O.A. 10-4-91 067 w/app.

IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 77,236

FILED
SID J. WHITE
JUN 5 1991
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

JOAN T. ROBERTSON,

Petitioner/Wife,

vs.

DAVID L. ROBERTSON,

Respondent/Husband.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

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

Case No. 89-3057

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PREAMBLE

Petitioner will be referred to as "the Wife" or "Appellee" and Respondent will be referred to as "the Husband" or "Appellant".

The record in the trial court will be referred to by the symbol "R." followed by the appropriate page number. The appendix to this brief will be referred to by the symbol "App." followed by the appropriate page designation.

Exhibits admitted into evidence in the trial court will be referred to as either "Husband's Ex. No." or "Wife's Ex. No." followed by the appropriate number. Copies of selected exhibits are included in the Appendix.

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STATEMENT OF THE CASE

In the trial court, the Husband petitioned for dissolution of marriage and for award of a special equity in the Wife's interest in the marital residence and a North Carolina note and deed of trust for $46,400, both titled in joint names. (R. 113-114, 153-155). The Wife counter-petitioned for counseling pursuant to section 61.052, Florida Statutes, or in the alternative, for equitable distribution of marital assets pursuant to section 61.075, Florida Statutes, rehabilitative alimony, attorney's fees, suit money and court costs. (R. 115-116, 131-134).

In the court below, the Husband appealed the final judgment dissolving the marriage between the parties and finding that the Husband had intended a gift to the Wife when the marital residence was acquired and placed in joint names. The Husband also appealed the failure of the trial court to provide for the payment to the Husband of certain promissory notes executed by the Wife during the marriage as well as certain rental income payments collected by the Wife. Lastly, the Husband appealed the trial court's award of attorney's fees in favor of the Wife.

The Wife cross-appealed that portion of the final judgment denying the Wife's claim that the Husband intended a gift of an interest in a certain promissory note and deed of trust in joint names resulting from the sale of pre-marital property located in North Carolina.

On December 7, 1990, the court below rendered its decision reversing the trial court's finding that the Husband intended to

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give the Wife a one-half interest in the marital residence and stated:

> When a party proves that all of the consideration for property held as tenants by the entirety has been supplied by that party from a source clearly unconnected with the marital relationship, that party should be awarded the property as a special equity unless the other party proves that a gift was intended. *Ball v. Ball*, 335 So.2d 5 (Fla. 1976). The party disputing the existence of a special equity has the burden of proving the other party's donative intent. *Johnson v. Johnson*, 454 So.2d 797 (Fla. 4th DCA 1984).

(App. 1-2).

Additionally, the court below denied the Wife's cross-appeal seeking an interest in the North Carolina note and deed of trust in joint names, her claim for appellate attorney's fees as well as the Husband's remaining claims.

On November 21, 1990, the Wife filed her motion for rehearing or for certification of conflict. On December 10, 1990, the court below entered an order denying the Wife's November 21, 1990 motion.

On January 8, 1991, the Wife filed with the lower court her notice to invoke the discretionary jurisdiction of this court. On May 7, 1991, this court accepted jurisdiction of this cause.

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STATEMENT OF THE FACTS

The parties married on July 6, 1985 in Winston-Salem, North Carolina after they had dated for approximately two years. (R. 31). The Wife was self-supporting, acting as a real estate manager and earning approximately $21,000 per year, including housing. (R. 61,89). The Husband was a retired general contractor. (R. 26). The Husband having persuaded the Wife to move to Florida (R. 32,90), both parties entered into a deposit receipt contract on July 26, 1985 to purchase a single-family residence for $180,000 cash. (Wife's Ex. No. 1; App. 6-7). The Wife negotiated the purchase contract for both parties. (R. 10; 17).

On September 26, 1985 the purchase was closed and title to the property was taken by the parties as tenants by the entireties. (Wife's Ex. 2; App. 10). The parties stipulated that all of the consideration was the Husband's separate property accumulated prior to the marriage. (R. 156-158). The Wife testified that the Husband intended a gift. (R. 75-76; 91-92). The Husband testified that no gift was intended. (R. 17). Both parties signed the closing statement. (Husband's Ex. No. 1; App. 8-9). Less than six months later, on March 14, 1986, the Husband executed a will in which the Husband provided:

> I will, devise and bequeath unto my Wife, JOAN T. ROBERTSON, the homeplace located at 5555 Bayview Drive, Ft. Lauderdale, Florida, automobiles, all household and personal effects, and one third of all properties owned solely by me. Jointly owned properties shall **remain** the property of my Wife, JOAN T. ROBERTSON. (emphasis added).

(Wife's Ex. No. 3; App. 11).

At the time of the final hearing, the Husband testified several times that he did not trust the Wife. (R. 28, 43). On August 31, 1989, less than three months prior to the final hearing, the Husband executed a power of attorney authorizing the Wife in his absence to list the property and to negotiate offers to purchase the Husband's interest. (Wife's Ex. No. 4; App. 14).

