution proceeding. Re Marriage of Lukens, 16 Wash.App. 481, 558 P.2d 279 (1976).

By selecting Stern v. Stern, 66 N.J. 340, 331 A.2d 257 (1979) and In re Marriage of Lukens, 16 Wash.App. 481, 558 P.2d 279 (1976), as supporting cases in Swann v. Mitchell, supra, this Court applied its holding to a range of professions, including law firms, in various situations, including marriage dissolution proceedings.

In Stern v. Stern, supra, the New Jersey Supreme Court recognized that while the personal earning capacity of a lawyer is not a marital asset, his partnership interest in the law firm is. The value of that partnership asset includes capital accounts, accounts receivable, work in progress, appreciation and worth of tangible personalty above book value and goodwill, with the total diminished by accounts payable and other liabilities. Stern recognized that while the goodwill of a law firm cannot be sold

for ethical reasons, it does exist and is a real element of economic worth.

In re Marriage of Lukens, supra, involved a solely held medical practice. Lukens recognized that goodwill is an asset subject to division in a marriage dissolution proceeding and is not the equivalent of a spouse's expectation of future earnings.

The husband attempts to distinguish Swann on the basis that Swann involved a business with goodwill that was separate from its partner while the goodwill of the husband's law firm is inseparable from the husband. This argument misses the point. There are significant and distinctive differences between the goodwill of a professional practice and a professional degree. Unlike a professional degree, goodwill is a "property right." It is a separate and distinct asset, not merely a factor contributing to the earning capacity of the practitioner.

As the Arizona Supreme Court recognized in Mitchell v. Mitchell, 152 Ariz. 317, 732 P.2d 208 (1987), the best analogy is to pension rights which are also marital property. Both are property rights acquired during the marriage, although their enjoyment and benefits are deferred. Like pension rights, a professional spouse's goodwill, to the extent acquired during the marriage, is a product of marital teamwork and reflects an appreciation of the non-professional spouse's contribution,

indirect though it may be, to the professional spouse's economic success. Diffenderfer v. Diffenderfer, 491 So.2d 265 (Fla. 1986).

In Moebus v. Moebus, 529 So.2d 1165 (Fla. 3d DCA 1988), rev. denied, 539 So.2d 475 (Fla. 1989), the Third District held that the goodwill of a professional practice should not be considered in marriage dissolution proceedings. The Third District based its opinion upon a Wisconsin case, Holbrook v. Holbrook, 103 Wis.2d 327, 309 N.W.2d 343 (1981), which the majority of states that have considered the question have refused to follow. Holbrook refused to allow consideration of goodwill because, "the 'asset' involved is not salable and has computable value to the individual only to the extent that it promises increased future earnings." Holbrook v. Holbrook, supra, 355. Although the goodwill of a professional practice is not readily salable, the important consideration is not whether the goodwill can be sold without the personal services of the professional, but whether it has value to him.

Goodwill is not equivalent to a spouse's expectation of future earnings and is properly valued when based on past earnings. See In re Marriage of Lukens, supra; Poore v. Poore, supra. Goodwill must be distinguished from future earning capacity and is not synonymous with future earning capacity. The value of goodwill frequently remains after a partner's death, resignation, or disability. Otherwise, why would the popular practice of retaining names of deceased or withdrawn members exist? When a professional

dies or retires, so does his or her earning capacity, but the goodwill that attached to the practice may continue in the form of established clients, referrals, trade name, location, and association. This Court recognized in Swann v. Mitchell, supra, that goodwill may be subject to evaluation as an asset even though it is not salable. The Holbrook approach ignores the probability that goodwill as a business asset can be separate and distinct from reputation and thus valuable as intangible property.

One frequently reads about lawyers who are "rainmakers." They produce clients whose work can be performed by other lawyers who are not rainmakers. A rainmaker can earn a high income without doing the day-to-day legal work. If the husband, who has been averaging approximately $600,000 a year in earnings, decides to stop doing day-to-day lawyer work and turn that over to his employee lawyers, he will still be able to earn a substantial living by merely attracting clients. Even if it is not ethically salable, it is a fact of life that it is worth a lot of money, and it was accumulated during the marriage. To hold there is no goodwill here is to ignore reality.

