IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO: 74,419

FL BAR NO: 126509

WILLIAM deFOREST THOMPSON,

Petitioner,

vs.

TOBITHA THOMPSON,

Respondent.
_____/

REPLY BRIEF OF PETITIONER

ON CERTIFIED QUESTION

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STATEMENT OF THE CASE

The Wife states that the Fourth District determined that there was no reason to conclude that the trial court had factored in goodwill for the Husband's P.A. in distributing the marital property. However, this Court is in an equal position to determine that the distribution of marital assets cannot be justified without factoring goodwill into the Husband's P.A. If the trial court did not consider goodwill, the Husband is left with assets of $239,695 and the Wife with assets of $643,450, which is reversible on its face.

STATEMENT OF THE FACTS

The Wife states that the Husband produced no expert to testify live as to the value of his P.A. The Wife misses the point. The Husband's argument is a legal argument regarding the proper method of valuation of his P.A. His contention is that since the P.A. is based upon his personal services, it has no goodwill and the Wife's CPA's testimony to the contrary is legally insufficient.

On the one hand, the Wife implies that the Husband produced no evidence as to the value of his P.A., and on the other hand she admits that such evidence was presented in the Husband's 1986 financial statement prepared by his CPA, Horowitz. She implies that Horowitz' documents were insufficient to establish value. The Wife is wrong. Horowitz did not testify live, but his statement of the Husband's assets and his opinion as to their value went into evidence, unobjected to (R475-481), and were repeatedly referred to by both counsel (R351-52). In those documents, the Husband's CPA, Horowitz, valued the Husband's P.A. at $100,000 (R477). Accordingly, the Wife's implication that only the live testimony of her CPA could be accepted has no basis. The documents that were prepared by Horowitz, and accepted in evidence unobjected to, were obviously proper evidence.

The Wife incorrectly states that the Husband ignores his stipulation that the home had an appraised value of $330,000. The Husband's attorney merely stipulated that if the Wife called her appraiser, he would testify that the value of

the home was $330,000 (R52). That stipulation was simply to accommodate the Wife's attorney so that he would not have to call the witness live, and the Wife's contention to the contrary on appeal is wrong. The Husband's evidence was that the value of the home was $400,000 - $500,000, with a $135,000 mortgage, for a net equity of $265,000 to $365,000 (R504).

The Wife labels as "egregious misrepresentations" the Husband's "so-called characterization" of her CPA's evaluations of his limited partnerships and tax shelters. The Husband did not characterize anything. The Husband quoted at page 8 of his brief in footnote 3 exactly what the Wife's CPA testified to. Her testimony was that although she listed the value for the limited partnerships and tax shelters at cost, that was probably not their value now many years later (R25-26). She further admitted: "I do not know what a fair market value for those partnerships would be" (R25-26). That was the Wife's CPA's own testimony, not the Husband's "characterization" of it. The Wife's CPA never voiced an opinion as to the present value of the tax shelters/limited partnerships.

The Wife states that the Husband's stockbroker, Pressinger, testified that since Dean Witter's records listed the limited partnerships and tax shelters at their original cost, it is impossible to determine any other value. That was not Pressinger's testimony at all. He testified that Dean Witter's records automatically reflect the original cost of a limited partnership/tax shelter as its value, unless or until there is some reason to determine an up-to-date value (R186,201). Then Dean Witter would consider what had occurred since the original purchase, and would determine the present value. Pressinger, who was a Vice President of Dean Witter, valued the Husband's tax shelters as limited partnerships at the time of trial (R181). His testimony unequivocally demonstrated that they were not presently valued at cost by Dean Witter. The Wife's contention that they were valued at cost by Dean Witter totally ignores Pressinger's testimony.

The Wife's statement that the values Pressinger attributed to the Husband's tax shelters were "suspect" has no basis in fact. The very opposite is

demonstrated by the record. Pressinger's testimony was based on what happened to these tax shelters/limited partnerships since they were originally purchased, and what they were presently selling for. The Wife's CPA totally ignored the facts, and simply relied upon the original cost, which she admitted she could not say was the fair market value. She had no idea what their present value was. Her testimony was absolutely incompetent.