In 1987, the Husband purchased an automobile in his name alone; a 1981 Chevrolet station wagon, which the Husband gave the Wife to drive. (R. 51, 93). In 1987, the Husband also purchased a boat for himself for $26,000. (R. 23). The Wife co-signed a note for the purchase (R. 93); however, the boat was titled in the Husband's name alone. (R. 49). On October 23, 1987, the Husband's North Carolina townhouse apartment, which had been acquired by him prior to marriage and titled in his name alone, was sold and a $46,400 promissory note and deed of trust naming both him and the Wife as joint tenants were taken back. (R. 11-13).

A month before, on September 17, 1987, the Husband had written his North Carolina attorney and instructed him to prepare a note and deed of trust showing both the Husband and Wife as beneficiaries. (Husband's Ex. No. 2; App. 15). The Wife also testified that the Husband specifically told her that he was making a gift of the note and deed of trust. (R. 74, 77). The Husband testified at trial that he had no intention of making a gift. (R. 10).

After the final hearing, on November 17, 1989, the trial court entered a three-page order entitled "Finding and Final Judgment,"

finding, among other things:

> In his Last Will and Testament, DAVID LEE ROBERTSON, SR., provided as follows:
>
> > "Jointly owned property shall remain the property of my wife, JOAN T. ROBERTSON."
>
> The marital residence appears to be the only jointly owned real estate that the parties ever owned, so it appears that the Petitioner's [Husband's] intent that this jointly owned and titled marital residence was to remain the property of Joan T. Robertson. Further, the evidence does not show any other intention but that of joint ownership in the marital residence until the petitioner filed for a dissolution of the marriage and then asserted a special equity.
>
> The court finds that the described marital residence and furnishings, is joint property of the parties.

(R. 161-163; App. 3-5).

The trial court also awarded the Wife the sum of Five Hundred Dollars ($500.00) per month for a six-month period as rehabilitative alimony.

SUMMARY OF ARGUMENT

ISSUE I

First, the equitable distribution statute changes the "no-gift" presumption under *Ball v. Ball*, 335 So.2d 5 (Fla. 1976) and imposes upon the donor spouse claiming a special equity in tenancy by the entireties property the burden of proving that no gift was intended. The lower court applied the incorrect rule and imposed the burden of proving that a gift was intended on the recipient spouse.

Under the equitable distribution statute, tenancy by the entireties property is presumed to be marital property. Such property is then to be equitably distributed.

Second, distribution of marital property should be approximately equal unless there is justification for a disparity of treatment. The burden of proving a justification should be on the party seeking disparity of treatment.

ISSUE II

Alternatively, the lower court erred in substituting its judgment for that of the trial court by ruling that the recipient spouse had failed to sustain her burden on the question of donative intent in violation of this court's decision in *Marsh v. Marsh*, 419 So.2d 629 (Fla. 1982).

ARGUMENT

ISSUE I

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 TENANCY BY THE ENTIRETIES PROPERTY THE BURDEN OF PROVING THAT NO GIFT WAS INTENDED.

Petitioner submits that the foregoing question should be answered in the affirmative.

Fifteen years have elapsed since this court announced *Ball v. Ball*, 335 So.2d 5 (Fla. 1976)[1], holding that:

> [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. [footnote omitted] 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).

Petitioner suggests that under the equitable distribution statute the law has now changed as reflected in the Second District Court of Appeal's decision in *Straley v. Frank*, 15 F.L.W. 2564 (Fla. 2nd DCA October 11, 1990) [2]. In *Straley*, the Second District ruled that Florida's new equitable distribution statute:

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[1]The *Ball* court noted that the respondent failed to either appear or file a brief with the Court.

[2]In *Straley*, the entire Second District recused itself and a Fifth District panel heard the appeal as the Second District. Motions for rehearing, for rehearing *en banc*, for clarification, and for certification were denied. The Second District court recently granted a hearing *en banc*.

> ...appears to undo the "no gift" presumption evolved by *Ball v. Ball*, 335 So.2d 5 (Fla. 1976); and returns the state of Florida's law on this point back where it was in *Davis v. Davis*, 282 So.2d 655 (Fla. 4th DCA 1973) and *Tiffany v. Tiffany*, 305 So.2d 798 (Fla. 4th DCA 1975). ***Under this statute, the donor spouse has the burden of proving no gift was intended.*** (emphasis added).

Straley at 2564-65.

Straley specifically rules that the effect of the new equitable distribution statute upon special equity claims on jointly-held property is to now require the donor [the Husband in this appeal] to prove that no gift was intended. Under *Straley*, the result reached by the court below is entirely different.

The reasoning of the *Straley* court is founded in the language of the equitable distribution statute. As was pointed out by the Wife in the trial court (R. 106), section 61.075(3)(a)5, Florida Statutes provides:

> All real property held by the parties as tenants by the entireties, whether acquired prior to or during the marriage, shall be presumed to be a marital asset. If, in any case, a party makes a claim to the contrary, the burden of proof shall be on the party asserting the claim for a special equity.

