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**IN THE SUPREME COURT
OF THE STATE OF FLORIDA**

KAREN HAMLET,
Petitioner,

vs.

JOHN E. HAMLET, JR.,
Respondent.

Case No. 75,177
(5th DCA Case No. 88-1849)

✓
MAY 23 1990
CLERK OF THE SUPREME COURT
Deputy Clerk

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

PETITIONER'S BRIEF ON MERITS

**Marcia K. Lippincott
MARCIA K. LIPPINCOTT, P.A.
644 West Colonial Drive
Orlando, Florida 32804
(407) 425-0116
Fla. Bar # 168678**

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STATEMENT OF CASE

On March 13, 1987 Petitioner, Karen Hamlet (hereinafter referred to as the Wife), filed her Petition for Dissolution of Marriage. [R. 134-141; Petition, (Vol. I)] Respondent, John E. Hamlet, Jr. (hereinafter referred to as the Husband), filed an Answer and Counter-Petition. [R. 184-187, Answer (Vol. I)]

The trial court's December 17, 1987 order on temporary matters stated as follows:

"In lieu of the Court granting the Wife control over specific liquid marital assets or otherwise granting the additional relief requested by the Wife in her motion, the Court will take into consideration in determining an equitable division of the marital estate any reduction of the value of the marital estate the Court finds was caused by the Husband through his investments from the date of the filing of the wife's petition for dissolution of marriage to the date of the final hearing."

[R. 897, Order (Vol. V)]

On March 29, 1988 the parties stipulated to the use of an abbreviated hearing procedure instead of a traditional trial. [R. 1043-1045; Pre-Trial Conference Order (Vol. VI); Petitioner's Appendix, A. 24-26] The agreed procedure called for submission of evidence in the form of written proposals and arguments, followed by written rebuttals, which were followed by testimony of the parties and argument of counsel.

On April 7, 1988 the trial court entered a Pre Trial Conference Order pursuant to the stipulation of the parties. [R. 1043-1045; Pre-

Trial Conference Order (Vol. VI); A. 24-26] In compliance with this Order the parties made the following submissions:

1. Wife's Proposed Settlement
[R. 1185-1484 (Vols. VII & VIII)];
2. Husband's Proposal for Final Judgment
[R. 1738-1809 (Vol. X)];
3. Wife's Rebuttal
[R. 1810-1842 (Vol. X)]; and
4. Husband's Rebuttal
[R. 1616-1735 (Vols. IX & X)].

Final hearing was held before the Honorable Kenneth M. Leffler of the Eighteenth Judicial Circuit, Seminole County, on May 12, 1988. [R. 1-117, Transcript (Vol. I)] On August 18, 1988 the trial court entered its Final Judgment of Dissolution of Marriage. [R. 1911-1931; Final Judgment (Vol. XI)]

The Husband filed his Notice of Appeal on September 14, 1988. [R. 1939; Notice of Appeal (Vol. XI)] On August 31, 1989 the Fifth District Court of Appeal issued its decision, reversing the award of permanent periodic alimony to the Wife. [Petitioner's Appendix, A. 36 - A. 38] The Wife's Motion for Rehearing was denied on November 14, 1986.

On December 13, 1989 the Wife filed her Notice to Invoke the Discretionary Jurisdiction of this Honorable Court. Jurisdictional Briefs were submitted and on April 16, 1990 this Court entered its Order accepting jurisdiction of this case.

STATEMENT OF FACTS

The parties were married on September 3, 1965 and separated in May of 1987. [R. 21-22; Transcript (Vol. I); R. 135; Petition] Two children were born -- John E. Hamlet III, age 20; and Jennifer Lynn Hamlet, age 17. [R. 1822; Wife's Response to Husband's Proposal for Final Judgment, p. 3 (Vol. X); R. 1911; Final Judgment, p. 1 (Vol. XI)]

The Wife

Although the Wife has a college degree in business, the parties made a joint decision upon marriage that the Wife would forego pursuing her business career to enable the Husband to fully concentrate upon a career in business and finance. The Wife made the husband, children, the family's personal affairs and civic responsibilities her career. [R. 22-23; Transcript (Vol. I)]

The Wife is an active church and community leader. She serves on the Board of Directors for Straight, a drug rehabilitation program, as the Co-Chair for the Central Florida Heart Ball, as her church choir director and a church officer for financial matters and youth committees. [R. 23; Transcript (Vol. I)]

The Wife testified that she has no ability to start a career at this time. She has been to job interviews and is told "no experience, no job." [R. 32-34; Transcript (Vol. I)] Her monthly living expenses are \$7,763.45. [R. 1110; Wife's Third Amended Financial Affidavit (Vol. VI; Petitioner's Appendix, A. 2)]

The Husband

The Husband describes himself as an "entrepreneur" who has always been self-employed, except for six years in the Army. [R. 36; Transcript (Vol. I)] He states that he does not want to be "average" and has strived his entire life to be successful. [R. 39; Transcript (Vol. I)] The Wife describes the Husband as a brilliant businessman who started with \$200 and made a fortune. [R. 23, Transcript (Vol. I)]

The Husband states that his...

