O.A. 9-6-90

IN THE SUPREME COURT OF FLORIDA

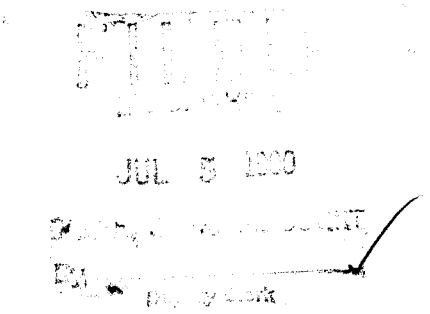
KAREN HAMLET,

Petitioner,

vs. Case No. 75,177

JOHN E. HAMLET, JR.,

Respondent.
_____/



RESPONDENT'S ANSWER BRIEF ON THE MERITS

THOMAS M. ERVIN, JR.
Fla. Bar No. 107788

and

MARGARET A. McCALL
Fla. Bar No. 760500
of the law firm of
Ervin, Varn, Jacobs,
Odom & Ervin
Post Office Drawer 1170
Tallahassee, FL 32302
(904)224-9135

ATTORNEYS FOR RESPONDENT
JOHN E. HAMLET, JR.

TOPICAL INDEX

CITATION OF AUTHORITIES

PRELIMINARY STATEMENT

Respondent will herein refer to the parties as "petitioner" or "wife," and as "respondent" or "husband," respectively. Petitioner's Initial Brief on the Merits shall be referred to as "B at ____," and pages of petitioner's appendix will be referred to as "A _____." Reference to the record shall be referred to as "R at _____."

The issue on this appeal is simply stated as whether the trial court's award of alimony to petitioner was improper as a matter of law or as an abuse of discretion in light of the trial court's actual finding that the parties' substantial assets had been distributed equitably. The appellate court so found, and reversed the alimony award. No basis for reversal of the appellate court is demonstrated by petitioner. This Court should affirm.

STATEMENT OF THE CASE

Respondent accepts petitioner's Statement of the Case, but notes that the reported opinion in Petitioner's Appendix at pages A 36-38 contains a publisher's omission from the actual opinion of the District Court of Appeal, Fifth District of Florida.

In the publisher's opinion appearing as Hamlet v. Hamlet, 522 So.2d 210 (Fla. 5th DCA 1989), the concluding portion of the district court is stated as follows at page 211:

> As argued in the husband's brief: 'An award of alimony, where substantial assets similarly situated spouses, giving them equal and complete ability to provide for their support, constitutes an abuse of discretion, and must be reversed.'
>
> The alimony award is
>
> REVERSED.

The record, however, reflects that the opinion and decision of the district court actually stated as follows, with that portion omitted by the publisher underlined below:

> As argued in the husband's brief: 'An award of alimony, where substantial assets have been equally divided between the two similarly situated spouses, giving them equal and complete ability to provide for their support, constitutes an abuse of discretion, and must be reversed.'
>
> The alimony award is
>
> REVERSED.
>
> See Record on Appeal, District Court of Appeal, Fifth District, pp. 2-5; see also Hamlet v. Hamlet, 14 FLW 2042 (Fla. 5th DCA 1989).

STATEMENT OF THE FACTS

Respondent husband submits the following in correction, supplement to and clarification of "facts" as stated by petitioner.

In these dissolution proceedings the trial court's Final Judgment of Dissolution of Marriage awarded primary physical residence of the parties' daughter (their only minor child) to respondent, did not require petitioner wife to contribute to support of that daughter, and made an equitable distribution of marital property to the parties, with a major portion of respondent husband's distribution consisting of the marital home [Petitioner's Appendix, A 27-35].

Petitioner wife did not appeal, or cross-appeal, from any portion of the final judgment, including that portion setting forth equitable distribution of marital assets.

As to the nature of its said action, the trial court in its final judgment included a separate or discrete paragraph 3 entitled "Equitable Distribution" and stated as to the wife's share:

> A. That as an equitable distribution of the marital estate the Wife shall have as her separate property the following described real and personal property which the Court finds is marital property:

and thereafter listed twenty-one specific, described items of real and personal property [Petitioner's Appendix, A 27-29, emphasis supplied].

In like fashion, the trial court in its final judgment, in paragraph 3 entitled "Equitable Distribution," stated as to the respondent husband's share:

> B. That as an equitable distribution of the marital estate the Husband shall have as his separate property the following described real and personal property which the Court finds is marital property:

and thereafter listed specific described items of real and personal property, including the marital home at 1188 Coachwood Court, Long wood, Florida [Petitioner's Appendix, A 30-31, emphasis supplied].

The trial court, under paragraph 3 entitled "Equitable Distribution," then included a paragraph C providing for division of designated personal property by alternating selection [Petitioner's Appendix, A 31-32].

The trial court then concluded its separate, discrete paragraph 3 entitled "Equitable Distribution" with a subparagraph D, which provided in pertinent part:

> D.(1) That in addition to those items set forth in paragraphs (3)(A) and (C) above, to provide for an equitable distribution of the parties' marital estate, the Husband will pay to the Wife the sum of Two Hundred Ninety Two Thousand Three Hundred Seventy One ($292,371.00) Dollars to be paid on or before October 4, 1988.
>
> [Petitioner's Appendix, A 32, emphasis supplied].

As noted above, petitioner wife did not appeal the final judgment or the equitable distribution of marital assets. With respect to the equitable distribution by the trial court, and the omission of petitioner wife to lodge any appeal therefrom, the

District Court of Appeal, Fifth District of Florida, held in pertinent part:

> Since the trial court found that there was an equitable division of these properties, and that finding is not challenged on appeal by either party, we must accept it.
>
> Hamlet v. Hamlet, 552 So.2d at 211. [Petitioner's Appendix, A 37, emphasis by court].

In her Brief on the Merits before this Court, petitioner has nevertheless included in her Statement of Facts (pp. 11-12) two "charts" purporting to describe the marital division and at least suggesting by form of presentation that same was not an "equitable" distribution. This presentation requires rebuttal and clarification by respondent husband.