Additionally, as the court notes, "...the equitable distribution statute defines as 'marital assets' interspousal gifts during marriage. § 61.075(3)(a)3, Fla. Stat. (1989)." *Straley* at 2565. The court states that "...even if a special equity can be asserted for spousal gifts derived from non-marital sources, it can only survive in a much paler form." *Straley* at 2565. The court observes further that section 61.075(5), expressly provides, in part:

> All assets acquired and liabilities incurred by either spouse subsequent to the date of the marriage and not specifically established to be non-marital assets or liabilities are presumed to be marital assets and liabilities. Such presumption is overcome by a showing that the assets and liabilities are nonmarital assets and liabilities.

Straley at 2565.

Applying to the instant appeal, the Wife submits that the Husband had the burden of proving that no gift was intended when title to the marital residence was taken as a tenancy by the entireties. And, in considering the evidence adduced by both parties, the Wife submits that the Husband's proof in the trial court fell woefully short of his burden. *Straley* significantly changes the status of the law in Florida as to the burden of proof in special equity cases involving jointly-titled property. *Straley* directly contradicts *Ball* and reverses the burden of proof. The burden of proof under *Straley* is now placed on the donor spouse rather than on the recipient.

WHY THE BURDEN OF PROOF UNDER *BALL* SHOULD BE CHANGED

At least five reasons exist for changing the burden of proof as it exists under *Ball*:

1. ***BALL* UNFAIRLY PLACES THE BURDEN ON THE RECIPIENT TO DIVINE THE DONOR'S INTENT.**

As the law presently exists, once the donor spouse has proven that all the consideration for jointly-titled property has come from a source unconnected to the marriage, the burden then shifts to the recipient to show that a gift was intended. But how does the recipient adduce such evidence? Petitioner contends that in

all but the most clear "I want to give you an undivided one-half present interest in the house" cases, the recipient spouse is relegated to "reading the mind" of the donor. *Ball* as interpreted by the court below, Petitioner submits, unfairly requires the recipient to discern the donor's intent when only the donor truly knows what he or she intended upon taking title as a tenancy by the entireties. Rarely, if at all, will that intent ever be clearly communicated to the recipient spouse.

2. **A STRICT APPLICATION OF *BALL* ILLOGICALLY EXCUSES THE DONOR FROM HAVING TO PROVIDE ANY REASONABLE EXPLANATION FOR TITLING NON-MARITAL PROPERTY AS A TENANCY BY THE ENTIRETIES.**

Under *Ball* as interpreted by the court below, the donor may simply say nothing in the face of titling property in joint names and prevail. Such a proposition flies in the face of both logic and fairness.

It is, after all, the decision of the donor spouse to take title jointly that has caused the problem in the first place. To defeat a gift, the donor, Petitioner submits, should be required to demonstrate "some reasonable explanation" for making the decision to take title jointly. Such explanation may be the need to place the title to property beyond the reach of creditors or to implement an estate plan. But under *Ball* as strictly interpreted by the court below, the donor need demonstrate no reason for his conduct in allowing title to be taken jointly in order to prevail. Under *Ball* as strictly interpreted by the court below, the donor bears no burden for muddying the waters created by taking title jointly.

3. **A STRICT INTERPRETATION OF *BALL* REDUCES THE CONTROVERSY TO A "SWEARING MATCH".**

Under normal circumstances, the parties are left with testifying as to their own versions why property acquired totally through the resources of one party was titled in both names. The result is often an irreconcilable conflict to be resolved by the trial court as the trier of fact with almost no bright lines to guide it in determining donative intent.

Worst of all, the Wife submits that a strict application of *Ball* encourages parties to commit perjury. There can be no worse public policy.

4. **UNDER A STRICT INTERPRETATION OF *BALL*, SUCH IMMUTABLE PROOF AS DOCUMENTARY EVIDENCE (WHICH NEVER CHANGES WITH THE PASSAGE OF TIME) BECOMES SUBORDINATE TO THE TESTIMONY OF THE PARTIES, WHICH ALMOST ALWAYS CHANGES WITH THE PASSAGE OF TIME, THE VICISSITUDES OF MARRIAGE, AND THE INTERESTS TO BE SERVED.**

Record title has become almost meaningless under the lower court's interpretation of *Ball* since once the donor has established he really is a donor (by showing all the consideration came from a source unconnected to the marriage), the recipient must then show that the donor "intended" to make a gift.

Even the lower court in at least two prior opinions written by different panels has demonstrated the efficacy of the written word over the testimony of the parties in discerning donative intent. Considering the effect of documentary evidence such as a deed versus the testimony of witnesses, the lower court in *Laws v. Laws*, 364 So.2d 798 (Fla. 4th DCA 1978) reasoned:

> Passage of time and the interest to be served have a way of coloring or changing a person's recollections, but the documentary evidence is not subject to such imperfection and stands as immutable and irrefutable memorials to the true intent of the parties.

Laws at 801.

In the case *sub judice*, four (4) pieces of documentary evidence supported the Wife's claim of gift: a contract and closing statement signed by both parties, a deed reflecting the names of both parties, and a will signed by the Husband confirming his gift to the Wife, all where the Husband had supplied all of the consideration for the purchase from a source unconnected to the marriage. There simply is no reason why all of the closing documents should reflect the Wife's name except that the Husband intended to make a gift.