"... life has been characterized by hard work, diligence, and steadfast application to any task undertaken. These qualities, combined with... intelligence and creativity, led to his conceiving and organizing a business to produce software for the insurance industry. The success of his efforts was verified when The Travelers purchased his company."

[R. 1739; Husband's Proposal for Final Judgment, p. 2
(Vol. X)]

Indeed, the business of which the Husband speaks was called Engineered Business Systems, Inc., known as E.B.S., and sold to the Travelers Insurance Company for \$4,750,000.00 in December of 1981. [R. 1358-1389; Appendix #13 to Wife's Proposed Settlement (Vol. VIII)]

The Husband testified that prior to the stock market crash in October of 1987 he was earning \$30,000.00 a month in the stock market. [R. 37, Transcript (Vol. I)] He also stated that he does

arbitrage in foreign currency and has made a lot of money in handling and predicting the decline of the U.S. dollar. [R. 45; Transcript (Vol. I)] Even with the '87 stock market crash, the Husband described his performance...

"...in [his] trading portfolios [as] exceeding most major stock brokerage firms in the United States during 1987. I also had gains from currency appreciation, dividends and interest."

[R. 1622-1623; Rebuttal to Wife's Proposal for Settlement, pp. 6-7 (Vol. IX)]

The Husband's First Amended Financial Affidavit, dated September 1, 1987 shows \$41,136.00 gross monthly income. [R. 911, Petitioner's Appendix A. 4] His Financial Affidavit, dated March 31, 1988, shows gross monthly income of \$16,124.00. [R. 1776; Husband's Proposal for Final Judgment, Appendix B (Vol. X); Petitioner's Appendix A. 11]]

The Wife stated that the Husband told her he was not going to do anything to earn more money until he saw how this case was going to turn out. [R. 16-17; Transcript (Vol. I)] The Husband's trial attorney stated:

"He's (the Husband) is capable of making more money, that's certainly true..."

[R. 89; Transcript (Vol. I)]

"We think he can make a good living once the capital is freed up..."

[R. 90; Transcript (Vol. I)]

"As soon as he's freed up from the divorce, I expect John Hamlet to have the cash..."

[R. 91; Transcript (Vol. I)]

"Even with the crash, Mr. Hamlet was able to make about \$200,000.00 this last year..."
[R. 103; Transcript (Vol. I)]

"He'd like to get back to work, he enjoys it. He's in some ways a driven man when it comes to work, he likes it very much. The way he likes to work has been restricted over this last, oh, roughly now almost twelve months because there have been court orders that say don't transfer assets, don't borrow money, leave things alone..."
[R. 104; Transcript (Vol. I)]

"He does need to wait until Your Honor rules because although he hates the thought of it, I doubt would ever do it, I guess he'd have to consider taking a job with somebody, he'd really rather be an entrepreneur."
[R. 104; Transcript (Vol. I)]

Finally, the Husband describes himself as...

"... a dynamic, energetic and creative worker, with a demonstrated ability to succeed in business and the investment world."
[R. 1741; Husband's Proposal for Final Judgment, p. 4 (Vol. X)]

Net Worth of Estate

The net worth of the parties' estate has deteriorated, according to documents prepared by the Husband, from \$9,231,543.00 in December of 1984 to \$3,238,499.00 in February of 1988. [R. 1250; Wife's Proposed Settlement, Exhibit E (Vol. VII)]

<u>Date</u>	<u>Net Worth</u>	<u>Source</u>
12/31/84	\$9,231,543	[R. 1390; Wife's Proposed Settlement Appendix #14 (Vol. VIII)]
12/31/85	\$9,170,195	[R. 1397; Wife's Proposed Settlement Appendix #16 (Vol. VIII)]
12/31/86	\$9,086,900	[R. 1400; Wife's Proposed Settlement Appendix #17 (Vol. VIII)]
12/31/86	\$4,434,065	[R.1413; Wife's Proposed Settlement Appendix #19 (Vol. VIII)]
6/1/87	\$4,165,987	[R. 1418; Wife's Proposed Settlement Appendix #20 (Vol. VIII)]
9/1/87	\$4,142,381	[R. 1287; Husband's First Amended Financial Affidavit; Wife's Proposed Settlement, Appendix #1(Vol. VIII); Petitioner's Appendix A. 4-10]
2/1/88	\$3,238,499	[R. 1995; Husband's Second Amended Financial Affidavit; Wife's Proposed Settlement, Appendix #2 (Vol. VIII)]

