O/A 11-7-90

IN THE SUPREME COURT

OF THE STATE OF FLORIDA

KAREN HAMLET,

Petitioner,

vs.

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

JOHN E. HAMLET, JR.,

Respondent.
_____/

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

PETITIONER'S REPLY 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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I. DISSOLUTION OF MARRIAGE JUDGMENTS MUST BE REVIEWED AS A WHOLE RATHER THAN PIECEMEAL.

In ***Canakaris v. Canakaris***, 382 So. 2d 1197, 1202 (Fla. 1980)[1] this Court announced that appellate courts must review a dissolution judgment as a whole, and may not divide and review one segment of such judgment. The Fifth District in ***Hamlet*** clearly violated this principle by dividing and reviewing one segment of that judgment -- the alimony award.

Respondent makes several desperate attempts to deny this clear violation. First, the Respondent attempts to argue that the words "eventual use" erases the words "reviewed... as a whole, rather than independently." This position is ridiculous!

The words "eventual use" in the ***Canakaris*** quote simply means that to the extent a trial court employs or "eventually uses" more than one of the listed dissolution remedies, those remedies are part of one scheme, and must be reviewed as a whole, rather than independently. The Fifth District Court of Appeal explicitly violated

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[1] "[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 the independently." [Emphasis supplied; 382 So.2d at p.1 202]

this principle by dividing the alimony award from the entire scheme and declaring it improper.

Next, the Respondent's contention that the "divide and review" rule of ***Hamlet*** has been codified and applies to this case reveals the **desperateness** of his position. First, the ***Hamlet*** judgment preceded the October 1, 1988 effective date of Florida Statute ss. 61.075(6) (1989). Secondly, the point at issue is the standard of review for **appellate** courts, not the legal principles to be initially applied by **trial** courts. And finally, the Respondent neglects to read or note that the sentence which precedes the one he quotes states as follows: "[T]he court **may** provide for equitable distribution of the marital assets and liabilities without regard to alimony for either party." In conclusion, this statute has no bearing on the issues before this Court.

Next, Respondent contends that the Petitioner ignores the ***Canakaris*** standard for an award of permanent periodic alimony. However, the exact opposite is true. This Court listed a number of criteria to be used in making an alimony determination. [382 So. 2d at p. 1201] The Respondent and the Fifth District Court of Appeal attempt to limit the criteria to one: the value of the parties' estates. This position is clearly erroneous and illustrates one of the mistakes made by the Fifth District in reviewing this case.

Respondent attempts to distinguish ***Thompson v. Thompson***, 546 So. 2d 99 (Fla. 4th DCA 1989)[2]. Respondent contends that the

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[2]Respondent's arguments regarding lump sum alimony, needs and abilities will be addressed in Section IV of this Brief.

Thompson court reviewed the trial court's judgment piecemeal. This contention is simply incorrect. After quoting the ***Canakaris*** pronouncements, the Fourth District Court of Appeal stated in ***Thompson*** that:

> "[a]pplying the guiding principles cited above, we conclude that a reasonable person could have created the economic scheme employed by the trial court in this case. It is not lopsidedly in favor of the former wife, as the former husband urges."
> [546 So. 2d at p. 100; Note that the husband in ***Thompson*** appealed from property distribution, permanent periodic alimony and attorney's fees award.]

Finally, Respondent argues that ***Walter v. Walter***, 464 So. 2d 538 (Fla. 1985) is distinguishable because ***Hamlet*** did not announce a new rule of law. Rather:

> "[t]he district court simply reviewed the nature of substantial investment assets equitably distributed by the trial court, and not appealed by the 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."
> [Respondent's Brief at p. 18]

This statement contradicts the purpose for which it was made and demonstrates the point of Petitioner. First, note that the Wife is being chastised for not appealing the equitable distribution **portion** of the judgment. **Divide and Review!** Secondly, the trial court did not make **any** express findings of fact in this case. Rather, the **appellate** court **divided** the judgment, and found that since the judgment labelled the property distribution as equitable and the

Wife failed to appeal, the alimony award was subject to a **separate review**, as if awarded alone.