Before turning to petitioner's oversights and omissions, however, it is pertinent that petitioner's own "chart" at page 12 describing the equitable distribution to respondent husband constitutes recognition, or admission, on its face that there was evidence before the trial court that the value of the listed real and personal property distributed to the husband was a total of $1,521,119 [Petitioner's Brief on the Merits, Statement of Facts, p. 12, Column entitled "Husband's Value"].

This amount ($1,521,119), however, is grossly overstated due to three substantial omissions in petitioner wife's chart at page 12. The most glaring error in this illustration is the complete disregard of the $292,371 cash payment to the former wife from the former husband. Respondent husband was not awarded the ancient coin collection, but rather the option of buying it from

petitioner wife for the cash payment to wife of $292,371. Therefore, the totals on petitioner's chart at page 12 are immediately overstated by the $292,371 cash payment that the trial court used to balance the equitable distribution of assets. This single error completely misrepresents the "TOTAL MAJOR ASSET AWARD TO HUSBAND" by nearly $300,000 regardless of which column of values are used.

Further, as to omission of evidence respecting equitable distribution and value before the trial court, petitioner has also overlooked or omitted evidence that the "Northwest Towers" partnership interest awarded to respondent husband in paragraph 3 B (16) of the final judgment constituted $55,000 liability [see Petitioner's Appendix, A 15, Item 4A, "Affiant's Liabilities] and that respondent had accounts payable of $60,791 to bear at the time of asset valuation [see Petitioner's Appendix, A 15, Item 4A, "Affiant's Liabilities"]. When adjusted for the above three omissions, evidence using "Husband's Values" supports husband's distribution of $1,112,957.

Finally, in the column titled "Wife's Values" of the chart on page 12 of petitioner's brief, there is substantial difference in the values shown as "Investment Assets" from the values shown in the column titled "Husband's Values." Clearly, there was little confusion as to the values in evidence before the court since these values were based on statements from the respective institutions [see Petitioner's Appendix, A 13, A 14, A 15; R 1738-1809 (Vol. X); R 1616-1735 (Vols. IX and X)]. The

correct value of these stock accounts are correctly shown in the chart at page 12 in the column titled "Husband's Values." The values shown in the column titled "Wife's Values" are overstated by $134,786 primarily as the result of the omission of the margin balances in these accounts.

Thus, properly viewed, petitioner's own "chart" at page 12 of her Statement of Facts establishes that in reaching its finding of equitable distribution, the trial court had before it evidence that the assets distributed to respondent husband were valued at $1,112,957 ($1,521,119 "Husband's Values" less $408,162 in the three omissions). Even when viewed using "Wife's Values," the assets distributed to respondent husband were valued at $1,293,512 ($1,836,460 less $542,948 in the three substantial omissions detailed above, and proper evaluation of "Investment Assets").

Turning to petitioner's own "Chart" at page 11 of her Statement of Facts, describing equitable distribution to petitioner, on the face of same there is petitioner's recognition, or admission, that were was evidence before the trial court that the value of the listed real and personal property distributed to the wife was a total of $1,469,033 [Petitioner's Brief on the Merits, Statement of Facts, p. 11, column entitled "Husband's Value"].

Petitioner wife has also erred by both omission and misstatement of fact in this chart. The value for the property described as 6955 S. Atlantic Avenue shown in petitioner's chart

on page 11 under the column "Wife's Value" is shown as $275,000. The correct value in evidence before the trial court was $285,000 which was submitted by the petitioner wife [Petitioner's Appendix, A 18].

In addition, petitioner has omitted from her listing on page 11 of assets awarded to her in item 3 A (4) of the final judgment entitled "(a)ll bank accounts in the name of the Wife," and evidence before the trial court of a value of approximately $23,000 for this asset of petitioner [see Petitioner's Appendix, A 1, Wife's Third Amended Financial Affidavit, "Sun Bank," "Southeast Bank," and "Resource Management" asset items]. After substituting the correct value for the real property above, and adding this asset to the values shown as "TOTAL MAJOR ASSET AWARD TO WIFE" in the chart at page 11, the record reflects evidence before the trial court that petitioner wife was awarded assets in the amount of $1,492,033 using "Husband's Value" or $1,332,288 using the petitioner wife's own values.

Thus, there was clearly evidence before the trial court that the distribution of marital assets to petititoner wife exceeded, or at least equaled, that to respondent. Petitioner's suggestion "as fact" that she received less must be rejected.

Petitioner has also stated as "fact" in her Statement of Facts at page 3 of her Brief on the Merits that:

> Her monthly living expenses are $7,763.45 [R 1110; Wife's Third Amended Financial Affidavit (Vol. VI; Petitioner's Appendix, A 2].

Respondent disagrees with this description of "fact" or evidence on several grounds. First, review of petitioner's cited affidavit of expenses [Petitioner's Appendix, A 2] reflects that of her $7,762.35 listed monthly expenses, $3,500 per month represents expenses of maintenance and operation of the marital home at 1188 Coachwood Court, which asset was awarded to the respondent husband by paragraph 3 B (1) of the final judgment, and which expenses respondent husband now bears in providing a home for himself and the minor child of the parties.

Thus, of the itemized $7,762.35 monthly living expenses recited as "fact" by petitioner, with reference to her affidavit (A 2), only $4,262.35 were living expenses to be borne by her after the final judgment ($7,762.35, less $3,500 for maintenance of the marital home, borne by respondent after the final judgment).

Furthermore, the record reflects that petitioner received by paragraph 3 A (1) of the final judgment [see A 28] the mortgage-free Villa D'Este property as a residence, valued at between $285,000 and $390,000 [see petitioner's Statement of Facts, p. 11]. Evidence before the trial court was to the effect that monthly expenses of residential operation and maintenance of Villa D'Este were approximately $1,300 [see Petitioner's Appendix; Respondent's Financial Affidavit, A 12; Villa D'Este residence-related expense items consisting of trash collection $20, electricity $250, property tax $327, water $25, home repairs/maintenance $100, pest control $20, security system $27, lawn/landscaping maintenance $48,

housekeeper expense $260, cable TV $52, homeowners association $100, insurance home $70].

Thus, respondent husband disagrees with petitioner's statement of fact that her monthly living expenses were $7,762.35, and respectfully states that evidence before the trial court established petitioner's monthly living expense of a maximum of approximately $5,560 per month ($4,262 nonresidential-related monthly expense, plus approximately $1,300 monthly expense for maintenance and operation of the Villa D'Este residence).

