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IN THE SUPREME COURT
OF FLORIDA

STACY FRANK,

Petitioner,

v.

MARK K. STRALEY

Respondent.

CASE NO. 78,556

DCA CASE NOS. 89-3505 and
90-1546

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PREFACE

This appeal arises from the dissolution of the marriage between the Petitioner and former wife, Stacy Frank (Frank) and the Respondent and former husband, Mark K. Straley (Straley). Citations to (R.) followed by a number or numbers refer to page numbers of the Record on Appeal. Citations to (In. Br.) followed by a number or numbers refer to page numbers of Frank's Initial Brief on the Merits. Citations to (App.) followed by a letter and page reference refer to Straley's Appendix which accompanies this Answer Brief. The Appendix contains copies of the briefs submitted by the parties to the district court in Case No. 89-3505 and copies of the briefs submitted by the parties to the district court in Case No. 90-1546. These appeals were subsequently consolidated by the district court for purposes of appellate review.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

Frank's statement of the case and facts omits many relevant facts and is misleading, particularly with respect to financial matters. A far more objective recitation of the pertinent facts is set forth in the decision below. 585 So.2d 334. Because Frank's statement of the facts is so one-sided, Straley submits the following statement:

This case involves the dissolution of a four year, childless marriage between two practicing attorneys.[1] At the time of the marriage in June 1984, Frank, a 1982 law graduate, was practicing with a new law firm she had formed, Hagendorf, Deason & Frank (R. 122-123, 373). Straley, a 1976 law graduate, joined the law firm of Bush Ross Gardner Warren & Rudy (Bush Ross) as an associate in 1982, became an equity partner in 1983 (R. 125, 306), and completed his financial contribution imposed by the firm in lieu of a capital contribution at the end of 1983 (R. 304-305).

[1] Non-Marital Assets and Liabilities: Because Straley had practiced law six years longer than Frank (R. 122, 304), he entered the marriage with more assets. In addition to his partnership interest in Bush Ross, undisputed by Frank to be a non-marital asset (R. 125, 306), Straley owned fractional interests in three affiliated real estate investment partnerships: 601 South Florida Land Trust (601), Harbor Property Associates (Harbor Property), and 216 South Franklin Associates (216 Franklin) (R. 307-13).

Straley owns a 1/6th interest in 601, which was formed in May 1982 by the partners of Bush Ross to purchase an old warehouse in downtown Tampa (R. 307-308, 62). In January 1983, the partners of Bush Ross formed Harbor Property to purchase an adjacent warehouse (R. 308, 311). Straley owns a 6.625% interest in Harbor Property (R.

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[1]The case was tried in Hillsborough County before two trial judges. On appeal, the Second District declined to hear the case because Frank's father, Judge Richard H. Frank (R. 1651), is a member of that court. This Court then appointed three judges from the Fifth District to hear the case and later appointed all nine judges of the Fifth District to sit en banc to hear and decide the appeal. Frank then petitioned this Court to review the en banc decision of the district court.

311-12, 636). Both 601 and Harbor Property were purchased in anticipation of speculative gain as a result of market conditions (R. 313). In January 1984, the partners of Bush Ross formed 216 Franklin to purchase the office building where Bush Ross conducts its business (R. 313). This purchase was not made as a speculation (R. 314).

Prior to the marriage, Straley owned a home on Jetton Avenue which he had purchased seven years earlier in 1977 (R. 358). In preparation for the marriage, Straley sold his premarital home in December 1983, and he received net proceeds from the sale of $27,000 (R. 120, 358). The proceeds went directly toward the full purchase for $10,791 of a 21-foot Mako motorboat (the motorboat) in February 1984 (R. 746-47, 128-129, 358-59), and the partial purchase ($15,344.95 down payment and closing costs toward the $47,500 purchase price) of two vacant lots on Palm Island in Charlotte County in April 1984 (the beach property) (R. 718-19, 361-62, 126). The balance of the purchase price for the beach property (i.e., $32,500) was evidenced by a purchase money note and mortgage signed by both parties (R.1052). These purchases were made in tandem because the beach property is on an island that does not have a bridge to the mainland and a boat was needed to gain access (R. 431, 360). With the wedding mere months away, the motorboat and beach property were placed in joint names with survivorship rights as an estate planning tool (R.129, 363). Significantly, there was no claim or evidence that Straley intended to make a gift of his vested non-marital investments in these assets leaving Straley's non-gift testimony unrebutted (R. 363). 585 So.2d at 338.

At the time of the marriage, Straley also owned a 30-foot sailboat, known as the Windvane (the non-marital sailboat), which he purchased in April 1983 with a down payment of $8,500 (R. 706, 134, 329, 370), and several other assets not at issue here.

Straley had a loan associated with the non-marital sailboat and an unsecured loan to Sun Bank with a principal balance of $18,333 (R. 1096).[2]

Frank, on the other hand, entered the marriage with some personal property and a house on Bristol Avenue (the Bristol house). The Bristol home was purchased in the spring of 1983 with a down payment of approximately $5,000 that she obtained from her parents (R. 115-116, 131-32, 703-04).[3] Frank testified that the Bristol house was renovated during 1983 at a cost of between $12,000 and $13,000, $10,000 of which was obtained from a second mortgage loan paid off during the marriage (R. 163-64). Thus, viewing the evidence most favorably toward her, Frank had no more than $7,000-$8,000 in equity in the Bristol house at the time of the marriage (which the record shows she never claimed as a special equity). Frank also owned an older car not at issue here.

[2] **Marital Assets and Liabilities:** The parties began living together in the Bristol house in the fall of 1983 (R. 162, 372). Although Frank claims she made the mortgage payments on the Bristol house before the marriage (R. 121; In. Br. at 2-3), she later conceded that expenses were "shared" and that she received no income whatever from the Hagendorf, Deason & Frank law firm from February 1984 through the fall of 1984 (R. 121, 164-165). Straley testified that he supported Frank and made all the mortgage payments on the Bristol house when Frank was not receiving any income from her law

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[2]Frank tries to associate this debt, (claimed to be $20,000), with Straley's non-marital real estate partnerships (In. Br. at 12, 40-41). This is not supported by the record which merely shows that it was an unsecured personal obligation repaid from Straley's windfall profit from a subsequent real estate investment (R. 1096, 321).

[3]The parties have disagreed about the characterization of that equity. Frank's mother testified that she and her husband gifted the $4,776.56 down payment on the house to the Wife (R. 116), and that Frank and Straley later made an unconnected "gift" of $5,000 to the Wife's parents (R. 114), notwithstanding the clear notation on the $5,000 check reflecting the address of the Wife's premarital home, the then-marital home (R. 116-117, 705). Frank indicated that there was no obligation to repay her parents, but "I wanted to pay them back the money they had given me." She intended to do so upon the sale of the house, and "considered the marriage a sale" (R. 141-142). After repayment, the premarital house was retitled in joint names (R. 142-43); Frank testified that this was done for tax purposes (R. 130). Straley testified that his 1984 bonus (half attributable to before the marriage), was used to repay Frank's loan to her parents (R. 372), and that this payment entitled him to an equity interest in the Bristol house (R. 412).

firm (R. 373-74). Straley's total income in 1984, the year of the marriage, was $146,619; Frank's total income was $8,460 (R. 707).

In April 1984, Straley borrowed $15,000 from Freedom Savings to pay estimated 1984 taxes, see I.R.C. §6654(c). This was not as Frank contends (In. Br. at 4), a payment of pre-marital taxes for 1983 (R. 381, 419-20). These current taxes were for during a year when the parties were living together and then married, Frank was not earning any income from her law practice, and Straley's draws were not subject to witholding. This short term borrowing was fully repaid from Straley's 1984 year end distribution from Bush Ross, nearly half of which was premarital income (R. 419-20, 1055).

In the fall of 1984, Frank became associated with the Jacobs Robbins law firm, and she worked there approximately one year (R. 374). Thereafter, Frank voluntarily remained unemployed, during which time she participated in various political campaigns (R. 124, 165-66, 384-85). In the fall of 1986, Straley was instrumental in helping Frank obtain her present position as corporate counsel for TECO Energy, Inc. (R. 166, 374-75). Straley, a more experienced real property lawyer, also assisted Frank in the development of her professional skills (R. 374). Straley practiced law with the Bush Ross law firm throughout the marriage and his annual income was in excess of $100,000 every year. His financial contributions during the marriage were five times greater than Frank's cumulative income from her law practice (R.707). However, once she began her job as corporate counsel for TECO four years out of law school, Frank's career has advanced rapidly, as demonstrated by her annually increasing salary (R. 770, 1419-20, 1435).

Straley's non-marital sailboat was refinanced in 1985, to reduce the interest rate, and the boat was jointly titled only at the insistence of the lender; significantly, Frank did not claim that this was a gift. (R. 134-35, 370-71, 392-93, 1018). Subsequently, in November 1987, the parties began purchasing and renovating a 40-foot sailboat, the Evtide

(the Evtide sailboat), which was located in Canada (R. 144-46, 329-33). In connection with this purchase, Straley's non-marital sailboat was sold, netting $10,500 (R. 1020), $8,500 of which was directly traceable to the Husband's premarital investment in his non-marital sailboat (R. 706), which Frank acknowledged in her testimony (R. 134-35). Frank's claims of the amount spent on the Evtide are erroneous, and are also irrelevant: the trial court valued the boat at $98,000 and assigned all boat-related debts to Straley (R. 634-44), all of which Frank left unchallenged by failing to appeal the valuation.

During late 1984 and 1985, a vacation home was built on one of the beach property lots for a cost of approximately $35,000 (R. 127). It was built with out-of-pocket funds and unsecured borrowings from Straley's line of credit at Freedom Savings (R. 127, 405-06). In 1985, a permanent mortgage loan was obtained, the proceeds of which were used to pay off the purchase money financing ($32,500) and the unsecured line of credit borrowings (R. 405-06, 1013, 1056). At that time, the mortgage lender required that the property be retitled as a tenancy by the entireties (R. 129, 363).

The parties lived in the Bristol house until it was sold in May 1986 (R. 1039-40). At the end of 1985, the house was retitled from Frank's name to both parties as tenants by the entireties (R. 1042), the alternative explanations for which are discussed in n. 3, supra. Frank did not testify that she intended to make a gift of her non-marital interest in the Bristol house. The proceeds from the Bristol house were used to acquire and furnish a home on Bayshore Blvd. (the marital home), and for other marital purposes (R. 406-08).

In 1986, Straley and his partners formed another real estate partnership, Ella Mae Associates (Ella Mae) (R. 318). The land owned by Ella Mae was sold later in 1986, and Straley received a $77,000 profit from the investment, which was used to purchase a replacement diamond engagement ring for Frank, to repay Straley's personal note to Sun Bank, and to begin restoration of the Evtide sailboat (R. 321, 139-40).

In late 1986, the partners of Bush Ross formed a fifth speculative real estate partnership, 238 South Franklin Street Associates (238 Franklin), in which Straley also owns a fractional interest (R.323). Because this investment was made during the marriage, Straley conceded it was marital (R. 323), the parties concurred in an award to Frank of a 50% beneficial interest in 238 Franklin (R. 154, 323), and it is not an issue on appeal.

[3] **Straley's Non-Marital Assets:** During the marriage, Straley continued to own his non-marital partnership interests in Bush Ross, 601, Harbor Property, and 216 Franklin. Straley made no contributions to Bush Ross after the marriage (R. 305). Although Frank erroneously speculates that marital funds were invested in 216 Franklin (In. Br. at 7), the record reveals that there were no costs associated with 216 Franklin, because all of the expenses of this partnership were paid by the Bush Ross law firm in the form of rent to 216 Franklin (R. 294). In any event, since the value of 216 Franklin did not increase during the marriage (R. 56-57, 233-34) and Frank never claimed an interest in this partnership, her discussion of 216 Franklin is irrelevant.