Although the Wife addresses each of the limited partnerships in her brief, she excludes important facts. For example, she states that Pressinger valued Clinton Street at -$11,000 because of changes in the tax law. His opinion had nothing to do with "changes in the tax laws". Pressinger testified that Clinton Street had already been sold, which would result in the Husband receiving a check for $55,850 and a corresponding tax liability of $66,822, so the value of his interest in the limited partnership was -$11,000 (R184-85). There was no speculation here. The property had been sold, the figures were in and the $11,000 deficit was not in dispute. Dean Witter had issued documents to the Husband reflecting that deficit (R217). Ignoring all this, the Wife's CPA listed the value of this limited partnership at $53,196, the original cost, which she admitted she could not say was its fair market value, and which obviously did not take into consideration the sale and its tax ramifications. For this reason, the Wife's CPA's blind acceptance of the original cost as Clinton Street's value cannot be accepted.

The difference in the Wife's value for Equus ($50,000) and the Husband's value ($45,000), is not worth arguing about.

NPI Plant Research is a tax shelter that originally cost $42,000 in 1984 (R203). Pressinger had personally talked at length with NPI to determine its present value. The history of that tax shelter indicated that people who originally invested had not gotten their money out of their investment (R188). I Pressinger's opinion, the Husband's interest was now worth only $20,000 (R188). Obviously, the Wife's CPA had not taken into consideration what had in fact occurred with this tax shelter after it was purchased. She simply accepted the

original cost of $42,000, which is not supported by the evidence. Even the Wife's CPA admitted that its present value was probably not its original cost (R25-26), and the facts demonstrated that to be true. The Wife's CPA never considered the post-purchase facts.

Capital Realty is a tax shelter purchased in 1982. The investment was in Section Eight Housing (residential apartments) (R188). The Husband's 30 shares originally cost $1,000 each for a total investment of $30,000 in 1982 (R189). Pressinger had contacted Capital Realty and was advised that the shares were presently selling for $275 each, and so the Husband's 30 shares were now only worth $8,250 (R189,196). None of this was disputed. The Wife's CPA took none of this into consideration, which was obvious error.

SLM Entertainment, Ltd. was purchased in 1983 for $30,000 (R190). Pressinger testified that this limited partnership had had severe problems (R191), and turned out to be very unprofitable (R191). In trying to sell their interests in 1985, the investors had received an offer for .10 a share (R190,206). Most of the investors had accepted the offer, and so Pressinger's opinion was that the shares were worth that (R206). The Wife's CPA never considered this information.

B&D is a duplex in South Carolina in which the Husband owned a 1/3 interest (R295). Its $170,000 mortgage exceeded its appraised value of $135,000, so it had a zero value (R295). The Wife's CPA admitted this. The Husband's CPA simply took into consideration the sales costs of $10,000 for a brokerage fee and closing costs, of which the Husband would have to pay $3,333 (R295).

Vision Four, Inc. is an investment in Sonny's Barbecue in Georgia (R296). It had no value and in fact had a listed book value of zero (R296). Each of the partners were required to contribute $200 a month for the next six months to keep the business afloat (R296). None of this was disputed. Based on these facts, the Husband's CPA valued the Husband's interest at zero (R296). The Wife's CPA ignored the facts and simply listed the Husband's original cost of $60,000 as the

value of his interest (R661). The facts belie its cost as its present fair market value (R661).

Contrary to the Wife's statement, TLC-200 Limited Partnership is not a partnership corporation that owns the Husband's condominium office building. TLC-200 is made up of four groups who purchased 2,500 square feet in the same building that houses the Husband's condominium office (R256). That purchase was 100% financed (R257). There was no equity in the corporation (R257). The Husband's CPA testified that the value of the Husband's investment was zero (R296). The Wife's CPA listed it as $12,000, which she indicated was the original cost of the Husband's investment (R661). That figure is not supported by the facts, which showed that the purchase was 100% financed (R257).

