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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 77,236

01A 10-4-91

JOAN T. ROBERTSON,

Petitioner/Wife,

vs.

DAVID L. ROBERTSON,

Respondent/Husband.
_____/

# PETITIONER'S REPLY BRIEF ON THE MERITS

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

Case No. 89-3057

McDONALD & CRAWFORD, P.A.
Attorneys for Petitioner
315 Southeast Seventh Street, Suite 303
Fort Lauderdale, Florida 33301

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McDONALD & CRAWFORD, P.A., ATTORNEYS AT LAW • 315 S.E. 7TH STREET, SUITE 303, FT. LAUDERDALE, FL 33301 • (305) 462-2717 FAX (305) 462-6953

## 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.

Respondent's answer brief will be referred to by the symbol "A.B." followed by the appropriate page numbers.



McDONALD & CRAWFORD, P.A., ATTORNEYS AT LAW • 315 S.E. 7TH STREET, SUITE 303, FT. LAUDERDALE, FL 33301 • (305) 462-2717 FAX (305) 462-6953

## 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).



McDONALD & CRAWFORD, P.A., ATTORNEYS AT LAW • 315 S.E. 7TH STREET, SUITE 303, FT. LAUDERDALE, FL 33301 • (305) 462-2717 FAX (305) 462-6953

## 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.**

In answer to Petitioner's first point on appeal, Respondent simply re-hashes *Ball v. Ball* and its progeny and states that the equitable distribution statute is nothing more than a codification of existing law.

In reply, Petitioner submits that the equitable distribution statute changes the law significantly. Section 61.075, Florida Statutes states in pertinent part:

> 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. [emphasis added.]

Petitioner submits that the equitable distribution statute presumes the subject real property, which was titled by the parties as a tenancy by the entireties, to be a marital asset. The burden is clearly on the Husband to prove otherwise ***"in any case"*** in accordance with the statute.

Respondent offers this court not one policy argument favoring his interpretation of the law. Petitioner submitted for this court's consideration five different reasons why the rule in *Ball* should be changed under the equitable distribution statute.

Moreover, Respondent completely ignores the statement of the general rule in dual property (non-community property or common law) jurisdictions that a spouse's separate property which has been transferred into joint ownership becomes marital property. Only the courts of one common law state, Maryland, appear to hold otherwise.

On page seven (7) of his brief, Respondent asserts that the equitable distribution statute is "silent on the issue of donative intent". Petitioner disagrees. By creating a presumption that tenancy by the entireties property is marital property, the legislature has in effect implied donative intent. What the Respondent has overlooked in his answer brief is that when real property is titled as a tenancy by the entireties, a gift to the ***marital estate*** is presumed. The legal fiction of one party making a gift of an undivided one-half interest in real property to the other party is eliminated.

Respondent makes a damaging admission on page eight (8) when he states that "under the equitable distribution doctrine, the marriage relationship is treated as an economic partnership and the status of record title is irrelevant." By admitting that the new equitable distribution statute introduces into the law the 'marriage as an economic partnership' notion, Respondent impliedly concedes that the new statute creates something fundamentally different from the simple codification of existing law under *Ball* he contends at the outset of his brief.

Petitioner submits that the 'economic partnership' idea

implies a common enterprise and a sharing of property. The word "partnership" has been defined as "[a] voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them in lawful commerce or business, with the understanding that there should be a proportional sharing of the profits and losses between them." BLACK'S LAW DICTIONARY 1009 (5th ed. 1979).

What Respondent appears to argue is that when separate property is titled as tenancy by entireties property, such property does not become partnership property. Petitioner contends, however, that under the equitable distribution statute such property presumptively becomes 'partnership' or "marital" property.

One Florida commentator has noted the importance of the 'partnership' concept as a rationale for equitable distribution:

> The guiding rationale for an equitable distribution is that marriage is a partnership; both spouses have contributed to the accumulation of marital assets and have earned an interest in the marital assets upon divorce. [footnote omitted.]

Sessums, *What are Wives' Contributions Worth upon Divorce?: Toward Fully Incorporating Partnership into Equitable Distribution*, 41 FLA. L. REV. 987, 1003 (1989).