There were debt service and maintenance expenses for 601 and Harbor Property. All of these expenses were paid directly by the Bush Ross law firm (R. 284-86), never from funds out of Straley's or Frank's pocket (R. 139, 172-73, 316), and the debt associated with 601 and Harbor Property was fixed and known to Frank before the parties' marriage (R. 173-74). The parties necessarily never relied upon the monies used to service the debt and maintain 601 and Harbor Property for any other purpose (R. 316), which was uncontroverted by Frank.[4] The only change in the portfolio was the principal reduction of the mortgage debts on 601 and Harbor Property of $6,715 and $1,980, respectively (R. 191, 716). Frank's two appraisers or Straley's appraiser testified that the maintenance, debt service, and real estate taxes on 601 and Harbor Property did not in any way increase

[4]Frank disputes the $8,500 1988 deficit owed to Bush Ross as marital. In fact, the record shows all partnership debts were paid first, draws distributed second (R. 284-86), so a deficit means the parties took excessive draws for marital living expenses.

the value of these non-marital real estate partnerships. Instead, the speculative 601 and Harbor Property investments were established to be passive in nature, requiring no labor. Frank did not dispute that the increased values were directly and solely caused by market conditions (R. 322-23, 233-80).

Frank's claim about the amount of funds spent with regard to Straley's non-marital real estate partnerships (In. Br. at 7-8, 40-41) was never a finding of any court. It is based solely upon her accountant's analysis which, as Frank's accountant conceded, failed to consider the tax benefits from these investments to the joint marital tax returns filed by the parties (R.100). Additionally, Frank mischaracterizes the nature of the partnership maintenance costs, calling them real estate investments (In. Br. at 7,8) which were actually debt service, tax and similar payments required merely to maintain the assets.

Straley's accountant testified that the non-marital partnerships were tax shelters which during the marriage produced income tax savings to the parties of more than $45,000 (R. 712, 185-87). After deducting the tax savings realized by the parties by virtue of the real estate partnerships and deducting costs associated with 238 Franklin (because the parties agreed that Frank would receive a 50 percent beneficial interest in this marital real estate investment partnership), Straley's accountant testified that the actual cost of maintaining Straley's non-marital partnerships was $27,077 during the four year marriage; this testimony is uncontroverted (R. 186-188). In fact, after taking into account the $77,000 profit from the Ella Mae investment, Straley's real estate partnerships were actually a source of net income to the parties (R. 321, 712).

At trial, Straley (R. 314-24), his appraiser (R. 243-80), and Frank's appraisers (R. 66-78, 341-58) all testified about the speculative increase in downtown Tampa land values in the area where the warehouses owned by 601 and Harbor Property are located. There were minor disagreements about specific land values at the time of the marriage in mid-1984 and at the time Frank filed her petition in November 1988. It is undisputed,

however, that the appreciation in value was entirely due to speculative market forces (R. 249). There was testimony that a convention center hotel might be built on the land, in which case Straley and his partners would realize a substantial profit (R. 277-79, 350-51). However, there was also uncontroverted testimony that if the hotel is not located on these properties, then "they have got a long way to go and a long way to wait before they are going to be purchased" (R. 280, 275). Immediately after the trial, the City of Tampa announced that it had received three proposals for a convention center hotel, but none located the hotel on the 601 and Harbor Property site (R. 648-49).

Straley's appraiser, Kim Schwencke, testified that land speculation in downtown Tampa is similar to a poker game with high risks and rewards and rapidly fluctuating values (R. 248, 250, 251, 275). This testimony is uncontroverted and is supported by the record subsequent to the trial: by the time of the fee hearing in early 1990, there was uncontroverted testimony that market conditions had deteriorated significantly (R. 1774-88). A convention center hotel may not be built at all, largely because inflated land prices caused by excessive speculation make the project economically unfeasible. (R. 1785-88).

This Court may take judicial notice of the fact that the fee hearing in early 1990 coincided with the onset of the current severe real estate recession,[5] thus proving out the trial testimony about the speculative, risky nature of these investments. Just as land prices experienced an "incredible rise" (R. 257) during the boom years of the 1980's, commercial real estate values in Florida have plummeted during the current recession. See, e.g., Commercial Real Estate - Will Anyone Survive?, Florida Trend, Jan. 1992 at 36 ff.

Finally, it is undisputed that Straley's minority interests in 601 and Harbor Property are totally illiquid (R. 253, 1781-82, 1785, 1906). There is no dispute that Straley cannot

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[5] §90.202(11), Fla. Stat. (1991). See, e.g., Builders Finance Co., Inc. v. Ridgewood Homesites, Inc., 157 So.2d 551, 552 (Fla. 2d DCA 1963) ("Courts have frequently taken judicial notice of general market conditions with respect to real estate at times significant to the proceeding under consideration") and Mahood v. Bessemer Properties, 18 So. 2d 775, 777 (Fla. 1944) ("This Court takes judicial notice of the [1925] boom, its disastrous collapse and the subsequent deflation in Florida of real estate values.")

sell his interests unless and until the properties themselves have been sold for redevelopment, which in turn is entirely dependent on external market forces.

[4] **Separation and Dissolution:** After the parties separated in June 1988, Straley asked to remain in the marital home, because he needed a place for his sister who had recently relocated to Tampa. This arrangement continued for a month, and then Frank asked Straley and his sister to move. From that point on, Frank claimed exclusive possession of the marital home and she resided there until November 1989, when the trial court awarded the marital home to Straley (R. 174-75, 376-77, 634-44). Straley was forced to lease an apartment (R. 377-78). After the parties separated, Straley completed the restoration of the Evtide sailboat and had it shipped to Florida (R. 333). Straley paid all expenses associated with the Evtide sailboat and had exclusive possession of the boat (R. 147). Frank complains that she never sailed on the Evtide (In. Br. at 9) but the record is devoid of any assertion by Frank of an interest in using the sailboat.

The parties shared the beach property after separation, both before and after the trial. Frank testified she spent six weekends at the beach property prior to the trial, and her use continued thereafter pending the decision of the trial court (R. 158, 649-50). Notwithstanding their joint use of the beach property, Straley paid all of the expenses associated with the beach property which totalled $20,376 through the post-trial period before the trial court announced its ruling (R. 645-50, 731-32, 649). Frank refused to pay any of these costs, (R. 650), and she unilaterally moved the motorboat, which prevented Straley from accessing the beach property (R. 650).

At trial, it was apparent that the beach property was the only specific asset either party sought. Frank expressed no interest in the Evtide sailboat, and Straley emphasized his willingness to sell the boat, especially if necessary to preserve his rights to the beach property (R. 339, 395-96). There was undisputed testimony that the Evtide could be sold in four to six months (R. 218-19). The parties were also willing to sell the marital home

(R. 377-78, 387).[6] Of course, the fractional interest in the real estate partnerships, both marital and non-marital, are illiquid and cannot be sold. Thus, to the extent 601 and Harbor Property were deemed marital, Straley proposed giving Frank a beneficial interest in these investments similar to her beneficial interest in 238 Franklin (R. 710).

Notwithstanding Straley's request for partition, the trial court distributed the parties' assets. The principal award to Straley was the unrealized "profit" from 601 and Harbor Property totalling $97,724. Straley received less than 25% of the assets acquired during the marriage. In contrast, as the district court noted, Frank received most of the assets acquired during the marriage, including the coveted beach property, virtually all of the furniture and personalty from both residences, over $22,000 in cash, and she was relieved of responsibility for $111,000 of unsecured marital debt. 585 So.2d at 338-39.

[5] **Frank's Attorney Fee Claim.** At the time of the fee hearing, Frank was earning more than $50,000 per year as corporate counsel for TECO Energy with no liabilities or dependents. 585 So.2d at 339. Although there was "no reasonable basis . . . for finding that Frank was at a financial disadvantage in obtaining legal assistance," id., she nonetheless claimed an entitlement to fees. Despite Straley's objections (R. 645), the original trial judge, Judge Manuel Menendez, Jr., refused to hear Frank's ancillary claim for fees and costs (R. 695), because he had been transferred to the criminal division of the Circuit Court. As a result, Judge Phillip K. Knowles (the successor judge) decided her fee claim.

Because he had not heard the case and the trial record was not available to him, the successor judge acknowledged at the outset that it was impossible for him to determine the amount of fees reasonably incurred by Frank (R. 1658-61). Although the the fee hearing

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[6]Before the trial court entered its judgment, Frank sought permission from another judge to sell the marital home (R. 1107-10). Straley opposed Frank's motion because the judge had no jurisdiction to adjudicate matters currently pending before the trial judge and because the proposed sales price was less than the house was worth based on Straley's appraisal (R. 227-28) and the trial court's subsequent determination (R. 635).

was lengthy (In. Br. at 13), the record reveals that much of this time was devoted to argument between counsel about what was and was not previously litigated at trial. See, e.g., R. 1641-45, 1779, 1838-39, 1846, 1849, 1886-87, 1891-94, 1909, 1916.

On April 2, 1990, the successor judge signed a proposed order submitted by Frank's counsel (R. 1568) directing Straley to pay all of the fees and costs sought by Frank: specifically, $71,706.50 in fees, $12,836.32 in costs, and $1,950 in witness fees (R. 1483-85). Straley's attorney's fees, which he also must pay, were then approximately $25,000 (R. 1443, 1897) and his litigation expenses were $13,280.85 (R. 1443-44). Based on the district court's decision, Frank's trial fees and costs were nearly 50% of the marital estate. Based on the values and awards established by the trial judge, Frank's counsel admitted that his firm's fees alone, excluding her costs and Straley's attorney fees and costs, totalled approximately 25% of the marital estate (R. 1658).

Frank's counsel testified as to $64,869 in fees and $11,924.27 in costs (R. 1300, 1347). Frank also offered testimony from Eugene Langford, a lawyer who practices primarily in commercial litigation and banking matters (R. 1663). Although he has handled divorce cases in the past, Mr. Langford testified that he was not handling any divorce cases at the present time (R. 1670). He is not board certified in marital and family law (R. 1679). Mr. Langford expressed a conclusory opinion that a reasonable rate for Frank's attorney was $250 an hour because he had an abundance of clients who were willing to pay him that rate (R. 1676), and a reasonable fee for Frank's counsel in this case was $64,869 (R. 1669), the precise amount charged by Frank's counsel (R. 1300). Mr. Langford did not offer a range of reasonable fees, hours or rates.

Mr. Langford did not testify that $250 an hour was the prevailing market rate in Tampa; rather, he said it was at the "high side of the spectrum" (R. 1669, 1675), and he stated that competent counsel could be found for $150 to $200 an hour or even $125 (R.

1675-76). Frank's attorney had earlier agreed that his rate was "among the highest in town" (R. 1653).

Mr. Langford claimed that a factor contributing to Frank's very high attorney's fees (saying that the "fees in this case are high relative to net worth" R. 1665) was the fact that Straley was an attorney which he presumed based on a single previous representation of an attorney's wife in a dissolution case (R. 1663). He testified that he had never represented a spouse in a case where both spouses were attorneys (R. 1670).

Of the 20 depositions, Frank took 14 (70%), and of the 16 discovery requests, she issued 14 (88%). She deposed several of Straley's law partners, his office manager, his secretary, other law firm personnel, his sister, and his fiancee (R. 1127, 1129, 1138, 1144, 1172, 1175, 1203, 1232, 1235, 1241, 1252, 1257), and even subpoenaed Straley's father's bank records (R. 1139). Frank pursued this invasive discovery, despite her attorney's testimony that Straley had not tried to hide assets or make the attorney's jobs more difficult (R. 1649-50). Indeed, in March 1989, before Frank had conducted any discovery, Straley voluntarily submitted a financial affidavit at the pre-trial conference which fully disclosed all marital and non-marital assets (R. 534-36).

At the continuation of the hearing two months later, after Frank had rested (R. 1700), Frank's counsel submitted a supplemental affidavit seeking additional fees of $6,837.50, costs of $912.50 and fees for Langford of $1,950 (R. 1430-31, 1763). The attorney's fees were at a new (and previously unconsidered) rate of $260 per hour for Mr. Sessums, and increased rates for others in his office (R. 1421-22). The reasonableness and necessity of these additional fees and costs were supported by no testimony of either Frank's counsel or her fee witness. The final award of $71,706.50 in fees and $12,836.32 in costs included the unsupported supplemental amounts, with no adjustment (R. 1483-85). Additionally, Frank offered no testimony as to the $19,050 paralegal fee portion of her claim. Mr. Langford tried to justify the disparity between Frank's and Straley's fees,

by assuming Straley's secretary and fiancee assisted him (R. 1674), but there is no evidence in the record to support this assumption.

