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IN THE SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

FILED
SID J. WHITE
JAN 13 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

STACY FRANK,

Petitioner,

v.

MARK K. STRALEY,

Respondent.

CASE NO. 78,556

DCA CASE NOS. 89-3505
90-1546

PETITIONER'S INITIAL BRIEF ON MERITS

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[1] Table of Authorities prepared by Lexis.

STATUTES

STATEMENT OF THE CASE AND FACTS

The Petitioner/Wife, STACY FRANK,[2] respectfully states the Statement of the Case and Facts as follows[3]:

On November 17, 1988, the Wife filed her petition for dissolution of a childless marriage and sought an equitable distribution and division of the marital assets, a determination of each party's responsibilities for the debts incurred during the marriage and an order requiring the Husband to pay a reasonable fee for the services of the Wife's attorneys.[4] (R. 517-518) The Husband answered and admitted that the marriage was irretrievably broken, but denied knowledge concerning the equitable division of property, a determination of debts and attorneys' fees. (R. 519) The Husband also counterpetitioned for dissolution and an equitable division of real and personal property. (R. 519-520)

A pretrial conference was held on March 7, 1989, and thereafter, the Husband filed an amended and second amended counterpetition seeking to establish special equity claims in

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[2] For ease of reference herein, the Petitioner/Ex-Wife, Stacy Frank, will be referred to as Wife. The Respondent/Ex-Husband, Mark Straley, will be referred to as Husband.

[3] Of course, since the standard of review for the trial court's findings in the final judgment and fee award was whether there existed competent substantial evidence to support the findings, the facts will be stated in a light most favorable to the Wife and the trial court's findings. See, Herzog v. Herzog, 346 So.2d 56, 58 (Fla. 1977).

[4] All references to the Record on Appeal will be referred to as (R.) followed by citation to the appropriate page number of the Record on Appeal.

various properties. (R. 553-554, 560-565, 568-575) In the second amended counterpetition, the Husband claimed a special equity in the marital home located on Bayshore Boulevard in Tampa, a beach house located on Palm Island in Charlotte County, Florida, a 1963 Bermuda 40 yawl-rig sailboat known as the "Evtide" and a 1982 Mako motorboat. The Husband also requested partition of those properties. (R. 568-575) The Wife denied that the Husband had any special equity in the properties and affirmatively stated how the properties were acquired. (R. 585-587) The Wife also stated that some of the property which the Husband sought to have partitioned was not located in Hillsborough County, but in Charlotte County, therefore, not subject to partition in this matter. (R. 587-588)

Following the Husband's assertion of various special equities, extensive discovery was undertaken by the parties. (R. 1127-1141, 1144-1170, 1172, 1175-1179, 1183-1184) On June 6, 1989, a two and one-half day trial commenced. At the beginning of trial during opening statements, the parties agreed that Fla. Stat. § 61.075 was applicable to the case because the petition for dissolution was filed after the effective date of that statute. (R. 7, 23)

The parties were engaged in October, 1983. (R. 120) At that time, the Husband was living in his pre-marital home located on Jetton (hereinafter referred to as "Jetton home"). (R. 120) The Wife was living in her pre-marital home located on Bristol (hereinafter referred to as "Bristol home"). (R. 120-121) Shortly thereafter, the parties decided to live in the Bristol home since

it was newly refurbished, and the Husband decided to put his Jetton home on the market. (R. 120-121) The Jetton home sold quickly, and the Husband thereafter moved into the Wife's pre-marital home on Bristol. (R. 120-121)

The parties were married on June 9, 1984. (R. 118) This was the Wife's first marriage. The Husband had one previous marriage. (R. 118) Prior to the time that the parties were married, but while they were living together, the Wife made all mortgage payments on the Bristol home. (R. 121) Household expenses were basically commingled. (R. 121)

Prior to the marriage, the parties jointly purchased property on Palm Island in Charlotte County, Florida (hereinafter referred to as "beach property"). (R. 125) The parties made the down payment on the property of $15,000.00, the funds of which came from the sale of the Husband's Jetton home. (R. 126) The balance was financed with a note that both signed, and the parties entered the marriage with a $32,000.00 first mortgage on that property. (R. 126, 1013) The beach property was unimproved at the time they purchased it. At the time it was purchased, they were paying $500.00 a month for dockage on Boca Grande, and the two believed that if they built the dock on the beach property, it would pay for itself. (R. 126) Thereafter, a dock was built and a structure begun in the fall of 1984. (R. 127)[5] When the parties jointly

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[5] At the time of the marriage, the Wife's debts were a first and second mortgage on the Bristol home totalling $39,000.00 and a $700.00 lien on the Wife's car. (R. 131-132, 137-138) The Husband, on the other hand, entered into the marriage owing in excess of $35,000.00 in

purchased the beach property, they took title as joint tenants with rights of survivorship. (R. 125-126) The parties gave the seller a note and a mortgage for approximately $32,000.00 for which the Husband and Wife were jointly and severally liable. (R. 126, 1013)

During the same month that the parties purchased the beach property, the Husband drew approximately $15,000.00 on his line of credit to pay the Husband's 1983 federal income tax liability. (R. 92, 406, 419, 1055) That line of credit was later repaid with marital funds during the marriage. (R. 127-128, 406, 1055) The Husband had established this line of credit at Freedom Federal (hereinafter "Freedom") prior to the marriage. (R. 92, 406)

After the parties were married, sometime in the fall of 1984, the parties began to develop the beach property. They contracted to build a home on that property. (R. 127) The parties paid all initial expenses associated with building the beach home from their salaries, and by drawing on the Freedom line of credit. (R. 127) After the completion of the beach home, the parties obtained a permanent loan for $80,000.00 from which they satisfied the purchase money mortgage and note of approximately $32,000.00 and the Freedom line of credit. (R. 127-128, 1055) At this point in time, the parties re-deeded the property to be held jointly by the entireties. (R. 129) During the course of the marriage, additional improvements were made to the beach home. Those

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unsecured loans, a $40,000.00 loan on a sailboat, a $13,500.00 loan on the Husband's car and various debts attendant to real estate partnerships which had annual debt service of approximately $20,000.00. (R. 92, 136-139, 172, 381)

improvements were paid with available funds and did not require any financing. (R. 128)