The Washington Supreme Court addressed this issue in In re Marriage of Hall, 103 Wash.2d 236, 692 P.2d 175 (1984), holding as follows on page 178 of the opinion:

> Goodwill is a property or asset which usually supplements the earning capacity of another asset, a business or a profession. Goodwill is not the earning capacity itself.

> It is a distinct asset of a professional practice not just a factor contributing to the value or earning capacity of the practice. ... Discontinuance of the business or profession may greatly diminish the value of the goodwill but it does not destroy its existence. When a professional retires or dies, his earning capacity also either retires or dies. Nevertheless, the goodwill that once attached to his practice may continue in existence in the form of established patients or clients, referrals, trade name, location and associations which now attach to former partners or buyers of the practice. ... Reference to Judge Reed's example in Lukens, 16 Wash.App. at 485, 555 P.2d 279 illustrates the difference in that a professional can transport all of his skill (earning capacity) to a new town, but patients or clients, reputation and referrals (goodwill) cannot always be transported.

The New Jersey Supreme Court further defined the issue in Dugan v. Dugan, 92 N.J. 423, 457 A.2d 1 (1983), stating on page 6 of the opinion:

> ... Future earning capacity per se is not goodwill. However, when that future earning capacity has been enhanced because reputation leads to probable future patronage from existing and potential clients, goodwill may exist and have value. When that occurs the resulting goodwill is property subject to equitable distribution. ...
>
> When, however, the opportunity provided by the license is exercised, then goodwill may come into existence. Goodwill is to be differentiated from earning capacity. It reflects not simply a possibility of future earnings, but a probability based on existing circumstances. Enhanced earnings reflected in goodwill are to be distinguished from a license to practice a profession and an educational degree. In that situation the enhanced future earnings are so remote and speculative that the license and degree have not been deemed to be property. The possibility of additional earnings is to be distinguished from the existence of goodwill in a law practice and the

> probability of its continuation. (Emphasis added).

As these cases indicate, goodwill is not a projection of increased future earnings. It would be inequitable to allow the form of the business enterprise to defeat a spouse's interest in the professional goodwill. Such a result ignores the contributions made by the non-professional spouse to the success of the professional, especially when the marriage spans as many years as this one. The wife of a professional makes the same contributions to the value of the goodwill as does any wife to her husband's earnings and accumulations during the marriage. She is as much entitled to be recompensed for that contribution as if it were represented by the increased value of stock in a family business. Mitchell v. Mitchell, supra; Dugan v. Dugan, supra.

Interestingly, while Moebus v. Moebus, supra, is the Florida case which most directly deals with the issue of goodwill in a marital dissolution proceeding, the Fourth District Court of Appeal and this Court previously considered the issue in Marcoux v. Marcoux, 445 So.2d 711 (Fla. 4th DCA 1984), quashed and remanded, 464 So.2d 542 (Fla. 1985), appeal after remand, 475 So.2d 972 (Fla. 4th DCA 1985), and concluded differently. In its earlier Marcoux decision, the District Court indicated that although there had been no findings as to the value of the husband's small, closely-held, personal service corporation, the award indicated that the trial

court had determined that the corporation had substantial goodwill value. The District Court could not conclude that the business had no such value as a matter of law and affirmed, but certified a question concerning the scope of appellate review in light of Conner v. Conner, 439 So.2d 887 (Fla. 1983) and Kuvin v. Kuvin, 442 So.2d 203 (Fla. 1983). In reviewing the certified question, this Court recognized that the disagreement concerned whether the business had goodwill value. Affirmatively stating that it expressed no view on the merits, this court answered the certified question and remanded for reconsideration. On remand, the Fourth District held (475 at 972):

> ... Accordingly, the issue here is not whether the trial court abused its discretion in fashioning a remedy based on the facts as he found them, but whether he was correct in his determination of the facts. So long as there is evidence to support the trial court's finding, appellate courts cannot act as new fact finders in the stead of the trial judge. ...