Straley's fee witness, James Knox, is board certified in marital and family law (R. 1712). His practice is limited to matrimonial law and divorce litigation (R. 1724), and Frank's attorney stipulated as to his expertise and qualifications (R. 1712).

Mr. Knox testified that the issues in the case were straightforward in the marital world (R. 1715-16). In terms of the hours expended, Mr. Knox testified that what is important is the case at hand and what is reasonable labor for the case; what was actually done at the behest of the client is not the test of a reasonable fee (R. 1724). Thus, notwithstanding Frank's claim that he should have reviewed Mr. Sessums' file (In. Br. at 16), Mr. Knox actually stated that a review of her attorney's file would not have been helpful, because the test is what is reasonable, not what is actually done (R. 1729-30).

In short, Mr. Knox concluded that this was a case where the parties should each have spent approximately 100 hours, and the legal assistant should have spent 50 to 100 hours, plus or minus five to ten percent (R. 1719-21). Mr. Knox was unequivocal in his opinion that the attorneys for both parties spent far too much time on this case (R. 1732).

Mr. Knox testified that the prevailing market rate in Tampa for qualified legal representation in this case is $175 to $200 per hour for an attorney (R. 1721-22), and $50 to $75 per hour for a legal assistant (R. 1727). The prevailing market rate is not the highest rate that "the market will bear" as evidenced by a "very small number" of divorce lawyers in Tampa who charge more than $200 an hour (R. 1722-24). Applying Mr. Knox's range of hours and rates, plus or minus five to ten percent, Mr. Knox supported attorney's fees from $15,750 to $22,000 (ranging from 90 hours at $175 to 110 hours at $200), and legal assistant fees from $2,250 to $8,250 (ranging from 45 hours at $50 to 110 hours at $75).

Straley's attorney, a board certified marital and family law attorney (R. 1487) recognized by Mr. Langford to enjoy "a very good reputation as a matrimonial lawyer" (R.

1666), charged Straley $135 per hour for his services (R. 1897). Straley testified that he could not afford a lawyer who charged $250 an hour (R. 1852). Instead, he shopped around to find competent counsel that he could afford (R. 1851-52, 1898). Frank testified that she did not "shop around" for affordable, competent counsel (R. 1709-10).

Frank is in an excellent position to afford competent counsel. As of January 1990, she was earning $54,350 per year (R. 1435), grossing $4,549.17, and taking home $3,196.97 per month (R. 1435-36). In addition to her pension, a company car and other benefits, Frank also voluntarily saves 6% of her income, or $271.75 per month, to add to her TECO savings account (R. 1435), and until December 1989, she had been saving $560.50 per month (R. 1702-03). The record indicates that she received the $9,337 marital income tax refund and $13,000 lump sum alimony (R. 634-644). No portion of these cash awards appeared on Frank's financial affidavits (R. 546-48, 1381-83, 1435-37).

A similar review of the record shows that Straley has no resources to pay Frank's fees. Straley's monthly gross income is $7,000 (R. 1857-1858), plus a year-end bonus which is determined on an annual basis, and which cannot be predicted with any certainty: in 1989 he received a net bonus of $9,562 (R. 1448), but in 1988 he actually ended up with a deficit and owed money to the Bush Ross law firm (R. 1861).[7] Straley's take home pay, claiming one exemption (R. 2945), is approximately $4,480 (R. 1939). Straley has monthly expenses, including the mortgage payment on former marital home, $1,200; debt service on the unsecured marital debt of approximately $1,765 monthly (and $78,500 of principal debt to mature in the summer of 1990) (R. 1869); and miscellaneous living and professional expenses of over $2,000 monthly (the total slightly exceeding his take home pay). Including his litigation expenses of at least $14,000 (R. 1447-50) and the $87,000

[7] Although the Court refused Straley's submission of a financial statement showing his monthly gross of $7,000 (R. 1860-61), it allowed similar testimony (R. 1857-58). Also, the Court acknowledged that some years Straley would receive more than his base draw and some years he owed for an excessive draw (R. 1448, 1861).

of Frank's fees and costs, Straley's monthly expenses were estimated at $9,847 (R. 1447), $5,367 more than his monthly income.

Frank's statistics showing her four-year earning average of $27,079.60, as compared with Straley's sustained efforts grossing an annual average of $130,395.40 during the time of their marriage (In. Br. at 16, R. 1379) is very misleading. Frank earned no income during nearly half of the four year marriage while she was trying to establish her law practice or working on political campaigns. The trend of incomes over the pertinent years shows Straley's income from his real estate practice has levelled off and actually declined during the current recession, while Frank's income from a secure corporate utility salary has steadily risen. Clearly, as Frank practices law longer, the gap in the parties incomes continues to shrink. Straley's income every year since 1987 has been less than the marital "average" of $130,000 (R. 770, 1419-20) and in 1990 appeared to be significantly less (R. 1448). In stark contrast, Frank's salary has risen from $10,048 in 1986, to $40,750 in 1987, to $44,017 in 1988 (R. 770), to $52,000 in 1989 (R. 1419-20), to $54,350 plus a company car and other benefits in 1990 (R. 1435, 770).

None of Straley's assets, premarital or assigned to him in the dissolution proceeding, are possible sources for the payment of fees. The successor judge indicated that the value of Straley's interest in Bush Ross (less than $14,386 as of November 1988) based on the firm's buy/sell agreement, (R. 1438-39, 1800-01) was of little practical relevance (R. 1799). The building owned by 216 Franklin where the Bush Ross law firm conducts its business (R. 313) was 100% financed with borrowed funds (R. 44-46),[8] and

[8]At trial and at the fee hearing, there was testimony about the April 1989 mortgage loan to 216 Franklin (R. 316-18, 46-51, 1890-1892). This loan was based solely on the income stream from a new lease between 216 Franklin and its affiliated tenant, the Bush Ross law firm (R. 316-17, 1910). The rent payable under the new lease is substantially above market rent (R. 57-58, 316-17). Straley received $57,000 (Frank cited this as a $55,000 distribution (In. Br. at 17)), as his share of the loan proceeds (R. 47). These loan proceeds were used to pay some of his litigation expenses (R. 1895-96), to reduce some of the secured marital and non-marital debt (R. 1908), and to maintain the beach property (R. 1842). Straley was left with no asset to show from the distribution; he was left only with a substitute debt-repayment obligation. Straley testified that the mortgage debt now far exceeds the fair market value of the property after the April 1989 refinancing (R. 1841, 1442).

the appraisers employed by both parties testified that the value of the office building had not increased at all during the marriage (R. 56-57, 233-34). Straley's fractional interest has no value. 601 and Harbor Property are illiquid and any equity or profit is speculative. Further, Frank's claim that Straley's net worth was $548,000 (In. Br. at 17) is unsupported by the trial court's values and the record.

At the fee hearing, Straley attempted to introduce the pre-trial settlement offers made by both parties on the grounds that they were relevant in determining the amount of fees reasonably incurred by Frank. After argument by counsel (R. 1819-1829), the successor judge denied their admissibility based on Florida Rule of Civil Procedure 1.442 (R. 1829). Straley then proffered and testified about the six written settlement offers and a final oral offer, and outside of the successor judge's presence (R. 1917-24). The six proposals were entered as Straley's proffered Exhibit 9 (R. 1950-80), and two charts summarizing the offers, and converting the values to correspond to those established by the final judgment, were introduced as proffered Exhibits 10 (R. 1981) and 11 (R. 1982).

SUMMARY OF THE ARGUMENT

This Court should should recede from Robertson v. Robertson, 16 F.L.W. S758 (Fla. Dec. 5, 1991), which erroneously concluded that the "marital asset" presumption in section 61.075(3)(a)(5), Florida Statutes (1991) is synonymous with the "gift" presumption addressed in Ball v. Ball, 335 So.2d 5 (Fla. 1976). The terms are not synonyms. While a marital asset presumption can be rebutted by showing that non-marital assets were invested in jointly titled property, a gift presumption is, by its very nature, irrebuttable. Thus, Robertson effectively abolishes the common law of special equity.

This is not what the legislature intended. Section 61.075(3)(a)(5) mandates that the common law of special equity is to remain viable and the equitable distribution statute expressly provides that non-marital assets are to be excluded from equitable distribution.

Admittedly, section 61.075(3)(a)(5) is ambiguous. Although it can be construed as a simplified codification of the Ball doctrine, Robertson approves a construction of the statute which will invariably produce unfair results. The principle that a spouse should receive credit for capital investments of non-marital assets in jointly titled property is grounded in fairness. See Landay v. Landay, 429 So.2d 1197 (Fla. 1983).

In the alternative, this case can be distinguished from Robertson because there was no claim of gift by Frank, no finding of fact that a gift was made, and uncontroverted evidence that a gift was not intended. Moreover, unlike Robertson, this case involves a Landay fact pattern in which record title will never fairly reflect the investment of non-marital and marital funds. Finally, the statutory rule announced in Robertson should not be applied retroactively. To do so, destroys vested special equity property rights acquired in good faith reliance upon established Florida law before the statute was enacted.

This Court's jurisdiction is predicated upon the conflict between the en banc decision below and Robertson. This Court should exercise its discretion and decline to address other issues in the case lying beyond the scope of the conflict. This case has already been the subject of extraordinary scrutiny by two appellate tribunals. If the district courts are not mere "way stations" on the road to the Supreme Court, this Court should decline to conduct a de novo review of every issue of potential interest to the litigants. Lake v. Lake, So.2d 639, 642 (Fla. 1958).

In the alternative, the decision of the district court should be approved. Although Frank is entitled to half of the increased equity in 601 and Harbor Property "resulting from" mortgage payments made during the marriage, it was error to treat the passive appreciation in 601 and Harbor Property as a marital asset. The district court did not reweigh the evidence, because it is undisputed that this passive appreciation was entirely due to speculative market forces and did not "result from" marital funds or labor. See §61.075(3)(a)(2), Fla. Stat. (1991).

Finally, this is not a fee award case: the parties are both practicing attorneys with good jobs and the same income earning ability. The district court examined the financial resources of both parties and properly concluded that the parties have a similar ability to secure competent counsel. See Cummings v. Cummings, 330 So.2d 134 (Fla. 1976) and Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980). Moreover, the fees claimed by Frank are grossly excessive and consumed nearly half of the marital estate. The fees incurred by Frank were also unnecessary. Frank over-litigated the case and unreasonably rejected four pre-trial settlement offers which, if accepted, would have produced a better result for her than she achieved in court.

ARGUMENT

I. THIS COURT SHOULD RECEDE FROM OR CLARIFY ITS DECISION IN ROBERTSON; IN THE ALTERNATIVE:

A. ROBERTSON CAN BE DISTINGUISHED ON THE FACTS.

B. THE STATUTORY RULE ANNOUNCED IN ROBERTSON SHOULD NOT BE APPLIED RETROACTIVELY.

C. IN THE ABSENCE OF ANY JUSTIFICATION, A CO-TENANT WITH A SPECIAL EQUITY SHOULD NOT BE ARBITRARILY DIVESTED OF TITLE.

In Robertson, this Court held that the equitable distribution statute reverses Ball and the entire body of special equity case law that has evolved in Florida since Ball. See, e.g., Canakaris, 382 So.2d at 1200-01; Duncan v. Duncan, 379 So.2d 949, 452 (Fla. 1980); Wright v. Wright, 422 So.2d 306 (Fla. 1982); and Landay. The Robertson decision expressly disapproved the en banc decision below which held that the statute is a simplified codification of Ball. This Court has impliedly disapproved the other district court decisions which have similarly treated the statute as a codification of Ball. E.g., Amato v. Amato, 16 F.L.W. D2803 (Fla. 4th DCA Nov. 6, 1991); see also the cases cited in the decision below, 585 So.2d at 337.

Because Florida's appellate courts have reached entirely different conclusions about the effect of section 61.075(3)(a)(5) on Ball, it is apparent that there is ambiguity in this section of the statute. This ambiguity provides a basis for further examination of the statutory scheme in order to discern legislative intent.