In contrast, *Ball* has nothing to do with the 'marriage as an economic partnership' idea. Rather, *Ball* deals with tenancy by the entireties property in terms of a gift from one party to the other of an undivided one-half interest in property and a special equity asserted by one party in the other party's undivided interest. The equitable distribution statute contemplates a third entity, which may be referred to as 'the marital estate', through the segregation



McDONALD & CRAWFORD, P.A., ATTORNEYS AT LAW • 315 S.E. 7TH STREET, SUITE 303, FT. LAUDERDALE, FL 33301 • (305) 462-2717 FAX (305) 462-6953

of "marital" from "non-marital" property. Under the statute, 'the marital estate' becomes the partnership to be dissolved and whose assets are to be equitably distributed upon divorce.

For Respondent to maintain that the equitable distribution statute is nothing more than a codification of existing law while also conceding that marriage is an "economic partnership" under the statute is more than paradoxical. It is also to ignore the whole historical context out of which the statute was born and the progress that has been made in this state in bringing equality to the sexes since *Ball*. The whole point is that marriage is now acknowledged to be an "economic partnership". The history on this point has shown dramatic changes.

One writer has succinctly stated the status of women under the common law:

> The common law system of marital property rights suspended the wife's legal existence during the marriage, or at least consolidated it into that of the husband. It assumed that she was incompetent, and that the husband must act in the capacity of a guardian. During the marriage she is nothing and has nothing: "Marriage is for the woman a sort of civil death." [footnotes omitted]
>
> > This attitude of mind seems to take the form of assuming that the husband is entitled in full to the benefit of the wife's services in the marital relation, that she must fulfill the functions of cook, chambermaid, maid, nurse, washwoman, etc., with no obligation on the husband to do more than supply her with food and clothing and other such necessaries, while he on his side is entitled in full to ownership of everything he earns. ***This puts the wife in the status,***

> ***not of partner with equal rights and responsibilities, but of a combined domestic chattel and servant...*** [footnotes omitted.] [emphasis added.]

Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 48 (1967).

Unquestionably, there have been fundamental changes in our state in the property rights of married women since the common law. The 'marriage as an economic partnership' idea represents a dramatic change in the way in which we, as a society, view the rights and responsibilities of the marital relationship.

Respondent's citation to *Davis v. Carr*, 554 So.2d 669 (Fla. 2nd DCA 1990) and *Miceli v. Miceli*, 533 So.2d 1171, 1172 (Fla. 2nd DCA 1988) in footnote number 1 appearing at the bottom of page nine (9) of his answer brief is misleading. With respect to *Davis*, Petitioner submits that it is not clear whether *Davis* was decided under the equitable distribution statute, which became effective October 1, 1988.

Regarding *Miceli*, Petitioner submits that the Respondent incorrectly characterizes *Miceli* as stating "that Section 61.075 is 'essentially' a codification of existing case law". First, *Miceli* was decided on August 3, 1988, almost two months prior to the effective date of the equitable distribution statute. Second, what *Miceli* says concerning the equitable distribution statute is contained within a footnote in that case and is as follows:

> As of October 1, 1988, the matter of equitable distribution will be governed by the provisions of chapter 88-98, § 1, Laws of Florida. One source has been quoted as saying that this legislation essentially codifies

> case law on the subject. *The Florida Bar News*, June 15, 1988, p. 4.

*Miceli* at 1172, fn. 1.

*Miceli* does not state, as Respondent suggests, that "[s]ection 61.075 is 'essentially' a codification of existing case law". The *Miceli* footnote merely states that a "source" for the *Florida Bar News* article is "quoted as saying that the legislation essentially codifies case law on the subject". *Miceli* says nothing about the effect of the equitable distribution statute on pre-existing marital property law. The quoted material is *obiter dictum*.

Respondent's argument on page ten (10) that the name in which any asset is held is irrelevant under the statute "thus comporting with the general principles established under *Ball* and *Canakaris*" ignores a plain reading of the statute. The statute specifically creates a presumption of marital property when real property is titled as a tenancy by the entireties.

Respondent further states:

> 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.