Thus, both this Court and the Fourth District Court of Appeal have previously acknowledged that good will has a value which can increase the book value of a business.

While there are various approaches to valuing goodwill, each of the cases in the first category hold that it is an asset subject to equitable distribution. Like pension rights, goodwill is not easily valued, but the most preferable approach involves a reduction to present value. Diffenderfer v. Diffenderfer, supra. That is precisely what the wife's experts, Mary Plum and William

Darbey, did here. Mrs. Plum used two approaches to value the husband's practice and Mr. Darbey used a third. Each method, according to the expert, is a standard in the profession and accepted in evaluating a law firm. Both Mrs. Plum's and Mr. Darbey's methods were based upon past results and not future earnings (R 2-21, 141-53).

This Court should align itself with those jurisdictions and hold that the goodwill of a professional practice has value which should be treated as property upon dissolution of marriage. To hold otherwise would ignore the contribution made by the non-professional spouse to the success of the professional.

POINT II

THE METHODS OF VALUATION USED BY THE WIFE'S EXPERTS WERE LEGALLY PROPER.

The husband has waived his right to contest the methods of evaluation used by the wife's experts. The husband produced no evidence at trial to contradict the approach of the wife's experts. On the other hand, both Mrs. Plum and Mr. Darbey testified that their methods comported with acceptable accounting methods. The husband had an opportunity to cross-examine these witnesses, challenge their findings, and produce experts to impeach them. He chose not to challenge their methodologies. He offered no experts of his own to impeach their approaches. In fact, the husband never

raised any problem with the accounting methods used by the wife's experts until this case reached the appellate level. As such, he waived his right to contest these methods.

In any event, the methods used were proper. Mrs. Plum used two different approaches to value the husband's practice, the cash flow capitalization approach and the assets valuation approach, and Mr. Darbey used a third approach and averaged the annual earnings of the prior three years. Each method, according to the expert, is a standard in the profession and accepted in evaluating a law firm; none of the methods involved future earnings. For this reason, the husband's reliance on Marriage of Fortier, 109 Cal.Rptr. 915, 34 Cal.App.3d 384 (Cal.App. 2d Dist. 1973), is misplaced.

The decision in Fortier is consistent with the wife's position that goodwill should be considered in determining an award to a wife upon dissolution of marriage and should be valued according to its market value at the time of dissolution of the marriage, taking into account the expectancy of the continuity of the practice. The problem in Fortier was the wife's suggestion that future income should control the method of evaluating goodwill. This problem does not exist here. The trial court accepted the wife's witnesses as experts, the husband cross-examined them and adduced nothing to demonstrate their methods were incorrect. The

husband has failed to demonstrate that the methods employed were improper.

Many jurisdictions have recognized various approaches for valuing goodwill (see Point I, supra). Contrary to the husband's assertions, these methods are not based on future earnings, which results in double-dipping. They do, however, recognize that goodwill can have a value which must be considered when effecting an equitable distribution. For example, in Dugan v. Dugan, 92 N.J. 423, 457 A.2d 1 (1983), the husband exclusively owned his law practice and contested the court's inclusion of goodwill as an asset subject to equitable distribution. The New Jersey Supreme Court upheld the trial court's consideration of goodwill as an asset, stating as follows on pages 6-7 of the opinion:

> Much of the economic value produced during an attorney's marriage will inhere in the goodwill of the law practice. It would be inequitable to ignore the contribution of the non-attorney spouse to the development of that economic resource. An individual practitioner's inability to sell a law practice does not eliminate existence of goodwill and its value as an asset to be considered in equitable distribution. Obviously, equitable distribution does not require conveyance or transfer of any particular asset. The other spouse, in this case the wife, is entitled to have that asset considered as any other property acquired during the marriage partnership. (Emphasis added).

POINT III

THE DISTRIBUTION OF MARITAL ASSETS TO THE WIFE WAS NOT EXCESSIVE, EVEN WITHOUT ANY CONSIDERATION OF GOODWILL IN THE HUSBAND'S LAW FIRM, AND REVERSAL OF THE LUMP SUM ALIMONY AWARD IS NOT REQUIRED.