The holding in Robertson is based, at bottom, on the view that the "marital asset" presumption contained in the statute is synonymous with the "gift" presumption addressed in Ball. Of course, the terms are not synonyms. The fact that the term "gift" is used elsewhere in the statute is a further indication that the terms "marital asset" and "gift" were not intended to have the same meaning. §61.075(3)(a)(3), Fla. Stat. (1991). See 49 Fla. Jur. 2d Statutes §133 (1984).

The analysis in Robertson also overlooks the fact that section 61.075(3)(a)(5) expressly refers to the judicially created term of art "special equity". In the absence of a statutory definition, this term necessarily must be defined in the context of existing case law. See Thornber v. City of Ft. Walton Beach, 568 So.2d 914, 918 (Fla. 1990). Under Ball and its progeny,[9] the "no gift" concept is an inherent part of the common law doctrine of special equity. The modern special equity case law presupposes that a gift is not presumed. Indeed, a cognizable special equity interest cannot exist if a gift is presumed.

This is because a gift presumption is essentially irrebutable. To overcome the presumption, a claimant spouse must now prove fraud or mistake or produce a post-nuptual agreement specifically disclaiming donative intent. See Special Equity: Who Dropped the Ball?, 16 Fam. L. Comm., No. 4 (Aug. 1991) at 13. Thus, in virtually every case, the newly imposed statutory burden of proving a negative (i.e., of proving that a gift was not intended) will be insurmountable. Id. Under Robertson,"the doctrine of special equity has suffered a fatal blow." Walsh, 353 Acad. Fla. Trial Law. J. at 33 (Feb. 1992).

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[9]Earlier Florida case law used the term "special equity" to address entirely different concerns. See generally Canakaris, 382 So.2d at 1200.

This is inconsistent with section 61.075(3)(a)(5). If the legislature had intended this result, the statute would have simply provided that jointly titled real estate is a marital asset in all instances. Instead, the legislature clearly indicated that the common law doctrine of special equity is to remain viable under the statute. It cannot be viable if the statute is also construed to resurrect a gift presumption.

The distinction between the "marital asset" presumption in the statute and the "gift" presumption addressed in Ball is critical. A "marital asset" presumption can be rebutted by showing that non-marital assets were invested in jointly titled property. In contrast, except in the most extraordinary circumstances, no one can overcome a presumption that a jointly titled deed, standing alone, is conclusive evidence of a completed gift.

The analysis in Robertson is also flawed in that it fails to examine section 61.075(3)(a)(5) in the context of the entire statutory scheme. When part of a statute is ambiguous, a court should examine the entire statute in an effort to discern legislative intent. See, e.g., Sobelman v. Sobelman, 541 So.2d 1153, 1154 (Fla. 1989).

Although the gift presumption announced in Robertson will prevent the recognition of a non-marital investment in a marital home, the legislature indicated elsewhere that interspousal "gifts" are to be set aside upon divorce. §61.075(3)(a)(3). For example, if one spouse uses marital assets to buy an expensive gift for the other spouse, the legislature has instructed the courts to ignore both donative intent and record title. The previously gifted asset is to be treated like any other asset. It is inconsistent to conclude that the legislature would mandate that interspousal gifts must be undone, while simultaneously creating an irrebutable gift presumption with regard to non-marital investments in jointly titled real estate.

Without question, the legislature intended to exclude non-marital assets from equitable distribution. §61.075(1), Fla. Stat. (1991). Non-marital assets include money and property owned before the marriage "and assets acquired . . . in exchange for such

assets . . . " §61.075(3)(b)(1), Fla. Stat. (1991). The statute expressly authorizes a tracing of non-marital money and property from its pure non-marital form into other assets acquired after the marriage. Significantly, section 61.075(3)(b)(1) does not prescribe how title to the new assets must be held. It does not not require, for example, that assets acquired with non-marital money or property must be segregated from marital assets, nor does it require that non-marital assets remain titled as if the spouse were still single.

In fact, except for section 61.075(3)(a)(5), the equitable distribution statute is silent about record title. This is consistent with the modern common law of equitable distribution. Prior to Ball and Canakaris, property was usually distributed on the basis of record title. The modern trend of the case law, now codified in the statute, rejects this formalistic title approach and instead views the marriage relationship as an economic partnership. Solely titled assets acquired with marital funds or labor are now treated as marital assets. By the same token, when a non-marital nest egg is used to acquire jointly titled property, the spouse who made the "capital investment" is entitled to credit for the investment, again without regard to record title. Landay, 429 So.2d at 1199.

This is consistent with the concept that marriage is an economic partnership. Under partnership law, partnership assets need not be titled in the partnership name or in the name of every partner. §620.605(2), Fla. Stat. (1991). A partner's capital contribution to the partnership is treated as partnership property during the duration of the partnership. §620.595(1), Fla. Stat. (1991). Upon dissolution, however, each partner is entitled to the return of his or her respective capital contribution. §620.755(2)(c), Fla. Stat. (1991). A partner's capital contribution is not forfeited because it was "given" to the partnership to further partnership objectives.

In contrast, the gift presumption announced in Robertson resurrects the discredited record title approach. Under Robertson, form (i.e., the status of record title) will now triumph over substance (i.e., whether an asset was acquired with marital or non-martial

funds). This is fundamentally inconsistent with the partnership concept embodied in both post-Canakaris case law and the equitable distribution statute.

As record title itself has become irrelevant, courts should no longer place any significance upon a purported "gift" of a record title interest. This makes sense for several reasons. First, the manner in which an asset is titled is often affected by other considerations which do not have anything to do with donative intent. For example, in this case the parties retitled assets for tax reasons and to accommodate lender requirements. (R. 130-31, 134-35, 370-71, 392-93, 1018). The creation of joint tenancies with survivorship rights is also common to most estate plans, both to avoid probate expense and the peculiarities of descent and devise of homesteads in Florida. (R. 360, 363, 1052).

Second, because "[m]ost all marriages are entered into with the expectancy of enduring," Crews v. Crews, 536 So.2d 353, 355 (Fla. 1st DCA 1988), interspousal title transfers are generally thought of as meaningless, i.e., they do not divest the donor of possession and enjoyment and they have no economic consequence unless a divorce occurs. Of course, only the most cynical spouse acts in contemplation that his or her own marriage will end in divorce. Prior to Robertson, even cynical spouses ignored record title since the law was clear that the joint titling of property would not constitute a gift.

The far better approach is to treat a "gift" of a record title interest as having been made, if at all, on the condition that the marriage endures. This is the policy underlying section 61.075 (3)(a)(3). This is how the law treats the gift of an engagement ring. See Gill v. Shively, 320 So.2d 415 (Fla. 4th DCA 1975). This also reflects most donors' actual intent had the question been squarely presented when the purported "gift" was made.

Finally, this approach is fair. For better or worse, nearly half of all marriages now end in divorce. This has led to an increasing number of second marriages where the parties are older and one or both enter the marriage with significant non-marital assets. See Bayles, Marriage as a Bad Business Deal: Distribution of Property on Divorce, 17 Fla. St.

U.L. Rev. 95 (1989). If the parties are wealthy, they likely will have a prenuptual agreement. Ordinary Floridians, however, will simply expect the law to be fair. They will reasonably expect to receive credit for capital investments of non-marital funds in the marriage partnership. Under Robertson, these middle class Floridians will soon discover that the law is neither fair nor reasonable.[10]

Ironically, the statutory rule announced in Robertson only applies to one species of property, i.e., real property held as tenants by the entireties. It simply does not make sense to conclude that the legislature intended to treat one type of property interest in a manner totally inconsistent with the overall thrust of the statute. It is far more reasonable to conclude, as the district courts have done, that the "marital asset" presumption in section 61.075(3)(a)(5) merely codifies the initial Ball presumption that record title ordinarily "speaks for itself." 335 So.2d at 7. The analysis in Robertson overlooks the fact that the initial presumption in Ball (like the statute) mandates an equal division of entireties property in most cases, and that Ball (like the statute) clearly places the burden of proving a non-marital or special equity investment on the claimant spouse.

A. ROBERTSON CAN BE DISTINGUISHED ON THE FACTS.

This case is distinguishable from Robertson in two important respects. First, there is uncontroverted testimony that Straley did not intend to make a gift of his extraordinary non-marital contributions used to purchase the beach property, the motor boat, and the Evtide sailboat (R. 363). As the district court noted, there is not a single word of testimony that a gift was intended or made. In the absence of any claim of gift, the trial court obviously did not make a finding of fact that a gift had been made (R. 636).

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[10]As this Court noted in Landay, the recognition of a spouse's capital investment of non-marital funds in jointly titled property is grounded in fairness. Even before Ball the harsh and unfair results produced by the gift presumption caused courts to devise alternative theories which would permit recognition of non-marital or special equity contributions. See, e.g., Hegel v. Hegel, 248 So.2d 212 (Fla. 3d DCA 1971).

The principal case relied upon by Frank, Geddes v. Geddes, 530 So.2d 1011 (Fla. 4th DCA 1988), is similar to Robertson. In Geddes there was conflicting testimony about whether a gift was intended. The trial court held that a gift was intended, and this factual determination was not disturbed on appeal. Geddes is inapplicable here, however, because Frank never claimed that Straley intended to make a gift. Straley's testimony that a gift was not intended is unrebutted and thus dispositive, at least under pre-statutory case law. See, e.g., Crews and Bassett v Bassett, 459 So.2d 473, 475 (Fla. 2d DCA 1984).

Of course, if the gift presumption announced in Robertson is indeed irrebuttable, Straley's special equity must fail. On the other hand, if it is not irrebuttable, it should not defeat a special equity in a case where there is no claim of gift, no finding of fact that a gift was made, and uncontroverted evidence that a gift was not intended.

This case can also be distinguished from Robertson because it involves a Landay fact pattern. Although Straley's non-marital funds were used as the down payment for the beach property, there is no question that marital funds were also invested in this asset. In contrast, Robertson involved a classic Ball fact pattern where one spouse's non-marital assets provided all of the consideration for the entireties property.

In a Ball situation, the spouse investing non-marital funds arguably has a choice: title can be taken in one name or (for whatever reason) title may be held jointly. A Landay special equity, however, involves a situation where non-marital and marital assets are invested in a mixed or hybrid asset, in this case the beach property. In a case involving a Landay fact pattern, record title will never fairly or accurately reflect the investment of non-marital and marital funds. For example, had the beach property been titled in Straley's name alone, record title would not have fairly reflected the admittedly marital share of the asset. If section 61.075(3)(a)(5) also overules Landay, spouses such as Straley are put in an impossible dilemma. No matter how the asset is titled, someone will be treated unfairly in the event of divorce.

Frank emphasizes that marital and non-marital assets were "comingled" in the beach property. (In. Br. at 31-32.) Of course, by definition a Landay special equity involves a mixed investment of marital and non-marital funds in a jointly-titled asset. Frank's reliance upon Terreros v. Terreros, 531 So.2d 1058 (Fla. 3d DCA 1988) and Walser v. Walser, 473 So.2d 306 (Fla. 2d DCA 1985) is misplaced. Both cases involve situations where non-marital funds were comingled with marital funds in an active joint bank account. Because of multiple deposits and withdrawals over the years, the non-marital funds were deemed to have lost their non-marital character, partly because of the proof problems inherent when funds are comingled. That is not what happened here: both parties testified that Straley's non-marital funds went directly from his non-marital bank account towards the purchase of the beach property and the motorboat, and the proceeds from his non-marital sailboat went directly toward the purchase of the Evtide sailboat. (R. 120-29, 747-49).

B. THE STATUTORY RULE ANNOUNCED IN ROBERTSON SHOULD NOT BE APPLIED RETROACTIVELY.

Because the Robertson decision applies the new statutory rule retroactively, it materially impairs or destroys vested special equity property rights established before the legislation became effective on October 1, 1988. This retroactive application of the statute violates the due process clause of the Florida Constitution. See, e.g., State Department of Transp. v. Knowles, 402 So.2d 1155 (Fla. 1981).

