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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: 77,236

JOAN T. ROBERTSON,

Petitioner/Wife,

vs.

DAVID L. ROBERTSON,

Respondent/Husband.

RESPONDENT'S ANSWER BRIEF

On appeal from the District Court of Appeal,
Fourth District, State of Florida

Case No.: 89-3057

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The symbol "R" appears throughout various portions of this Brief, and refers to various pages of the Record in the trial court. The Appendix to this Brief will be referred to by the symbol "APP", followed by the appropriate page number of the Appendix.

STATEMENT OF THE CASE AND FACTS

DAVID L. ROBERTSON and JOAN T. ROBERTSON, were married on July 6, 1985, in North Carolina. The ROBERTSONS moved to the Fort Lauderdale area shortly thereafter, and entered into a purchase and sale agreement on July 26, 1985, for what would turn out to be for their marital residence. This property became the residence of the parties throughout the duration of their marriage. The home was purchased for $180,000.00 cash, all of the funds of which came solely from the Husband's separate assets. There was never any dispute as to this issue, as the parties had stipulated in the pre-trial stipulation that the funds were the separate property of the Husband. (APP 1) The issue that had to be decided by the trial court in reference to the home, was the issue of a "gift", and whether or not the Husband had intended on making a gift when the title to the property in question was placed in joint names. The trial court made a determination based on the evidence presented that the Wife, in fact, met her burden of proof in demonstrating that the Husband intended on making a gift to her of one-half (1/2) interest in the marital residence. On appeal to the Fourth District Court of Appeal, the finding of the trial court was reversed. The appellate court, after review of the record, found that there was absolutely no competent evidence to support a finding of donative intent upon the part of the Husband, and that the Wife failed to sustain her burden of proof. (APP 2)

This appeal comes before this court upon the Wife's Petition seeking review based upon conflict between the opinion of the Fourth District Court of Appeal in this case, and the opinion of the Second District Court of Appeal rendered in Straley v. Frank, 15 FLW 2564 (Fla. 2DCA, October 11, 1990).

SUMMARY OF ARGUMENT

The Wife presents two (2) issues before this court for review. The first issue concerns the effect, if any, that the Equitable Distribution Statute, effective October 1, 1988, has upon the long established principle of special equity that was enunciated by this court in the case of Ball v. Ball, 335 So.2d 5 (Fla. 1976), and all cases subsequent thereto. It is the Wife's contention that the Equitable Distribution Statute revises the standards that have previously been applicable, and various burdens and presumptions are reverted back to pre-Ball standards.

The Husband respectfully submits to this court that the Equitable Distribution Statute merely codifies the Ball case and all cases subsequent thereto, and makes no modifications to established burdens and presumptions. Furthermore, the purchase of the marital residence by Mr. & Mrs. Robertson occurred in 1985, three (3) years prior to the effective date of the Equitable Distribution Statute, effective October 1, 1988.

The second issue that the Wife presents to this court for review concerns the substitution of the appellate court's judgment for that of the trial court as a finder of fact. The Wife's position is that it is an improper function of the appellate court to substitute its judgment for that of the trial court. The Husband's contention is, and which was appropriately demonstrated to the appellate court, that the appellate court must and has an obligation to substitute its judgment for that of

the trial court, when there is no competent evidence to support the findings by the trial court.

A R G U M E N T

ISSUE ONE

WHETHER THE EQUITABLE DISTRIBUTION STATUTE CHANGES THE "NO-GIFT" PRESUMPTION UNDER BALL V. BALL, AND IMPOSES UPON THE DONOR SPOUSE CLAIMING A SPECIAL EQUITY IN THE TENANCY BY THE ENTIRETY'S PROPERTY THE BURDEN OF PROVING THAT NO GIFT WAS INTENDED.