In its final judgment the trial court, having stated in paragraph 3 that equitable distribution was provided [A 27-32], did not make any finding of financial need on the part of petitioner wife, or of ability to pay on the part of respondent husband, but merely ordered the husband to pay permanent, periodic alimony of $4,000 per month [Petitioner's Appendix, A 33-34, Final Judgment of Dissolution of Marriage, para. 4, "Alimony"]. Each party was ordered to pay their own attorneys' fees.

Respondent husband appealed the periodic alimony award, and the district court reversed the award of alimony, holding in pertinent part:

> These parties had an affluent life-style, supported by multiple investments. From the judgment entered below, it cannot be mathematically ascertained that the trial court equally divided those investments, since there were no specific findings in regard to the value of individual items. Since the trial court found that there *was* an equitable division of these properties, and that finding is not challenged on appeal by either party, we must accept it. From that point, it follows that it was error to award pure alimony to the wife in addition to the equitable distribution of the investment assets. The trial court cannot force one spouse to a lesser

standard of living in order to maintain the other spouse at a higher level. *Woodard v. Woodard*, 477 So.2d 631 (Fla. 4th DCA 1985), *review denied*, 492 So.2d 1336 (Fla. 1986). This is so because neither the wife's need for alimony, nor the husband's greater ability to pay that alimony, can be demonstrated under the facts as found by the trial court in this case. Given those findings, and the affluent circumstances of the wife, she can have no continuing interest in her former spouse's future earnings. *See Irwin v. Irwin*, 539 So.2d 1177 (Fla. 5th DCA 1989); *Howerton v. Howerton*, 491 So.2d 614 (Fla. 5th DCA 1986).

As argued in the husband's brief: 'An award of alimony, where substantial assets have been equally divided between the two similarly situated spouses, giving them equal and complete ability to provide for their support, constitutes an abuse of discretion, and must be reversed.'

The alimony award is

REVERSED.

Hamlet v. Hamlet, 522 So.2d 210 (Fla. 5th DCA 1989) (publisher's omitted phrase added and indicated by underlining; see correct opinion at 14 FLW 2042 (Fla. 5th DCA 1989).

SUMMARY OF ARGUMENT

The decision of the District Court of Appeal, Fifth District of Florida, should be affirmed.

Petitioner received an equitable distribution of marital assets, and did not appeal or cross-appeal respecting that award or its equitable nature. There was evidence in the record that the marital assets so received by petitioner had a value of from $1,300,00 to $1,500,000, and included cash and investment assets of almost $1,000,000.

Petitioner received, as part of her unappealed equitable distribution an unmortgaged residence (Villa D'Este) with a value of $285,000 to $390,000. There was evidence that her monthly living expense would not exceed $5,600, even allowing over $1,000 per month for her groceries, restaurants and recreation/entertainment. Petitioner was not required to provide support for the minor daughter of the parties. Respondent was granted primary physical residence of the minor daughter, and bears all support expenses.

Respondent was also granted an equitable distribution of marital assets, and there was evidence in the record which would support the conclusion that the marital assets distributed to respondent were equal to, or even less in value than, those distributed to petitioner. The largest single asset received by respondent was the non-income-generating marital home with a value of from $680,000 to $900,000, and requiring approximately $3,500 per month for maintenance and operation.

The trial court, while clearly finding and holding its unappealed distribution of marital assets to be equitable, made no findings of either need of petitioner for additional support or ability of respondent to pay support.

Nevertheless, the trial court in its final judgment awarded to petitioner permanent periodic alimony in the amount of $4,000 per month. The district court properly reversed, holding in pertinent part that the equitable division of marital assets was not challenged on appeal by either party, and must be, and was, accepted as established. The district court properly held that an award of alimony to petitioner, in addition to her equitable distribution of substantial investment assets in this case, was error. Hamlet v. Hamlet, 552 So.2d 210 (5th DCA Fla. 1989). The court's reference to "pure alimony" was simply recognition that the erroneous permanent periodic alimony award was of the nature of support, rather than equitable distribution which had been separately accomplished by the trial court.

Whether viewed as a ruling of law or a finding of abuse of discretion, the decision of the district court was entirely within the dictates of, and consistent with, Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980). Not only was the award of permanent periodic alimony bereft of any requisite finding of need of petitioner and ability to pay of respondent, but such an award was precluded by the unchallenged equitable distribution of marital assets to each party and the evidence respecting those assets establishing that after the distribution (in this case) petitioner

could not demonstrate the requisite additional need for, or respondent's greater ability to pay, additional alimony.

Petitioner's reading of "new rules of law" and prospective "confusion" into the district court's decision is without basis. The decision simply stands for the correct and preexisting rule of Canakaris, 382 So.2d 1197, and later cases that if, after unchallenged equitable distribution of substantial marital assets and investment properties, the evidence establishes an ability of petitioner to support herself (i.e., a lack of need for additional support), and an inability of respondent husband to provide such additional support except by depletion of equitably distributed assets, then the alimony award must be reversed.

The decision of the district court should, therefore, be affirmed.

ARGUMENT

I.

THE COURT OF APPEAL CORRECTLY REVIEWED THE ALIMONY PORTION OF THE FINAL JUDGMENT FOR WHICH REVIEW WAS REQUESTED IN THE CONTEXT OF THE TRIAL COURT'S TOTAL PLAN.

In Canakaris v. Canakaris, 382 So.2d 1197, 1202 (Fla. 1980), this Court established that "to the extent of their eventual use," the awards of property and alimony made by a trial court in a dissolution of marriage should be reviewed by appellate courts as a whole, rather than independently (emphasis added). The district court in Hamlet v. Hamlet, 552 So.2d 210 (Fla. 5th DCA 1989), obviously found the trial court's eventual use of an award of permanent periodic alimony improper by its holding that: "An award of alimony where substantial assets have been equally divided between the two similarly situated spouses, giving them equal and complete ability to provide for their support, constitutes an abuse of discretion, and must be reversed." Id. at 211 (emphasis added).