In *Geddes v. Geddes*, 530 So.2d 1011 (Fla. 4th DCA 1988), the husband had claimed a special equity in a residence which was titled in both names. The court below noted:

> While conceding that the ... residence was titled in the parties' joint names, [the husband] claims that he jointly titled the property solely for estate purposes, and that he had not intended to create a vested interest in [the] wife. The deeds in evidence have no reservations or limitations upon them to indicate that the transfer was only to take place in the event of [the husband's] death, and *except for his assertion at trial, there was no testimony or evidence to support [the husband's] claim that he had been motivated to jointly title the property for estate purposes only.* (emphasis added).

Geddes at 1014.

Thus, even the court below in prior opinions has recognized the importance of record title in determining donative interest. Yet the panel of the lower court in the case at bar entirely ignored the weight of the documentary evidence. Petitioner submits the lower court below erred in applying a strict interpretation of

Ball to the facts adduced before the trial court. The burden should have been on the Husband to prove that no gift was intended.

5. **THE EQUITABLE DISTRIBUTION STATUTE REPRESENTS A CHANGE IN PUBLIC POLICY FAVORING THE TREATMENT OF THE MARRIAGE RELATIONSHIP AS AN ECONOMIC PARTNERSHIP IN WHICH PROPERTY TITLED IN BOTH NAMES IS PRESUMED TO BE MARITAL PROPERTY.**

In dual property (non-community property or common law) jurisdictions, the general rule appears to be that a spouse's separate property which has been transferred into joint ownership becomes marital property. One leading authority states:

> As a general rule, courts in dual property jurisdictions have concluded that a spouse's separate property that is transferred into joint ownership becomes marital property. Departures from this rule, based on statutory construction, are found in Maryland and North Carolina. In those states, separate property transferred into joint ownership retains its character as separate property.

J. GREGORY, THE LAW OF EQUITABLE DISTRIBUTION, ¶ 2.13 (1989).

North Carolina, however, apparently has now joined the overwhelming majority of jurisdictions concluding that separate property transferred into joint ownership becomes marital property. In 1988, the Supreme Court of North Carolina held:

> When a spouse uses separate property in the acquisition of property titled by the entireties, a gift to the marital estate is presumed. This presumption is rebuttable only by clear, cogent and convincing evidence that a gift was not intended.

McLean v. McLean, 323 N.C. 543, 555, 374 S.E.2d 376, 383 (N.C. 1988)[3]

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[3]Interestingly, the Husband and Wife in the case at bar were both North Carolina residents when they married in Winston-Salem, North Carolina. At trial, the Husband asserted that he titled the

Golden articulates the rationale for the majority rule presuming property so titled to be marital property:

> If a spouse could claim separate property status for jointly held property merely by showing that such property was acquired in exchange for separate property, the common law presumption would be severely undermined. In fact, the other spouse could be subjected to greater hardships by virtue of mechanistic application of the *remedial* equitable distribution statute than under the common law. (emphasis supplied).

L. GOLDEN, EQUITABLE DISTRIBUTION OF PROPERTY, § 5.30 (1983).

Maryland appears to be the only dual-property state now adhering to the rule that separate property, even though jointly titled, which is acquired in exchange for separate property retains its separate character. It is submitted that Florida should now join the overwhelming majority and adopt the better rule that:

> When a spouse uses separate property in the acquisition of property titled by the entireties, a gift to the marital estate is presumed. This presumption is rebuttable only by clear, cogent and convincing evidence that a gift was not intended.

LEGISLATIVE HISTORY OF FLORIDA'S EQUITABLE DISTRIBUTION STATUTE

None of the legislative background materials collected by the author appears to shed any light on the burden of proof issue. Neither a summary of the minutes of the Florida Senate Judiciary - Civil Committee meeting on Senate Bill 152 [the equitable distribution bill] on November 4, 1987 (App. 16-35), nor the state

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marital residence in Florida in both names only because under North Carolina law he believed he was required to do so. (R. 18). The Wife submits that the result for the Husband in North Carolina under *McLean* would have been exactly the same as it was in the trial court.

Senate and House staff reports (App. 36-39; 40-43) provide any guidance in determining what the legislative intent might have been with respect to separate property later transformed into tenancy by the entireties property.[4]

The Florida Bar *News* in reporting passage of the bill in 1988 simply stated:

> A bill designed to encourage statewide uniformity in the distribution of assets following divorce has won approval from the Florida Legislature....All real property held by the parties as tenants by the entireties, whether acquired prior to or during the marriage, are to be presumed marital assets. If a party makes a claim to the contrary, the burden of proof rests on the party asserting the claim for special equity.

Equitable Distribution Bill Approved by Legislature, FLA. B. NEWS, June 15, 1988.