This Court has expressly stated that a special equity arising from the investment of non-marital funds in jointly titled property is a vested property interest. A special equity is "a prior vested right" in the nature of a "property interest or lien" upon jointly-titled property. Canakaris, 382 So.2d at 1200-01. See also Duncan and Landay.

Because this constitutional issue has already been raised in the motion for rehearing now pending in Robertson, it need not be extensively restated here. It is apparent that

Straley's non-marital investments in 1984 created vested property rights under the established law in effect when the investments were made.[11] Assuming section 61.075(3)(a)(5) reverses Ball and Landay, it is equally apparent that the retroactive application of this statute effectively destroys Straley's capital investment, i.e., his previously vested rights. This "retroactive abrogation of value" is generally considered a denial of constitutional due process. State Department of Transp., 402 So.2d at 1158.

In determining whether a right is vested and thus entitled to constitutional protection, this Court has approved a "weighing process" involving three factors: "the strength of the public interest served by the statute, the extent to which the right affected is abrogated, and the nature of the right affected." Id. The equitable distribution statute governs the private rights of divorcing spouses. To the extent the newly imposed gift presumption promotes a policy objective, it is adequately served by applying the statute prospectively. Second, the practical effect of the Robertson rule is to totally abrogate previously vested rights acquired in reliance upon Ball, Duncan, Canakaris, Wright, and Landay. Finally, as this Court has indicated, the right affected is a substantial property right. For these reasons, previously vested special equity rights should be protected and the statutory rule announced in Robertson should be applied prospectively.

C. IN THE ABSENCE OF ANY JUSTIFICATION, A CO-TENANT WITH A SPECIAL EQUITY SHOULD NOT BE ARBITRARILY DIVESTED OF TITLE.

As noted in the decision below, neither party in this case wishes to retain any marital asset except the beach property. 585 So.2d at 339. Primarily because his non-marital or special equity investment enabled the parties to acquire the property, and also because he spent more than $20,000 maintaining this asset during the period of separation, Straley argued that Florida law supported an award of the beach property to him. See e.g.,

[11] In her initial brief at 33-34, Frank makes much of the fact that Straley is an "experienced real estate lawyer". Of course, as a real estate lawyer, he presumably was familiar with Ball and Landay and acted in reliance upon this established law when he made his non-marital investments in jointly titled property.

Ball, 335 So.2d at 7; Duncan 379 So.2d at 952; and Tronconi v. Tronconi, 466 So.2d 203, 206 (Fla. 1985).

In Tronconi, the couple owned two residences: the marital home where the wife resided which was awarded to her, and a second home where the husband resided which was awarded to him. Each party wanted the residence awarded to them and the trial court specifically found that partition was not appropriate.

Although the parties here also own two residences, the trial court erred by awarding the wrong residence to each party. In July 1988, Frank asked Straley to vacate the marital home, and thereafter she remained in exclusive possession of the marital home through dissolution (R. 174-75). Because the beach property was too far away to commute to work, Straley was forced to rent an apartment, but it is undisputed that he made all mortgage and real estate tax payments for the beach property throughout the separation, while the parties shared the use of this asset (R. 649-50).

The justification for the cross award in Tronconi was that it "permitted the parties to continue the occupancy of their present residences." Faust v Faust, 505 So.2d 606, 609 (Fla. 1st DCA 1987) In contrast, by awarding Frank's residence (i.e. the marital home) to Straley, the trial court here did the opposite by requiring each party to move. The Tronconi decision emphasizes that there must be a justification for a cross award of real property. 466 So.2d at 205-06. Indeed, this Court has indicated that there must be justification for an award of exclusive possession of real property, which is a far less drastic remedy than a complete divesture of title. Duncan; Weisfeld v. Weisfeld, 545 So. 2d 1341 (Fla. 1989).

Absent any countervailing considerations such as the support needs of a spouse, Tronconi reaffirms that a special equity interest justifies an award of the asset to the special equity claimant. 466 So.2d at 206. In this case, there were no countervailing considerations whatever for an outright award of the beach property to Frank. It is not the marital home, nor are there children involved. Even if section 61.075(3)(a)(5) precludes

any monetary recognition of his special equity investment, Straley's contributions to the beach property were nonetheless extraordinary. Without his contributions, the property could not have been purchased or sustained upon separation.

As the district court stated, at a minimum Straley's request for partition should have been granted. 585 So.2d at 339. Because neither party objects to the sale of any of the other marital assets, they can be sold and the proceeds equitably divided. When unwanted assets are sold, disputes about valuations are less significant, and neither party is saddled with an asset whose suitability and affordability evaporates with the marriage.

As for the coveted beach property, because it consists of two buildable lots, physical partition in kind may be possible. Alternatively, at a court ordered partition sale the co-tenants can both bid for the property and they will receive credit for their respective ownership interests. Grable v. Nunez, 66 So.2d 675 (Fla. 1953). Absent any basis or rationale for divesting a co-tenant of title, partition produces a fair result, favored by the law, which is generally available as a matter of right to co-tenants in Florida. See 12 Fla. Jur. 2d Co-tenancy and Partition, §§40, 47. A partition sale is inherently fairer than an arbitrary divestiture of title "by judicial fiat", because at the sale "each party would at least have the opportunity to purchase the other's interest." Faust, 505 So.2d at 609. In the absence of any justification for doing otherwise, neither Tronconi nor the equitable distribution statute modify section 689.15, Florida Statutes (1991), which provides that upon divorce the owners of entireties property automatically become tenants in common.

It is not a coincidence that the foregoing cases all involve the disposition of real property: the law has long recognized that real estate is unique. Although there were a number of other assets in this case, both parties clearly consider the beach property to be unique and irreplaceable. Even if the statute has destroyed his special equity, Straley's rights as a co-tenant should be respected.

II. THIS COURT SHOULD EXCERCISE ITS DISCRETION AND DECLINE TO REVIEW ISSUES IN THIS CASE WHICH ARE BEYOND THE SCOPE OF THE CONFLICT WITH ROBERTSON.

This Court's jurisdiction is based on the conflict between the decision below and its recent decision in Robertson. Although it has jurisdiction to review other issues in the case, this Court should exercise its discretion and decline to do so.[12]

This case involves two appeals which were separately and extensively briefed at the district court. Because of space constraints, as well as the procedural posture of the case at this third level of appellate review, the district court briefs addressed a number of issues which cannot be raised here. (See App. A-F.)[13] The two appeals were later consolidated for oral argument before the three judge panel and reargument before the district court en banc. Because the consolidated case involved a voluminous record and a large number of issues, both the original panel and the en banc panel sua sponte granted extraordinary time for oral argument.

In the first appeal pertaining to the property distribution, five major issues were raised, together with a number of sub-issues. Only two of these issues are addressed in the opinion below. This does not mean that the other issues are without merit. Because the district court concluded that the trial court erroneously treated all of the passive gain in Straley's non-marital real estate partnerships as a marital asset, that court was not required to reach and address several of the other issues raised.

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[12]In cases involving its discretionary jurisdiction, this Court frequently declines to review other issues which are beyond the scope of the conflict or the certified question, as well as issues which were not addressed in the district court's opinion. See, e.g., Ombres v. Ombres, 16 F.L.W. S740 (Fla. Nov. 14, 1991); Sandoval v. Banco De Comercio, S.A., 585 So.2d 934 (Fla. 1991); State v. Gibson, 585 So.2d 285 (Fla. 1991); Bedell v. Bedell, 583 So.2d 1005 (Fla. 1991); Schutz v. Schutz, 581 So.2d 1290 (Fla. 1991); State v. Williams, 576 So.2d 281 (Fla. 1991).

[13]Consistent with the role of the district courts in Florida, the briefs and appendices submitted below on direct appeal contain a detailed recitation and analysis of the voluminous record. In contrast, in a case involving its discretionary jurisdiction, the briefs to this Court appropriately should focus on the significant policy issue of whether the doctrine of special equity set forth in Ball has been abolished by the legislature.

The second appeal of the attorney fee award also involved five major issues. Because the district court found merit in the first issue, it did not reach and address any of the other points on appeal.[14] Again, however, this does not mean that the other issues are without merit. In fact, the dissenting judges agreed with some or all of the other points raised by Straley. 585 So.2d at 339-348.

Although the dissolution of this four year marriage has already been the subject of extraordinary scrutiny by two appellate panels, Frank now seeks a de novo review of every issue decided against her by yet a third appellate tribunal. The other issues raised do not involve decisional conflict, nor are they in any way affected by or necessary for this Court's resolution of the special equity issue. To the contrary, if Robertson destroys Straley's special equity claim, Frank's position on remand is substantially improved.

In contrast, even if he wished to further prolong this litigation, Straley is now precluded from raising any of the issues decided against him. Some of these issues are addressed in the opinion below; others were rejected sub silento. In any event, since there was no basis to invoke this Court's jurisdiction, Straley could not file a cross petition seeking a similar de novo review. Instead, solely because of the jurisdictional limitations of this Court, Straley has been forced to assume a basically defensive posture. At the same time, he is also forced to assume an appellant's role by pointing out alternative grounds for a reversal of the trial court's judgments.

At bottom, Frank seeks a de novo review in the hope that she will benefit from the convoluted procedural posture of this case. She is hoping that this Court will simply disagree with the district court. Especially in a case to be decided without benefit of oral argument and complete briefs addressing all of the issues, such disagreement would

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[14]Given the procedural posture of this case, it is not clear what relief this Court could possibly fashion on the non-conflict issues. Comity and fundamental fairness would suggest that if this Court disagrees with the Second District's assessment of passive gain on non-marital assets or allocation of attorney's fees, the case should be remanded to the Second District en banc for their consideration of those alternative issues which their previous ruling did not require them to reach.

"necessarily [be] made from the least reliable source--a second level appellate record." Cummings, 330 So.2d at 137 (England, Overton, and Sundberg, JJ. dissenting).

III. THE TRIAL COURT ERRONEOUSLY TREATED ALL OF THE UNREALIZED PASSIVE GAIN FROM STRALEY'S NON-MARITAL REAL ESTATE PARTNERSHIPS AS A MARITAL ASSET. IN THE ALTERNATIVE:

A. SECTION 61.075(3)(A)(2) IS INAPPLICABLE BECAUSE ONLY NON-MARITAL ASSETS WERE USED TO MAINTAIN STRALEY'S NON-MARITAL PARTNERSHIP INTERESTS.

B. ASSUMING ARGUENDO, THAT THE PASSIVE APPRECIATION IN STRALEY'S NON-MARITAL REAL ESTATE PARTNERSHIPS IS A MARITAL ASSET, THE TRIAL COURT ABUSED ITS DISCRETION BY AWARDING ALL OF THIS SPECULATIVE AND UNREALIZED "PROFIT" SOLELY TO STRALEY.

Apart from the special equity issue, the district court reversed the trial court's property distribution because it erroneously characterized "the passive appreciation in market value of Straley's interest in non-marital real estate partnerships (601 and Harbor Property) as a marital asset." 585 So.2d at 338. Notwithstanding Frank's claim to the contrary, a trial court does not have discretion to include non-marital assets in its scheme of equitable distribution. §61.075(1), Fla. Stat. (1991). The characterization of a marital or non-marital asset is essentially a question of law. See, e.g., Harper v. Harper, 546 So.2d 438 (Fla. 2d DCA) rev. den., 553 So.2d 1165 (Fla. 1989). Indeed, all of the cases cited by Frank in this regard involve situations where an appellate court reversed a trial court because it had mischaracterized an asset of the parties. (In. Br. at 37-42).

The Second District's opinion did not involve an improper reweighing of the evidence, because the evidence is not in dispute. At trial, Straley (R. 314-24), his appraiser (R. 243-80), and Frank's appraisers (R. 66-78, 341-58) all testified about the speculative and illiquid nature of increases in downtown Tampa land values in the area where the warehouses owned by 601 and Harbor Property are located. Although there were minor disagreements about specific land values, it is undisputed that the appreciation

in value of Straley's non-marital assets was passive and entirely due to "fortuitous market forces". Wright v. Wright, 505 So.2d 699, 700 (Fla. 5th DCA 1987).[15]

In what is essentially a codification of prior case law, section 61.075(3)(a)(2) provides that the enhancement and appreciation of a non-marital asset "resulting from" or caused by marital funds or labor is a marital asset. Conversely, however, passive appreciation due to inflation or market forces remains non-marital, because it did not "result from" marital efforts or funds. See, e.g., Wright, Macaluso v. Macaluso, 523 So.2d 615, 616 (Fla. 2d DCA 1988), Rion v. Rion, 421 So.2d 541, 543 (Fla. 5th DCA 1982), and Hanks v. Hanks, 553 So.2d 340, 342-43 (Fla. 4th DCA 1989).