Petitioner's assertion that the appellate court has "established a 'new rule' in Hamlet, [and that] it is called 'divide and review'" [B at 16] is colorful, but completely baseless in light of the actual language of the appellate court's opinion in this case.[1]

---

[1]It is an interesting aside that this "new rule" is codified in Florida Statutes, Section 61.075(6) (1989) which provides for "equitable distribution of marital assets and liabilities without regard to alimony for either party," prior to consideration of whether an award of alimony should be made.

It is clear that the appellate court below applied the principle of Canakaris and determined that, as between two millionaires, where there had been an arguably equal, and expressly equitable distribution, there was no evidentiary or legal basis for determining that one was in need of an additional $48,000 per year of support from the other, or that one had a greater ability to pay than the other.

Petitioner's argument that the appellate court's reference to the alimony award in Hamlet as "pure alimony" will "generate considerable confusion among the bench and the bar" is utterly without merit [B at 17]. Petitioner ignores the standard for an award of permanent periodic alimony which was set out by this Court in Canakaris. In Canakaris, this Court stated that the purpose of permanent periodic alimony and its place in the overall scheme in a court's final judgment of dissolution of marriage, was to provide support, except in one very limited circumstance not applicable herein.[2]

---

[2]The court noted that in "limited circumstances" permanent periodic alimony might be used to balance such inequities which might result from the allocation of income generating properties acquired during the marriage. Canakaris, 382 So. 2d at 1202. However, there is no indication in the trial court's Final Judgment in Hamlet that the award of alimony was for this purpose. In fact, the court specifically made a final balancing of equities by a cash award to the wife by the husband of nearly three hundred thousand dollars ($300,000.00). Furthermore, this limited use of permanent periodic alimony as outlined in Canakaris, would be inapplicable in Hamlet as it is the wife that was allocated the income generating properties acquired during the marriage in addition to the nearly Three Hundred Thousand Dollars ($300,000.00) in cash [R at 1215-1216, 1746, 1918-1931].

The trial court could easily have signalled the appellate court that it was using permanent periodic alimony in this exceptional way [balancing allocation of income-generating assets] and not for the traditional purpose of furnishing support. It did not do so, but described its division of property as "providing" an equitable distribution. It was, therefore, proper for the district court to recognize that the alimony was in the nature of support, or "pure alimony," rather than equitable distribution. Hamlet, 552 So.2d at 211.

In addition to Canakaris, petitioner cites the case of Thompson v. Thompson, 546 So.2d 99 (Fla. 4th DCA 1989), in support of her propositions [B at 13]. However, Thompson can be distinguished from the instant case in that it was the award of lump sum alimony which the court stated should be analyzed in light of all relevant circumstances to assure equity and justice between the parties. The award of permanent periodic alimony in Thompson was found to be justified based on the standard of law, to-wit: "the former wife's needs and the former husband's financial ability". Id. at 100. In this case sub judice the $300,000.00 cash award as part of equitable distribution was used to assure equity and justice between the parties in the same manner that the lump sum alimony in Thompson, was used. However, in the instant case, unlike Thompson, there was no finding that the periodic alimony awarded was in line with, or based upon, the former wife's needs and the former husband's financial ability, and the alimony award was properly reversed as a matter of law.

Petitioner also cites Walter v. Walter, 464 So.2d 538 (Fla. 1985), for the proposition that this Court rejects establishment of new rules of law which unduly restrict discretionary authority of trial judges. In Walter, however, the district court had announced, as a rule of law, that permanent alimony should be awarded only as "the last resort" and would otherwise be improper. This Court properly reversed.

No such restrictive rule of law was announced by the district court in this case. The district court simply reviewed the nature of substantial investment assets equitably distributed by the trial court, and not appealed by petitioner, and properly held, in pertinent part, "neither the wife's need for alimony, nor the husband's greater ability to pay that alimony, can be demonstrated under the facts as found by the trial court in this case." Hamlet, 552 So.2d at 211.

Petitioner's Point I shows no basis for reversal of the district court.

II.

THE APPELLATE COURT'S OPINION IS CLOTHED WITH A PRESUMPTION OF CORRECTNESS AND ALL DOUBTS MUST BE RESOLVED IN FAVOR OF THE JUDGMENT.

Petitioner correctly states that the trial court's judgments are accorded a presumption of correctness [B at 18 citing First Atlantic National Bank v. Cobbett, 82 So.2d 870 (Fla. 1955)]. The burden is imposed on the appellant to show reversible error. Id. at 870, 871. A presumption of correctness is also afforded the judgment of the district court, and petitioner bears the burden of establishing error.

In this case, neither party disputed the correctness of the trial court's equitable distribution and, in fact, the district court accepted it. Hamlet, 552 So.2d. at 211. However, the alimony award was challenged and the appellate court correctly found that husband met his burden by showing reversible error respecting the award of alimony.

Petitioner also cites the case of Delgado v. Strong, 360 So.2d 73 (Fla. 1978), which states that an appellate court may not substitute its judgment for that of a trial court by re-evaluating the evidence. The appellate court in the instant case adhered strictly to this principle when it found, "since the trial court found that there was an equitable division of these properties, and that finding is not challenged on appeal by either party, we must accept it." Hamlet, 552 So.2d at 211 (emphasis in original). It is the petitioner that is requesting that this appellate

tribunal re-evaluate the evidence and alter the distribution of marital assets which the trial court found equitable and the district court accepted.

Contrary to the petitioner's suggestion, reversing the award of alimony in this case required no re-evaluation of evidence by the appellate court. In fact, the appellate court stated specifically that its ruling was based exclusively upon the trial court's evaluation of the evidence and its own conclusions of law. "[N]either the wife's need for alimony, nor the husband's greater ability to pay that alimony, can be demonstrated under the facts as found by the trial court in this case. Given those findings, and the affluent circumstances of the wife, she can have no continuing interest in her former spouse's future earnings." Id. (citations omitted) (emphasis supplied).

Respondent recognizes the case of Herzog v. Herzog, 346 So.2d 56 (1977), as cited by petitioner, and would emphasize that the test is "whether the judgment of the trial court is supported by competent evidence." Id. at 57. It is clear from the language of the appellate opinion that the findings of the trial court in its final judgment support the equitable distribution, but not the alimony award. See Hamlet, 552 So.2d 210.