The main asset of E.B.S., the business sold to Travelers Insurance for almost five million dollars, was computer software programming. In addition to the insurance software, the Husband had developed other software programs. [R. 1192; Wife's Proposed Settlement, p. 8 (Vol. VII)] From December of 1984 until the time this litigation commenced, the Husband continued to list the value of this software on his statement of assets at \$3,000,000.00. [R. 1390, 1394, 1397, 1400; Wife's Proposed Settlement, Appendix #14, #15,#16, and #17 (Vol. VIII)] On or about March 1, 1987 the

Husband made a "correction" on his financial statement which reduced the value of this computer software to zero. [R. 1403; Wife's Proposed Settlement, Appendix #18 (Vol. VIII)]

The Wife testified that in March of 1987 before she instituted this action, the parties had almost a million and half dollars in cash, and now, the money is no longer there. [R. 31; Transcript (Vol. I)]

The Husband states that he has only one foreign bank account, a Credit Suisse account in London. [R. 45-46; Transcript (Vol. I)] On March 19, 1987, Credit Suisse, per a telephone request from the Husband, sent him an application for a personal account in Switzerland. [R. 1842; Wife's Rebuttal, Exhibit E (Vol. X)]

Major Assets

The major assets¹ of the parties consist of real estate, an ancient coin collection, investment accounts, jewelry, investment diamonds, furs and cars. [R. 12222-1226; Wife's Proposed Settlement, Exhibit D (Vol. VII)]; Petitioner's Appendix A. 18-22; R. 1746; Husband's Proposal for Final Judgment, Exhibit A (Vol. X); Petitioner's Appendix A. 23]

The Wife values these assets at a total of \$3,135,748.00. [R. 1109-1111, Wife's Financial Affidavit; Petitioner's Appendix A-1-3;

¹Miscellaneous items such as furniture, art work, personal banking accounts and IRA's are not included. For excluded items and values, see Petitioner's Appendix A. 1-3, A. 11-23]

R. 1222-1226; Wife's Proposed Settlement, Exhibit D (Vol. VII); Petitioner's Appendix A. 18-22] The Husband values these assets at a total of \$2,990,102.00. [R. 1776-1782, Husband's Financial Affidavit, dated March 31, 1988 (Vol. X), Petitioner's Appendix A. 11-17; R. 1746, Husband's Proposal for Settlement (Vol. X); Petitioner's Appendix, A. 23]

The marital home of the parties, 1188 Coachwood Court in Longwood, Florida was purchased in March of 1982 for \$506,000.00. The adjacent lot was purchased in July of 1983 for \$251,153.00. An addition to the home was constructed in October 1985 at a cost of \$303,327.00, bringing the total "purchase price" to \$1,060,480.00. [R. 1748, Husband's Proposal for Final Judgment, Appendix A-1, p. 2]

The Wife had three appraisals of \$1,300,000.00 [R. 1227-1280; Wife's Proposed Settlement, Exhibit D, pp. 6-20 (Vol. VII)]; \$896,700.00 [R. 1241; Wife's Proposed Settlement, Exhibit D, p. 21 (Vol. XII)]; and \$900,000.00 [R. 1243; Wife's Proposed Settlement, Exhibit D, p. 23 (Vol. VII)] The Husband had one appraisal of \$680,000.00. [R. 1245-1260; Wife's Proposed Settlement, Exhibit D, pp. 24-39 (Vol. VII)]; R. 1727-1733, Husband's Rebuttal, Exhibit 18 (Vol. X)]

Villa D'Este was purchased by the Husband in June, 1987 when he moved out of the marital residence for \$285,000.00 in cash. [R. 1346, Wife's Proposed Settlement, Appendix #12, Villa D'Este Closing Statement (Vol. VIII)]

Final Judgment

The Final Judgment, by agreement, provides for shared parenting of Jennifer with the Husband being the primary residential parent. [R. 1911-1931, Final Judgment (Vol. XI)] The marital estate was divided as shown in the following charts. The Husband was given and elected to take the option of paying the Wife a cash payment of \$292,371.00 for the ancient coin collection. [R. 1916; Final Judgment (Vol. XXI)]