The parties also re-deeded the Bristol home to tenants by the entireties. (R. 130) The Wife explained that there were two reasons to change title to her pre-marital home. First, the parties basically held everything jointly and commingled all of their funds. (R. 130) In fact, the Wife stated that what was hers was his and so forth. Secondly, a tax attorney who worked at the Husband's law firm suggested it would be advantageous for the Husband to roll over his gain from the Jetton home into the Bristol home. (R. 130-131)

During the course of the trial, the Husband presented conflicting testimony concerning the purpose of jointly titling various properties. His explanation concerning the beach property was that the parties were jointly held and jointly financed solely for estate planning purposes or because of lender requirements. (R. 411, 363) With respect to the re-deeding of the Bristol home, the Husband testified that since the two had paid the Wife's parents $5,000.00 as a repayment for their initial help to their daughter, that he essentially bought the Wife's interest in her pre-marital home. (R. 410-411)[6]

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[6] The parties' explanation as to the intent behind the "repayment" to the Wife's parents vary greatly. The Wife and her mother testified that the Wife's parents had given the Wife the money for her down payment on the Bristol home as a gift and never expected any type of repayment. (R. 114) On the Wife's marriage, the Husband and Wife wanted to repay the Wife's parents for their contributions. The Wife testified that the repayment was partly because of the down payment on the Bristol home,

Eventually, the parties sold the Bristol home for a net profit of approximately $35,000.00 and thereafter, purchased the marital home located on Bayshore Boulevard (hereinafter referred to as "Bayshore home"). (R. 130-131, 133, 149) The proceeds from the sale of the Bristol home was used to make the down payment on the Bayshore home (approximately $6,700.00). The remainder of the proceeds from the Bristol home presumably paid quarterly taxes, $10,000.00 of the Freedom line of credit which had again been drawn down since it had been previously paid through the beach loan proceeds, and other family expenses. (R. 148, 150, 408, 1056)

The parties also acquired various items of personal property prior to and during the marriage. Those items included: a Mako motorboat purchased in February, 1984, prior to the marriage and titled jointly. (R. 129) Likewise, the parties obtained a 40-foot sailing yacht named the "Evtide" which was purchased and substantially refurbished during the marriage. (R. 140, 146) They also replaced the Wife's stolen diamond engagement ring and partially purchased the replacement with insurance proceeds. (R. 155) Likewise, the parties purchased a yacht club membership during their marriage. (R. 150) Automobiles purchased prior to the marriage included the Husband's 1984 Volvo with a four-year loan

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and the fact that the Wife's parents had paid for the Wife's wedding, et cetera. The Husband, on the other hand, testified that the payment was for repaying the down payment on the marital home. It is significant to note, however, that the Husband did not testify that the repayment was expected or actually owed to the Wife's parents. (R. 410-411)

of $13,500.00 and the Wife's pre-marital car with a loan balance of approximately $700.00. (R. 136-137) The payments on both vehicles were completed during the marriage. (R. 137) During the course of the marriage, the Wife's pre-marital vehicle was replaced by a 1987 Jeep Wagoneer, which at the time of filing, had a value of $16,375.00. (R. 634-644, 957-958)

There were also several real estate partnerships which were in the Husband's name. The partnerships are:

1. 216 S. Franklin (pre-marital): This is the office building Husband's law firm leases from the partnership. Wife's expert, Frank Catlett, and M. A. I. & S. R., P.A. testified that the value of this partnership at marriage was $1,750,000.00 and at the time of filing remained the same. (R. 56-58) The Husband's expert witness, Kim Schwenke, valued the interest in this partnership at $1,900,000.00 at the time of marriage and, likewise, $1,900,000.00 at filing. (R. 233) The Wife made no claim to the Husband's law firm interest, and apparently because of that, the trial court did not value this partnership. (R. 534-644) This property was purchased in January of 1984, but it appears that 100% of the funds invested in the partnership were marital. The marital funds invested total $9,501.00. (R. 959)

2. Harbor Property Associates (pre-marital): Wife's expert testified that the value of the marriage was $80.00 per square foot, and at filing, was $125.00 per square foot. Therefore, the expert valued the partnership at $1,755,200.00 at marriage and $2,742,500.00 at filing. (R. 59-61, 65) The Husband's expert, on the other hand, testified that the value at marriage was approximately $2,000,000.00 and at filing, approximately $2,500,000.00. (R. 239-240) The court valued Harbor Property Associates at $1,992,530.00 at the time of marriage and $2,621,750.00 at the time of filing. (R. 636) 30.7% of the total funds invested in this partnership were marital. (R. 959) The total marital contribution invested was $14,746.00. (R. 959)

3. 601 S. Florida Land Trust (pre-marital): Wife's expert testified that the partnership value at the time of marriage was $1,256,000.00 and at the time of filing, $1,884,000.00. (R. 61-62, 65) The Husband's expert said it was worth $1,300,000.00 at the time of marriage and $1,500,000.00 at the time of filing. The court valued the partnership at $1,295,610.00 at marriage and $1,636,560.00 at filing. (R. 636) 60.74% of the total funds invested in the partnership were marital, and the total marital funds invested were $42,097.00. (R. 959)

4. 238 S. Franklin (marital): Wife's expert valued this partnership at $1,250,000.00. The Husband's expert testified to an approximate value of $1,150,000.00. The court did not value the partnership, but instead, directed the parties to share equally the use and benefit of the Husband's interest in the partnership with the Husband acting as a trustee for the Wife. (R. 640) 100% of the funds invested in the partnership were marital. The total marital funds invested were $25,434.00.