The petitioner cites what she refers to as "three important offsprings" of the general principle that judgments are clothed with a presumption of correctness. The appellate court clearly confined itself to these important "offsprings" in making its decision.

First, the petitioner states that missing findings of fact must be implied in accordance with the judgment [B at 18]. This is precisely what the appellate court has done in Hamlet when finding that, because there were no specific findings in regard to the values of the individual items distributed, these missing findings of fact must be applied in accordance with the judgment and, therefore, the appellate court found that "there was an equitable division of these properties." Id. at 211 (emphasis in original).

Secondly, petitioner correctly states that conflicting findings must be construed, if possible, to harmonize with each other and with the judgment [B at 18]. To this end, it is obvious that the appellate court in Hamlet chose to harmonize whatever valuations were before the trial court with each other and more importantly to harmonize them with the judgment and hold "that there was an equitable division of these properties." Hamlet, 552 So.2d at 211 (emphasis in original).

Finally, as to the posited third "offspring," petitioner misstates the case of Mank vs. Hendrickson, 195 So.2d 547 (Fla. 4th DCA 1967), as holding that all doubts must be resolved in favor of the trial court's judgment [B at 18, emphasis supplied.] What the court in Mank, which was a criminal case, actually said was that "where the appellate court is in doubt as to its propriety or correctness, the doubt will be resolved in favor of the ruling in issue". Id. at 576. The appellate court in Hamlet, having no demonstration of the wife's need for alimony and the

husband's greater ability to pay the same, and in light of the affluent circumstances of the wife, was not in doubt as to the propriety or correctness of the trial court's judgment; it was clearly in error. The language of Mank is inapposite.

Thus, the principles espoused by petitioner were, in fact, the guiding forces of the appellate court's decision in Hamlet, and to say that such were "totally ignored" by the appellate court is absurd. The trial court did not award permanent periodic alimony to accomplish equitable distribution as petitioner has alleged elsewhere in her brief. It found that such an equitable distribution had been accomplished, and then it erroneously awarded permanent periodic alimony contrary to the legal standards for such an award.

Contrary to petitioner's strained description of the district court's opinion, that court did not "impl[y] findings which it then used as a justification to reverse the alimony award" nor did it create "conflicting findings when conflict did not exist or the findings could not be harmonized." In fact, the appellate court stated precisely that it was accepting the findings of the lower tribunal, cloaking them in the presumption of correctness as it were, and assuming missing facts [specific valuations] to be in accordance with the judgment of that tribunal.

There simply were no facts establishing the wife's need for alimony nor the husband's greater ability to pay once the distribution which the appellate court correctly accepted as

equitable had been made, and wife was left in the affluent circumstances sufficient to meet her needs. It required no "implications" or "creations" on the part of the appellate court to find that the award of alimony herein was in error as a matter of law.

III.

WHEN A FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE ACHIEVES AN EQUITABLE DISTRIBUTION THERE IS NO "PREVAILING PARTY."

The petitioner cites the case of Walter v. Walter, 464 So.2d 538, 539 (Fla. 1985), for the principle that the trial court's judgment must be reviewed by taking the facts in a light most favorable to the prevailing party [B at 20]. Petitioner fails to point out that the court in Walter stated two important factors in applying that principle.

> In reviewing the trial court's disposition of property and award of alimony and support, the appellate court's responsibility is to determine from the admitted facts, or the facts taken most favorably to the prevailing party (1) whether the rules of law were applied correctly and (2) whether the trial court's discretionary authority was reasonably exercised under the test set forth in Canakaris. The correction of an erroneous application of law and the determination that the trial court abused its discretion are two separate and distinct appellate functions. An erroneous application of a rule of law is illustrated by a trial court order requiring payment for a child who has reached majority and is not dependent by reason of unusual circumstances [citation omitted]. An example of an appellate court's proper determination, upon known facts, that the trial court abused its discretion is found in the oft-cited decision of Brown v. Brown 300 So. 2d 719 (Fla. 1st DCA 1974) [Finding that trial court abused its discretion in awarding wife pittance of the marital assets accumulated during twenty-one years].[3] Id. at 539 (emphasis added).

---

[3]The distinction between an award of alimony, which is a question of law and thus requires a determination under the first criteria of Walter, and the equitable division conducted by a court which is a matter of judicial discretion requiring a determination under criteria two, is the pivotal distinction validating the appellate court's action herein which petitioner ignores. See Argument IV herein.

In this case, neither party challenged the court's equitable distribution. There simply was no "prevailing party." In fact, it is abundantly clear from the parties' briefs below that each tends to believe the other "prevailed." With no "prevailing party," Walter dictates that an appellate court "determine from the admitted facts" the propriety of a trial court's awards of property and alimony. Id. From those admitted facts, the appellate court is to determine whether the rules of law were applied correctly. Id.

The district court, in Hamlet, did just that. That court took the admitted facts as found in the final judgment: "there was an equitable distribution of these assets"; "neither the wife's need for alimony, nor the husband's greater ability to pay that alimony [was] demonstrated"; and "the affluent circumstances of the wife," and found that an award of alimony was contrary to the rules of law. Hamlet, 552 So.2d at 211 (emphasis in original).

IV.

THE COURT OF APPEAL CORRECTLY HELD THAT THE TRIAL COURT APPLIED AN INCORRECT PRINCIPLE OF LAW IN AWARDING PERMANENT PERIODIC ALIMONY UNDER CIRCUMSTANCES WHERE SUCH AN AWARD HAD NO LEGAL JUSTIFICATION.

This Court's opinion in Canakaris, 382 So.2d 1197, continues to set the standards under which this Court should affirm the appellate court's decision in Hamlet.

> In order to properly review orders of the trial judge, appellate courts must recognize the distinction between an incorrect application of an existing rule of law and an abuse of discretion. Where a trial judge fails to apply the correct legal rule, as when he refuses to terminate periodic alimony upon remarriage of the receiving spouse, the action is erroneous as a matter of law. This is not an abuse of discretion. The appellate court in reviewing such a situation is correcting an erroneous application of a known rule of law.
>
> Canakaris, 282 So.2d at 1202 (emphasis in original).[4]

When a former wife has the capacity to make her own way unassisted by her former husband, then courts cannot require the husband to pay alimony other than for rehabilitative purposes. Campbell v. Campbell, 432 So.2d 666, 668 (Fla. 5th DCA 1983). The trial court applied an incorrect principle of law when it awarded permanent periodic alimony under circumstances where such an award had no legal justification. Id. at 669. Application of the correct legal rule is not a matter of discretion. Wagner v.