Any arguments on this issue must be first directed to the case of Ball v. Ball, 335 So.2d 5, 7 (Fla.1976). As the Wife has pointed out, the Ball case held:

> "A special equity is created by an unrebutted showing... that all of the consideration for property held as tenants by the entireties, was supplied by one spouse from a source clearly unconnected with the marriage relationship. In these cases, the property should be awarded to that spouse, **as if the tenancy were created solely for survivorship purposes during coverture,** in the absence of contradictory evidence that a gift was intended." Ball v. Ball, 335 So.2d 5, 7 (Fla.1976)

In addition to the principle of special equity as established in Ball, the case also establishes the presumption that the property has been jointly titled solely for survivorship purposes during coverture. Thus, if the presumption of joint tenancy for purposes of survivorship during coverture is the standard, the donee spouse clearly has the burden of proof to overcome that presumption. The usual argument employed to defeat the donor's special equity is that the titling of the property in joint names constitutes a "gift".

JOAN T. ROBERTSON submits to this court the concept that

Florida Statute 61.075 (3)(a) 5, reverses the long-established principles enunciated in Ball v. Ball, which in turn would require the donor to prove the lack of donative intent. This, in turn would also eradicate the previous existing presumption that the tenancy was created soley for survivorship purposes. DAVID L. ROBERTSON would respecfully submit to this court that Section 61.075 (3)(a) 5 codifies the concept as stated in Ball v. Ball and it's progeny and by the Statute's reference to the term of art "special equity", the Statute directs the litigants back to existing case law standards.

Section 61.075 (3)(a) 5 does not provide that a gift is now to be presumed, notwithstanding the views expressed by the Second District Court in Straley v. Frank, 15 FLW 2564 (Fla. 2DCA, October 11, 1990). In the case of tenancy by the entirety real property, the Statute (like the decision in Ball) simply provides an initial presumption that record title "speaks for itself", so that ordinarily such property would be a marital asset, unless a special equity is established by virtue of the expenditure of non-marital funds. The "marital asset" presumption contained in the Statute has nothing to do with the "no-gift" presumption addressed in Ball.

A court is empowered to equitably distribute marital assets and liabilities in such proportions as are equitable. This authority is found under Section 61.075 (1). Marital assets are any assets which are acquired during the marriage, no matter in whose name the asset is titled. This definition of a marital

asset is found under Section 61.075 (3)(a) 1. Real property is presumed to be a marital asset, if held as tenants by the entirety. If a claim is made to the contrary, the burden is on the party making the claim to prove a special equity. Once a party has proven a special equity, he has overcome the presumption of a marital asset; once this presumption has been overcome, the property has been established as the claimant's separate property, and not subject to equitable distribution. The equitable distribution Statute is silent on the issue of donative intent, but it is submitted by the Husband that once the special equity has been established, as stated in the Ball case, the presumption then carries that the joint tenancy was created solely for survivorship purposes during coverture, and that this presumption shall carry unless the donee spouse can establish a gift on the part of the donor.

In the instant case, had there been no evidence of a special equity, it would have been appropriate for the trial court to treat the parties' residence as a marital asset. However, because the parties stipulated that the Husband's non-marital assets were the source of funds used to purchase the residence, (APP 1), the Husband established his special equity, and the burden then shifted to the Wife to establish that a gift was intended. In the absence of substantial competent evidence to support the finding that a gift had been made, the Fourth District Court of Appeal correctly concluded that the trial court erred in denying the Husband's special equity. The result is

mandated both by the plain language of the equitable distribution Statute and established Florida case law. The Second District has misconstrued Section 61.075 and that court's interpretation of the Statute is inconsistent with the equitable distribution doctrine that has evolved in Florida since the Ball case, and Canakaris v. Canakaris, 382 So.2d 1197 (Fla.1980). Prior to both these cases, upon a divorce, property was distributed to the parties, based upon the status of record title. Thus, solely owned assets were usually treated as non-marital, even if acquired during the marriage. Likewise, the parties ordinarily became equal owners as tenants in common of former entireties property, even when one spouse had furnished the consideration for the asset from that spouse's non-marital funds.