The evidence amply supports the distribution to the wife and the methods of valuation used by the wife's experts. The husband's charts on pages 23-24 of his brief are incorrect. As to his P.A., even if the husband's book value of $100,000 were accepted (R 477), certain other items must be added to this in order to determine the full value of the P.A. Using the husband's figures, these include $314,311 in the outstanding costs receivable ($471,232) less one-third, which the husband conceded was an asset (R 237, 356-58); $300,000 in equipment which the P.A. recently purchased (R 355); $40,000 - $60,000 in a operating cost account (R 370); $10,000 - $20,000 in a cost account (R 370); and a $13,650 rent deposit (R 148). This brings the value of the P.A. to $777,961. Even deducting the operating account, cost account, and rent deposit, the P.A. has a value of $714,311.

Further, the husband deducts $125,000 from his assets as a "loan from P.A." (Appellant's brief at 24). However, he has failed to make a corresponding increase in the value of his P.A. for the loan receivable. Since this loan and loan receivable cancel each other out in any analysis of the husband's total assets, both must either be included or excluded. Also, the

husband ignores the fact that he stipulated to an appraised value for the marital home of $330,000 less a $138,712 mortgage, for a net value of $191,288 (R 42).

Finally, the husband's continued reflection of "no opinion" by the wife as to values for the various tax shelters and limited partnerships is unjustified. The husband attacks Mrs. Plum's use of cost figures for her valuation but his own expert, Whitfield Pressinger, testified that cost is the method used on the books of Dean, Witter, Reynolds and the only other method he knew of was offerings (R 201). Consequently, cost is apparently an acceptable valuation method. Also, at numerous points during his testimony, Mr. Pressinger indicated that the values he attributed to several items were far less than certain (R 186-87, 191, 197-98, 202-03). While the methods used and degree of certainty expressed by the experts might affect the weight of the values to which they testified, there is no basis for total exclusion of the figures offered by the wife, particularly in light of the indefinite quality of the figures suggested by the husband. The following

charts more accurately reflect the parties' net estates following dissolution:

HUSBAND

ASSETS	WIFE'S VALUATION	HUSBAND'S VALUATION
Mercedes	$ 35,000.00	$ 35,000.00
Ft. Lauderdale Townhouse	49,500.00	49,500.00
Ft. Lauderdale Furniture	19,900.00	2,000.00
South Carolina Duplex (B & D)	- 0 -	- 3,333.00
NPI Plant Research	42,236.00	20,000.00
Equus	50,000.00	45,000.00
TLC	12,000.00	- 0 -
Visions Four, Inc.	60,000.00	- 0 -
Avalon	- 0 -	- 0 -
Pension/Profit Sharing	192,167.00	131,600.00
IRA	4,335.00	4,335.00
Office Condominium	22,541.00	9,800.00
P.A.	714,311.00 *	100,000.00
Cash	40,873.00	40,873.00
P.A. Loan Receivable	48,820.00	48,820.00
Clinton Street	53,196.00	- 11,000.00
TOTAL	$1,334,879.00	$ 472,595.00
Lump Sum Alimony	- 250,000.00	- 250,000.00
	$1,094,879.00	$ 222,595.00
	61.27%	

* See pages 29-30, supra.

WIFE

ASSETS	WIFE'S VALUATION	HUSBAND'S VALUATION
Marital Home	$191,288.00	$191,288.00
Furniture	6,200.00	6,200.00
Jaguar	22,800.00	22,800.00
Georgia Vacation Home	119,932.00	119,932.00
Georgia Furniture	200.00	200.00
Georgia Boat	2,000.00	2,000.00
Charleston (Boca)	- 0 -	
Capital Realty	30,000.00	8,250.00
SLM	30,000.00	3,000.00
Sun Bank (CD & Cash)	32,780.00	32,780.00
Lump Sum Alimony	250,000.00 (25,000/year for 10 years)	250,000.00
Cash	2,000.00	2,000.00
Jewelry	5,000.00	9,300.00
TOTAL	$692,200.00	$647,750.00
	38.73%	

Husband's argument regarding whether his practice has goodwill value is a red herring. The determinative question is whether reasonable men could differ regarding the court's valuation of the assets and distribution of them. Since the charts above reflect that the husband received 61.27% of the marital assets, even without any consideration of goodwill and with a $250,000 lump sum alimony award to the wife, there is no basis for disturbing the awards effected by the trial court.