The Wife argues that the value of his interest in his pension and profit sharing plan should not have been reduced by "some nebulous figures for taxes and penalties". She argues that a reduction was improper since she was not actually awarded an interest in the plans. The Wife misunderstands the Husband's argument. The actual amount of money in the Husband's pension and profit sharing plan is not the present value of his interest. The present value would necessarily require liquidation, which requires consideration of taxes and penalties.

The Wife argues that in determining the value of the Husband's P.A., even if book value is considered, there must be added the $125,000 loan receivable and $471,000 in accounts receivable[1]. Both these factors were obviously considered by the Husband's CPA. It is axiomatic that "book value" entails a "full examination of the books of the firm", 50 Am. Jur 2d Partnership, §1168. Book value is arrived at by considering all the assets of a firm as they appear on the ledger, and deducting all the liabilities therefrom. RUBEL v. RUBEL, 75 So.2d 59 (Miss.

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[1]/The costs advanced were $471,000, not $47,000.

1954). "Book value" obviously includes loans receivable and accounts receivable, and there is no indication that the $100,000 book value figure arrived at by the Husband's CPA, or the $193,059 book value figure arrived at by the Wife's CPA, excluded those items. The Wife's argument to the contrary has no factual basis whatsoever, and totally ignores what "book value" is by definition.

Additionally, the $471,000 which the Wife characterizes as accounts receivable were not accounts receivable at all. No one has ever made that contention. They are costs advanced (R356). $72,885 were costs associated with a case the Husband had lost and he would never recover those costs (R236). One-third of the other costs advanced would never be collected, leaving $265,410 in costs that hopefully would be recovered in the future. These costs advanced were obviously considered by both the Husband's CPA and the Wife's CPA in arriving at their respective book value figures of $100,000 and $193,059.

A comparison of the Wife's chart of marital assets and their values on page 11 of her brief with the Husband's chart on pages 6-7 of his brief, shows only a few differences. They value the marital home differently, and the furniture in the Husband's townhouse, but the Husband accepts the Wife's values regarding those items under Point III of the argument section of his brief. The Wife adds in a Georgia boat for $2,000, and the Husband accepts that value under Point III. The Husband also accepts the Wife's value for his pension profit sharing plan under Point III. The $75,653 listed by the Wife as "cash (including Sun Bank cash and CD)" is listed separately by the Husband as Wife's cash $2,000, Husband's cash $40,873, Sun Bank $22,780.

There are really only two critical differences in the parties' charts. First, the Wife values the Husband's P.A. at $981,640 at page 11 of her brief (her CPA's goodwill value). Later in her brief, the wife comes up with an entirely different figure of $714,311, which she now claims is the P.A.'s book value, totally ignoring her own CPA's book value figure of $193,059, which the Husband has accepted under his Point III for argument's purpose. As will be shown, the $714,311 has

no basis in this record whatsoever and is a newly concocted figure being relied upon for the first time in this Court after four years of litigation.

The second difference in the parties' charts is that the Wife lists the tax shelters/limited partnerships at their original cost, even though her CPA admitted that their original cost was not their market value, and further admitted that she had no idea what their present fair market value was.

The Wife states that her expenses are small in comparison to the Husband's $31,409 in expenses listed on his affidavit. But, as she acknowledges in her brief, $16,231 of that figure was for payment of the mortgages and taxes on property the Wife has been awarded, $9,370 was for payment of alimony and attorney's fees, and $2,766 was for payment of the children's expenses. By simple arithmetic, the Husband's total personal expenses were $4,412 a month versus the Wife's $11,000 a month in claimed expenses.

The Wife argues that although the Husband claimed he made $2,000 to $2,500 a week from 1981 to 1983, that was simply the amount he was "drawing" from his practice, and that he actually received more than that because he got bonuses. The Husband included any bonuses he received when he listed his yearly income at page 10 of his brief as $120,000 in 1981, $130,000 in 1982 and $127,500 in 1983, as contained in his tax returns. Those figures were actually taken from documents prepared by the Wife's own CPA (R673), and therefore the fact that they included all the Husband's salary and bonuses is not in dispute.