In contrast, under the equitable distribution doctrine, the marriage relationship is treated as an economic partnership and the status of record title is irrelevant. Thus, solely owned assets acquired during the marriage are now treated as marital assets.[1] See, e.g., Section 61.075 (3)(a) 1. By the same token, however, when non-marital assets are used to acquire jointly titled property, the contributing spouse is entitled to a credit

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[1] Based on the reasoning in Straley, if gifts are now to be presumed, based on the status of record title, it logically follows that a soley owned asset acquired during the marriage by a marriage partner ought to be viewed as an asset that has been "given" to the "owner" by the non-title holding spouse who presumably acquiesed in the title arrangement. Both the case law and the statute reject the view that the status of title in and of itself connotes a gift.

for his or her contribution, again without regard to the status of record title. Although Ball speaks in terms of record title and presumptions with respect thereto, subsequent case law makes it clear that the concept of a special equity is intended to fairly credit a marital partner for non-marital capital contributions toward the acquistion of marital assets. See, e.g., Landay v. Landay, 429 So.2d 1197 (Fla.1983). By construing Section 61.075 as reversing the Ball case, the Second District Court of Appeal erroneously perceives a legislative reversal of fifteen (15) years of equitable distribution case law, and a revival of the title theory that was rejected in Canakaris.[2]

Section 61.075 speaks in terms of marital assets and non-marital assets. Marital assets are to be divided between the parties in an equitable fashion, based upon specific criteria, and non-marital assets shall be set apart to each spouse by the court. Section 61.075 (1). Non-marital assets include "assets acquired.... by either party, prior to the marriage, and assets acquired in exchange for such assets...". Section 61.075 (3)(b) 1.

The Statute ignores the status of title by allowing a

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[2]Ironically, the views expressed by the panel in Straley also conflict with recent decisions of other panels of the Second District. See, e.g., Davis v. Carr, 554 So.2d 669 (Fla.2d DCA 1990) (applying post-Ball special equity principles without any mention of section 61.075) and Miceli v. Miceli, 533 So.2d 1171, 1172 (Fla.2d DCA 1988) (stating that Section 61.075 is "essentially" a codification of existing case law).

tracing of assets from their pure pre-marital form, to an asset exchanged for that original asset. The name in which any asset is held, is irrelevant under the Statute, thus comporting with the general principles established under Ball and Canakaris, for identifying special equities.

To overcome the presumption that real property held by the parties as tenants by the entirety is a marital asset, the claimant must prove a special equity. Therefore, proof of special equity overcomes a presumption that the property is a marital asset and thereby converts the property into a non-marital asset. To become a marital asset once again, the donee spouse would be required to prove that a gift was made, pursuant to Section 61.075 (3)(a) 3, which provides that inter-spousal gifts are marital assets. Non-marital assets are not subject to equitable distribution by the court under Section 61.075. DAVID L. ROBERTSON met his initial burden in the trial court, based upon the stipulation of the parties that the residence was purchased with the separate funds of the Husband. (APP 1). Having established his special equity and carrying with him the presumption found in Ball v. Ball, that

> "the tenancy is created solely for survivorship purposes during coverture",

the property must be awarded to the Husband, unless the Wife can clearly establish donative intent by competent substantial evidence to overcome the presumption established by Ball v. Ball.

The rule proposed by the Straley court will make it far more difficult (if not impossible), as a practical matter, for any divorcing spouse to establish a special equity based on the expenditure of non-marital funds. In the vast majority of cases, it will be impossible for a special equity claimant to affirmatively establish that a gift was not intended. Thus, if the Straley court is correct, non-marital contributions toward the acquisition of jointly titled property will now rarely receive recognition upon a divorce. This conclusion is totally inconsistent with Section 61.075, which mandates that non-marital assets must be set aside and returned to the parties before the court undertakes an equitable distribution of marital assets, i.e. the assets acquired during the marriage partnership as a result of marital funds and marital efforts.