The Fifth District Court of Appeal clearly enacted a new rule in ***Hamlet***, "divide and review". And this rule is in direct conflict with the pronouncement of this Court in ***Canakaris*** that dissolution awards must be reviewed as a whole.

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

The Petitioner has noted that the presumption of correctness principle has three important offspring: 1) missing findings of fact must be implied in accordance with the judgment; 2) conflicting findings must be construed; if possible, to harmonize with each other and with the judgment; and 3) all doubts must be resolved in favor of the trial court's judgment. [Petitioner's Initial Brief on Merits, pp. 18-19] Respondent essentially agrees with these principles but contends that the Fifth District Court of Appeal abided by, rather than violated, these principles.

In so contending, the Respondent repeats his favorite line from the ***Hamlet*** decision:

> "'[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.'" [Respondent's Brief at p. 20]

The truth of the situation is that the trial court in ***Hamlet*** made absolutely **no** express findings of fact. Rather, the Fifth District

and the Respondent focus entirely upon the provision of the final judgment entitled "equitable distribution". Solely because of this title, and the substantial assets of the parties, the Fifth District and the Respondent draw the conclusion above-cited.

It should be noted and emphasized that the judgment in issue expressly states:

> "[t]hat the ***Wife is entitled to*** and the Husband shall pay directly to the Wife the sum of Four Thousand ($4,000.00) Dollars per month as permanent periodic alimony."
> [Emphasis supplied; Petitioner's Appendix A. 33-34]

This express statement, in accordance with the above principles, implies factual findings of the Wife's need and the Husband's greater ability to pay.

The decision of the Fifth District Court of Appeal totally ignores this statement and these principles. The trial court in ***Hamlet*** found its award accomplished "equitable distribution" **AND** also found that permanent periodic alimony was warranted. The Fifth District's "divide and review" tactics violate these fundamental principles of appellate review.

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

Respondent takes the position that these was no "prevailing party" for purposes of the ***Walter*** rule and alimony awards are questions of law, rather than questions of judicial discretion. Both positions are absurd! "Prevailing party" as used in ***Walter*** and its

predecessors simply means the Appellee, i.e. the party who is not appealing.

Although it is possible for a trial court to make an alimony award pursuant to a mistaken view of the law, generally alimony awards are a judicial exercise of discretionary authority. To review any judgment regardless of the alleged error, the first thing which must be done is to determine the admitted facts. Secondly, any facts in controversy must be viewed in favor of the party who is not appealing, i.e. in this case -- the Wife. The Fifth District violated this principle by reweighing the evidence.

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.

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

The Fifth District totally disregarded the fact that the trial court divided the marital estate **and** provided permanent periodic alimny to the Wife as one entire scheme. The Respondent also attempts to mask this fact. He contends that since his numbers show an approximatley equal distribution of the marital estate, that the alimony award, standing alone, is improper. He is incorrect.

First, the issue is whether there is competent evidence to support the trial court award, **not** the appellate court's reversal of

that award. Secondly, the issue must be viewed in the proper context as discussed **supra** in Argument III.

The facts viewed properly show as follows:

1. A major asset award to the Husband of **at least** $1,836,460.00[3][4]; [Petitioner's Initial Brief on Merits, pp. 11-2]

2. A major asset award to the Wife of $1,299.288.00; [Petitioner's Initial Brief on Merits, pp. 11-12]

3. An **election** by the Husband to expend $292,371.00 on purchasing an ancient coin collection from the Wife;[5]

4. There is no evidence that the Wife has more income generating assets that the Husband; [Petitioner's Initital Brief on Merits, pp. 11-12]

5. The Husband has a number of different business entities which have been very successful but which proved impossible for the Wife to value; [Petitioner's Appendix A. 20]

6. From December, 1984 until this litigation commenced the Husband listed certain software on his statement of assets at 3 million dollars. Almost simultaneously with the

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[3]Note that the trial court could properly have ignored the liabilities raised by the Husband. For example, with respect to Northwest Tower, note that the Wife listed this asset on her financial affidavit as zero, with the accompanying note: "Husband carries this as a liability with no concomitant asset although approximately $300,000 of marital funds have been invested. Wife values this asset at 0 for the purpose of this chart." [Petitioner's Appendix A. 21]