The Husband was ordered to pay permanent periodic alimony to the Wife of \$4,000.00 per month; and as additional alimony to pay the Wife's health expenses for pre-existing conditions for one year. [R. 1917-1918; Final Judgment (Vol. XI)] Each party was ordered to pay their own attorneys fees. [R. 1919; Final Judgment (Vol. XI)]

FINAL JUDGMENT AWARD TO THE WIFE

<u>Property Description</u>	<u>Husband's Value²</u>	<u>Wife's Value³</u>
A. <u>Real Estate</u>		
Villa D'Este	\$390,000.00	\$285,000.00
6955 S. Atlantic Ave.	\$275,000.00	\$275,000.00
6975 S. Atlantic Ave.	<u>\$275,000.00</u>	<u>\$275,000.00</u>
Sub total	\$940,000.00	\$835,000.00
B. <u>Jewelry, Furs</u> <u>& Investments</u>		
Wife's Jewelry	\$100,000.00	\$ 47,886.00
Furs	\$ 25,000.00	\$ 11,000.00
Investment Diamonds	<u>\$ 55,000.00</u>	<u>\$ 55,000.00</u>
Sub Total	\$180,000.00	\$113,886.00
C. <u>Cars</u>		
1986 Zimmer	\$ 35,000.00	\$ 35,000.00
1984 Lincoln	\$ 8,000.00	\$ 9,000.00
1985 BMW	<u>\$ 12,000.00</u>	<u>\$ 12,000.00</u>
Sub Total	\$ 55,000.00	\$ 56,000.00
D. <u>Investment Accounts</u> <u>& Cash payment for coins</u>		
Shearson Amex Acct.	\$ 1,662.00	\$ 2,031.00
Cash payment (coins)	<u>\$292,371.00</u>	<u>\$292,371.00</u>
Sub Total	\$294,033.00	\$294,402.00
TOTAL MAJOR ASSET AWARD TO WIFE:	<hr/> \$1,469,033.00	<hr/> \$1,299,288.00

²Petitioner's Appendix, A. 23.

³Petitioner's Appendix, A. 18-22.

FINAL JUDGMENT AWARD TO THE HUSBAND

<u>Property Description</u>	<u>Husband's Value⁴</u>	<u>Wife's Value⁵</u>
A. <u>Real Estate</u>		
Kentucky Office Bldg.	\$225,000.00	\$200,000.00
Kentucky Duplex	\$ 36,529.00	\$ 28,568.00
Colorado townhouse	\$ - 3,369.00	\$ 24,000.00
Kentucky land	\$ 5,700.00	\$ 5,700.00
1188 Coachwood Ct.	<u>\$680,000.00</u>	<u>\$900,000.00</u>
Sub Total	\$943,860.00	\$1,158,268.00
B. <u>Ancient Coin Collection & Jewelry</u>		
Ancient coins	\$329,803.00	\$296,000.00
Husband's Jewelry	<u>\$ 16,550.00</u>	<u>\$ 16,500.00</u>
Sub Total	\$346,353.00	\$312,500.00
C. <u>Investment Accounts</u>		
Dominick #023-001340	\$ 69,513.00	\$107,651.00
Dominick #997763180	\$ -0-	\$ 12,718.00
HMCA #740-3170	\$ 2,508.00	\$ 2,754.00
Shearson FMA#43419538	\$ 1,939.00	\$ 4,471.00
Credit Suisse #2586623	\$ 66,996.00	\$148,148.00
Notes Receivable	<u>\$ 24,500.00</u>	<u>\$ 24,500.00</u>
Sub Total	\$165,456.00	\$300,242.00
D. <u>Cars</u>		
1987 Jeep	\$ 13,500.00	\$ 13,500.00
1982 Massarati	\$ 18,000.00	\$ 18,000.00
1983 Porsche	\$ 21,000.00	\$ 21,000.00
1973 Porsche	\$ 6,500.00	\$ 6,500.00
Honda motorcycle	\$ 250.00	\$ 250.00
Hobie w/trailer	\$ 2,500.00	\$ 2,500.00
Hobie w/trailer	\$ 2,500.00	\$ 2,500.00
2 Windsurfers	<u>\$ 1,200.00</u>	<u>\$ 1,200.00</u>
Sub Total	\$ 65,450.00	\$ 65,450.00
TOTAL MAJOR ASSET AWARD TO HUSBAND:	<hr/> \$1,521,119.00	<hr/> \$1,836,460.00

⁴Petitioner's Appendix, A. 23.

⁵Petitioner's Appendix, A. 18-22.