In essence, what JOAN T. ROBERTSON is arguing to this court is that once a special equity has been proved, the presumption as enunciated in Ball v.Ball, that jointly held property was created solely for survivorship purposes during coverture, is no longer of any validity. Nowhere in the Equitable Distribution Statute can such a presumption be found.

The Wife suggests that the Husband has an obligation to step forward and offer some reasonable explanation as to why property was placed in joint names, after having proven a special equity, since it was his actions that have allegedly created or muddled the situation. Since the Ball case and all cases that follow the analysis adopted by Ball indicate that a presumption of tenancy

solely for survivorship purposes exist, it is submitted that the Husband has muddled absolutely nothing, and therefore the burden continues to be placed upon the Wife in this case to overcome the presumption that has been well established under Florida law over the past fifteen (15) years.

Interestingly enough, the Wife in these proceedings never raised the issue of a shifting of the burden of proof in the trial court proceedings, and to the contrary, applied the principles as established under the case of Ball v. Ball, including all presumptions therein, to the trial court in this case. The first varying interpretation of the Statute submitted by the Wife, came only after the decision in the Straley case. Apparently the Wife interpreted the Equitable Distribution Statute in the same fashion as the Husband did at the trial court level.

There have been a long line of cases since the Ball decision which reaffirm and which clarify the distinction between inter vivos gifts and testamentary gifts. One such example is found in the opinion of Crews v. Crews, 536 So.2d 353 (Fla. 1DCA, 1988). The court stated on Page 355:

> "Most all marriages are entered into with the expectancy of enduring and that fact should not overcome the presumption that extraordinary contributions are not gifts. Such an initial expectancy should not defeat a legal presumption. As well, a spouse's intention to make a gift of an extraordinary contribution upon that spouse's death, should not be equated to an intention to do so inter vivos. To allow that a spouse's joint titling of property for the purpose of probate avoidance manifests an inter vivos donative intent would needlessly blur a

> distinction between inter vivos and testamentary gifts."

Once a special equity has been established, it is no easy task to obliterate it. The court stated in Merrill v. Merrill, 357 So.2d 792, (Fla.App. 1978) as follows:

> "We cannot read Ball v. Ball 335 So.2d 5, 7 (Fla.1976) as holding that a word or two of testimony by the recipient spouse, to the effect that the other intended a gift, obliterates the special equity resulting from an un-rebutted showing that the grantor spouse acquired the property from sources entirely independent of the marriage. Such a reading of Ball would manipulate its doctrines mechanically, if not magically."

In essence, the Merrill case establishes without any doubt, the recognition of a special equity, and once that special equity has been recognized, it can only be taken away by clear and convincing evidence of a gift.

This very court gave recognition to a special equity in Marsh v. Marsh, 419 So.2d 629, 630 (Fla.1982), and stated that:

> "The special equity may be defeated, however by "contradictory evidence that a gift was intended" at the time of the transfer."

Thus, once again having established a special equity, the burden on the claimant goes no further, or to state it another way, the burden to produce further evidence of entitlement to the special equity ceases, and can only be defeated by clear and convincing evidence that a gift was intended.

Historically, there does not appear to be any cases which would indicate a position contrary to that found in Ball v. Ball.

On the contrary, all cases subsequent to Ball would indicate a strengthening of the position in that case. For the Wife to now argue before this court that the equitable distribution Statute has reversed the established concepts under the Ball case, and reverted back to the pre-Ball standards, is without any judicial support precedent to support such a position.