Applying section 61.075(3)(a)(2) to the undisputed facts of this case, the district court held that Frank was entitled to one half of the increased equity of 601 and Harbor Property resulting from the mortgage payments which were made during the marriage. Accord Hickman v. Hickman, 572 So. 2d 1021 (Fla. 2d DCA 1991).[16] In contrast, the passive appreciation sought by Frank which was due solely to speculative market forces was not caused by marital funds or efforts and thus remained non-marital.

Frank argues in support of a "threshold" test. According to this argument, any expenditure of marital funds automatically "maritalizes" all of the appreciation in value of a non-marital asset during the marriage. Frank's argument is flawed in two respects. First, the pre-statute cases which refer to a "threshold" expenditure of marital funds have also

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[15]Of course, the same speculative market forces which created an "incredible rise" (R. 257) in values during the real estate boom of the 1980's have now produced an equally dramatic downturn in values as a result of the current recession.

[16]Because it is undisputed that Frank made no contribution of any kind, direct or indirect, to Straley's non-marital assets, there is authority that she was not entitled to any part of the increased equity resulting from the mortgage payments made by Straley's law firm during the marriage. See Pfleger v. Pfleger, 558 So.2d 198 (Fla. 2d DCA 1990) (non-owning husband replaced roof and made most of the mortgage payments on wife's non-marital property; his claim is limited "to the extent the increase in the home's value was attributable to his efforts") [e.s.] In a case where none of the other statutory factors are relevant, this result is also supported by the statute. See §61.075(1)(g), Fla. Stat. (1991).

held that the passive appreciation of a non-marital asset remains non-marital. See, e.g., Sanders v. Sanders, 547 So.2d 1014, 1016 (Fla. 1st DCA 1989). Second, the plain language of section 61.075(3)(a)(2) makes clear that Florida has adopted the "source of appreciation" rule rather than any threshold test.

At bottom, Frank's "threshold" argument is an effort to rewrite the statute so that the appreciation in value of a non-marital asset will always be a marital asset. This is because all non-marital assets have maintenance costs associated with ownership,[17] and the payment of these expenses (even when made by the owning spouse from his or her own income) will invariably create a marital taint. If any expenditure of marital funds creates a marital taint which has the effect of "maritalizing" subsequent appreciation, then the "resulting from" requirement in section 61.075(3)(a)(2) is mere surplusage. The statute does not provide that the increased value of a non-marital asset is automatically marital. The statute expressly requires a causal relationship between the funds expended and a non-marital asset's increased value.[18]

In arguing that all of the increased values of 601 and Harbor Property should be treated as marital assets, Frank seeks the benefit of investment decisions made by Straley and his partners before the marriage. Frank had no role in these decisions and thus has no entitlement to the passive appreciation associated with these investments.

Moreover, the statute totally protects a non-owning spouse from losses with respect to non-marital assets, which is another reason why increases in value are not automatically marital. What would Frank's position be now that speculative land values have declined as

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[17]For example, an owner of real property must pay ad valorem taxes; an owner of personalty must pay personal property or intangible tax; improvements to real property and tangible assets of value ordinarily are insured, which requires the payment of premiums, and such assets typically must be repaired and maintained to avoid waste; by the same token, if an asset is subject to a mortgage or other lien, finance charges must be paid.

[18]Because Frank's position is contrary to the plain language of the statute, she attempts to persuade this Court to disregard the statute because a threshold approach would be easier for trial courts to apply (In. Br. 38-40). Even assuming this is true, it does not provide a basis for disregarding the "source of appreciation" rule expressly set forth in the statute.

a result of market conditions? Would she be willing to shoulder a portion of Straley's non-marital obligations and share in the loss? Needless to say, if confronted with this question on remand, Frank will argue quite correctly that the risk and loss should be borne by Straley, because they are his non-marital assets and she had no role in the investments. This is the policy underlying section 61.075(3)(a)(2), which makes marital only enhancement and appreciation "resulting from" marital funds or labor. A direct causal relationship is required and this requirement is grounded in fairness.

Because Frank cannot argue that the market driven appreciation was caused by marital funds, she overstates the cost of maintaining Straley's non-marital assets in an effort to make the maritalization of his assets seem less unfair. Specifically, Frank simply ignores the substantial and uncontroverted tax savings produced by these partnerships. If Straley had not owned his non-marital assets, it is undisputed that the parties would have paid more than $45,000 in additional federal income tax. Thus, the real net cost of maintaining Straley's non-marital assets was only $27,077 (R. 712, 185-87).

A. SECTION 61.075(3)(A)(2) IS INAPPLICABLE BECAUSE ONLY NON-MARITAL ASSETS WERE USED TO MAINTAIN STRALEY'S NON-MARITAL PARTNERSHIP INTERESTS.

Although not addressed in the decision below, the result reached by the district court is also supported by section 61.075(3)(b)(3), Florida Statutes (1991). This section establishes a new rule with respect to income received from non-marital assets: "All income derived from non-marital assets during the marriage" is a non-marital asset "unless the income was treated, used or relied upon by the parties as a marital asset." [e.s.]

At the time of the marriage, Straley owned four non-marital partnership interests. The first partnership, Bush Ross, was an income producing business enterprise and a small portion of the income derived from this non-marital partnership was used to pay the debt service and other expenses of the affiliated real estate investment partnerships. Thus, income from a non-marital asset, i.e., Bush Ross, was used to maintain 601 and Harbor Property, and this income is expressly deemed to be non-marital unless Frank can demonstrate that it was "treated, used or relied upon" as a marital asset.

The expenses of 601 and Harbor Property were paid directly by the law firm (R. 284-85, 308,09, 316), were fixed and known to Frank at the time of the marriage (R. 173-74), were never deposited in a marital bank account, and this income was never available for marital purposes. Thus, this income was never "treated, used, or relied upon by the parties as a marital asset."

The three judge panel concluded that section 61.075(3)(b)(3) is inapplicable because the income used to maintain Straley's interests in the partnerships was "due to his work efforts primarily, if not solely" 15 F.L.W. at D2565. This analysis overlooks the statutory definition of "income" contained in section 61.046(4), Florida Statutes (1991). As used in chapter 61, including section 61.075(3)(b)(3), the term "income" is broadly

defined and clearly includes taxable income due to work efforts.[19] The statutory definition is controlling here and additional exceptions may not be implied by a court. See Alvarez v. Board of Trustees, 580 So.2d 151, 154 (Fla. 1991). Under the plain language of the statute, Straley was not required to make a showing that the income in question "was due to a passive investment interest in the law firm." 15 F.L.W. at D2565.

Because Straley's partnership interest in Bush Ross was a non-marital asset, and the portion of Straley's income from Bush Ross which was used to maintain his non-marital interests in 601 and Harbor Property was never "treated, used, or relied upon as a marital asset," this portion of his income remained non-marital and section 61.075(3)(a)(2) is inapplicable.

B. ASSUMING, ARGUENDO, THAT THE PASSIVE APPRECIATION IN STRALEY'S NON-MARITAL REAL ESTATE PARTNERSHIPS IS A MARITAL ASSET, THE TRIAL COURT ABUSED ITS DISCRETION BY AWARDING ALL OF THIS SPECULATIVE AND UNREALIZED "PROFIT" SOLELY TO STRALEY.

Under the trial court's analysis, the unrealized "profit" from 601 and Harbor Property totalled $97,724. By awarding these potential profits solely to Straley, he received less than 25% of the assets acquired during the marriage, while Frank received the lion's share of hard assets, including the coveted beach property, and she was relieved of any responsibility for $111,000 of unsecured marital debt. 585 So.2d at 338-339.

Irrespective of the statute, this result is an abuse of discretion. Frank concedes that Straley's financial contributions to the marriage were five times greater than hers (In. Br. at 19), and yet Straley leaves this four year marriage with less than what he had going into it. Assuming the increased values of 601 and Harbor Property were properly characterized as

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[19]If the legislature had intended to exclude income due to work efforts from section 61.075(3)(b)(3), it would have added appropriate words of limitation. Compare Ill. Ann. Stat., chapter 40, section 503(b)(3) (Smith-Hurd Supp. 1991). Instead, the legislature underscored its intent by specifically stating that section 61.075(3)(b)(3) applies to "all income". [e.s.] This is a departure from pre-statutory case law which treated income attributable to work efforts as a marital asset in all instances.

marital assets, it was fundamentally unfair to heap all of the speculative gain in these illiquid investments solely on Straley.

It is undisputed that the "on paper" appreciation of these partnerships was entirely due to speculative market conditions (R. 277-79, 350-51). It is also undisputed that market conditions had begun to deteriorate even by the time of the fee hearing in early 1990. This Court may take judicial notice of the fact that commercial real estate values throughout Florida have continued to fall during the current recession.

As Frank points out, the partnerships are "highly leveraged" with mortgage debt. (In. Br. at 36). This Court may also take judicial notice of the fact that financial institutions have recently experienced major problems with commercial real estate loans (in large part because of the decline in market values) and that such loans are now closely scrutinized by regulatory authorities. If Straley and his partners cannot renew these loans, the properties could be lost in foreclosure.

Finally, it is undisputed that Straley's small fractional interests in these land partnerships are totally illiquid (R. 253, 1781-82, 1785, 1906). Unlike stock in a publicly traded corporation, there is no market for fractional minority interests in closely held real estate partnerships. Straley must wait until the land is sold for redevelopment, which may not happen for many years.

The solution to this inequity is obvious. Instead of awarding the "on paper" profit solely to Straley, something more accurately described as an "expectancy" than as an "asset," the trial court should at the least have apportioned the appreciated value on a percentage basis and awarded Frank a beneficial interest in 601 and Harbor Property. Because they are passive investment partnerships, the trial court was not confronted with a situation where an ongoing business enterprise should be awarded to one spouse to avoid the acrimony that would exist if former spouses were required to be business partners. Compare §61.075(1)(f), Fla. Stat. (1991). This is precisely what was done with the 238

Franklin real estate partnership and neither party objected. This would permit Straley to receive an equitable share of the real and intrinsically desirable marital assets, rather than an award of nothing more than the potential speculative gain on assets which were his in any event before the marriage.

IV. THE DISTRICT COURT APPROPRIATELY REVERSED THE FEE AWARD BECAUSE THE PARTIES HAVE A SIMILAR ABILITY TO SECURE COMPETENT COUNSEL. IN THE ALTERNATIVE,

A. FRANK'S FEES AND COSTS ARE GROSSLY EXCESSIVE; THE SUCCESSOR TRIAL JUDGE'S DETERMINATION THAT $71,706 ARE "REASONABLE" ATTORNEY FEES IS NOT SUPPORTED BY SUBSTANTIAL COMPETENT EVIDENCE.

B. THE SUCCESSOR TRIAL JUDGE ERRED IN REFUSING TO ALLOW STRALEY TO INTRODUCE EVIDENCE ABOUT THE PRE-TRIAL SETTLEMENT OFFERS AT THE FEE HEARING

This is not a fee award case: the parties are both practicing attorneys with good jobs and the same income earning ability. As argued in Straley's jurisdictional brief, a new rule was not announced or applied by the district court in this case. To the contrary, in reversing the fee award, the district court examined the financial resources of both parties and concluded that the parties had a similar ability to secure competent counsel. See Cummings and Canakaris. See also Standard Guaranty. Ins. Co. v. Quanstrom, 555 So.2d 828, 835 (Fla. 1990) and Nichols v. Nichols, 519 So.2d 620, 621-622 (Fla. 1988).