SUMMARY OF ARGUMENT

The Fifth District Court of Appeal established a new rule of law in *Hamlet* which unduly restricts the discretionary authority of trial judges to render dissolution of marriage judgments which are equitable. That rule is called "divide and review". In essence, the Fifth District in *Hamlet* holds that a trial court's finding of "equitable distribution" requires the consideration of an alimony award as "pure" alimony, even though the trial court did not value the assets, nor label the alimony award as "pure". This ruling violates the principle that dissolution of marriage judgments must be reviewed as a whole, rather than piecemeal. [*Canakariss v. Canakariss*, 382 So. 2d 1197 (Fla. 1980) and *Thompson v. Thompson*, 546 So. 2d 99 (Fla. 4th DCA 1989)]

Dissolution of marriage judgments come to the appellate court clothed with a presumption of correctness. The Fifth District violated this principle by implying findings which it then used as a justification to reverse the *Hamlet* alimony award; by creating conflicting findings when conflict did not exist or the findings could be harmonized; and by resolving doubts against, rather than in favor of the judgment.

The *Hamlet* award of permanent periodic alimony is well within the bounds of judicial discretion based upon one or more of the following three factors: 1) as a part of equitable distribution; 2) as a result of the sharp disparity between the earning abilities of the

parties; and 3) as a result of the reduction in value of the marital estate during the pendency of the divorce proceedings.

According to the values placed on the marital assets by the Wife, the Husband was awarded marital assets which exceed those awarded to the Wife by more than a half million dollars. This fact alone justifies the \$4,000.00 monthly alimony award.

In addition, the Wife of this twenty two year marriage has never worked outside the home, while the Husband created a company which sold for five million dollars and earned more than \$30,000.00 a month in the stock market before the '87 crash. The uncontroverted facts establish a sharp disparity between the earning abilities of the Husband and Wife. This fact alone justifies the alimony award.

Furthermore, the Wife established the drastic reduction of the marital assets of the parties during the pendency of these proceedings. Again, this fact alone justifies the alimony award. Even *assuming arguendo* that one or more of these factors are insufficient to establish the propriety of the award, the combination of these factors mandate the reinstatement of the *Hamlet* alimony award.

The Fifth District reversed the alimony award in *Hamlet* due to a lack of express findings regarding the valuation of marital assets. This reversal was clearly erroneous. The lack of express findings should have resulted in the total affirmance of the trial court's decision; or, at the most, remand to the trial court for the purpose of making factual findings.

ISSUE INVOLVED

WHETHER THE TRIAL COURT'S AWARD OF
PERMANENT PERIODIC ALIMONY IS WITH-
IN THE BOUNDS OF JUDICIAL DISCRETION.

ARGUMENT

I. DISSOLUTION OF MARRIAGE JUDGMENTS MUST BE REVIEWED AS A WHOLE RATHER THAN PIECEMEAL.

In *Walter v. Walter*, 464 So. 2d 538, 540 (Fla. 1985), this Court announced that while it recognized the significant responsibility of district courts to review the reasonableness of discretionary acts of trial courts in dissolution proceedings, it...

"... must reject the establishment of new rules of law that would unduly restrict the discretionary authority of trial judges to render equitable property disposition or support or alimony awards."

The Fifth District has established a "new rule" in *Hamlet*, it is called "divide and review". Specifically, the Fifth District stated that:

"[T]hese 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 alimony to the wife in addition to equitable distribution of the investment assets."

[Petitioner's Appendix, A. 36]

It is a well-established principle that dissolution of marriage judgments must be reviewed as a whole, rather than piecemeal.

[*Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980); and *Thompson v. Thompson*, 546 So. 2d 99 (Fla. 4th DCA 1989)] As this Court declared in *Canakaris*:

"[d]issolution proceedings present a trial judge with The difficult problems of apportioning assets acquired by the parties and providing necessary support. The judge possesses broad discretionary authority to do equity between the parties and has available various remedies to accomplish this purpose, including lump sum alimony, permanent periodic alimony, rehabilitative alimony, child support, a vested special equity in property, and an award of exclusive possession of property. *As considered by the trial court, these remedies are interrelated; to the extent of their eventual use, the remedies are part of one overall scheme. It is extremely important that they also be reviewed by appellate courts as a whole, rather than independently.*"

[Emphasis supplied; 382 So. 2d at p. 1202; 546 So. 2d at p. 99]

The Fifth District has violated this principle and has written a decision which will generate considerable confusion among the bench and the bar. In essence, the Fifth District holds that a trial court's finding of "equitable distribution" requires the consideration of an alimony award as "pure" alimony, even though the trial court did not value the assets nor label the alimony award as "pure".