Even if one were to assume that the new Equitable Distribution Statute shifts the burden to the donor to prove lack of donative intent, this court should find harmless error. DAVID L. ROBERTSON testified that at no point in time did he ever intend on making a gift of any of his interest in the marital residence to his Wife. (R10) MR. ROBERTSON also indicated that he had children for over thirty (30) years, from a prior marriage, and there was no way in the world that he would give the kind of money involved after that short of a marriage to his Wife. (R17) If the court were inclined to accept the argument set forth by the Wife that the burden of proof shifts to the Husband in this particular case to prove lack of donative intent, the Wife would fail as well, since the record is replete with evidence to substantiate lack of donative intent. In essence, if the burden is on the Wife to prove donative intent, she fails, and if the burden is on the Husband to prove lack of donative intent, he prevails. Any errors that may have been committed by the trial court in applying an improper standard as to burden of proof would constitute harmless error, and therefore the decision of the District Court of Appeal should be affirmed.

As a final note, the Husband submits that since the purchase of the marital residence occurred in 1985, and that the Equitable Distribution Statute became effective October 1, 1988, that same would have no application or retroactive effect on the facts of this case.

ISSUE TWO

WHETHER THE LOWER COURT'S DECISION VIOLATES THIS COURT'S DECISION IN MARSH.

A trial court's ruling must be supported by competent substantial evidence as stated in Farah v. Farah, 424 So.2d 960, (Fla. 3DCA 1983). A review of the record in the instant case readily reveals that the Wife failed to prove the Husband's donative intent at the time that the marital home was acquired in joint names. For example, JOAN T. ROBERTSON responded to the Husband's line of questioning, found on Page 75 of the Record, as follows:

"MR. BURTON:	Did you ever have any discussions where how the property is going to be titled prior to taking title to the property? Were there any discussions that had ever occurred between you and your Husband?
MRS. ROBERTSON:	No, we really did not discuss it before that. O.K. It was obvious that it was going to be our home though. The home was purchased for us.
MR. BURTON:	Your testimony though today is that you never had any discussions with Buck prior to taking title to that property?
MRS. ROBERTSON:	It was always the impression that it was going to be our home. I mean he didn't say, lady, I am not going to leave this to you, lady I plan to -- it was our home. We were on our honeymoon."

On Page 76 of the Record, the dialogue continued:

"MR. BURTON: But, I think you are avoiding the issue. The question was: Did you have any explicit discussion with Buck concerning how title to that property would be taken, prior to the closing.

MRS. ROBERTSON: The answer is still no."

The essence of the dialogue and the responses elicited from Mrs. Robertson unequivocally demonstrate that there was never any intention of making a gift of Mr. Robertson's special equity in the residence to Mrs. Robertson. The Wife has pointed out, as well as did the trial court in its findings and final judgment, (APP 2), that since a Will was executed by Mr. Robertson which left his jointly held property to his Wife, and that the only jointly held property was, in fact, the marital residence, that this demonstrated a donative intent to create a gift. The Husband would submit that this indicates the contrary, that it was only his intention that the Wife should have the residence upon his death, and that the intention was not to establish an inter vivos transfer. One important point to note in this regard is that this particular document which the Wife claims to be a valid Will, (APP 3), was in fact prepared by the Wife, and submitted to the Husband for his signature at her request and direction.

Mr. Robertson, in response to questions from William G. Crawford, Jr., Esq., counsel for the Wife, has truly recognized his role in this marital relationship, as found in the Record on Page 28:

"MR. CRAWFORD: Now, you testified that you believe that this marriage is irretrievably broken. Do you know that your Wife has made some attempts to reconcile the marriage?

MR. ROBERTSON: Oh, she's made attempts, but you know -- I mean, why, I feel like a cow that's been milked to death. Everytime I turn around, it's money, money, money. It doesn't take a fool long to understand what she wants me for."

On direct examination by her attorney, Mrs. Robertston responded to the following question (R 92):

"MR. CRAWFORD: Allright. Was it your impression or not that David Robertson was making a gift of an interest in that property to you at that time?

MRS. ROBERTSON: Yes. It certainly was. It was our home. Never any indication of anything otherwise. It was our home."