In challenging the district court's reversal of the fee award, Frank makes two arguments: First, she points out that Straley's income during the marriage was about five times greater than her income. Of course, if there was ever an instance where an arithmetic average is misleading, it is the average incomes of these two lawyers. During almost half of the four year marriage, Frank earned no income at all while she was endeavoring to start her own law practice and later when she was voluntarily unemployed working on political campaigns, (R. 124, 164-65, 384). The lengthy periods when Frank received no income skews the arithmetical average to the point of making it meaningless.

Since finding her professional niche as corporate counsel for TECO Energy in late 1986, Frank's annual income has steadily increased and she earned $54,350 in 1990, plus a company car and other benefits (R. 707, 1435). In contrast, Straley's income has leveled off and actually declined. It is an irony, bitter indeed, that Straley received no credit whatsoever for his disproportionate financial contributions in the distribution of marital assets, yet these same contributions are now used by Frank as a basis for a fee award.

At the time of the fee hearing, Straley's income exceeded Frank's by a ratio of slightly more than two to one. But the gap has narrowed dramatically since 1987, and will continue to close as Frank, now 37 years old, enters the most productive years of her career. Moreover, the income disparity ratios relied upon by Frank in her examination of the case law are irrelevant when applied to two professionals earning well above subsistence levels. Compare, e.g., Davis v. Davis, 547 So.2d 309 (Fla. 4th DCA 1989) (husband earning $50,000 compared to wife's $16,000 justified fee award) and Hudgens v. Hudgens, 411 So.2d 354 (Fla. 2d DCA 1982) (professional husband earning $100,000 compared to wife's $14,000; husband paid fees) to Sizemore v. Sizemore, 487 So.2d 1080 (Fla. 5th DCA 1986) (husband earning $90,000 compared to wife's $30,000 in permanent alimony, each paid own fees), and Seitz v. Seitz, 471 So.2d 612, 615 (Fla. 3rd DCA 1985) (regardless of husband's ability to pay fees, with permanent alimony income of $4,500 per month and receipt of one half of the marital estate, wife required to pay own fees). See also Kantor Attorneys' Fees and Costs in Dissolution Actions: Erosion of the Practice of Automatic Court Awards, 62 Fla. B.J. No.1, January 1988 at 49.

Throughout this litigation, Straley has argued that Frank has an earning ability equal or comparable to his; Frank continues to deny that claim. Possessing an equal or comparable earning ability does not mean that the parties have the same income now or that they necessarily will have the same income in the future. Almost by definition, however, two lawyers practicing in the same community have the same earning capability or

potential. To be sure, Straley earns more now, but he is five years older and has been practicing law six years longer. Frank, a 1982 graduate of Florida State where she was on the law review (R. 1882), was earning nearly $55,000 a year at age 35 at the time of the fee hearing two years ago.

Frank's second argument is that a fee award is justified because Straley has a greater net worth. (In. Br. at 44) She claims that Straley has a net worth in excess of $500,000. This is not true. The value of his interest in Bush Ross is nominal and of academic interest. The record establishes that there is negative value with respect to the 216 Franklin partnership that owns the Bush Ross office building. Because Frank asserted no claim to these assets, the trial court did not attempt to value them. (R. 635-36).

Based on the trial court's valuations, there is substantial unrealized profit in 601 and Harbor Property. This is the sole source of Straley's greater net worth. Of course, as Frank notes, these investments were "highly leveraged", so that the vast majority of the equity bears the risk associated with debt repayment. In fact, Straley must pay $13,200 per year (R. 1440-41) for the foreseeable future to discharge his non-marital obligations with respect to these land speculations. In short, 601 and Harbor Property are not a source with which Straley can pay anyone's fees.

Although Frank continues to defend the trial court's decision, at this juncture a total of ten appellate judges have concurred that a 100% award of attorney fees and costs to Frank was an abuse of discretion.[20] If this Court disagrees with the decision below and believes that a partial fee award to Frank may be appropriate, then four other issues (not reached by the district court) must be considered. Although these issues were fully briefed

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[20]Even the dissenting judges acknowledged that Frank should be required to pay a substantial portion of her fees. The dissenters perceived a more "flexible" rule with respect to attorney fee awards in the Second District, but candidly admitted that the Fifth District "commonly" reverses fee awards in toto in cases similar to this one. 585 So.2d at 348.

and argued to the district court (see App. - D at 17-49), space constraints permit only two of the issues to be raised here:

A. FRANK'S FEES AND COSTS ARE GROSSLY EXCESSIVE; THE SUCCESSOR TRIAL JUDGE'S DETERMINATION THAT $71,706 ARE "REASONABLE" ATTORNEY FEES IS NOT SUPPORTED BY SUBSTANTIAL COMPETANT EVIDENCE.

The gross excessiveness of the fees claimed by Frank's counsel is apparent by simply comparing the numbers: Straley's fees total $25,000; Frank's fees total $71,706. This incredible disparity is the best evidence that Frank's fees are excessive.

Under section 61.16, Florida Statutes (1991), the purpose of a fee award "is to assure that one party is not limited in the type of representation he or she would receive because that party's financial position is so inferior to that of the other party." Standard Guaranty Ins. Co., 555 So.2d at 835. A fee award is not intended to enable a financially disadvantaged spouse (in this case, a "financially disadvantaged" attorney earning $54,350 per year and driving a company car) to hire an extremely expensive lawyer and incur extraordinary fees that the other spouse must then pay.

Accordingly, the amount of Straley's fees are highly relevant in determining a reasonable fee for Frank's counsel. See, e.g., Lowry v. Lowry, 512 So.2d 1142, 1143 (Fla. 5th DCA 1987) (fee award reversed, the court noting that the wife's fee "is some three times greater than the former husband's attorney received for the same hearing"). Federal courts, applying the lodestar test applicable here, often look to the amount of the other side's fees in determining a reasonable fee award. See, e.g., United States v. Metropolitan Dist. Comm'n, 847 F.2d 12, 19 (1st Cir. 1988) (defendant's fees for "substantially similar work" is the "best barometer" in determining a reasonable fee). A comparative approach is particularly appropriate in divorce cases where the purpose of an award is to ensure that a spouse is not unfairly "limited" in the type of representation received.

The gross excessiveness of Frank's fees is also apparent when her fees are compared to the marital estate. Ignoring Straley's special equity claims altogether, the marital assets in this case net of debt totalled approximately $198,000.[21] Thus, Frank's trial fees and costs alone consumed nearly half of the marital estate.

A fee of this size is unconscionable. It cannot be justified, under any circumstance, in a dissolution of a four year childless marriage between persons of comfortable but hardly substantial means. See, e.g., Travieso v. Travieso, 447 So.2d 940, 944 (Fla. 3d DCA 1984), rev'd on other grounds 474 So.2d 1184 (Fla. 1985), Donner v Donner, 281 So.2d 399 (Fla. 3d DCA) cert. denied, 287 So.2d 679 (Fla. 1973), and Dykes v Dykes, 475 So.2d 1261 (Fla. 5th DCA 1985). In a divorce case decided more than 40 years ago, this Court reversed an excessive attorney fee award because, as the late Justice Terrell expressed it, no one should be required to pay so much "for the luxury of having his name connected with a lawsuit". Rainey v. Rainey, 38 So.2d 60, 61 (Fla. 1948).

In reviewing the fee award, it is significant that the successor judge gave Frank's counsel all of the fees he requested, including $7,750 incurred after he had presented his case and at an increased rate of $260 per hour. These supplemental fees and costs and the new hourly rate were not supported by any testimony. In fact, the successor trial judge was prepared to award fees before Straley had even had an opportunity to present evidence about his financial circumstances (R. 1742). For whatever reason, the successor judge simply signed an order prepared by Frank's counsel (R.1568), thus awarding every penny requested. Such an award is inherently suspect. See McQuiston v. Marsh, 790 F.2d 798, 801 (9th Cir. 1986) (a reviewing court should give "special scrutiny to proposed findings [offered by one party] adopted verbatim by the district court").

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[21]This is based on the district court's analysis. By improperly including the speculative appreciation in Straley's non-marital assets, the trial court valued the marital estate at $286,969. Even under this formulation, Frank's trial fees and costs for just her side of the litigation consumed about 30% of the marital estate.

There are two main reasons why Frank's fees are so excessive:

1. **The Hourly Rate Charged by Frank's Counsel was Excessive: "A Michelangelo should not charge Sistine Chapel rates for painting a farmer's barn"[22]**

Each party hired an experienced and competent attorney, both of whom are board certified in marital and family law (R. 1291, 1666, 1487). Straley's lawyer charged $135 per hour; Frank's lawyer charged $250 and later $260 per hour.

The litigants here are especially well qualified to act as informed consumers when purchasing legal services in the marketplace. Frank is corporate counsel for TECO Energy, and she testified that she sometimes retains outside counsel for her employer (R.1710). Straley testified that he "shopped around" to find a lawyer he could afford. (R 1951-52, 1898). Frank did not "shop around" for a lawyer (R. 1709-10). Instead, she engaged Mr. Sessums because of his experience and reputation, even though the parties here are not nearly as wealthy as in the typical case handled by him. (R. 1652-53).

Florida courts are required to apply the federal lodestar test in determining the amount of a reasonable fee award. Standard Guaranty Ins. Co., modifying Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) (Rowe). In determining a reasonable hourly rate, the court must look to the enumerated factors set forth in rule 4-1.5, Rules Regulating The Florida Bar, including the amount of money in controversy. See 1 S. Speiser, Attorneys' Fees §8:9 (1973).

The reasonable rate then set by the court must be based upon "the prevailing 'market rate', i.e., the rate charged in [the] community by lawyers of reasonably comparable skill, experience and reputation, for similar services." Rowe, 472 So.2d at 1150. The burden of establishing the prevailing market rate is on the claimant and the fee arrangement between the claimant and that party's attorney clearly is not controlling. Id.

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[22]Ursic v Bethlehem Mines, 719 F.2d 670, 677 (3d Cir. 1983) (attorney fee award pursuant to federal ERISA statute).

Frank's fee witness, Mr. Langford, did not testify about the prevailing market rate. Instead, he concluded that the $250 hourly rate was reasonable because of the experience and reputation of Frank's counsel and because he has clients beating a path to his door who are willing to pay him $250 an hour (R. 1676). This may be true, but it is not the test under Rowe. Indeed, Messrs. Sessums and Langford both acknowledged that $250 per hour was the highest rate charged by any divorce lawyer in Tampa at the time (R. 1653, 1669, 1675). The lodestar is intended to provide "an objective basis for the award of attorney fees." Rowe, 474 So.2d at 1151. If, as Mr. Langford testified, the test turns on whether or not a particular lawyer can command a $250 hourly rate in the marketplace, then the lodestar approach becomes subjective and illusory. Under Mr. Langford's analysis, the rate charged by any lawyer is reasonable for that lawyer, provided he or she has a clientele willing to pay it.

This is not the lodestar test; the hourly rate must be based on the prevailing market rate. See, e.g., Coulter v State of Tennessee, 805 F.2d 146, 149 (6th Cir. 1986) ("a renowned lawyer who customarily received $250 an hour in a field in which competent and experienced lawyers normally receive $85 an hour should be compensated at the lower rate"). In this case, all of the evidence indicates that the "prevailing market rate" for competent and experienced divorce counsel in Tampa is substantially less than $250 or $260 per hour. Straley's fee expert, Mr. Knox, testified that competent counsel could be obtained for between $175 and $200 per hour (R. 1722-24). Mr. Langford testified that competent counsel could be obtained for as little as $125 per hour (R. 1676). Straley's lawyer charged $135 per hour. Finally, although the successor judge court did not apply the Rowe test[23], he acknowledged familiarity with market rates for divorce attorneys:

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[23]From the record, it appears that the successor trial judge sought to establish an hourly rate based on what would be an acceptable rate sui juris to Frank's counsel (R. 1653, 1656). This clearly is not the Rowe test.

> You know, I've seen very competent attorneys and one will do the job for $150, another one for $160, another one for $175, some for $200.
>
> I had Bob Fields and Leslie Friedsam in here recently and she had increased hers from $150 to $165 after becoming a certified marital lawyer. Bob Fields was charging $220 per hour, but there was also a case where a man had over seven million dollars in assets.

(R. 1657-58).