This Court has repeatedly recognized the importance of the trial court's discretionary authority to do equity between marital partners without undue restrictions or hindrances. The Fifth District's decision in *Hamlet* undermines this philosophy.

II. DISSOLUTION OF MARRIAGE JUDGMENTS
ARE CLOTHED WITH A PRESUMPTION OF
CORRECTNESS AND ALL DOUBTS MUST BE
RESOLVED IN FAVOR OF THE JUDGMENT.

Appellate review is founded on the principle that trial court judgments are clothed with a presumption of correctness. [*First Atlantic National Bank v. Cobbett*, 82 So. 2d 870 (Fla. 1955); *Delgado v. Strong*, 360 So. 2d 73 (Fla. 1978)] This principle is equally applicable to dissolution of marriage judgments. [*Herzog v. Herzog*, 346 So. 2d 56 (Fla. 1977); *Gustafson v. Jensen*, 515 So. 2d 1298 (Fla. 3d DCA 1987)]

This general principle has many offspring. Three of the most important offspring are as follows: 1) missing findings of fact must be implied in accordance with the judgment [*Vandergriff v. Vandergriff*, 456 So. 2d 464 (Fla. 1984); *Donner v. Donner*, 313 So. 2d 456 (Fla. 3d DCA 1975)]; 2) conflicting findings must be construed, if possible, to harmonize with each other and with the judgment [*Marsicano v. Rogers*, 164 So. 2d 531, 532 (Fla. 2d DCA 1964)]; and, 3) all doubts must be resolved in favor of the trial court's judgment [*Mank v. Richardson*, 195 So. 2d 547, 576 (Fla. 4th DCA 1967)]

These principles were totally ignored by the Fifth District in deciding *Hamlet*. The trial court in *Hamlet* found its award accomplished "equitable distribution" AND also found that permanent

alimony was warranted. The trial court in *Hamlet* did not label its alimony award as "pure" alimony, nor did it establish values for the parties' assets.

The Fifth District implied findings which it then used as a justification to reverse the *Hamlet* alimony award. It created conflicting findings when conflict did not exist or the findings could be harmonized. In addition, the Fifth District resolved doubts against, rather than in favor of the judgment.

**III. DISSOLUTION OF MARRIAGE JUDGMENTS
MUST BE REVIEWED TAKING THE FACTS
IN A LIGHT MOST FAVORABLE TO THE
PREVAILING PARTY.**

One of the most basic tenets of appellate review is that the judgment must be reviewed taking the facts in a light most favorably to the prevailing party. [*Walter v. Walter*, 464 So. 2d 538, 539 (Fla. 1985)] The Fifth District failed to apply this principle to *Hamlet* as will be demonstrated in the next section of this Brief.

IV. THIS DISSOLUTION OF MARRIAGE JUDGMENT, WHICH AWARDS THE WIFE PERMANENT, PERIODIC ALIMONY, IS WITHIN THE BOUNDS OF JUDICIAL DISCRETION AND IT MUST BE REINSTATED.

This Court set forth the following general principles regarding an award of permanent periodic alimony in *Canakaris, supra*:

"[it]... is used to provide the needs and necessities of life to a former spouse as they have been established by the marriage of the parties. 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 criteria to be used in establishing this need include the parties' earning ability, age, health, education, the duration of the marriage, the standard of living enjoyed during its course and the value of the parties' estates."

[382 So. 2d at pp. 1201-1202]

A. The award of permanent periodic alimony is within the bounds of judicial discretion as a part of equitable distribution.

The remedies of equitable distribution and special equity for property division are interrelated with the various alimony remedies for support. The trial court has broad discretion to employ any of

these remedies in any combination to accomplish a just and fair resolution. [*Diffenderfer v. Diffenderfer*, 491 So. 2d 265 (Fla. 1986); *Canakaris, supra.*]

According to the value placed on the marital assets by the Wife, the Husband was awarded major assets totalling \$1,836,460.00 and the Wife was awarded major assets totalling \$1,299,288.00. [Statement of Facts, *supra*, pp. 11-12] Certainly, the trial court acted within the bounds of judicial discretion in offsetting this difference, which exceeds half a million dollars, by alimony payments of \$4,000.00 per month.

B. The award of permanent periodic alimony is within the bounds of judicial discretion due to the needs of the Wife and the abilities of the Husband.