One of the parties' bigger investments of marital assets involve a 40-foot sailing yacht known as the "Evtide". During the marriage, the Husband had an opportunity to purchase the sailboat, which for him, had been a childhood dream. (R. 144, 1025-1030) The sailboat was located outside of Detroit and required extensive refurbishing to say the least. (R. 143-144, 1025-1030) In the Husband's quest to acquire and refurbish the "Evtide", he expended nearly $118,000.00 of marital funds. (R. 83-84, 1023-1030)[7] Over $35,000.00 of the funds were expended by the Husband during the period of separation. (R. 170) Following the parties' separation, the Husband shipped the "Evtide" to Tampa. (R. 147) Despite the enormous investment of marital funds by the Husband on this

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[7] The Husband claimed that in reality, he merely spent between $105,000.00 to $107,000.00 on the "Evtide". (R. 338)

sailboat, the Wife never had an opportunity to sail upon it. (R. 147, 153) In fact, when the "Evtide" arrived in Tampa, the Husband held a christening party at the Tampa Yacht Club for the yacht and even distributed among the attending guests a tribute to the "Evtide" authored by him, that discusses his affection for the sailboat. (R. 147, 1023-1030)

Prior to the marriage, the Husband purchased a $43,000.00 sailboat called the "Windvane". (R. 370, 391) Approximately $34,500.00 of the purchase price was financed. After the parties were married, and to reduce the interest rate, they refinanced the "Windvane" through Sun Bank, and the Wife and Husband signed a promissory note for approximately $30,000.00. (R. 371, 394) At that time, the parties retitled the boat into the joint names of the Husband and Wife. (R. 135)

The "Windvane" was sold in May of 1988, and the parties realized approximately $29,000.00 in gross sale proceeds ($32,000.00 less commission). Because the parties had accelerated the installment payments on the refinancing, they had reduced the balance on the note at the time of the sale to approximately $18,500.00 (a reduction of a little more than $11,000.00 which resulted in a "net" to the parties of approximately $10,500.00). (R. 145, 395) The Husband recognized at trial that boats are not money-making propositions. (R. 389)

The parties then used the $10,000.00 net "proceeds" towards the purchase of the "Evtide" together with a draw against a Florida National Bank line of credit for $20,000.00. (R. 409)

The trial court also heard evidence concerning the parties' work history. Briefly stated, immediately following graduation from law school, the Wife clerked for the Second District Court of Appeal. (R. 122) Thereafter, she subsequently joined the Tampa office of a Utah law firm known as Reynolds, Vance, Deason & Smith. The Tampa office ultimately severed its relationship with the Utah firm and the Wife remained with the Tampa people for a short time. Subsequently, she joined the firm of Jacobs, Robbins, Gaynor, et al. That firm began having difficulty, and the Wife left the firm in November, 1985. (R. 123) The Wife testified that she and the Husband had previously discussed the possibility of the Wife taking some time off from work in order to get their life in order and to sell their Bristol home without a broker. (R. 122-124) During that time, the Wife did sell the Bristol home, and the parties eventually purchased the Bayshore marital home. After briefly working with a political campaign, the Wife returned to full-time employment at her current position as corporate counsel with TECO. (R. 124-125) The Husband testified that he assisted his Wife in locating this position by putting her in touch with a headhunter. (R. 375)

The Husband, on the other hand, immediately began working with Holland & Knight following his graduation from the University of Michigan law school in 1976. (R. 304-305) He practiced with them until January, 1982, when he became an associate of the Bush, Ross law firm. He became a partner with that law firm in 1983. (R.

304-305) The Husband at all times material to this appeal remained a partner at that firm.

During the course of the marriage, the parties combined their respective incomes, enjoyed joint ownership of property and assumed joint responsibility for debts. (R. 130, 147, 406-408)

Pending the final hearing, the Wife resided in the Bayshore home and paid the mortgage and all other liabilities associated with the marital home. (R. 159) The Husband resided in an apartment, and despite the Wife's protests, regularly used the beach house on weekends and permitted the Wife to use it on only six weekends in an entire year. (R. 158, 427) During the separation, the Husband paid the majority of the expenses associated with the beach home. (R. 731-734, 1099) The amount each party paid toward the maintenance of the respective real properties was almost equal. (R. 1099) During the parties' separation, the Husband enjoyed sole use of the sailing yacht. (R. 147)

The only funds that the parties received through their employment that were not actually placed into joint checking accounts were the contributions that the Husband made to various partnership interests during the marriage, his 401K Plan and the Wife's TECO Savings Plan. Both the Husband and the office manager for Bush, Ross testified that it was customary for the law firm to pay the required quarterly cash contribution (debt service) to the partnerships directly and then to charge it to the Husband's account at year end. (R. 285-286) Those charges would then be credited against any bonus the Husband was entitled to receive at

year end. (R. 285-286), and the parties paid federal taxes on these sums as reflected in their joint tax returns. (R. 139, 173, 287)

The office manager also testified at times that the partners obtained personal loans to make the capital contributions to the partnership's debt service. The Husband had done so on only two occasions during the marriage. The Husband borrowed $20,000.00 for Harbor Properties and repaid that note from the proceeds obtained from the sale of the Ella Mae property.[8] (R. 285, 288, 321) The Husband also obtained a personal note for $15,000.00 on 238 S. Franklin. (R. 285, 288) Likewise, the Husband owed $8,500.00 to the law firm for 1988 because the debt service on the various land partnerships exceeded his bonus entitlement for 1988. (R. 286, 382) That debt was treated as marital debt in the court's equitable distribution. (R. 635)

On November 27, 1989, the trial court entered its final judgment of dissolution. (R. 634-644) (a copy of the final judgment is attached as an Appendix). In the final judgment, the court made various findings concerning the marital assets and liabilities of the parties. Likewise, the court denied the Husband's claims to special equities and fashioned an equitable distribution of the property. The judgment reserved jurisdiction to determine attorneys' fees. The Husband filed an extensive Motion for

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[8] The parties also owned a partnership interest in another partnership called "Ella Mae". It was acquired and sold during the marriage. The parties realized approximately $80,000.00 from the closing of this partnership. The funds generated from that partnership were used to pay the parties' taxes and the Husband's pre-marital debts. The remainder was spent on the "Evtide". (R. 140)

Rehearing with exhibits. (R. 645-691) Rehearing was denied. (R. 695) A Motion to Correct the Error in the Final Judgment of Dissolution was filed December 19, 1989. (R. 1266-1285)[9] The Husband timely appealed. (R. 701)

Thereafter, the trial court conducted three hearings concerning the Wife's claim for attorneys' fees. These hearings consumed between eight to nine hours of court time. At the hearings concerning the motions for attorneys' fees, the Wife's counsel filed an affidavit for attorneys' fees outlining the number of hours expended by both he and his paralegal assistants. (R. 1300-1346) He, likewise, filed an affidavit for costs and attached the various receipts from the associated costs. (R. 1347-1377) Also filed in support of the motion was the extensive curriculum vitae of the Wife's attorney along with a copy of the parties' retainer agreement. (R. 1292-1299) The Wife also filed her calculation of marital earnings, a net worth worksheet, her own financial affidavit, evidence of various loans that she was required to take out to pay her fees and costs, various tax documents and a personal financial statement of the Husband. (R. 1378-1391, 1406-1437)[10]

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[9] The parties filed an amended stipulation to correct the Record on Appeal. (R. 1481-1482) That stipulation included the correction in the final judgment to reflect that the judge based his property valuations as of the date of filing the petition and not at trial.