---

[4]This court in Canakaris distinguished between the award or termination of periodic alimony, which is a matter of law and the establishment of the amount of alimony which is a matter within the judge's judicial discretion.

Wagner, 383 So.2d 987, 988 (Fla. 4th DCA 1980). See also, Canakaris, 382 So.2d 1197.

A. There was no determination or evidence in the record that the award of permanent periodic alimony was part of the trial court's equitable distribution.

Petitioner's statement that the remedies for property distribution and alimony are interrelated and that the trial court has the discretion to employ "any of these remedies in any combination" [B at 21-22] is overly broad to say the least. The Canakaris opinion states that "these remedies are interrelated, to the extent of their eventual use" not that they are interdependent. Id. at 1202 (emphasis supplied). Furthermore, rather than giving the trial court *carte blanche* as implied by petitioner, Canakaris sets forth specific restrictions on awards of permanent periodic alimony including the requirement that the reviewing court correct erroneous applications of the standards for such an award. Id. at 1202.

In the Final Judgment of Dissolution of Marriage herein, the court made a detailed itemized equitable distribution of the parties' marital properties which extended seven full legal pages [R at 1911-1916]. At subparagraph D of the court's equitable distribution, the trial court applied this principle and stated specifically that it was facilitating the equitable distribution of the marital assets by ordering a monetary payment in a lump sum [R at 1915].

The court titled Section 3 of its order, which encompassed seven (7) pages of that order, as "Equitable Distribution" and within that same distribution stated, "in addition to those items set forth in paragraph 3(A) and (C) above, to provide for an equitable distribution of the parties' marital estate, the husband will pay to the wife the sum of Two Hundred Ninety-Two Thousand Three Hundred Seventy-one (292,371.00) Dollars" [R at 1916, emphasis supplied].

However, the court distinctly awarded permanent periodic alimony[5] making no finding that this was to "even out" an award between the parties as petitioner alleges. It is clear that if this had indeed been the court's intention, that the final judgment could have specifically stated that distinction as it did when making the lump sum cash award from husband to wife.

In her brief petitioner holds to one single, and clearly erroneous, set of values for the marital assets and absurdly states "the husband was awarded marital assets which exceed those awarded to wife by more than half a million dollars" [B at 14]. However, the standard is clear: is the judgment of the trial court supported by competent evidence? In her brief petitioner ignores that the husband also submitted figures and valuations to the trial court. This evidence as to valuation is described in the preceding statement of facts. It establishes that the wife's

---

[5]It is pivotal to the issue at hand that the alimony awarded was permanent periodic alimony rather than lump sum, a distinction in law that petitioner repeatedly ignores.

share equaled, or exceeded, respondent's. Based upon these valuations, or a combination of all the valuations presented, there is competent evidence to support the division of property found to be equitable by the trial court, and accepted by the appellate court and the parties.

Thus, the appellate court correctly found that there was no abuse of discretion in the equitable distribution by the trial court but that, as a matter of law, there was no justification for the award of permanent periodic alimony under the facts of this case.

B. The appellate court correctly held that there was no determination demonstrated under the facts as found by the trial court in this case that the award of permanent periodic alimony was based upon the wife's needs or the husband's greater ability to pay.

"To permit an award of alimony to stand absent the need, gives credence to the popular view of alimony as a judicially sanctioned state of indentured servitude, rather than a remedial tool to support a spouse unable to provide for himself or herself." Irwin v. Irwin, 539 So.2d 1177, 1178 (Fla. 5th DCA 1989).

"It is manifestly unjust to require the husband to provide support to a young healthy and capable wife for the remainder of her unmarried life without first requiring the wife to demonstrate that she is unable to make her way by herself." Contogeorgos v. Contogeorgos, 482 So.2d 590, 592 (Fla. 4th DCA

1986) (quoting Campbell v. Campbell, 432 So.2d 666, 669 (Fla. 5th DCA 1983)).

The case of Lochridge v. Lochridge, 526 So.2d 1010 (Fla. 2d DCA 1988), is factually similar to the case at hand. The final judgment in that cause required that the husband pay wife lump sum alimony for support in cash of $570,240.00 to be paid at the rate of $2,200.00 per month. Upon review the court found that the wife maintained a net worth of slightly in excess of $1,000,000.00 even without the lump sum alimony and that she had the present ability to and did generate income through employment, "albeit not a significant amount $700.00 per month when compared to the husband's income." Furthermore, the wife earned passive income from assets and investments on cash awarded to her as part of the dissolution judgment. Based upon figures furnished by wife's accountant, the above amounts were more than sufficient to cover her monthly expenses. When considering these financial resources available to the wife, the court found the award of lump sum alimony for support was in error. Lochridge, 526 So.2d 1010, is sound authority for the holding that permanent alimony for support was error requiring reversal in this case.

The value of the property apportioned to the wife may be considered in awarding alimony. Pirino v. Pirino, 549 So.2d 219, 220 (Fla. 5th DCA 1989). In this case the wife received most, if not all, of the parties' income-producing properties. These properties were unencumbered and of substantial value [R at 1912-1913, 1215, 1218, 1746, 1818].

In addition, wife was awarded substantial assets which were either liquid at the time of the award [R 1746, 1914] or easily liquidated [R at 1215-1216, 1746, 1914]. In fact, petitioner proposed that the court award her certain property so that she could liquidate it to support herself [R at 1197, 23-24], and the trial court granted her request [R at 1911-1931]. Further, pursuant to the final judgment, the husband made a cash payment to the wife of $292,371.00 [R 1916]. Additional income earned from assets a wife has received may be considered in fixing the amount of permanent alimony. See, Marston v. Marston, 484 So.2d 32, 34 (Fla. 2d DCA 1986); review denied, 494 So.2d 1151 (Fla. 1986).