Initially, it should be emphasized that requiring a wife to deplete her capital assets in order to maintain her standard of living is wrong as a matter of law. [*Gordon v. Gordon*, 204 So. 2d 734 (Fla. 3d DCA 1967); *Lutgert v. Lutgert*, 362 So. 2d 58 (Fla. 2d DCA 1978); *Holley v. Holley*, 380 So. 2d 1098 (Fla. 2d DCA 1980); *DeCenzo v. DeCenzo*, 433 So. 2d 1316 (Fla. 3d DCA 1983)]

Accordingly, the Fourth District Court of Appeal recently approved an award of permanent periodic alimony to a wife who left

a twelve year marriage with assets which exceeded a million dollars. [*Kelly v. Kelly*, 15 F.L.W. 485 (Fla. 4th DCA Feb. 21, 1990)] The wife in *Kelly* was 38, in good health, held a degree in psychology and earned \$13,000 per year as an aerobics instructor. The husband was 43, in good health, held a law degree and was actively engaged in the general contracting business, earning between \$150,000 to \$350,000 per year. The monthly expenses of the wife were set at between \$7,800 and \$11,000 per month. The husband's expenses were set forth as \$11,500 per month.

As here, the husband in *Kelly* challenged the award of alimony as an abuse of discretion in light of the equitable distribution of the parties assets. The Fourth District rejected the position of the husband as follows:

"[t]he record reflects that the wife leaves the marriage with one million dollars or more in assets much of which is quite liquid. In addition to the substantial income those assets could produce the wife earns approximately \$13,000 per year and receives child support of \$1,500 per month. These income accumulations would appear to cover the wife's monthly necessities described in the evidence. However, there is a sharp disparity between the husband's ability to produce income and that of the wife, a factor often used by the various courts to justify permanent alimony... In addition, the lifestyle of the parties was clearly lavish and continues to be so as evidenced by the husband's purchase of a Porsche automobile costing some \$57,000. Furthermore, in

Angelides v. Angelides, 466 So. 2d 1198 (Fla.3d DCA 1985) the court held an award of permanent alimony was appropriate even though distribution of the marital assets enabled the wife to maintain herself in a style to which she had become accustomed. Thus, we are unable to say that reasonable men could not differ on the allowances made here..."
[15 F.L.W. at p. 485]

Moreover, net income alone does not determine a spouse's ability to pay. Rather, net worth, past earnings, and the value of the parties' capital assets are appropriate considerations. [*Canakaris, supra*, at p. 1202] As the Third District declared in *Seitz v. Seitz*, 471 So. 2d 612, 614 (Fla. 3d DCA 1985):

"[i]t is well settled in Florida that income can be imputed to a spouse although the source of that income cannot be clearly established.

'Where the head of a family by supplying money over a period of years, establishes and maintains a standard of living on a certain financial level, it may be inferred, in the absence of a sufficient showing to the contrary, that he has a source of income or financial status sufficient to enable him to continue to maintain his spouse in substantially the same manner of living.'"

[See also: *Anderson v. Anderson*, 451 So. 2d 1030 (Fla. 3d DCA 1984); *Bucci v. Bucci*, 350 So. 2d 786 (Fla. 3d DCA 1977)]

It is uncontroverted that the Husband in this case:

- 1) Started with \$200 and created a company which sold for almost 5 million dollars;

- 2) Earned more than \$30,000.00 a month in the stock market prior to the '87 crash;
- 3) Exceeded the performance of most major stock brokerage firms in the United States during 1987; and
- 4) Elected the option of paying the Wife \$292,371.00 for an ancient coin collection.
[See Statement of Facts, *supra* at pp. 4-6, 10]

There should be absolutely no question but that the Husband in this case has the ability to pay the Wife permanent periodic alimony of \$4,000.00 per month. Any contention to the contrary should be summarily rejected as ridiculous!

C. The award of permanent periodic alimony is within the bounds of judicial discretion due to the reduction of the value of the marital estate during the pendency of the divorce proceeding.

The trial court announced in this case in a temporary order that:

"... the Court will take into consideration in determining an equitable division of the marital estate any reduction the Court finds was caused by the Husband through his investments from the date of the filing of the Wife's Petition for Dissolution of Marriage to the date of final hearing."

[R. 897; Order (Vol. V)]

The drastic reduction of the marital estate has been detailed in the Wife's Statement of Facts. [Supra, pp. 6-8] Certainly, this reduction in the estate's value provides an additional basis which supports the trial court's award of permanent alimony.

D. The award of permanent periodic alimony is within the bounds of judicial discretion as a result of the combination of any of the above factors.

There are three separate bases which can independently justify the trial court's award of permanent alimony: 1) as a part of equitable distribution; 2) as a result of the sharp disparity between the earning abilities of the parties; and 3) as a result of the reduction in value of the marital estate during the pendency of the divorce proceedings. Even *assuming arguendo* that one or more of these bases are insufficient to establish the propriety of the award, the combination of these factors provides abundant support for the trial court's decision. The award of permanent periodic alimony is well within the bounds of judicial discretion and must be reinstated.

