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IN THE SUPREME COURT

OF THE STATE OF FLORIDA

KAREN HAMLET,
Petitioner,

vs. Case No. (5th DCA No. 88-1849)

JOHN HAMLET,
Respondent.

DISCRETIONARY PROCEEDINGS
TO REVIEW A DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

RESPONDENT'S BRIEF ON JURISDICTION

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SUMMARY OF ARGUMENT

Petitioner has failed to demonstrate any direct or any express conflict of the District Court's opinion with that of any other District Court, or of this Court.

The arguments presented are those typically found in a brief on an appeal of right. The arguments presented are based on inferences of principles, which, through still further inference from the opinion of the District Court, are asserted as showing conflict. Petitioner is arguing that the District Court has erred, not that its holding conflicts with those of this Court or the other District Courts.

Petitioner claims three "holdings" are present in the Hamlet opinion:

1. That dissolution awards should be "divided" for review.
2. When a judgment is difficult to review due to lack of findings, the judgment must be reversed.
3. Appellate courts may review the record and find "conflict" which is factually non-existent.
    a. Appellate courts may ignore the possibility that the conflict thus found might be harmonized.

There are no such holdings to be found in the opinion. If there were, conflict would exist. The imaginary "holdings" created by Petitioner have been crafted as opposites to existing

Florida case law. The District Court has observed the law in all respects, as well as the law of proper review of matters appealed to it.

I. THE HOLDINGS OF THE DISTRICT COURT CONTAINS NONE OF THE "HOLDINGS" PETITIONER ASSERTS THAT IT EXPRESSED.

The concise opinion of the District Court contains this simple statement of their holding in this case:

> "An award of alimony, where substantial assets have been equally divided between the two similarly situated situated spouses, giving them equal and complete ability to provide for their support, constitutes an abuse of discretion, and must be reversed." (Hamlet v. Hamlet, 14 FLW 2042 (Fla. 5th DCA 1989)

In her alleged "holdings" Petitioner has created three straw men, unrelated to the holding of the District Court. At no point in her brief has she pointed to the express language of another opinion which directly conflicts with the express language of the stated holding.

Petitioner's dispute with the District Court is more over the method of analysis chosen by the Court than with the expressed holding.

II. THE REASONING OF THE DISTRICT COURT WAS APPROPRIATE TO THE CASE AND RESULTS IN NO CONFLICT IN METHOD OF ANALYSIS OR IN APPLICATION OF LAW WITH ANY EXPRESSED OPINION OF A FLORIDA APPELLATE COURT.

The Trial Court made an equitable distribution of assets which left each spouse with no less than about $1,000,000. The

Trial Court then awarded permanent periodic alimony to the wife. It did not state in its judgment or in the record that its use of alimony was to "...balance such inequities as might result from the allocation of income producing properties." Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980). The Trial Court could easily have signalled the appellate court that it was using permanent periodic alimony in the unusual way, and not in the traditional way of furnishing required support. It did not do so.

It was therefor reasonable for the District Court to recognize that the alimony was being used for support, and that the Trial Court's decision to do so must be tested against the standard of appropriate judicial discretion.

That standard was made clear in Canakaris (supra):

> "The two primary elements to be considered when determining permanent periodic alimony are the needs of one spouse for the funds and the ability of the other spouse to provide the necessary funds."

The District Court applied the standard, and quite rationally determined that, as between two millionaires, where there had been an arguably equal, presumably equitable distribution, there could be no logical 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. This finding was butressed by the observations of the Court that the Husband had undertaken the sole financial and the primary responsibilities for rearing the couple's minor child, and that

neither party had asserted the division of property to be inequitable.

III. THE PORTION OF THE JUDGMENT FOR WHICH REVIEW WAS REQUESTED WAS ADEQUATELY REVIEWED IN THE CONTEXT OF THE TRIAL COURT'S TOTAL PLAN, AS REVEALED BY THE JUDGMENT APPEALED AND THE RECORD SUPPORTING IT.

There is no requirement that findings be recorded by trial courts when making an equitable distribution. (E.g., Barrs v. Barrs, 505 So. 2d 602 (Fla. 1st DCA 1987). 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).

Florida law gives discretion to appellate courts to remand for findings, if the court finds that it is necessary to aproper disposition of the appellate case, Miceli v. Miceli, 533 So. 2d 1171 (Fla. 2d DCA 1988).

In Barrs, (supra), 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 theassets, they were 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 had requested review of the 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.

Petitioner offers Thompson v. Thompson, 14 FLW 1607 (Fla. 4th DCA 1989) and Clemson v. Clemson, 14 FLW 1587 (Fla. 2d DCA 1989) as guidance for review of the District Court's action in the instant case.

Thompson (supra) parrots Canakaris (supra), but does not discuss the trial court's award of permanent periodic alimony. It is of no help in dealing here with the reversal of the Trial Court's award of permanent periodic alimony. No expression in conflict with those ofthe District Court in Hamlet can be found in this opinion.

Clemson (supra) involved an award of permanent periodic alimony to a wife who was, on the record:

> ". . .in a debilitated physical and emotional condition, making if unlikely that she would soon be gainfully employed or be a candidate for rehabilitative alimony."

The District Court affirmed the Clemson trial court after finding that there was substantial, competent evidence of the wife's special need. The District Court in the instant matter does not refer to any such findings in the record. Petitioner has failed, again, to show any direct and expressed conflict.

District Courts daily search judgments and records for reasons, often inferred, that permit them to uphold trial court decisions. Conversely, when that process of reasoning and inference leads to the logical conclusion that the trial court has abused its judicial discretion, the District Court must reverse.

Trial courts are indeed usually free to express their decisions without detailed findings of fact or conclusions of law. Trial judges know how to communicate their reasoning to the parties and to appellate courts, but sometimes choose not to do so.

Appellate courts, even in the absence of such findings, have not been deprived of their ability to determine what decisions a reasonable person would have made on the record presented. Appellate courts have over the decades been able to infer from the record that which supports the judgment and that which does not.

It is clear from the District Court's opinion that it reviewed the record in this case, and viewed the Trial Court's Judgment in the light of that record. The District Court refers to the record in its opinion, as does the dissenter, as providing a means for arriving at their perceptions of the Trial Court's plan for the parties.

CONCLUSION

Respondent respectfully requests that the Court decline jurisdiction in this matter, as the decision of the District Court has not been shown to be in direct, express conflict with decisions of this Court or any of the District Courts.

Submitted this 9th day of January, 1990.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent has been furnished by U.S. Mail this 9th day of January, 1990, to Marcia K. Lippincott, of Marcia K. Lippincott, P.A., at 644 W. Colonial Drive, Orlando, Florida 32804.

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