[10] It should also be noted that the Wife's attorneys also filed a supplemental affidavit for attorneys' fees reflecting the time expended and anticipated for the attorneys' fees hearings. (R. 1421-1429)

At the first of the three hearings concerning fees, the Wife presented the testimony of Eugene Langford, Esquire, as an expert witness to testify as to the reasonableness of the fee she was required to pay her attorney. Mr. Langford was licensed in 1978 and is a board-certified civil trial lawyer in the State of Florida. (R. 1662-1663) He has handled complex divorce cases, and specifically, had represented wives of attorneys in various divorces. (R. 1663) Mr. Langford noted that the when attorneys were involved as the opposing parties, that the lawyer representing a spouse typically must spend an inordinate amount of time on details that were otherwise simply resolved by counsel. (R. 1663-1664) Mr. Langford testified that he had reviewed the Wife's attorney's complete file which was contained within three file transfer boxes. He estimated that it took him anywhere between 12 to 13 hours to review the file. (R. 1164) Mr. Langford opined that this was not a run-of-the-mill divorce case, that it was a complex case from a financial standpoint, and that opposing counsel had a good reputation as a matrimonial lawyer in the area. (R. 1165-1166) He reviewed the time records to see if those things charged correlated with those things performed. He had no doubt that the time reflected in the statements was committed to the case. (R. 1166-1167)

Mr. Langford also testified as to the time expended by the legal assistant. He noted that she did a significant amount of work on the file and believed that using her was economical because the attorney would have had to have expended a greater

amount of time. (R. 1167) He noted that there had been 26 depositions taken in the case along with a recorded discussion between the parties in December of 1988. He also noted that up to that time, there had been six hearings and a two and one-half day trial. (R. 1168)

Under the criteria enunciated by the Florida Supreme Court in Florida Patient's Compensations Fund v. Rowe, he believed that the time was reasonably spent on the case. He also indicated that the hourly rate of the attorney, for the most part, $250.00 an hour, while on the high side of the spectrum, was reasonable given the attorney's experience and expertise. Likewise, he indicated that in the marketplace, the Wife's attorney had no trouble whatsoever obtaining the rate, and in fact, had more work than he could handle. (R. 1169) He testified that he believed that a reasonable fee was what was reflected in the Wife's Exhibit No. 4. (R. 1300-1346, 1627-1628) He, likewise, testified that while initially he thought that the paralegal time appeared to be excessive, that upon reviewing the file, he changed his opinion because it did not seem at all out of the ordinary. (R. 1674) Mr. Langford explained that the Husband's attorney's time may not have correlated with the Wife's attorney's and paralegal's time because the Husband had spent his own time, the time of his paralegal and law firm and, likewise, the time of his fiancee, who herself was a lawyer, to assist him. (R. 1674)

Not surprisingly, the Husband provided testimony which conflicted with that presented by the Wife. The Husband presented

James Knox, Esquire, to testify as an expert concerning the reasonableness of the fee. Mr. Knox is a board-certified family lawyer and has been licensed in the State of Florida since 1974. (R. 1712) Mr. Knox testified that he had reviewed two sets of affidavits and had also looked at some time records. (R. 1712-1713) He indicated that he had reviewed several of the pleadings, but had not reviewed depositions or correspondence. He did recognize that there was a substantial amount of correspondence. (R. 1713-1714) Mr. Knox admitted, however, that he had never requested to see the Wife's counsel's file and, likewise, admitted that it probably would have been helpful had he reviewed the file. (R. 1728-1729) Despite the fact that he had never reviewed the file, he believed that 100 hours of attorney time and 100 hours of paralegal time might have been reasonable. (R. 1721) Mr. Knox testified that both attorneys' times were unreasonable. (R. 1732) He conceded that he believed that the Wife's firm had spent every minute they had billed. (R. 1733) He, likewise, admitted that he was not advised of the work that the Husband had done or the work that was done on behalf of the Husband, either through his firm or through some other assistance. (R. 1733-1734)

During the series of hearings, evidence was presented to the trial court which reflected that during the parties' marriage, the Wife had an average annual income of $27,079.60. (R. 1379) The Husband, on the other hand, during the marriage and subsequently, enjoyed an average annual income of $130,395.40. (R. 1379) The most recent information, based upon the Husband's 1989 income

indicated that the Husband's income exceeded the Wife's 1989 income by an amount in excess of $70,000.00 ($126,000.00 compared to $52,000.00). (R. 1419-1420)

In April, 1989, the Husband received a tax-free cash distribution in excess of $55,000.00 which had resulted from the refinancing of the 216 S. Franklin office building owned by the 216 S. Franklin Partnership in which the Husband was a partner. (R. 1891) The debt associated with the refinancing is paid entirely through rental payments which the 216 S. Franklin Partnership receives from the building's tenant, the Bush, Ross law firm. (R. 1907)