In the instant case, there had been no showing by competent, substantial evidence of any need of petitioner for additional funds for her support. The equitable distribution effected by the trial court in this action, if anything, left the wife in a better position than husband to generate income from the property she had been awarded. The wife has received unappealed from equitable distribution of property of a value of at least $1,330,000.00 [see p. 11, Petitioner's Statement of Facts] and there was evidence of value of almost $1,500,000.00. [See Respondent's preceding Statement of Facts.]

Of wife's equitable distribution, more than $300,000.00 was in the form of cash, $560,000 was in the form of two unmortgaged south Atlantic Avenue "Oceanfront" investment properties, $55,000.00 was in the form of "investment diamonds,"

and $56,000.00 was in the form of three motor vehicles. [See p. 11, Petitioner's Statement of Facts.]

In sum, petitioner wife, who separately received the unmortgaged Villa D'Este residence valued at $285,000.00 to $390,000.00, also received by equitable distribution at least $950,000.00 in liquid or investment assets, even disregarding jewelry and furs.

Furthermore, the trial court spared petitioner wife any and all expense of support of the parties' minor daughter which respondent bears. The evidence indicates monthly living expense of petitioner not exceeding $5,560.00 per month [see preceding statement of facts] of which, it might be noted, over $1,000.00 per month is allocated for "groceries," "restaurants," and "recreation/entertainment" [Petitioner's Appendix, A 2]. While there was evidence presented of this $5,560 monthly expense level, this sum does seem extravagant, if not absurd, for a single person with no child support obligation, a substantial paid-for home, no mortgage payments, and no significant debt or preexisting debt service.

This Court, in Canakaris, supra, included in the criteria used to establish the requesting parties' need for alimony the value of the parties' estate. Id. "[W]ith this kind of supportability on behalf of the wife, the award of permanent alimony to the wife was an abuse of discretion." Resner v. Resner, 553 So.2d 334, 335 (Fla. 4th DCA 1989).

In Roberts v. Roberts, 283 So.2d 396, 397 (Fla. 1st DCA 1973), the court reasoned that the public policy attendant to Florida's dissolution law required that "if the spouse has the capacity to make her own way through the remainder of her life unassisted by the former husband, then the court's cannot require him to pay alimony other than for rehabilitative purposes." Simply stated, "both parties to the marriage on a basis of complete equality as partners sharing equal rights and obligations in the marriage relationship and sharing equal burdens in the event of dissolution." Thigpen v. Thigpen, 277 So.2d 583 (Fla. 1st DCA 1973).

The cases cited by petitioner for the proposition that she should not be required to deplete her capital assets to maintain her standard of living are inapposite [B at 22]. Her assets are adequate to support her without depletion! While wife maintains she should not be required to deplete her assets for her own support, she maintains with equal fervor that husband should be required to deplete his capital assets to maintain her lifestyle. It is clear that the assets available to the parties are not sufficient to permit either spouse to live in the lavish manner established during the last five years of the marriage. Even absent the dissolution, it would not have been possible for them to have continued to have lived at such a fast pace [R 1739].

Further, it must be noted that in weighing the standard of living factor in awarding alimony, a trial court must take into consideration the fact that the parties lived beyond their means

prior to the dissolution. Sheiman v. Sheiman, 472 So.2d 521 (Fla. 4th DCA 1985), review denied, 486 So.2d 597 (Fla. 1986); Scotchel v. Scotchel, 524 So.2d 1045 (Fla. 4th DCA 1988). Additionally, it has been judicially recognized that the assets and income that support the standard of living of a couple when they are married will often be inadequate to support two separate households at the same standard the parties enjoyed during the marriage. Guilden v. Guilden, 104 So.2d 737, 738 (Fla. 3d DCA 1958).

In the instant case, to pay the ordered alimony would require husband to use his half of the marital assets to support himself, the child, and his former wife, while allowing the former wife to retain all the benefits of the equal amount of property awarded to her, with no cost for the welfare of the family. To require respondent's depletion of equitably distributed assets, including the marital home, would violate the very case authorities cited by petitioner. DeCenzo v. DeCenzo, 433 So.2d 1316 (Fla. 3d DCA 1983); Holly v. Holly, 380 So.2d 1098, (Fla. 2d DCA 1980).

Unless and until the need of the party requesting the support has been established, the ability to pay must not be considered. Once that need is established, the question is whether or not the husband has the ability to meet that increased need, in whole or in part. To hold otherwise improperly grants the alimony recipient a continuing interest in the former spouse's good fortune. See Howerton v. Howerton, 491 So.2d 614, 615 (Fla. 5th DCA 1986).

Despite the fact that the trial court made no finding of need on the part of the wife, petitioner in her brief explores, with some outrageous speculation, respondent's ability to pay.

The bulk of respondent's property award herein represents the value of the marital home, which is not an income-producing asset. No doubt this award was part of the court's plan to permit the husband to complete rearing his minor daughter in the home she had come to know, but the house represents only a cash outflow (approximately $3,500.00 per month even unmortgaged!), despite its value on the family's books.

Unlike the real property awarded to petitioner, that awarded to respondent was encumbered and required substantial monthly payments. As noted by the appellate court, the trial court made no finding of the husband's greater ability to pay.

Yet, petitioner surmises that the trial court must have imputed income to respondent in making its award. Once again, the record and the final judgment are entirely devoid of any such factual finding by the trial court [R at 1911-1931]. This unsupported and after-the-fact rationalization by petitioner similarly lends no legal justification to the award of alimony by the court.

The cases respondent cites in support of her "imputed income" proposition are clearly distinguishable from the instant case. In all of the cited cases there was specific competent evidence presented and argued to the trial court of the payor spouse's "undisclosed" income, and the trial court made a specific

finding that the payor spouse's income exceeded that reflected by his financial affidavit. Anderson v. Anderson, 451 So.2d 1030 (Fla. 3d DCA 1984); Seitz v. Seitz, 471 So.2d 612 (Fla. 3d DCA 1985); Bucci v. Bucci, 350 So.2d 786 (Fla. 3d DCA 1977). There exists no such evidence in the instant case, and the trial court made no such finding.

In particular, Bucci is inapplicable because in that case the lifestyle of the parties did not match the income as shown by the husband's balance sheets, and the parties, who did not have property to consume, had not gone into debt to support that lifestyle. Id. In complete contrast, the evidence in this case demonstrates that the parties in the instant case supported their lifestyle, not solely on a pay-as-you-go basis from the marital income, but by consuming the marital assets, thus rebutting any claim of undisclosed income [R at 1739-1740, 37-38].