The Wife states that in addition to yearly income, the Husband also received pension plan contributions. However, the Husband's pension plan is an asset, and was so considered, and contributions thereto cannot also be considered as income to the Husband. It cannot be both. Moreover, contrary to the Wife's contentions, there was no evidence of "fringe benefits" from 1981 to 1983. The Wife's CPA only testified to payment of fringe benefits after 1983 (R675). Fringe benefits began during the Husband's two good years, 1984 and 1985, and not before.

The Wife states that although the Husband was only drawing $3,000 a week in 1987, in the first quarter of the P.A.'s 1987 fiscal year it took in a million dollars in fees, from which the Husband had to pay a 1/3 referral fee. All that is true, but it represents four months of a 12 month year. The Husband's income, as admitted by the Wife's CPA, was as follows (R673):

	1981	1982	1983	1984	1985	1986
Gross income	$120,000	$130,000	$127,500	$599,500	$781,500	$114,000
Taxes		(-40,454)	(-21,631)	(-213,581)	(-230,227)	(-20,000)
Spendable Income		$ 89,546	$105,869	$385,919	$551,273	$ 94,000

The Husband's spendable income during the four years of their separation (1983 to 1987) was $1,137,061. From that, he paid the Wife $432,000 in tax-free support and purchased her a new Jaguar for $35,000, leaving him $670,061 for those years. But, the Husband also paid about $2,500 a month for his daughter's private schooling and his son's expenses in undergraduate and law school (R470-71), for a total of about $30,000 a year, or $120,000 over the four years. That left the Husband with spendable income of $540,000 for those four years, whereas the Wife received $432,000 in tax free income during those years. She was treated more fairly during those years.

SUMMARY OF ARGUMENT

The Wife argues that the amount of permanent periodic alimony was in line with the Husband's voluntary payments during the parties' separation. However, those voluntary payments were based upon the fact that the Husband had extraordinary years of income during the parties' separation. It is totally unfair to project the Husband's future income based upon those extraordinary years, which did not represent the parties' standard of living during the marriage. Moreover, the Husband was more than fair in sharing his high income during those years with the Wife.

The Wife incorrectly states that the Husband received 61.27% of the net marital assets. That is only true if incorrect values are attributed to the Husband's P.A., and if the erroneous cost figures are accepted for the tax shelters. If the true values of those assets are considered, the Husband received 25% of the assets.

The Wife incorrectly argues that this Court need not answer the certified question because the Fourth District determined that there was no reason to conclude that the trial court factored in the value of the Husband's P.A.'s goodwill in making the property distribution. In fact, there is no way the trial court could have come to the result it did without factoring in goodwill. Accordingly, the Wife's suggestion that this Court should simply answer the certified question in the abstract, rather than determining whether the trial court's distribution of assets necessarily required factoring in the value of the Husband's P.A.'s goodwill, must be rejected.

ARGUMENT

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 GOODWILL BE FACTORED IN IN DETERMINING THE PROFESSIONAL ASSOCIATION'S VALUE?

The Wife incorrectly argues that it is unnecessary for this Court to decide the certified question since the Fourth District found that it could not say that the trial court factored in goodwill in valuing the Husband's P.A. This Court does not have to blindly accept the Fourth District's determination in that regard, as this Court is in as good a position as the Fourth District to make that determination. It is clearly established that in deciding a certified question, this Court will review all issues in the case. One of the issues here is whether the trial court could have come up with the result it did, without factoring goodwill into the Husband's P.A. and then awarding that asset to the Husband.

The Wife cites out-of-state cases which have held that goodwill of a professional practice is an asset to be distributed in a dissolution of marriage

action. However, as the Third District held in MOEBUS v. MOEBUS, 529 So.2d 1165 (Fla. 3d DCA 1988), rev. den. 539 So.2d 475 (Fla. 1989), "the better view appears to be that goodwill should not be included as an asset". The cases the Wife relies upon in her brief are simply cases that do not represent the "better view". They conclude that goodwill is not equivalent to a spouse's expectation of future earnings. Many of those cases do not involve sole practitioners, as here. To the extent that they do involve sole practitioners, the cases are wrongly decided, as the Third District held in MOEBUS.