At best, the statute seems to indicate a preference for both marital and separate property. Florida would appear to be in the same boat as was North Carolina before the *McLean* decision. And, as was noted by one North Carolina commentator prior to the *McLean* decision, *supra*:

> It appears that the North Carolina statute is, to a considerable degree, at war with itself.... In effect, the statute indicates preferences for both marital and separate property classifications.... It remains for the judiciary to delineate the precise

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[4]Also consulted were audio tapes obtained from the Florida State Archives of the March 2, 1988 bill hearing before the Real Property and Family Law subcommitee of the state House Judiciary Committee, the March 9, 1988 state House Judiciary Committee meeting, and the April 6, 1988 state Judiciary - Civil Committee Meeting. The tape of the March 2, 1988 hearing was unintelligible to the author, the remaining tapes did appear not offer any insight on the precise question before this court.

> boundaries between the classifications and to effect a reconciliation between the dual legislative purposes.

Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N. C. L. REV. 247, 271 (1983).

In the case at bar, Petitioner respectfully suggests that it remains for this court to "delineate the precise boundaries" between marital and separate property under Florida's equitable distribution statute and "to effect a reconciliation between [its] dual legislative purposes". It is submitted that this court should follow North Carolina and adopt the better rule.

APPLYING THE NEW RULE TO THE FACTS IN THIS CASE

Assuming this court overrules the burden of proof under *Ball* in light of the equitable distribution statute, the next inquiry is the application of the new rule to the facts in the case *sub judice*.

Petitioner submits that once tenancy by the entireties real property has been included among the "marital property" to be equitably distributed between the parties, the next step is for the trial court to equitably distribute all of the "marital property" in accordance with the criteria identified in the equitable distribution statute.

In the case at bar, Petitioner contends that under the new rule this court should affirm the decision of the trial court with respect to the marital residence.

Petitioner submits that the trial court considered all of the equities and the criteria set out in the statute and determined what in effect was an equitable distribution of marital property

even though the trial court did not specifically state that it was equitably distributing marital property.

Petitioner submits that the trial court determined that an award of a one-half interest in the marital residence titled in both names was equitable based upon the following factors:

1. The Wife left her employment in North Carolina to marry the Husband; both then left North Carolina for Florida where they purchased the marital residence. The Wife's career track was disrupted in order to marry the Husband. (R. 31, 62, 90).
2. The Wife's negotiation of the purchase of the residence in Florida. The Husband had, by his own admission, no involvement in the negotiations involving the selection of the house. (R. 10, 17).
3. Marital funds were expended in maintaining the home during the marriage. (R. 19, 78-79, 94).
4. The Wife labored to maintain the home and was living in the home at time of trial, months after the Husband had abandoned the residence for North Carolina and had given the Wife a power of attorney to negotiate the sale of the home in his absence. (R. 6, 43).
5. The Husband sold his separate property in North Carolina and instructed his attorney to title the Note and Deed of Trust resulting from the transaction in both names. (R. 13; Husband's Ex. No. 2; App. 15). The trial court chose not to award the Wife any part of the North Carolina note

and deed of trust for $46,400 even though the evidence at trial was clear that the Husband intended to give the Wife an interest in the Note and Deed of Trust. (R. 77).

6. The Husband testified that his marital duties required him to provide a home for the Wife. (R. 20).

7. The Husband well-knew the difference between making a gift as he did in titling the marital residence in joint name for the Wife and requiring her to sign a promissory note for loaning the Wife money. (R. 22).

8. At time of trial, the Husband had a net worth of $626,400 (R. 53) and income of $2,600 per month (R. 46) as compared to the Wife's net worth of $35,000 (Wife's Ex. No. 5) and earnings of $7 per hour on a part-time basis (R. 65).

In analyzing the foregoing facts, it is submitted that the trial court considered all the circumstances of the marriage, including these factors enumerated in the equitable distribution statute:

> (a) The contribution to the marriage by each spouse, including contributions to the care and education of the children and services as a homemaker.
>
> (b) The economic circumstances of the parties.
>
> (c) The duration of the marriage.
>
> (d) Any interruption in the personal careers or educational opportunities of either party.
>
> (e) The contribution of one spouse to the personal careers or educational

opportunities of either party.

(f) The desirability of retaining any asset, including an interest in a business, corporation, or professional practice, intact and free and clear from any claim or interference by the other party.

(g) The contribution of each spouse to the acquisition, enhancement, and production of income or the improvement of, or the incurring of liabilities to, both the marital assets and the non-marital assets of the parties.

(h) Any other factors necessary to do equity and justice between the parties.

§ 61.075, Fla. Stat. (1989).

The Wife submits that the trial court considered all of the foregoing, and particularly paragraphs (a), (b) and (d), in determining an equitable distribution of marital property. The Wife specifically argued in the trial court:

> MR. CRAWFORD: Your Honor, this case is governed by Florida Statute 61.075, which is the Equitable Distribution Statute. The Equitable Distribution Statute enumerates a number of factors for the Court to consider in determining distribution of assets. Those factors include the contribution to the marriage by each spouse, economic circumstances of the parties, the duration of the marriage, interruption of personal careers or educational opportunities of either party, any other factors necessary to do equity and justice between the parties.
>
> In sub-section (3) (a) and subparagraph (5) all real property held by the parties as tenants by the entireties, whether acquired prior to or during the marriage, shall be presumed to be a marital asset. If, in any case, a party makes a claim to the contrary, the burden of proof shall be on the party asserting the claim for special equity.