Finally, the husband's argument regarding "double-dipping" is without merit. His pension and P.A. are assets which have a current calculable value. As assets, they also produce income available for support purposes. Carr v. Carr, 522 So.2d 880 (Fla. 1st DCA 1988). The evidence supports the court's award.

POINT IV

THE PERMANENT PERIODIC ALIMONY AWARD OF $11,000 PER MONTH IS NOT EXCESSIVE AND DOES NOT CONSTITUTE DOUBLE-DIPPING.

The husband argues that the $11,000 per month permanent alimony award is unfair, unwarranted and oppressive, but apparently concedes his ability to pay this amount. He claims the amount awarded was excessive because the wife's first financial affidavit was different from her second financial affidavit, which was different from her third.

The wife devoted 25 years of her life to caring for the husband and their two children. She accompanied the husband during his tour with the Army and taught school while he completed his law school training. She stopped teaching after four years of marriage and has not worked outside the marriage since. Now, after over 20 years of being together, 25 years of marriage, and two children, the husband begrudges his wife any semblance of financial security. He ignores her contributions to the marriage as a homemaker, wife, and mother, the disparity in their earning capacities, and her lack of security for the future. The husband can financially comply with the awards. The wife is not young, she is in poor health, she is incapable of supporting herself, and she is entitled to be supported in the style to which she was accustomed during the marriage. In spite of this, the husband ignores the long-term length of the marriage and the wife's contributions, claiming that because he did not earn his "big money" until after the separation, she should not reap the benefits of their joint efforts.

The wife's estimated expenses are not grossly inflated or unreasonable. A party is permitted to provide estimated figures where reasonable. West v. West, 399 So.2d 428 (Fla. 5th DCA 1981). As the wife explained, her first financial affidavit omitted many of the expenses that the husband was paying (R 129-30, 347-51). The husband's attack on her financial affidavits as portrayed on pages 26-27 of his brief is picayune at best. Over a year elapsed from the filing of the wife's first affidavit and her second. Some

of the items that she included on her second and third affidavits but omitted from her first were inadvertent exclusions: she will have a tax preparation fee, she will have income taxes, she does belong to the Lauderdale Yacht Club, etc.

In addition, none of the problems expressed by the husband as to specific items has any effect on the propriety of the wife's inclusion of the items. For example, the fact that the court awarded $700 in child support does not negate the wife's expenditures for this child, particularly since the child has now reached majority and the husband no longer has an obligation to make the child support payment. Also, the husband's speculation about the $4,445 tax figure is a new argument with no evidence to support it. Similarly, there is no evidence to support the husband's suggested deduction of $113 for Lauderdale Yacht Club expenses and $125 for Sea Gate Club expenses since the final judgment does not address these memberships, there is no evidence as to whether the wife is still a member even if the husband retained the memberships and, in consideration of the fact that the parties' lifestyle included club memberships, the wife is entitled to have such memberships and will incur the monthly expenses they entail. Also, while the wife has no car payment as such, she does have substantial car maintenance payments (R 119). Finally, the wife disagrees with the husband's suggestion that her inclusion of expenses attributable to the Georgia vacation home and the rental property results in the husband being required to maintain her non-

residential real estate in the future (Petitioner's brief at 27). The purpose of listing expenses on the affidavit is to reflect need. These are actual expenses incurred by the wife and the husband's suggestion that the list of the wife's expenses equates with his maintaining anything is a distortion. What the husband is suggesting is veto power over the wife's items of expense. This is not supportable.