Both the Wife and the Family Law Amicus argue that goodwill is like pension rights and to the extent that it was accumulated during the marriage it is a marital asset. The Wife argues that as pension rights must be reduced to present value, her experts did the same thing here. The Wife is totally wrong. As explained in the Husband's main brief, the Wife's experts used the same methods of calculation that were rejected in MARRIAGE OF FORTIER, 109 Cal.Rptr. 915 (Cal. App. 1973) because they considered future earnings.

The Wife argues that the value of goodwill is independent of a spouse, and that it frequently remains after a partner's death, resignation or disability. She claims that is the very reason names of deceased or withdrawn partners continue to be used. But that argument assumes a large firm with other partners. What the Wife overlooks is that the Husband here is a sole practitioner. He has no partners. If he dies, his practice is gone. If he retires or becomes disabled, there is nothing to sell. His goodwill does not continue, as the Wife argues. It dies with him.

The Wife argues that in the future the Husband may decide to stop doing day-to-day lawyer work, as he now does, and simply attract business which he then hands over to others to handle. But the point is that that is not presently the kind of practice this Husband has. He is his practice. He is a hands-on practitioner. But for him, his reputation, his skill, and his experience, there would presently be no practice and that is not in dispute.

IN RE MARRIAGE OF HALL, 692 P.2d 175 (Wash. 1984) relied upon by the Wife, refers to goodwill continuing, after death or retirement, to the remaining partners or buyers of the practice. As stated, the Husband here has no partners. If the Husband dies or retires, there is nothing left because the goodwill will have died or retired with this sole practitioner.

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), cited by the Wife, is distinguishable. In that case, this Court specifically stated that it was "expressing no view regarding the merits of this cause". Therefore, it cannot be argued that this Court implicitly acknowledged that a personal service business has goodwill that is a marital asset for dissolution purposes.

POINT II

THE WIFE'S EXPERTS' METHODS OF VALUATION WERE LEGALLY IMPROPER.

The Wife's argument on appeal that the Husband "waived" any right to contest the Wife's expert's methods of valuation is totally without merit. Even assuming the Husband presented no evidence as to the value of his P.A., which he did, that does not allow the court to license to rely upon an absolutely incorrect method of valuation of the Husband's P.A. The Husband repeatedly objected to, and moved to strike, the testimony of the Wife's expert, Weston Darbey, regarding valuation of the Husband's P.A. based upon goodwill (R133-34,140-41,150,154-55,174). Moreover, the main thrust of the Husband's cross-examination of Darbey was that his method of valuation was not an acceptable one (R156-74). The correct method of valuation is a question of law, not fact. The Wife ignores this, and attempts to convert the issue of the correct valuation of the Husband's law practice from a legal issue to a factual one. The Wife obviously realizes she loses on the legal issue.

For the reasons argued in the Husband's main brief, the consideration of goodwill that is personal to a husband as a marital asset, and also consideration of his earning capacity as a basis for awarding alimony is double dipping. This is because goodwill that is personal to him is nothing more than a projection of future earnings. The cases relied upon by the Wife simply disagree with the cases cited in the Husband's main brief, and as the Third District has concluded the Wife's cases do not represent the better view.

Although the Wife cites to out-of-state cases that have valued goodwill, none of those cases have come close to a goodwill figure of $800,000 or $900,000, as here. Rather, those cases, which contained goodwill figures in their opinions, were as follows: HUNT v. HUNT, 698 P.2d 1168 (Ak. 1985) - $132,760; MITCHELL v. MITCHELL, 732 P.2d 208 (Ariz. 1987) - $115,000; IN RE MARRIAGE OF HULL, 712 P.2d 1317 (Mont. 1986) - $103,410; DUGAN v. DUGAN, 457 A.2d 1 (N.J. 1983) - $182,725; MITCHELL v. MITCHELL, 719 P.2d 432 N.M. 1986) - $153,968; HERTZ v. HERTZ, 657 P.2d 1169 (N.M. 1983) - $49,357; MATTER OF MARRIAGE OF REILING, 673 P.2d (Or. 1983) - $18,000; SORENSEN v. SORENSEN, 769 P.2d 820 (Utah 1969) - $62,000; HALL v. HALL, 692 P.2d 175 (Wash. 1984) - $70,000; MARRIAGE OF SWANSON, 716 P.2d 219 (Mont. 1986) - $76,700; IN RE MARRIAGE OF KING, 197 Cal.Rptr. 716 (Cal. App. 2 Dist 1983) - $68,676; MARRIAGE OF FORTIER, 109 Cal.Rptr. 915, 34 Cal.Rptr. 3d 384 (Cal. App. 2 Dist 1973) - $10,963; and IN RE MARRIAGE OF LUKENS, 16 Wash. App. 481, 558 P.2d 279 (1976) - $60,000.