The Wife also reiterated that under the final judgment, the Husband retained all of his interest in three real estate partnerships including the 216 S. Franklin Partnership. Those partnerships owned land adjacent to the new Tampa Convention Center as well as premises which are occupied by the Bush, Ross law firm. (R. 1906) Likewise, the Husband received the 40-foot sailing yacht ("Evtide") which was lien-free and valued at $98,000.00. The Husband also received the marital home, a 1984 Volvo automobile and other personalty. After the equitable distribution, the Husband had a net worth of $548,690.94, which was net of all associated debt. (R. 1378) The liabilities in the amount of $111,000.00 which were assigned to the Husband were based upon marital debt as of the date the petition for dissolution was filed, November 17, 1988. (R. 1266) However, at the time of trial in June of 1989, or

immediately thereafter, those liabilities had been reduced to an aggregate balance of $68,000.00. (R. 1490, 1908)

The Wife also presented evidence to demonstrate that she had received the beach property which had been valued at $120,000.00 with a mortgage debt of approximately $65,000.00. Likewise, she had received the boat condominium valued at $25,000.00 with a mortgage debt of approximately $14,000.00. She also received a 1987 Jeep, a 1982 motorboat and certain personalty, including lump-sum alimony of $13,000.00 less set-offs retained by the Husband and the 1988 federal tax return in the amount of $9,337.00. (R. 1902-1903) After the equitable distribution, the Wife's net worth was $150,410.82.

At the time of the last fee hearing, the Husband was living with his new wife, a practicing attorney, in the Bayshore home (the former marital residence) which had been awarded to the Husband. (R. 1897-1898, 1939) The Husband testified that he paid all household expenses including the mortgage of $1,200.00 per month and did not receive any contribution whatsoever from his new wife. (R. 1898) At the time of the fee hearing, the Wife, on the other hand, was residing alone in an apartment. (R. 1765)

During the fee hearing, the Husband attempted to introduce a financial affidavit which demonstrated that his monthly income was roughly $7,000.00, after he had just elicited testimony from Bush, Ross' office manager that he had made $126,000.00 in 1989. The trial judge sustained an objection to the introduction

of the affidavit and ultimately struck the affidavit "as a sham". (R. 1860-1861)

On April 2, 1990, the trial court granted the Wife's claim for attorneys' fees. (R. 1483-1485) The order directs the Husband to pay the Wife's attorneys' fees and costs. It, likewise, sets forth specific findings that the Husband's income during the marriage exceeded the Wife's by a ratio of nearly five to one and that he had a net worth $400,000.00 greater than that of the Wife's as well as specific findings that the Wife's fees and costs were reasonable. (R. 1483)

The Husband moved for rehearing which was heard at a hearing on May 7, 1990. (R. 1600-1613, 1928-1949) During this hearing, the Husband tried to convince the trial court that his net income was $4,400.00 a month. (R. 1938) Despite his substantial net worth and earning ability, the Husband attempted to intimate to the judge that he may be forced to file for bankruptcy protection with respect to the Wife's attorneys' claim and those of other creditors. (R. 1940) The trial court denied Husband's Motion for Rehearing, but did create a payment schedule. (R. 1616-1618) The Husband appealed the attorneys' fee order on May 24, 1990. (R. 1746) By order of June 18, 1990, the Second District consolidated those appeals.

On July 31, 1991, the judges of the Fifth District Court of Appeal, specially appointed to sit as associate judges of the Second District Court of Appeal, sat en banc and reversed the equitable distribution plan contained in the final judgment of

dissolution. In doing so, that court reversed the trial court's determination that the enhancement in value of certain non-marital property was a marital asset subject to equitable distribution. Likewise, that court reversed the trial court's denial of the Husband's special equity claim and reversed in toto the trial court's award of attorneys' fees to the Wife.

ISSUES ON APPEAL

I.

WHETHER THE SECOND DISTRICT ERRED WHEN IT DISMANTLED THE EQUITABLE DISTRIBUTION SCHEME FASHIONED BY THE TRIAL COURT, WHERE THERE WAS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL JUDGE'S FACTUAL FINDINGS AND THE ORDER OF DISSOLUTION DEMONSTRATES THE TRIAL COURT'S COMPLIANCE WITH FLORIDA STATUTES § 61.075?

II.

WHETHER THE SECOND DISTRICT ERRED WHEN IT REVERSED THE TRIAL COURT'S ATTORNEY FEE AWARD CREATING A NEW STANDARD TO REVIEW FEE AWARDS BASED SOLELY UPON CONSIDERATIONS OF THE WIFE'S FINANCIAL CIRCUMSTANCES AND NOT THE RELATIVE FINANCIAL CIRCUMSTANCES OF THE PARTIES?

SUMMARY OF THE ARGUMENT

This case is not complicated. The trial judge fashioned an overall equitable distribution which divided the parties' assets approximately 50% to each. In fashioning the equitable distribution, the trial court made various findings of fact concerning the Husband's special equity claim and the enhancement in value of various items of the Husband's non-marital property during the course of the marriage. This Court has stated that the equitable remedies afforded to a trial judge in a dissolution proceeding should be considered inter-related parts of an overall scheme. The remedies should be reviewed as a whole, rather than independently. See, Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980). Only if it can be said that the trial court abused its discretion should an appellate court reverse the overall equitable scheme fashioned by the trial court.

As a predicate to the formulation of the distribution plan in this case, the trial court was required to make various findings of fact. Florida courts have long held that if there is any competent substantial evidence to support the trial court's findings of fact, they are presumed to be correct and must be sustained regardless of a district court's opinion to the contrary. See, Marsh v. Marsh, 419 So.2d 629 (Fla. 1982); Herzog v. Herzog, 346 So.2d 56 (Fla. 1977).

In the present case, the Second District overlooked well-established Florida law when it dismantled the equitable distribution scheme fashioned by the trial judge. First, the

Second District misinterpreted Fla. Stat. § 61.075(3)(a)(5) and held that the statute simply was a codification of this Court's decision in Ball v. Ball, 335 So.2d 5 (Fla. 1976). In Robertson v. Robertson, ___ So.2d ___ 16 FLW S758 (Fla. December 5, 1991), this Court held that the statute was not a codification of the principles identified in Ball, but instead, represented a modification of those principles such that there was a presumption that entireties real estate was to be considered marital property regardless of who paid for it. Based upon the facts contained in this record, the Husband did not overcome that presumption. Moreover, this record would amply support the trial court's findings even under the pre-existing law.