The standard of living of the parties prior to a divorce is only one factor to be examined when setting the amount of alimony. The primary criteria remains the wife's need coupled with the husband's ability to pay. Pirino v. Pirino, 549 So.2d 219, 220 (Fla. 5th DCA 1989).

An award of permanent alimony in a case such as this where there is no basis or justification in the record except as a means to provide the wife with a higher standard of living at the husband's expense, is contrary to the established rules of law. Therefore, the appellate court in this cause appropriately reversed that award and that reversal should hereby be affirmed.

C. An award of permanent periodic alimony is not an appropriate vehicle to right an alleged wrong.

Petitioner's assertion that the trial judge used the award of alimony to compensate for respondent's alleged dissipation of the marital accounts is baseless speculation. There is not a single indication in the final judgment that the trial court had any concern regarding any alleged wrongdoing by respondent [R 1911-1931].

As throughout the trial proceedings, and appellate process, petitioner indulges in allegations of financial misconduct on the part of respondent. These allegations are not only irrelevant to the instant appeal, but are utterly unsupported by the evidence. Throughout the lengthy proceedings involved in this case, the wife spent more than $30,000.00 for the services of outside accountants to review the parties' books [R 616] and was unable to produce any evidence, beyond her own suspicions, that her husband had misappropriated or secreted assets or had been irresponsible in his investing. All funds of the parties, from 1980 until the time of the trial, were accounted for [R 1641, 1678-1686]. In making its equitable division of the marital assets, the trial court in no way indicated that it had found any improper investment activity on respondent's part [R 1911-1931].

Furthermore, an award of permanent periodic alimony is not an appropriate vehicle to right an alleged wrong. Unlike lump sum alimony, permanent periodic alimony is awarded as support for the payee spouse and, with one narrow exception, is not an

alternate method of property division. Canakaris, 382 So.2d 1197. As previously noted, this exception does not apply herein. In this case the appellate court properly accorded the trial court's finding that the distribution of the parties' assets was equitable the presumption of correctness and did not disturb that distribution on appeal. This court should affirm.

V.

BASED UPON THE TRIAL COURT'S FINDINGS OF FACT, THERE IS NO BASIS FOR THIS CAUSE TO BE REMANDED.

Finally, petitioner argues that: "This dissolution of marriage judgment should be remanded, requiring the court to make factual findings" [B at 27]. This allegation seems absurd in light of the seven pages of specific item-by-item distribution by which the court sought to do equity. In addition, the court specifically balanced its equitable distribution of the parties' assets with a three hundred thousand dollar ($300,000.00) cash award to the wife. The mere fact that the court did not recite the valuations does not prevent the division from being found equitable. Again, there is competent substantial evidence in the record based on the valuations provided to the court that sustain the award, as made, was an equitable distribution. Further, it should be noted that at no time in the appellate proceedings below did the petitioner question the equity of the distribution.[6]

The test of reasonableness requires a determination of whether there is logic and justification for the result. Bobb v. Bobb, 552 So.2d 334 (Fla. 1st DCA 1989). There is substantial evidence in this case to dictate that the specific and itemized distribution made by the court was based upon logic and that there

---

[6]Interestingly enough, the result reached in Canakaris was that the wife ended up with about ten percent (10%) of the assets where substantially all of them had been accumulated prior to the parties' lengthy separation. However, the wife apparently did not complain on appeal about this disparity.

was justification for the result that was reached. The court specifically found that result to be equitable. As so aptly stated in petitioner's brief, there is presently no mandate that trial judges make specific findings in equitable distribution cases Kelly v. Kelly, 557 So.2d 625 (Fla. 4th DCA 1990).

There is no need for such a principle, as appellate courts are not permitted to try these issues do novo. Westerman v. Shell's City, Inc., 265 So.2d 43 (Fla. 1972). In Barrs v. Barrs, 505 So.2d 602 (Fla. 1st DCA 1987), the district court had been asked to review a decision making a distribution of marital assets. In the absence of any findings detailing the character and value of the assets, the court was unable to determine if the distribution was "equitable." Barrs is not a matter in which a district court found review "difficult." It found review impossible.

In the instant matter, unlike Barrs, neither party appealed or requested review of the equitable distribution of assets. The issue was solely whether, in view of the equitable distribution accepted by the parties, an additional award of permanent periodic alimony was permissible. In the instant case the additional award of alimony was clearly unauthorized and properly reversed.

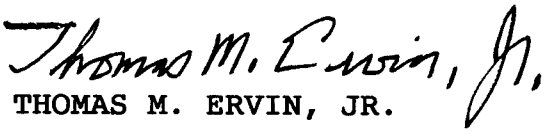
This Court should affirm.

CONCLUSION

Petitioner's reading of "new rules of law" and prospective "confusion" into the district court's decision is without basis. The decision simply stands for the correct and preexisting rule of Canakaris, 382 So.2d 1197, and later cases that if, after unchallenged equitable distribution of substantial marital assets and investment properties, the evidence establishes an ability of petitioner to support herself (i.e., a lack of need for additional support), and an inability of respondent husband to provide such additional support except by depletion of equitably distributed assets, then the alimony award must be reversed.

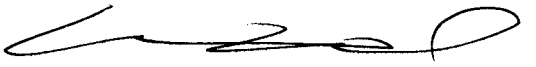
The decision of the district court should, therefore, be affirmed.

Respectfully submitted.



THOMAS M. ERVIN, JR.

and



MARGARET A. McCALL
of the law firm of
Ervin, Varn, Jacobs,
Odom & Ervin
Post Office Drawer 1170
Tallahassee, FL 32302
(904)224-9135

ATTORNEYS FOR RESPONDENT
JOHN E. HAMLET, JR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of Respondent's Reply Brief on the Merits has been furnished by U.S. mail to **Marcia K. Lippincott, Esq.**, 644 West Colonial Drive, Orlando, FL 32804, and **David U. Strawn, Esq.**, Post Office Box 532096, Orlando, FL 32853-2096, this 5th day of July, 1990.

Thomas M. Irvin, Jr.
Attorney