Mrs. Robertson was unable to offer any evidence to show donative intent by Mr. Robertson. Her only evidence that she was able to put forth before the court was her impressions and feelings. She was unable to provide any concrete evidence to the trial court to establish donative intent. The trial court improperly found that she had, in fact, established donative intent. The appellate court was well within its function to reverse the findings of the trial court if the record was devoid of substantial competent evidence to support that finding, and clearly the record is totally devoid of any such evidence.

THe only evidence Mrs. Robertson was able to present to the trial court in support of her contention of a gift of the marital

residence, was the fact that the parties entered into a purchase and sale agreement (APP 4), and that a deed was subsequently drafted, conveying the property to the parties as husband and wife. (APP 5). This is insufficient evidence to defeat a special equity. See, e.g., Agudo v. Agudo, 449 So.2d 909, 910 (Fla. 3DCA 1984), where the court stated as follows:

> "As to the special equity, the evidence is undisputed that all the funds to purchase this home came from the proceeds of a sale of a home owned by the husband prior to the marriage. The husband testified that title was put in both names for probate purposes, and not with the intention to create a gift. The wife offered no testimony, beyond the fact that the deed was in both names, to meet her burden to establish a gift. Therefore we find no error in the trial judge awarding the husband the entire house, which was purchased entirely with his pre-marital assets. Ball v. Ball, 335 So.2d 5 (Fla. 1976)."

In the case of Rabben v. Rabben, 468 So.2d 500 (Fla. 5DCA 1985), the District Court of Appeal reversed the trial court's denial of the husband's claim for a special equity, which had found that there had been an executed gift based on "the totality of the circumstances". The Rabben court further stated that findings of fact by a trial court are presumed to be correct and are entitled to the same weight as a jury verdict, Marsh, unless there is a lack of substantial evidence to support the court's conclusion. Strawgate v. Turner, 339 So.2d 1112 (Fla. 1976). The appellate court found no evidence to support the trial court's conclusion that a gift was intended, based on the titling of the property in joint names of the parties.

The critical issue on which the Wife failed to provide any evidence was the Husband's intention to make a gift when he

placed the property in the joint names of the parties. Instead the Wife attempts to substantiate her position with documents such as Wills, which were created well after the taking of title to the property, and which offer no proof on donative intent. Johnson v. Johnson, 454 So.2d 797 (Fla. 4DCA 1984) requires that donative intent be established at the time of the conveyance.

The Wife's reliance on the case of Laws v. Laws, 364 So.2d 798 (Fla. 4DCA 1978) in support of her position, is misplaced. The Laws case dealt with several conveyances of the property through a strawman, and was previously owned by the Wife prior to the marriage. These facts are clearly distinguishable.

A final word on this issue can be found in the case of Bickerstaff v. Bickerstaff, 358 So.2d 590 (Fla. 1DCA 1978). In that case, the Wife's sole testimony to prove donative intent on the part of the Husband, in an attempt to establish a gift of one-half (1/2) of the residence, was her "understanding" that he intended it as a gift to her when he purchased the property. However, a word or two of testimony by the recipient spouse to the effect that the other intended a gift does not obliterate the special equities resulting from an unrebutted showing that the grantor spouse acquired the property through sources entirely independent of the marriage. As previously indicated, the only testimony offered by Mrs. Robertson was her "impression" that a gift was intended and nothing more. Impressions or understandings, as indicated in Bickerstaff, are evidence of and probative of nothing.

CONCLUSION

This court should affirm the decision of the lower court who properly applied the appropriate standards in reaching the conclusion they did. The new Equitable Distribution Statute codifies the existing case law in Florida under Ball v. Ball and it's progeny, and does nothing to shift the burdens of proof or alter any existing presumptions.

This court also properly substituted its judgment for that of the trial court when the decision of the trial court was not supported by competent substantial evidence as stated in Farah v. Farah, 424 So.2d 960 (Fla. 3DCA, 1983).

Any award for attorney's fees claimed by the Wife should be denied.