The Second District also erred when it reversed the trial court's findings concerning the enhancement in value of two pre-marital land partnerships owned by the Husband. The evidence was undisputed that the parties contributed substantial marital funds to maintain and sustain the parties' interest in those properties. Pursuant to Fla. Stat. § 61.075(5)(a)(2), any resulting enhancement in value of those assets should have been considered "marital" for purposes of the equitable distribution. The Second District re-weighed the evidence and concluded that only a small fraction of the increased value of the assets resulted from the infusion of marital funds. That decision should be reversed because under either of the two available theories recognized in Florida law concerning the distribution of

enhancement of non-marital assets, there was more than ample evidence before the trial court to support its factual findings.

Finally, the Second District erred when it reversed the attorney's fee award to the Wife. To reach its conclusion, the court analyzed only the financial resources of the Wife and gave no consideration to those of the Husband. Florida law has long held that the relative financial resources of both parties should be considered prior to making the decision concerning attorneys' fees. Where one party's financial position is superior to the other's, it may be an abuse of discretion not to require the spouse with the greater financial ability to pay the other's attorneys' fees. See, e.g., Greeley v. Greeley, 583 So.2d 1078, 1080 (Fla. 1st DCA 1981).

In the present case, the Husband's income earning history during the course of the marriage indicated that his average income was nearly five times greater than that of the Wife's. His net worth, even after the equitable distribution, was more than twice that of the Wife and exceeded hers by approximately $400,000.00. Given the fact that the Husband was in a far better financial position than was the Wife, no reasonable court can conclude that the trial judge abused his discretion in requiring the Husband to pay the Wife's fees. This Court should reverse the decision of the en banc majority of the Second District with directions on remand to reinstate the remedies fashioned by the trial judge.

ARGUMENT

I.

THE SECOND DISTRICT ERRED WHEN IT DISMANTLED THE EQUITABLE DISTRIBUTION SCHEME FASHIONED BY THE TRIAL COURT, WHERE THERE WAS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL JUDGE'S FACTUAL FINDINGS, AND THE ORDER OF DISSOLUTION DEMONSTRATES THE TRIAL COURT'S COMPLIANCE WITH FLORIDA STATUTE § 61.075.

At the outset, it is important to remember that cases such as the present one are to be reviewed under several fundamental guiding principles. First, in dissolution proceedings, the equitable remedies available to a trial judge should be considered interrelated parts of an overall scheme. Appellate courts are to review such remedies as a whole, rather than independently. See, Canakaris v. Canakaris, 382 So.2d 1197, 1202 (Fla. 1980). In those situations where a trial court possesses broad discretionary authority to do equity between the parties, the trial court's findings should not be disturbed absent the trial court's abuse of that discretion. Id. at 1202 - 1203. Judicial discretion is abused where a trial court's actions are arbitrary, fanciful or unreasonable such that it can be said that no other reasonable person would have acted as did the trial judge. Id. If reasonable men can differ as to the actions taken by the trial court, then it cannot be said that the trial court abused that discretion which the law affords to it. This court has recognized that dissolution proceedings afford Florida's trial judges broad discretionary power because it is impossible to

establish strict rules of law for every conceivable situation which might arise in the course of a domestic relations proceeding. Id. at 1202.

Likewise, it is an "incontrovertible premise of law" that it is not the function of an appellate court to re-evaluate the evidence and substitute its judgment for the trier of fact. See, Helman v. Seaboard Coastline Railroad Co., 349 So.2d 1187, 1189 (Fla. 1977). If there is any competent substantial evidence to support a finding of fact, that finding must be sustained regardless of a district court's opinion to the contrary. See, e.g., Herzog v. Herzog, 346 So.2d 56 (Fla. 1977). Findings of fact by a trial court are presumed to be correct and entitled to the same weight as a jury's verdict. See, Marsh v. Marsh, 419 So.2d 629, 630 (Fla. 1982); Strawgate v. Turner, 339 So.2d 1112 (Fla. 1976).

Determinations concerning the existence of a special equity, which by necessity, requires a determination concerning donative intent, is a type of a factual determination by a trial judge which is entitled to deference by the appellate court. See, Marsh v. Marsh, 419 So.2d 629 (Fla. 1982). Likewise, determinations concerning valuation and causation, in this instance, whether the enhancement of non-marital assets resulted from marital contributions of labor or funds, are the types of factual determinations which an appellate court is prohibited from reversing if there is competent substantial evidence to support the trial court's determination. Confer, Thompson v. Thompson,

576 So.2d 267 (Fla. 1991). See also, Macaluso v. Macaluso, 523 So.2d 615, 616 (Fla. 2d DCA 1988).

The distribution fashioned by the trial judge recognized the basic principle that the starting point for the equitable distribution of the value of marital assets is an approximate equal division between the parties. See, Massis v. Massis, 551 So.2d 587, 589 (Fla. 1st DCA 1989). See also, Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980); Sanders v. Sanders, 547 So.2d 1014, 1015 (Fla. 1st DCA 1989). The net result of the trial court's distribution gave the Husband approximately 50% of the parties' marital assets. (R. 634-644, 957-958) The Husband was also allowed to maintain sole ownership of his non-marital assets. (R. 634-644)[11] Even after the assessment of attorneys' fees and costs, the Husband's net worth was far greater than the Wife's.

The distribution fashioned by the Second District, on the other hand, does not purport to implement any recognized notion of equity. Under that court's distribution, recognition of special equities to the Husband and requirement that the Wife pay fees, the Wife stands to leave the marriage with nothing more than

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[11] The final judgment does not appear to address a $57,000.00 216/220 property partnership equity distribution made to the Husband in May, 1989. Likewise, it does not appear to address the fact that the Freedom line of credit, about $15,000.00 of indebtedness at the time of marriage, had been reduced at the time of hearing to $14,500.00. (R. 381-382). It also does not address $30,000.00 of indebtedness assumed by the Husband to Barnett after filing and paid prior to the hearing. (R. 396) The trial court's assessment of the marital debt to the Husband may have been a recognition of these payments.

her salary. Had a trial judge fashioned such a distribution under the facts of this case, most of Florida's appellate courts would have held that the distribution was an abuse of discretion. It is no less an abuse of discretion simply because the en banc majority of the district court created such an obvious disparity.