(R. 106-107).

Although the trial court did not specifically employ the language of equitable distribution in awarding the Wife a one-half interest in the marital residence titled as a tenancy by the entireties, the Wife contends that the trial court ruled equitably and in accordance with the presumptions stated in the equitable distribution statute.

EQUAL DIVISION AS A STARTING POINT

At least five common law jurisdictions have statutes mandating a presumption that courts divide marital property equally. ARK. STAT. ANN. § 34-1214A)(1) (Supp. 1987); N.C. GEN. STAT. § 50-20(c) (1987); OR. REV. STAT. § 107.105(f) (1987); W. VA. CODE ANN. § 48-2-32(a) (1986); WIS. STAT. ANN. § 767.255.

While the Florida Legislature has not yet enacted such a statute, four of the District Courts of Appeal have stated that an equal division of marital property is the starting point for an equitable distribution. In *Ervin v. Ervin*, 553 So.2d 230 (Fla. 1st DCA 1989), an equitable distribution case not involving the equitable distribution statute, the First District held:

> While a fifty-fifty split of marital assets is not required, it has been held a "good starting point" for equitable distribution. *Moore v. Moore*, 543 So.2d 252 (Fla. 5th DCA 1989). Inequitable distributions are permissible in the face of such factors as a compensating permanent periodic alimony award, the performance of "extraordinary services over and above the performance of normal marital duties," or a showing of special equities in the marital property. *Moore*.

Ervin at 231.

In *Eckroade v. Eckroade*, 570 So.2d 1347 (Fla. 3rd DCA 1990),

the Third District, in reversing a final judgment distributing marital property, ruled:

> As the trial court acknowledged, the starting point for equitable distribution is an award of half to each party; only upon a showing of extraordinary circumstances will an unequal division of the assets be appropriate. *Halberg v. Halberg*, 519 So.2d 15 (Fla. 3rd DCA 1987); *Ervin v. Ervin*, 553 So.2d 230 (Fla. 1st DCA 1989); *Moore v. Moore*, 543 So. 2d 252 (Fla. 5th DCA 1989.)

Eckroade at 1349.

Likewise in *Bain v. Bain*, 553 So.2d 1389 (Fla. 5th DCA 1990), the Fifth District held:

> It is the court's responsibility to achieve an equitable distribution of marital assets. Generally, a 50/50 split of marital assets is not required, but is a good starting point. *Moore v. Moore*, 543 So.2d 252, 256 (Fla. 5th DCA 1989). Unequal distribution must be justified. *Wynn v. Wynn*, 478 So. 2d 380 (Fla. 5th DCA 1985); *Ente v. Ente*, 442 So.2d 232, 234 (Fla. 5th DCA 1983).

Bain at 1391.

In an *en banc* decision, the Fourth District stated:

> "[M]arital assets should be distributed equally unless some showing is made of a disparity in the contributions of the parties to the marriage, or unless some other relevant factor justifies disparate treatment." *Woodard v. Woodard*, 477 So.2d 631, 633 (Fla. 4th DCA 1985, REV. DENIED, 492 So.2d 1336 (Fla. 1986).
>
> *Longo v. Longo*, 533 So.2d 791 (Fla. 4th DCA 1988).

In *Bobb v. Bobb*, 552 So.2d 334 (Fla. 4th DCA 1989), the Fourth District stated:

> In adopting the concept of equitable distribution in *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980), the supreme court recognized that a trial court need not

> equalize the financial positions of the parties but should insure that neither spouse falls from prosperity to misfortune. *Canakaris* at 1204. To that end the trial court is vested with discretionary power which is subject only to the test of reasonableness. ... [B]ut that test requires a determination of whether there is logic and justification for the result. The trial court's discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. Judges dealing with cases essentially alike should reach the same result. *Canakaris* at 1203.
> In this district that admonition in *Canakaris* has evolved into a general rule that asset distribution should be equal unless there is justification for a disparity in treatment.

Bobb at 334-35.

One Florida commentator has noted the public policy goals to be served in using a presumption of equal division:

> A presumption of equal division of marital property would promote the concept of marriage as a partnership rather than the coupling of two individuals pursuing separate goals. [footnote omitted.] The presumption would recognize the importance of wives' contributions to the family. [footnote omitted] Because contributions benefit, [sic] families [,] wives should not be punished by receiving less than half of the marital property upon divorce soley [sic] because they rendered their contributions outside the marketplace.

Sessums, *What are Wives' Contributions Worth upon Divorce?: Toward Fully Incorporating Partnership into Equitable Distribution*, 41 FLA. L. REV. 987, 993-94 (1989).

Petitioner submits that this court should adopt the rule that distribution of marital property is to be approximately equal unless there is justification for a disparity of treatment. The burden of proof should properly be on the party seeking a greater

than equal portion of the marital assets to demonstrate justification for disparity of treatment.

Should this court rule that the trial court did not distribute marital property equitably in light of the equitable distribution statute, then it is submitted that this court should remand this case for a new hearing before the trial court for the purpose of not only equitably distributing both the marital residence and the North Carolina note and deed of trust as marital property but also redetermining rehabilitative alimony.