In contrast, in this case the Wife's CPA and her management consultant came up with anywhere from $800,000 to $900,000 in goodwill. These figures were necessarily based upon calculations which considered future earnings, which is impermissible.

POINT III

THE DISTRIBUTION OF MARITAL ASSETS TO THE WIFE WAS EXCESSIVE AND COULD ONLY HAVE BEEN THE RESULT OF ATTRIBUTING GOODWILL TO THE HUSBAND'S LAW FIRM, WHICH WAS IMPROPER, AND NOW REQUIRES A REVERSAL OF THE $250,000 LUMP SUM ALIMONY AWARD.

The Wife's argument under this point is an obvious recognition that the application of goodwill here is reversible error. In the trial court, the Wife's CPA took the position the book value of the Husband's P.A. was $193,059 (R666), but that by adding in goodwill, the P.A. was worth $981,167 (the median figure for $916,086 to $1,063,317) (R666-67). The Wife's management consultant testified the P.A.'s book value was $97,176 and its goodwill was $799,455 (R698). The Wife's argument in her brief before the Fourth District was that the trial court had not erred in <u>including</u> goodwill in valuing the Husband's P.A. Now the Wife apparently sees the fallacy in including goodwill as a marital asset here, since the goodwill of the Husband's practice is not separate and distinct from him. Accordingly, for the first time the Wife now advances a new fall-back position. She now adds the value of a number of items to the Husband's CPA's $100,000 book value figure to come up with a new book value figure of $714,311 (Appellee's brief p.30). Since the Wife has decided to now rely upon book value, rather than goodwill, she has apparently decided that the book value figures of her own experts ($97,176 to $193,059) are too low. Accordingly, she has totally ignored those figures, and has instead concocted a new book value of $714,311, which has absolutely no basis in the evidence. The Wife's attorney is not a CPA, and cannot simply pick figures out of thin air, add them together and represent it to be the P.A.'s value. The Wife is obviously ignoring her own experts' book value figures (either $97,176 or $193,059), and coming up with her own inflated book value figure. The Wife arrives at her $714,311 figure by simply adding to the CPAs' book value figures, items that were already included by the CPAs in arriving at their figures. The Wife has also ignored depreciation of equipment, and all the P.A.'s liabilities and debts. When all these matters were considered by the

P.A. The Wife continues to ignore the fact that both the Husband's and Wife's CPAs took into consideration all the P.A.'s assets, and liabilities, including this loan receivable, in arriving at their book value figures. The Wife has, in effect, added the $125,000 loan to the P.A. twice.

The Wife continues to rely upon the cost figures for the tax shelters and limited partnerships. She totally ignores the fact the original cost figures were obviously wrong in light of the undisputed evidence regarding what had happened to the tax shelters since their original purchase many years ago, and the evidence regarding what other shares in those same tax shelters were selling for today. Additionally, the Wife's CPA freely admitted that the cost figures did not represent the present day fair market value of these assets.

The Wife argues that Dean Witter's Vice President indicated that the values he attributed to several items were far less than certain. However, certainty in value is not required. He testified to the assets' fair market value, as determined by Dean Witter. That evidence was the only reliable evidence as to value. Certainly, the court could not rely upon the cost figures, as the Wife does here, since her own CPA testified they were not correct, and that they did not represent the fair market value of the tax shelters and limited partnerships (R25-26).