With all due respect to the Second District, it appears that it overlooked these very fundamental principles of law in its haste to visit its notions of "equity" upon the parties. The decision of the Second District should be quashed with instructions to reinstate the trial court's judgments on remand.

A. The District Court Erred When It Determined That The Husband Was Entitled To A Special Equity In Various Marital Assets.

The Second District reversed the trial court's denial of the Husband's claim to a special equity in the beach property and boat condominium. The court also stated that it was error to deny the Husband's claim to credit for one-half of the value of the Mako motor boat, which error was conceded at oral argument.[12] The

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[12] In its majority en banc opinion, the Second District stated that it was error for the trial court not to have recognized a one-half interest in the parties' Mako motorboat when fashioning the equitable distribution. The district court uses the Wife's concession that the Husband's interest should have been recognized as some type of confession of error sufficient to justify a reversal of the overall distribution plan. Merely conveying a jointly-held asset to a party who requests it does not necessarily mean that the overall equitable distribution is erroneous. In Tronconi v. Tronconi, 466 So.2d 203 (Fla. 1985), this Court stated that a trial court, upon proper request by either party for a disposition of jointly-held assets, had the authority to order the conveyance of those assets to various awards as would achieve an equitable distribution. Conveyance of jointly-held assets by the trial court to effect an overall equitable distribution is not limited to

court upheld the trial court's denial of the Husband's claim to a special equity in the sailboat, the "Evtide".

The basis of the Second District's recognition of the Husband's special equity claims was that Fla. Stat. § 61.075(3)(a)(5) was a codification of the doctrine identified in this court's decision in Ball v. Ball, 335 So.2d 5 (Fla. 1976). According to the Second District, the statute did not undo the "no-gift" presumption recognized in Ball. Applying the test identified by the Ball court, the district court relied upon the Husband's bald assertion at trial that the purpose of placing the various assets into joint names with the Wife was for the purpose of estate planning and loan refinancing. According to the Second District, there was no testimony presented by the Wife that a gift of the Husband's premarital assets was to be made to her and, therefore, she had not satisfied her burden under the Ball test.

Obviously, the Second District did not have the benefit of this Court's decision in Robertson v. Robertson, ___ So.2d ___, 16 FLW S758 (Fla. December 5, 1991) when it reviewed this case. In Robertson, this Court explained that Fla. Stat. § 61.075 (1989)

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residences or real property. See, Gary v. Gary, 467 So.2d 362 (Fla. 2d DCA 1985).

Rather than focus upon the trial court's failure to recognize the Husband's one-half interest in the Mako, the issue is whether the distribution effectuated by the trial court affects an equitable distribution. It is respectfully submitted that once the trial court's plan is reinstated, the plan as a whole, effectuates an equitable distribution which should not have been improperly modified by the district court of appeal.

created a statutory form of equitable distribution. While noting that the statute for the most part appeared to be a codification of existing case law, there were some modifications. Florida Statutes § 61.075(3)(a)(5) represented one of the changes and preempted the principle which this Court established in Ball. This Court explained that the statute created a presumption that the entireties' real estate is considered marital property regardless of who paid for it. The party claiming a special equity and who sought to have the property declared to be a non-marital asset now had the burden of overcoming the presumption by proving that a gift was not intended. The Court concluded there that there was ample support in the record for the conclusion that the Husband did not meet his statutory burden of proving a special equity and, therefore, quashed the decision of the Fourth District Court of Appeal and disapproved of the decision in Straley v. Frank, 585 So.2d 334 (Fla. 2d DCA 1991) to the extent that it conflicted with Robertson.

As it did in Robertson, this Court can easily conclude that based upon the facts of this record, the Husband did not rebut the statutory presumption, a prerequisite to the recognition of the special equities that he claimed. Admittedly, the Husband testified real property was jointly titled for estate purposes and because of requirements of various lenders. He likewise testified to $15,000.00 in down payments and other expenditures towards the purchase of the properties. He denied that placing the properties

into joint names with the right of survivorship was intended as any type of gift. (R. 363)

If that were the only evidence before the trial court regarding the special equity claim to the beach properties, the trial judge very well may have erred in his denial of the Husband's special equity claims. However, the Husband's testimony was not the only evidence presented to the trial court regarding this issue.

The Wife's evidence showed that the parties purchased the beach properties prior to the marriage. They took title as joint tenants with the right of survivorship and thereafter changed title to tenancies by the entirety. (R. 125, 129) The parties jointly contracted to buy the property and jointly financed it from the beginning. Equally important is the Wife's testimony that the parties held their property jointly because everything was considered to be joint and all funds were commingled. (R. 130)

Even the Husband's testimony supported that assertion. He admitted that the proceeds of the Bristol home (Wife's premarital home) were used to purchase the Bayshore marital home, paid down lines of credit and otherwise went into a family pot for the use of other family expenses. (R. 406-408) Likewise, at the time that the beach properties were initially purchased, the Husband was living at the Bristol residence while the Wife was making all mortgage payments, and they were jointly contributing to living expenses. Under those conflicting facts, the record

certainly supports the conclusion that the Husband failed to satisfy his burden.

Other courts have held that where the parties commingled marital and non-marital funds, the non-marital funds no longer maintained their separate identities. See, e.g., Terreros v. Terreros, 531 So.2d 1058 (Fla. 3d DCA 1988); Walser v. Walser, 473 So.2d 306 (Fla. 2d DCA 1985). In this case, even if one were to conclude that the initial purchase funds for the beach properties came from the sale of the Husband's premarital home, the use of those funds was made possible by the utilization of the Bristol home as the parties' residence and, therefore, did not come from a source clearly unconnected with the marriage. See, Vandegrift v. Vandegrift, 477 So.2d 638 (Fla. 5th DCA 1985). Certainly, the trial court, under the statute, could have properly concluded that the Husband had not met his burden of rebutting the statutory presumption.