V. AT THE MOST, THIS DISSOLUTION OF MARRIAGE JUDGMENT SHOULD BE REMANDED, REQUIRING THE TRIAL COURT TO MAKE FACTUAL FINDINGS.

The Fourth District recently stated in *Kelly, supra*, that:

"[w]hile we agree that it would facilitate appellate review for trial judges to make specific findings in equitable distribution cases there is presently no mandate that they must do so in all cases."

[15 F.L.W. at p. 485]

Indeed, this Court specifically ruled in the case *Vandergriff v. Vandergriff*, 456 So. 2d 464 (Fla. 1984) that:

"[w]e are not prepared to hold, as Judge Nimmons apparently would, that trial judges must support their decisions with factual findings. This would be contrary to the well established rule that trial court decisions are presumptively valid and should be affirmed, if correct, regardless of whether the reasons advanced are erroneous."

[456 So. 2d at p. 466; see also *Zalis v. Zalis*, 498 So. 2d 505 (Fla. 3d DCA 1986)]

Nevertheless, the Third District Court of Appeal in *Barrs v. Barrs*, 505 So. 2d 602 (Fla. 1st DCA 1987) has held that the failure of the trial court to make explicit findings regarding disputed facts that form the basis for equitable distribution necessitates remand. Thus, the following question was certified to this Court as one of great public importance:

"Whether the trial court can be required to make explicit written findings regarding disputed issues of fact in awarding equitable distribution of marital assets in a dissolution of marriage proceeding."
[505 So. 2d at p. 604]

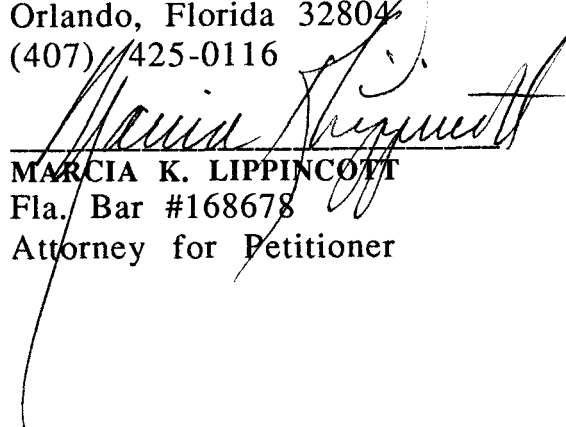
It is not necessary to resolve this question in order to resolve this case. The trial court award of permanent periodic alimony is well within the bounds of judicial discretion, despite the lack of specific findings regarding the value of the marital assets. Moreover, at the most, this dissolution of marriage judgment should be remanded requiring the trial court to make factual findings.

CONCLUSION

For the reasons stated herein, the Petitioner respectfully requests this Honorable Court to reverse the decision of the Fifth District Court of Appeal and affirm the trial court's judgment in its entirety; or alternatively, to remand this matter to the trial court for the purpose of making factual findings.

RESPECTFULLY SUBMITTED this 21st day of May, 1990.

MARCIA K. LIPPINCOTT, P.A.
644 West Colonial Drive
Orlando, Florida 32804
(407) 425-0116

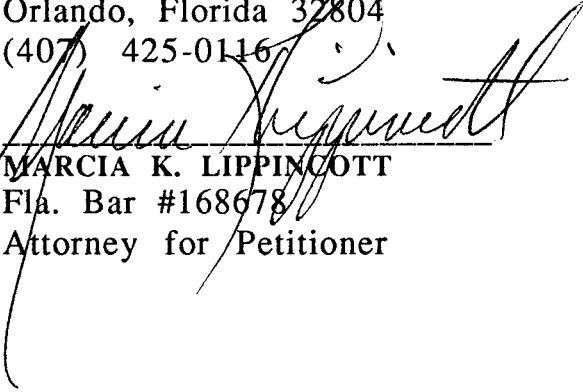


MARCIA K. LIPPINCOTT
Fla. Bar #168678
Attorney for Petitioner

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U.S. Mail this 21st day of May, 1990 to: DAVID U. STRAWN, Esquire, Post Office Box 532096, Orlando, Florida 32853-2096.

MARCIA K. LIPPINCOTT, P.A.
644 West Colonial Drive
Orlando, Florida 32804
(407) 425-0116


MARCIA K. LIPPINCOTT
Fla. Bar #168678
Attorney for Petitioner