Finally, should this court remand this cause for a new hearing, it is submitted that this court should direct that the starting point for equitable distribution is an equal division of property with the Husband bearing the burden of proving his entitlement to any greater portion.

ISSUE II

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

In the event this court does not accept the foregoing argument, in the alternative, it is submitted that in reversing the trial court's finding that the Husband intended to make a gift to the Wife of an interest in the marital residence the lower court's decision violates this court's ruling in *Marsh v. Marsh*, 419 So.2d 619 (Fla. 1982), clarifying *Ball v. Ball*, 335 So.2d 5 (Fla. 1976).

In *Marsh*, this court held on essentially the same set of facts as in the case *sub judice* that an appellate court may not reweigh the evidence and redetermine facts already found by the trial court on the basis of conflicting evidence. *Marsh* at 630. In reversing the trial court's decision on the question of the Husband's gift to the Wife of an interest in the marital home, the lower court both conflicts with and violates *Marsh*. In *Marsh,* this court quashed the decision of the appellate court, holding that the appellate court had improperly substituted its judgment for the trial court decision and that the trial court had properly evaluated the evidence in reaching its decision. *Marsh* at 630.

In evaluating the testimony of witnesses, the *Marsh* court ruled:

> The credibility of the witnesses and the weight given their testimony, however, is a question for the trial court. [Citations omitted]. Findings of fact by a trial court are presumed to be correct and are entitled to the same weight as a jury verdict. [Citation omitted].

Marsh at 630.

And, in considering conflicting testimony, the *Marsh* court further stated:

> When, as here, the grantor's intent is to be determined from the *conflicting testimony* of the parties, it is the responsibility of the trial court to evaluate the weight and credibility of that testimony and to arrive at a determination. Our examination of the record convinces us that the trial court properly evaluated the weight of the evidence in reaching its decision. The district court improperly substituted its judgment for the trial court's in reaching a contrary decision.

Marsh at 630. (Emphasis added.)

Petitioner submits that the lower court may violate the dictates of this court spelled out in *Marsh* with impunity unless this court enforces its own rules. The decision of the lower court not only conflicts with *Marsh*, it violates it.

Based on *Marsh*, this court should quash the decision of the lower court and remand with instructions to affirm the judgment of the trial court because competent substantial evidence existed to support the judgment of the trial court.

As stated previously, the evidence in the case at bar includes at least four (4) pieces of documentary evidence: a contract and closing statement signed by both parties, a deed reflecting the names of both parties, and a will signed by the Husband confirming his gift to his Wife. None of the cases cited by either party in any brief or by the lower court in its opinion include facts demonstrating such an abundance of documentary evidence. There simply is no reason why these documents should reflect the Wife's

name except that the Husband intended to make a gift.

For the court below to say that the Husband ought not to have the burden of proof on the question of gift is not the same thing as requiring him, as the court ought, to dispel the normal inferences which may be drawn in the face of such documentary evidence as was adduced at trial. In the face of such evidence the Husband had the burden of giving a reasonable explanation for allowing title to be taken in joint names. When the Husband undertook to explain the title in joint names as compliance with what he understood the requirements of Florida law to be he ran the risk of having his testimony on the gift issue seriously questioned if not discounted entirely by the trial judge.

In affirming the trial court's denial of special equity, the court below in *Geddes v. Geddes*, 530 So.2d 1011 (Fla. 4th DCA 1988) stated:

> In the face of the conflicting evidence before him, we believe the trial judge was entitled to conclude that at the time of the conveyance of the home into joint ownership, [the husband] intended to make a gift of the half-interest in the home to his wife.

Geddes at 1015.

In the case at bar, like *Geddes*, in the face of conflicting evidence the trial court was entitled to conclude that at the time of the conveyance of the marital home into joint ownership the Husband here intended to make a gift of the half-interest in the home to the Wife. None of the documentary evidence in the case at bar shows anything but any intention to make a gift.

The court below overlooked abundant competent evidence

supporting the trial court's decision. The following evidence in the record supports the trial court's decision:

A. EXECUTION OF CONTRACT BY BOTH PARTIES. Both the Husband and the Wife executed a deposit receipt contract for the purchase of the marital residence. (Wife's Ex. 1; App. 6-7). Moreover, the Wife actually negotiated the purchase of the house. (R. 10). As a result of the signing the contract, the Wife was obligated, along with the Husband, to close on the purchase of the house. Not one case briefed by either party in this cause involves the execution of a contract to purchase by both parties.

B. BOTH PARTIES EXECUTED THE CLOSING STATEMENT. After the execution of the contract the parties attended a closing at which both the Husband and Wife executed a closing statement. (Husband's. Ex. No. 1; App. 8-9).

C. HUSBAND TAKING TITLE TO MARITAL RESIDENCE IN BOTH NAMES. The record reflects that title was taken at closing in both names at the instruction of the Husband. (Wife's Ex. No. 2; App. 10).