(A.B. 11). Exactly so. The new statute eliminates the presumption that entireties property was created solely for survivorship during coverture once a special equity is established.

In stating on page twelve (12) that "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*" Respondent overlooks the record. Petitioner specifically argued in the trial court the applicability of the equitable distribution statute to the only real property owned by the parties as a tenancy by the entireties - - the marital residence:

> 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).

Unfortunately, the trial court employed language in the final judgment utilizing the old gift and special equity ideas of *Ball* and its progeny. It was Petitioner's contention in the lower court, that the trial court's decision was correct under pre-existing law announced by this court in *Marsh v. Marsh*, 419 So.2d 629 (Fla. 1982). In *Marsh*, on facts similar to the case at bar, this court held that it was improper for the lower court to have substituted its judgment for that of the trial court on the question of donative intent. And, under *Marsh*, Petitioner still

maintains that the lower court in the case at bar improperly substituted its judgment for that of the trial court.

After the lower court rendered its opinion, Petitioner timely moved for rehearing or for certification of conflict [Appendix to Initial Brief on Jurisdiction 3] on the basis of *Straley v. Frank*, 15 F.L.W. 2564 (Fla. 2nd DCA October 11, 1990), decided just two days after oral argument in the court below. The court below denied both motions without opinion.

Petitioner submits that the trial court was also correct under the new equitable distribution statute even though the language employed was reflective of *Ball's* gift and special equity ideas. As was argued in the initial brief on the merits, Petitioner contends that in consideration of all the statutory criteria for making an equitable distribution, the trial court created what in effect was an equitable distribution of marital assets since the trial court refused to award the Wife any interest in the North Carolina note and deed of trust when the Wife was plainly entitled to such property under old *Ball* principles.

Respondent's citation to *Crews v. Crews*, 536 So.2d 353 (Fla. 1st DCA 1988) and *Merrill v. Merrill*, 357 So.2d 792 (Fla. 1st DCA 1978) is inapposite to the question before this court. *Crews* apparently was decided in the trial court before the enactment of the equitable distribution statute. *Merrill* was decided in the appellate court ten years before the effective date of the statute. Neither case deals with a wife leaving employment in another state to marry the husband and then both parties leaving that state for

Florida where ***both*** entered into a contract for purchase. Neither case deals with a wife actively involved in the negotiation of the purchase of the residence as in the case at bar. Finally, neither case deals with a husband confirming his donative intent in a will executed just six (6) months after closing stating that all jointly held property was to remain the property of the Wife.

On page thirteen (13) of his answer brief, Respondent misstates the law of this court as announced in *Marsh v. Marsh*, 419 So.2d 629, 630 (Fla. 1982). After specifically quoting this court's opinion, Respondent states that once the Husband has established a special equity it can "only be defeated by clear and convincing evidence that a gift was intended". (A.B. 13). Respondent cites no law in support of that notion and clearly there is nothing in the *Marsh* opinion requiring the recipient spouse to produce "clear and convincing evidence" under *Ball*. In fact, *Marsh* requires only "contradictory evidence" to defeat a special equity. *Marsh* at 630.

In reply to Respondent's assertion on page fourteen (14) that "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", Petitioner would observe that the Respondent has provided no law whatsoever to this court in support of that assumption. Moreover, the Petitioner submits that abundant competent and substantial evidence existed to support the trial court's findings of donative intent.

Respondent closes his argument on the first issue in appeal:

> 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.

(A.B. 15).

Respondent provides no authority whatsoever in support of that statement. Petitioner submits that a plain reading of the equitable distribution statute supports the application of the statute to all actions filed after October 1, 1988 and that the terms of the statute clearly contemplate the application to property acquired prior to October 1, 1988. Again, Section 61.075 (3)(a)5, Florida Statutes provides in pertinent part:

> 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. [emphasis added.]

The equitable distribution statute clearly is applicable to the facts of this case. In fact, the statute itself provides specific guidelines for determining the date on which marital assets are to be categorized. Subsection (4) states:

> The date for determining marital assets and liabilities and the value of such assets and the amount of such liabilities is the earliest of the date the parties enter into a valid separation agreement, such other date as may be expressly established by such agreement, or the date of the filing of a petition for dissolution of marriage, unless the trial judge determines another date is just and equitable under the circumstances.