A comparison of the Husband's chart at page 23-24 of his main brief and the Wife's chart at page 32 of her brief indicates that both charts contain the same figures for the Wife's valuation of assets, except for the tax shelters and limited partnerships and except for the P.A. The Husband's chart is the correct one. The Wife's cost figures for the tax shelters should be ignored because the Wife's CPA admitted those figures did not represent present fair market value. Also, the Wife gives the Husband's P.A. a $714,311 book value figure, whereas her own experts testified its book value was only $97,176 or $193,059, and the Husband has accepted the $193,059 figure for argument's purpose.

Under the Husband's chart, the Wife received $643,450 in marital assets and he received $239,695. The Wife received 75% of the marital assets. The only way

CPA admitted those figures did not represent present fair market value. Also, the Wife gives the Husband's P.A. a $714,311 book value figure, whereas her own experts testified its book value was only $97,176 or $193,059, and the Husband has accepted the $193,059 figure for argument's purpose.

Under the Husband's chart, the Wife received $643,450 in marital assets and he received $239,695. The Wife received 75% of the marital assets. The only way she justified this equitable split before the Fourth District was to attribute a $981,640 goodwill figure to the Husband's P.A. Since the Wife apparently foresees reversal if she now relies upon goodwill for this result, she is now trying to justify an obvious inequitable split of assets by attributing $714,311 in book value to the Husband's P.A. That book value figure is contrary to all the evidence, most particularly the opinion of her own experts that the P.A.'s book value was only $97,176 to $193,059.

The Wife's contention that the Husband received 61.27% of the marital assets is wrong. He received about 25%. The Wife's figure is based on tax shelter and limited partnership cost figures, which her CPA admitted were wrong; and on a $714,311 book value figure for the Husband's P.A., which her CPA and management consultant admitted were wrong. If the correct figures are used, as contained in the Husband's chart, he received 25% of the assets and the Wife received 75%.

CARR v. CARR, 13 FLW 480 (Fla. 1st DCA 1988), cited by the Wife, does not support double dipping. That case held that it was error for the trial court not to consider the husband' pension and profit sharing as a marital asset <u>at all</u> simply because the court felt it would be needed to pay alimony and child support. The appellate court found that the Husband had plenty of current income, $125,000 plus, to meet his support obligations. Therefore, the pension and profit sharing should have been considered a marital asset. That case did not hold that it could be considered both as an asset and income.

In contrast, here the Husband admits that the book value of his P.A. can be considered a marital asset, and his yearly income derived from that P.A. can be considered in determining his support obligations. The double dipping comes into play here, unlike in CARR, as a result of the court considering goodwill in valuing the Husband's P.A., because goodwill is nothing more than a projection of the Husband's increased income in the future. That is evidenced by simply reviewing the Wife's CPA's calculations of goodwill, which were based on the Husband's projected future income (R666). As stated in MOEBUS v. MOEBUS:

> The concept of professional goodwill evanesces when one attempts to distinguish it from future earning capacity....The goodwill...of such a business accrues to the benefit of the owners only through increased salary.

Clearly, consideration of goodwill in valuing the Husband's P.A. as an asset is improper double dipping because it is based on a projection of increased earnings. The Husband's earnings were considered not only as a basis for determining support, but were also assigned a value as a marital asset (goodwill in P.A.). That is double dipping.

POINT IV

THE $11,000 A MONTH PERMANENT, PERIODIC ALIMONY AWARD IS CLEARLY EXCESSIVE, AND CONSTITUTES DOUBLE DIPPING.

The Wife mischaracterizes the Husband's argument. It is not simply that the Wife's financial affidavits reflected an increase from $7,550.28 a month in November, 1985 (R742-45), to $8,981 a month in January, 1987 (R746-48), to $9,887 a month in April, 1987. The Husband's argument is that the Wife's last affidavit is obviously excessive and, therefore, will not support an $11,000 a month permanent alimony award. First, the Wife's last financial affidavit requested $9,042 for herself and $845 for the parties' daughter plus a bogus claim if $4,445 a month for taxes. If the bogus taxes are ignored, the trial court awarded the Wife more than she asked for. The $11,000 a month alimony award (plus $700 a month in child support, which was what the court determined the child's legitimate expenses were) should at least be reduced to $9,042, the amount the Wife

requested for herself. Awarding the Wife $2,000 more than her financial affidavit requested was an obvious error. This Court so held in WENZEL v. WENZEL, 512 So.2d 275 (Fla. 4th DCA 1987). In that case, the wife's attorney was represented by the same trial attorney who represented the Wife in this case. This Court reversed the alimony award stating that the:

> alimony awarded by the trial court not only exceeds the amount requested by the wife, but also appears to exceed the standard of living established by the parties during the marriage.