[4]The Final Judgment awarded the ancient coin collection to the Wife with the proviso that the Husband could purchase the collection for a cash payment of $292,371.00. [Petitioner's Appendix A. 32-33]

[5]The Final Judgment awarded the ancient coin collection to the Wife with the proviso that the Husband could purchase the collection for a cash payment of $292,371.00. [Petitioner's Appendix A. 32-33]

institution of this action, the Husband made "a correction" on his financial statement reducing the value to zero. [Petitioner's Appendix A. 21]

Furthermore, despite the figures placed on the assets, even ***assuming arguendo*** that the parties were left in fairly **equal** positions, we have all been taught by this Court that equal does not necessarily mean equitable. The trial court divided the marital estate **and** provided alimony as one entire scheme to achieve equity. If there is any competent evidence to support this decision in its totality, it must be affirmed. Petitioner contends that such evidence exists.

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.

The Respondent contends that if the estate of the parties are relatively equal and substantial, that it is error **as a matter of law** to award permanent periodic alimony. This contention is erroneous as this Court clearly announced in ***Walter***. All of the criteria listed in ***Canakaris*** must be given proper consideration. The rule announced by the Fifth District and espoused by the Respondent limits consideration to one criteria: the value of the parties' estates. This is not a correct view of Florida law.

The Respondent contends that the needs of the Wife are inflated due to the inclusion of $3,500.00 as the cost of maintaining the Coachwood residence awarded the Husband. The following

factors should be noted in rebuttal: 1) there is no evidence that the **Wife's** expenses in Villa D'Este will not equal $3,500.00; 2) there is no clear demarcation on the Husband's Financial Affidavit regarding **his** expenses at Villa D'Este [Petitioner's Appendix A. 12-13]; 3) the Wife received $3250.00 in temporary monthly alimony from the Husband, plus he paid the cost of maintaining the Coachwood residence, $3,500.00 while she lived there. [Petitioner's Appendix A. 12-13]; and 4) the Wife testified that she was in need of more funds than she received in temporary support. [R. 31] There is evidence to support the Wife's need.

In addition, this is a 22 year marriage where the Wife forfeited her opportunity to pursue a career for family obligations. She has no job and no opportunity to start a career. {Petitioner's Initial Brief on Merits at p. 3] Whereas the Husband demonstrates the other end of the spectrum:

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 th stock market prior to the 1987 crash;

3. Exceeded the performance of most major stock brokerage firms in the U.S. during 1987; and

4. Earned $16,124.00 per month at the time of final hearing without working at it. [Petitioner's Initial Brief on Merits at pp. 4-6, 10]

It is extremely intersting to note that the Husband fails to discuss the case which comes closest to the situation at bar, ***Kelly v. Kelly***, 557 So. 2d 625 (Fla. 4th DCA 1990). In that case the Fourth

District ruled that it could not find the trial court's award of permanent periodic alimony to be an abuse of discretion despite the facts that:

1. The wife left the marriage with more than 1 million dollars in assets, much of which is liquid;

2. She was 38 years old, in good health and she earned $13,000 a year;

3. She received child support of $1,500 per month;

4. Her monthly income covered her monthly expenses without alimony.

As in ***Kelly***, there is competent evidence to support the alimoy award in ***Hamlet***.

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 Respondent contends that an award of permanent periodic alimony cannot legally be made to offset a drastic reduction of the marital estate. No support is given for this proposition. Petitioner respectfully submits that such is a valid consideration for which some evidence does exist in the record.

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.

Respondent offers no specific answer for this section which simply states that the permanent periodic alimony award is within the bounds of judicial discretion as a result of the combination of any of the factors discussed in Sections IV A-C of this Brief.

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

The Respondent continues with his support for the ***Hamlet*** rule "divide and review". A seven page distribution - listing properties - does not equal findings of fact. Again it is inconsistent with basic fundamental appellate principles to split a trial court's judgment and use one portion to attack the other.

Reversal is mandated!

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 13th day of August, 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 13th day of August, 1990 to: **THOMAS M. ERVIN, JR., ESQUIRE,** Post Office Box 1170, Tallahassee, Florida 32302.

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

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