D. HUSBAND'S TAKING TITLE TO OTHER PROPERTY IN HIS NAME ALONE. After acquisition of the marital residence in joint names, the Husband took title to both a boat for himself and an automobile for the Wife in his name alone. (R. 49; 51; 93). The Husband took out a loan for the purchase of the boat. (R. 93). The Wife, even though her name was not on the title, co-signed the note for the Husband. (R. 93). The Wife submits that the Husband well-knew the difference between taking title to property in his name alone and

taking title in joint names.

Moreover, there was no necessity for the Wife's name to be on the deed since the $180,000 purchase price was paid by the Husband entirely in cash. The Wife's joinder in the execution of a mortgage was unnecessary. The Wife submits that her name appeared on the deed to the house because the Husband chose to make a gift to her of a one-half interest in the house.

This evidence completely destroys the Husband's contention that he placed title to the house in both names because he thought he was required to do so under Florida law.

E. HUSBAND'S EXECUTION OF WILL CONFIRMING GIFT TO WIFE. The Husband executed a will, barely six months after closing on the purchase of the residence, in which the Husband provided:

> I will, devise and bequeath unto my Wife, JOAN T. ROBERTSON, the homeplace located at 5555 Bayview Drive, Ft. Lauderdale, Florida, automobiles, all household personal effects, and one third of all properties owned solely by me. Jointly owned property shall remain the property of my Wife, JOAN T. ROBERTSON.

(Wife's Ex. No. 3; App. 11-13).

As the trial court noted in its findings and final judgment, the only asset owned by the parties jointly on March 14, 1986 was the marital residence. (App. 3-5). Thus, the Husband acknowledged that the marital residence, which was the only asset titled in both names at the time of the making of the will, was in fact to **remain** the property of the Wife.

This evidence is totally contradictory to the Husband's astonishing testimony that he had in fact revoked that will by a

subsequent will, which purported document he was unable to produce at trial.

F. NO EVIDENCE OF TAKING TITLE IN JOINT NAME TO AVOID CREDITORS OR FOR ESTATE PLANNING PURPOSES. There was no evidence whatsoever, either by testimony or by exhibit, that title to the marital residence was taken in joint names for estate planning purposes or to avoid creditors. In fact, the Husband disclaimed having creditor problems at the time of the closing (R. 37-39), and in fact, the evidence shows that he had $180,000 in cash to pay for the residence (R. 9). Nor did the Husband testify that title was taken as a tenancy by the entireties for estate planning reasons. There was no testimony that title was taken in joint name solely for survivorship purposes such that the Wife was intended to receive title to the property only if the Husband predeceased her, nor was there testimony that it was necessary to create a joint tenancy for estate tax or other similar reasons.

G. THE WIFE TESTIFIED THAT THE HUSBAND INTENDED TO MAKE A GIFT. The Wife testified that the Husband intended a gift:

[THE WIFE:]	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.
Mr. Burton:	Judge I think she's answered the question already.
Mr. Crawford:	I think she has --
The Court:	Overruled. You're going to the idea whether or

not there was or was not a gift?

Mr. Burton: Uh-huh.

The Court: She is entitled to explain it. Overruled. Go ahead.

The Witness: Well, I wasn't looking to buy a home for him. We were looking -- Buck was very much in love with me. I was very much in love with him. I did not go into the marriage with being single for ten years without there -- there had been love up until he decided to separate from me. And I mean I couldn't foresee buying -- I certainly -- would not buy a home for me, it was a home for us, it was a marriage. There had always been mutual love and respect in this marriage.

(R. 75-76).

Later on, the Wife described the circumstances under which a contract was consummated with the assistance of Virginia O'Hara, a real estate broker:

[THE WIFE:] We were in her [Virginia O'Hara's] living room and d i n i n g r o o m , subsequently, you know, made a contract.

Q. All right, can you tell me how the contract came to be typed up with both names on it?

A. Virginia asked Buck -- it was very obvious to her who had the money. *She asked who is the -- who is to hold the title to the property. And he said David L. Robertson and Joan T. Robertson.*

Q. All right. Was it your impression or not that David Robertson was making a gift of an interest in that property to you at that time?

A. Yes, it certainly was. It was our home. Never any indication of anything otherwise, it was our home. (emphasis added).

(R. 91-92).

Based upon the foregoing, Petitioner submits that the lower court clearly violated the dictates of this court *Marsh* when it substituted its judgment for that of the trial court on the question of donative intent.

CONCLUSION

This court should quash the decision of the lower court because the lower court applied the incorrect burden of proof under the new equitable distribution statute. Petitioner contends that under the new rule the decision of the trial court with respect to the marital residence should be reinstated.

Petitioner submits that in the event this court should not accept the argument that the burden of proof under *Ball* is changed under the new equitable distribution statute, then this court should quash the lower court's decision because that decision conflicts with this court's decision in *Marsh v. Marsh,* 419 So.2d 619 (Fla. 1982). The lower court improperly substituted its decision on the question of donative intent for that of the trial court. This court should remand this cause with instructions to affirm the judgment of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Initial Brief on the Merits was served upon Alan R. Burton, Esquire, Attorney for Respondent, 2000 West Commercial Boulevard, Suite 114, Fort Lauderdale, Florida 33309 by U. S. Mail this 3rd day of June, 1991.

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