See the the same effect, SCHUBOT v. SCHUBOT, 523 So.2d 661 (Fla. 4th DCA 1988), where the Court held that an award of alimony to the wife must be reversed as excessive where the wife's financial affidavit, which included $3,842 a month for taxes, was obviously excessive. The wife's trial attorney in that case was again the same attorney who represented the Wife here.

As in WENZEL and SCHUBOT, the $11,000 award was obviously excessive and must be reversed. In addition to the bogus taxes, the Wife listed $1,007 as monthly car payments but the Husband had purchased a Jaguar for the Wife, which the Wife was awarded. She had no car payments. The Husband is also not responsible for $892 a month listed for the Wife's rental property expenses or $299 a month in expenses for the Georgia home. The Wife was awarded those properties and the Husband is not responsible for maintaining them for the rest of his life. The Wife does not need $113 a month for the Lauderdale Yacht Club or $125 for the Sea Gate Club since she was not awarded those memberships. Reduction of these items leaves needs of:

$ 9,042	needs
- 1,007	non-existent car payments
- 892	rental property expenses
- 299	vacation home expenses
- 113	Lauderdale Yacht Club
- 125	Sea Gate Club
$ 6,606	

And there were other deductions that could be made. But just by deducting these expenses leaves the Wife with needs of $6,606 a month, which is a far cry from the $11,000 a month she was awarded.

Additionally, WENZEL held that an alimony award is excessive when it exceeds the standard of living established during the marriage. In this case, the Husband's big income years were after the parties separated. The trial court failed to take this into consideration as the courts have held it should in TEMPLE v. TEMPLE, 519 So.2d 1054 (Fla. 4th DCA 1988).

The Husband's personal needs were not $23,409 a month as the Wife claims. As explained in detail at page 7 of this brief, the Husband's personal expenses (excluding $9,370 in alimony and attorney's fees, $2,766 in children's expenses and $16,231 in mortgages and taxes on the parties' different pieces of realty) were $4,412 a month, as compared to the Wife's claimed $11,000 a month in expenses.

POINT V

THE HUSBAND SHOULD NOT HAVE BEEN MADE RESPONSIBLE FOR THE WIFE'S ATTORNEY'S FEES AND COSTS TOTALLING $45,500.62, NOR FOR HER APPELLATE ATTORNEY'S FEES.

The Husband relies upon the argument set forth in his main brief. The Wife received not only the major portion of the parties' assets, but $11,000 a month in periodic alimony. Awarding her attorney's fees is adding insult to injury.

POINT VI

ALL THE AWARDS TOGETHER ARE SO EXCESSIVE AS TO CONSTITUTE PUNISHMENT FOR THE HUSBAND'S ADULTERY.

The Husband relies upon the argument set forth in his main brief.

CONCLUSION

This Court should rule that while under some circumstances a business or profession may have goodwill that must be considered in distributing marital assets in a divorce, that is not true where the goodwill is personal to the Husband, as here. The trial court's distribution of assets which necessarily considered goodwill, the $11,000 award a month in permanent alimony which is excessive and constitutes double dipping, and attorney's fees and costs must be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by mail, this 6th day of NOVEMBER, 1989 to: RONALD SALES, ESQ., Post Office Box 3107, West Palm Beach, FL 33402; JANE KREUSLER-WALSH, ESQ., 501 South Flagler Drive, Suite 503, Flagler Center, West Palm Beach, FL 33401; ROBERT M. MONTGOMERY, JR., ESQ., 1016 Clearwater Place, West Palm Beach, FL 33401; A. MATTHEW MILLER, ESQ., 4040 Sheridan Street, Post Office Box 7259, Hollywood, FL 33081-1259; and DEBORAH MARKS, ESQ., 1010 City National Bank Building, 25 West Flagler Street, Miami, FL 33150.

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