In the case at bar, the record reflects that the parties did not enter into a valid separation agreement nor did they expressly

establish a date for asset and liability determination by such an agreement. The action was filed on February 9, 1989 (R. 113), after October 1, 1988, and the trial court did not determine any earlier or later date. Accordingly, under the equitable distribution statute, the date for determining marital assets was the date of filing the action in the case at bar -- February 9, 1989.

## ISSUE II

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

While Petitioner agrees with Respondent's general statement of the law found on page sixteen (16) of his answer brief that "a trial court's ruling must be supported by competent substantial evidence", citing *Farah v. Farah*, 424 So.2d 960 (Fla. 3rd DCA 1983), Petitioner disagrees that under pre-equitable distribution statute law Petitioner failed to prove Respondent's donative intent at the time that the marital home was acquired in joint names.

In so concluding, Respondent, as did the lower court, ignores the four (4) pieces of documentary evidence in the case at bar: a contract and a closing statement signed by both parties, a deed reflecting the name of both parties, and a will signed by the Husband confirming his gift to his Wife. Not one case cited by Respondent turns on these facts.

In the case at bar, Petitioner was actively involved in the selection and negotiation of the purchase of the marital residence, while the Respondent was absent during the selection of the house. Both parties signed the contract for purchase. Petitioner would ask why the Wife's name was reflected on the purchase contract obligating her to pay $180,000 cash if the Husband intended to keep the residence as his separate property?

The Husband also took title to other property in his name alone, thus contradicting his own testimony that he took title to the marital residence in both names because he thought he was

required to do so under North Carolina law. (R. 18).

The evidence abundantly contradicts Respondent's assertion on page seventeen (17) that "there was never any intention of making a gift". Moreover, while the Husband asserts on the same page that it was "only his intention that the Wife should have the residence upon his death" there is nothing in the record to support that statement.

On page nineteen (19), Respondent ridicules Petitioner's evidence supporting a gift and flatly states: "This is insufficient evidence to defeat a special equity", citing this court to *Agudo v. Agudo*, 449 So.2d 909, 910 (Fla. 3rd DCA 1984) and *Rabben v. Rabben*, 468 So.2d 500 (Fla. 5th DCA 1985). However, neither case deals with the facts in the case at bar, such as both a husband and wife entering in a contract for purchase of a marital residence where one of the parties is furnishing the entire consideration from a source unconnected with the marriage.

Likewise, Respondent's reliance upon *Bickerstaff v. Bickerstaff*, 358 So.2d 590 (Fla. 1st DCA 1978) is misplaced. The record demonstrates that there was abundant competent and substantial evidence to support the trial court's finding of donative intent beyond "a word or two" of the Petitioner's testimony. In the case at bar, there was Petitioner's active selection and negotiation of the purchase of the marital residence. There was Petitioner's signing of the contract, obligating herself to purchase the marital residence for $180,000 cash, and then there was Respondent's execution of a will just six months after the

closing, confirming that jointly-owned property was to remain the property of the Petitioner.

In conclusion, the evidence adduced in the trial court amply supported the trial court's finding of donative intent. The court below improperly substituted its judgment for that of the trial court in violation of this court's ruling in *Marsh v. Marsh*, 419 So.2d 629 (Fla. 1982).

## 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 629 (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,

McDONALD & CRAWFORD, P.A.
Attorneys for Petitioner

BY: _____
WILLIAM G. CRAWFORD, JR.
For the Firm



McDONALD & CRAWFORD, P.A., ATTORNEYS AT LAW • 315 S.E. 7TH STREET, SUITE 303, FT. LAUDERDALE, FL 33301 • (305) 462-2717 FAX (305) 462-6953

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Reply 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 11th day of July, 1991.

McDONALD & CRAWFORD, P.A.
Attorneys for Petitioner/Wife
315 Southeast Seventh Street,
Suite 303
Fort Lauderdale, Florida 33301
Telephone (305) 462-2717
Fla. Bar. No. 191527

By: William G. Crawford, Jr.
WILLIAM G. CRAWFORD, JR.
For the Firm