2. An Excessive Number of Hours were Devoted to this Case: "Florida families are entitled to legal advice that is as sensible and cost-effective as that given to Florida corporations."[24]

In a case involving $198,000 in marital assets, the hours spent by Frank's counsel were also excessive. Based on the issues in the case as reviewed by Straley's fee expert, 100 hours was a reasonable amount of attorney time for each side (R. 1719-21). In contrast, at the trial level alone, 231.4 hours of attorney time were spent by Frank's counsel (R. 1300, 1422).

Frank's counsel made it clear that neither party impeded discovery, hid assets, or was otherwise uncooperative (R. 1650). In fact, the record reveals that at the pretrial conference (held before Frank had conducted any discovery) Straley submitted a financial affidavit fully and fairly disclosing all marital and non-marital assets (R.534-36).

Thereafter, Frank needlessly increased the hours of both lawyers[25] by conducting the lion's share (70% of the depositions, and 88% of all other discovery requests) of time-consuming and expensive discovery. See page 12, supra. As Mr. Knox put it, the question is whether a case "warrants turning every single stone" (R. 1716-17). In this case, Straley disclosed all assets at the outset, nothing was hidden, and little, if anything, was discovered from the Wife's excessive discovery. Of course, since the successor judge had not presided at the trial and was not familiar with the issues litigated, there was no way he could fairly determine if the hours expended were reasonable or not.

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[24]Wrona v. Wrona, 16 F.L.W. D3074, 3075 (Fla. 2d DCA Dec. 11, 1991).

[25]The fact that Frank caused opposing counsel to react and expend more time than was reasonably necessary on the case should hardly justify the discovery abuser's attempt to shift the cost of such abuse. See Mirabel v. General Motors Acceptance Corp., 576 F.2d 729, 731 (7th Cir.) cert. denied, 439 U.S. 1039 (1978).

Frank's counsel and Mr. Langford also argued that legal fees were reduced because of extensive paralegal involvement in this case (R. 1637, 1667), but there is nothing in the record to support this claim. Moreover, there is nothing in the record to explain how Frank incurred $19,050 in paralegal fees, while Straley incurred only $1,090 in paralegal fees.

The record also indicates that the fee requested was in some sense a contingent fee. The parties' net worth is substantially less than the typical case handled by Frank's counsel. Even though his client earns more than $50,000 per year and had been invoiced monthly for legal fees, nothing had been paid to Frank's counsel since July 1989 (R. 1655), although his client was then able to save more than $500 per month from her income (R. 1381, 1702). At first, Frank's counsel testified that his client would be required to pay him in accordance with the fee contract, irrespective of the fee award (R. 1656). He later conceded, however, that he would in fact accept whatever lesser amount might be awarded by the court in full discharge of Frank's fee obligation (R. 1656-57). Thus, the fees invoiced really represent an "asking price" for the services of Frank's counsel.

Florida courts have expressed increasing concern about astronomically high fees in divorce cases, and have urged the bench and bar to be mindful of excessive fees. See e.g., Wrona and Katz v. Katz, 505 So.2d 25 (Fla. 4th DCA 1987). Because this Court has adopted federal law in this area, the federal response to excessive fee claims is now equally appropriate in Florida courts. Under federal law, grossly excessive fee applications are denied. The policy underlying this rule is obvious:

> If . . . the Court were required to award a reasonable fee when an outrageously unreasonable one has been asked for, claimants would be encouraged to make unreasonable demands, knowing that the only unfavorable consequence of such misconduct would be reduction of their fee to what they should have asked for in the first place. To discourage such greed, a severer reaction is needful...

Brown v. Stackler, 612 F.2d 1057, 1059 (7th Cir. 1980).

B. THE SUCCESSOR JUDGE ERRED IN REFUSING TO ALLOW STRALEY TO INTRODUCE EVIDENCE ABOUT THE PRE-TRIAL SETTLEMENT OFFERS AT THE FEE HEARING

At the fee hearing, Straley argued that the parties had incurred an enormous amount of "avoidable litigation expense" in this case. See Wrona, 16 F.L.W. at D3074. To demonstrate this point, Straley sought to introduce evidence about the settlement offers he had made to Frank before trial.

Relying on Florida Rule of Civil Procedure 1.442, the successor judge erroneously refused to admit or consider the pre-trial settlement offers. This case does not involve any offers of judgment and Straley was not seeking to recover his fees. The issue here is whether settlement offers are relevant and admissible after trial in a separate proceeding in equity to determine (a) if a claimant spouse is entitled to a fee award, and (b) if so, the reasonable amount of litigation expenses incurred by the claimant and the reasonable portion that should be borne by the other spouse.

The proffered evidence reveals that Straley made five increasingly generous settlement offers before trial, each of which was rejected (R. 1917-24, 1950-82). As legal fees escalated, Straley was forced to bid against himself by making successive proposals without waiting for a counter-proposal. Based on the Second District's decision, four of Straley's offers would have given Frank more than half of the marital estate, even assuming Robertson mandates a denial of Straley's special equity claims.[26] In contrast, Frank made only two settlement proposals, both of which would have given her far more than half of the marital assets under any conceivable view of the case. Significantly, Frank's final proposal was much more overreaching than her first proposal.

With respect to attorney fee awards, this Court has indicated that the principles to be applied are "flexible" rather than rigid. Standard Guaranty Ins., Co., 555 So.2d at 835.

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26 Even if the trial court's determination of the marital and non-marital assets had been correct, Straley's third settlement offer approximated the award made to Frank at trial and his fourth and fifth settlement offers, if accepted, would have given Frank more than she received at trial.

See also Wrona and Meloan v. Coverdale, 525 So.2d 935, 937 (Fla. 3d DCA), rev. denied, 536 So.2d 243 (Fla. 1988). Thus, even where a litigant could have taken advantage of rule 1.442, this Court has held that pre-trial settlement offers are admissible and relevant in determining the other party's entitlement to a fee award. C.U. Associates, Inc. v. R.B. Grove, Inc., 472 So.2d 1177 (Fla. 1985).

Moreover, in determining if a fee award is appropriate pursuant to section 61.16, a trial court is required to consider all relevant factors; it is error to "look exclusively to the financial circumstances of the parties in determining whether to award fees." Thornton v. Byrnes, 537 So.2d 1088, 1090 (Fla. 3d DCA 1989). Other relevant factors include whether one party is responsible for causing avoidable litigation expense. Wrona; Meloan. Frank's unreasonable rejection of settlement offers far exceeding what she received at trial or on appeal is obviously relevant in this regard. Indeed, a spouse who has unnecessarily prolonged the litigation may be required to pay the other's fees and may even receive a reduced share of the marital assets. Wrona, 16 F.L.W. at 3074; see also Meloan.

Settlement offers are also relevant in determining the amount of fees reasonably incurred under Rowe. At the fee hearing, Frank emphasized the time and effort required to analyze Straley's special equity claims and his non-marital assets (R. 1633, 1673-74, 1677-78). Even if this is true, the extraordinary time spent by Frank's counsel was unreasonable because it was unnecessary.

Was it reasonable to spend time examining Straley special equity claims when Straley had made settlement proposals waiving his special equities? (R. 1950-1982) Was it reasonable to incur substantial legal and appraisal fees with respect to Straley's non-marital real estate partnerships when he had made settlement proposals offering Frank a generous percentage share of these investments? (R. 1950-82) Was it reasonable for Frank's counsel to dissipate almost half of the marital estate when settlement offers had been made which were better than what his client would receive in court? The proffered

evidence reveals that, Straley's pre-trial offers were made before the bulk of Frank's fees had been incurred (R. 1917-24, 1950-82).

By the same token, when a lawyer achieves less for a client in court than he could have attained by settling the case, a downward reduction in the fee is appropriate to reflect the "results achieved" by counsel. Rowe; Margulies v Margulies, 506 So.2d 1093, 1094 (Fla. 3d DCA 1987). An analysis of the settlement proposals is also relevant in assessing the lawyer's skills and determining a reasonable hourly rate.

Although settlement proposals are inadmissible at trial, §90.408, Fla. Stat. (1991), this does not mean that settlement proposals are inadmissible in a post-trial proceeding where they are not offered "to prove liability or absence of liability for the claim or its value." See Sperry Remington Office Machines v. Stelling, 383 So.2d 1150 (Fla. 1st DCA 1980) (settlement correspondence admissible and relevant to a fee award in workman's compensation case where extent of employer's liability is no longer at issue).[27]

In domestic cases, a fee award is not based on who "wins" the lawsuit. See, e.g., Hudgens. Thus, if a spouse must go to court, that spouse's entitlement to fees is not defeated merely because he or she is not the prevailing party. This rule obviously is not intended to encourage an impecunious spouse to incur unlimited fees by engaging in unnecessary litigation.

An express purpose of Florida's no-fault divorce statute is "[t]o promote the amicable settlement of disputes that arise between parties to a marriage. . . ." §61.001(2)(b), Fla. Stat. (1991). See also Wrona, and Katz. The public policy

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[27] Although there are no reported divorce cases in Florida on this precise point, settlement offers are routinely admitted into evidence in post-trial proceedings for attorney's fees in divorce cases. See, e.g.,Fenters v. Fenters, 231 S.E.2d 741 (Ga. 1977) and 45 Am. Jur. Proof of Facts 2d, 699, 749-51. Pre-trial settlement offers are also routinely considered by federal courts in post-trial proceedings for attorney's fees and the rejection of favorable offers has been cited both as a basis for denying fees altogether and as a basis for reducing the amount of the fee award. See e.g., Proulx v Citibank, N.A., 709 F. Supp 396, 401 (S.D.N.Y. 1989); Vocca v. Playboy Hotel of Chicago, Inc., 686 F.2d 605 (7th Cir. 1982); Kuhns v. City of Commerce City, 618 F. Supp 1475, 1478-80 (D. Colo. 1985); and United States v. 0.51 Acre of Land, 592 F. Supp 42, 43-44 (E.D. Wash. 1984).

encouraging settlement is frustrated and prolonged litigation is actually encouraged if a claimant is allowed to recover fees for hours unnecessarily spent litigating a case that should have settled:

> To award attorneys fees and costs when any judgment is won, without reference to earlier, bona-fide good faith offers to settle the claim, allows the plaintiff a free throw of the dice in an attempt to squeeze the last penny out of the claim.

C.U. Associates, Inc., 472 So.2d at 1178-79 [emphasis in original].

The point is simply this: what more could Straley have reasonably done to avoid this incredibly expensive litigation? He could not force the other side to settle, nor did he have any say in Frank's decision to hire an extremely expensive lawyer. The view that one party has an absolute right to a fee award leaves the other party "ripe for extortion." Id.

Because Straley refused to succumb to Frank's demands, his share of the marital estate was forfeited "in a nightmarish plethora of motions, transcripts and timeslips", Katz, 505 So.2d at 26. This is grossly unfair. It was Straley's contributions that basically enabled the parties to acquire the marital assets at issue in this case, and Straley's pre-trial settlement offers demonstrate that he made extraordinary efforts to avoid this litigation.

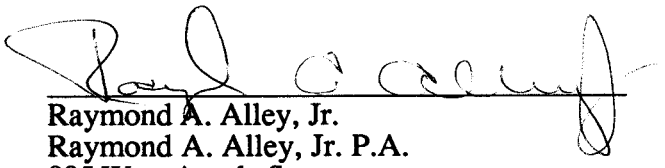
CONCLUSION

This Court should recede from Robertson or, in the alternative, should not apply the statutory rule announced in Robertson retroactively thereby destroying vested special equity rights established before the effective date of the equitable distribution statute. In a case which has already been the subject of extraordinary review by two appellate tribunals this Court should decline to conduct a de novo review of issues lying beyond the scope of the conflict with Robertson. In the alternative, this Court should approve the en banc decision of the district court of appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by ~~U.S. Mail~~*to George A. Vaka, Esquire at P.O. Box 1438, Tampa, FL 33601 and Stephen W. Sessums, Esquire at P.O. Box 2409, Tampa, FL 33601,and George K. Rahdert at 535 Central Avenue, St. Petersburg, FL 33701 on February 18, 1992.

*hand delivery



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