In any event, the husband claims he needs $23,409 per month, excluding the $6,000 alimony and $2,000 attorney's fee payments, for himself (R 468-74). The wife's expenses of $9,042 pale in light of this (expenses for the wife alone total $9,042/month; expenses for Caroline total $845/month; income taxes are estimated at $4,445 a month, for a total monthly expense of $14,322. The trial court awarded her $11,000 a month, more than $3,000 less than she needs to meet her expenses after taxes). Moreover, the husband's claim on his financial affidavit of needing $15,731/month for rental payments is no longer totally correct since the wife is now responsible for the mortgage on the Georgia vacation home and the Charleston Place Townhouse in Boca (R 779-81).

The husband's reliance on Gordon v. Gordon, 335 So.2d 321 (Fla. 4th DCA 1976), cert. denied, 344 So.2d 324 (Fla. 1977), and 354 So.2d 981 (Fla. 1977), is misplaced. Gordon involved a short-term marriage and a 33 year old wife in good health with employment capabilities. Conversely, the wife here is 47 years old, in poor

health, and has not worked outside the home in 20 years of this 25 year marriage. The husband's salary, averaged over the past three years, totalled $595,532 per year (R 10). With the $11,000 per month alimony, $25,000 per year lump sum alimony installments (for 10 years), and $700 per month child support, the wife's yearly income totals $165,400. She is no longer receiving the $700 per month child support since Caroline has turned 18 years old. The husband's yearly income averages more than three and one-half times that of the wife.

The record amply supports the court's finding that the wife and Caroline need the amounts awarded and that the husband, as he concedes, has the ability to pay them. Likewise, the wife would reiterate that the husband's argument regarding "double-dipping" is without merit. His pension and P.A. are assets which have a current calculable value. As assets, they also produce income available for support purposes. Carr v. Carr, 522 So.2d 880 (Fla. 1st DCA 1988). The evidence supports the court's award. The amounts are justified and the judgment should be affirmed.

POINT V

THE HUSBAND WAS PROPERLY MADE RESPONSIBLE FOR THE WIFE'S ATTORNEY'S FEES AND COSTS TOTALLING $45,500.62.

The final judgment equitably divided the assets, leaving the husband with approximately 61.27% and substantial liquid assets.

Section 61.16, Florida Statutes (1987), permits the court to award attorney's fees to insure that both spouses have similar ability to secure legal counsel. Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980). It is not necessary that one spouse be totally unable to pay attorney's fees in order for the court to require the other spouse to pay them.

Without question, the parties' financial positions here are unequal due to the substantial disparity between their incomes. The courts properly required the husband to pay the wife's trial and appellate fees since the husband's assets and earnings are substantially greater. Temple v. Temple, 519 So.2d 1054 (Fla. 4th DCA 1988). Otherwise, the wife would have been forced to inequitably diminish her share of the marital assets. Canakaris v. Canakaris, supra; O'Steen v. O'Steen, 478 So.2d 489 (Fla. 1st DCA 1985); Johns v. Johns, 423 So.2d 443 (Fla. 4th DCA 1982).

The wife should not be forced to deplete her capital assets to pay her attorney. DeCenzo v. DeCenzo, 433 So.2d 1316 (Fla. 3d DCA 1983). Under these circumstances, the court properly required the husband to pay the wife's attorney's fees and costs.

POINT VI

THE AWARDS ARE NOT EXCESSIVE AND DO NOT CONSTITUTE PUNISHMENT FOR THE HUSBAND'S ADULTERY.

The husband's adultery prior to the separation was mentioned at trial, but it certainly was not the focus of the trial. The court sustained the husband's objections to any misconduct after the separation. In fact, the Fourth District Court of Appeal specifically determined that the record failed to support the husband's supposition that the trial court had punished him for adultery. Further, using the wife's evaluation, the husband received 61.27% of the net marital assets and certainly was not punished.

CONCLUSION

This Court should refrain from answering the certified question in this case since it can have no effect on the outcome. Should the Court decide to answer the question, review should be limited and should not involve de novo review of the facts of this

case. If full review is undertaken, the decision of the Fourth District Court of Appeal should be approved.

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I CERTIFY that a copy of the foregoing has been furnished, by mail, this 25th day of September, 1989, to:

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