Even without the help of this Court's decision in Robertson, the trial judge nevertheless correctly denied the Husband's claims to special equities in the beach properties. Florida courts have affirmed the denial of a special equity in marital property where it appears that non-marital funds of the other spouse are also attributable to the purchase of the property, or where marital funds have been used to pay the mortgage and for improvements. See, Weinstein v. Weinstein, 528

So.2d 49 (Fla. 5th DCA 1988); Geddes v. Geddes, 530 So.2d 1011 (Fla. 4th DCA 1988).[13]

The Geddes case is substantially similar to this one. In Geddes, the court affirmed the denial of the Husband's claim for special equity. The court noted that the Wife had testified that the Husband referred to the property as theirs, never his individually. Likewise, the deeds regarding the properties at issue contained no limitations or reservations to suggest that transfers were to occur only in the event of the Husband's death. Nor was there evidence' to support such a motivation by the Husband. The parties had purchased the property just a few months prior to the marriage while they lived together, and within six months of the marriage, titled it jointly. Finally, the Husband was a sophisticated businessman, well-versed in the area of trusts. Therefore, it was unlikely he would have accomplished his estate planning through mere words of devise in deeds, rather than making a will.

The facts of the present case are nearly identical to those of Geddes. The parties jointly acquired and titled the properties. The deeds have no restrictions. The parties always treated their property as joint. They contributed significant amounts of marital funds to the properties. Likewise, the Wife was jointly and severally liable for the debt. Finally, the

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[13] On the other hand, other cases have recognized special equities where non-marital property was used to purchase all or part of marital property. See, Davis v. Davis, 554 So.2d 669 (Fla. 2d DCA 1990); Johnson v. Johnson, 517 So.2d 790 (Fla. 2d DCA 1988).

Husband here is an experienced real estate lawyer, who presumably would have a far greater understanding of how to transfer property than a businessman.

The key issue even under the pre-statute case law is not whether the appellate court agrees or disagrees with the trial court's recognition or denial of a special equity. The issue is whether or not there is competent substantial evidence to support the trial judge's decision. See, Sheperd v. Sheperd, 526 So.2d 95, 97 (Fla. 4th DCA 1987). The determination is premised upon the question of donative intent. That conclusion is to be based on the preponderance of credible evidence. See, Laws v. Laws, 364 So.2d 798, 801 (Fla. 4th DCA 1978). Special equity decisions require findings of fact by the trial court which must be affirmed if there is competent substantial evidence to support them. See, Marsh v. Marsh, 419 So.2d 629 (Fla. 1982).

In the present case, it is clear that the Husband did not rebut the statutory presumption. Likewise, even if this issue were to be analyzed under the pre-statute case law, there was competent substantial evidence to support the trial court's denial of the Husband's special equity claims. Based upon a preponderance of the credible evidence and upon the conduct of the parties, sufficient donative intent was demonstrated. The trial court's decision concerning the denial of the Husband's special equity claims should not have been disturbed by the Second District and should be reinstated here.

B. The Second District Erroneously Substituted Its Judgment For That Of The Trial Court When It Determined That The

Enhancement In Market Value Of The Husband's Interest In Two Non-Marital Real Estate Partnerships Was Not A Marital Asset Where the Evidence Was Undisputed That The Assets Were Maintained By the Infusion Of Marital Funds.

The Second District stated that the trial court erred in characterizing "the passive appreciation and market value" of the Husband's interest in the non-marital real estate partnerships (601 S. Florida and Harbor Properties) as a marital asset. Citing, Wright v. Wright, 505 So.2d 699 (Fla. 5th DCA 1987). At a minimum, the Second District was required to reweigh the evidence to reach its conclusion.

In the final judgment, the trial judge found that the partnership interest in Harbor Properties which accumulated during the marriage was $40,899.00. He likewise found that the partnership interest in the 601 S. Florida Land Trust increased in value $56,825.00 during the marriage. (R. 635) The court also found, based on uncontradicted evidence, that during the marriage, substantial marital funds were contributed to maintain and sustain the parties' interests in those properties. (R. 636-637)

The obvious analytical starting point to review the trial court's allocation of the enhanced value of the partnership is Fla. Stat. § 61.075(5)(a)(2) which states:

> "Marital assets and liabilities" include:
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> 2. The enhancement in value and appreciation of non-marital assets resulting either from the efforts of either party during the marriage or from the contribution to or expenditure thereon of marital funds or

other forms of marital assets or both;

The evidence was undisputed that the funds used to maintain the partnership were paid by the Husband's employer, Bush, Ross. The funds used to maintain the Husband's interest in the partnership were derived from those funds which would have otherwise been distributed to the Husband as part of his income through either a draw or bonus and, therefore, constituted income.[14] That income clearly constituted a marital asset. Florida Statutes § 61.075(5)(a)1 (1989). It is likewise not disputed that the partnerships were almost 100% financed. Under these facts, there certainly was competent substantial evidence to support the trial court's determination that the enhanced values of the partnerships "resulted from" the efforts of the Husband as an active partner in the law firm who serviced the debt from the contribution of marital funds (income) which would have otherwise gone into the "family pot". Certainly, to the extent that "resulting from" in the statute may be equated to "caused by" under traditional notions of causation, the Second District was not free to substitute its judgment for that of the trier of fact. See, Helman v. Seaboard Coastline Railroad Co., 349 So.2d 1187 (Fla. 1977). It was error for the Second District to do so here.

Even before the Equitable Distribution statute was enacted, Florida's District Courts of Appeal established two

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[14] Fla. Stat. § 61.046(4) defines income to mean any form of payment to an individual, regardless of source, including wages, bonuses and any other type of payment made by any person.

approaches to the distribution of the enhanced value of non-marital assets.[15] Under either analysis, the trial court's distribution should have been affirmed. The first approach involves a "threshold" test. Under that analysis, once it is established that marital funds or labor have been expended in the maintenance of a non-marital asset, the asset becomes, in part, a marital asset. For the period of time it is a marital asset, the parties are entitled to an equitable distribution of any increase in value of the asset. Under this scenario, the "enhancement" to be distributed is measured by determining the value of the asset at the time of filing. The valuation includes enhancement due to inflation or market conditions. The court then excludes from distribution only that portion of the asset's value which is established as exempt because of its character as a non-marital asset. This approach appears to have been utilized in both the First and Second District Courts of Appeal. See, Massis v. Massis, 551 So.2d 587 (Fla. 1st DCA 1989); Miceli v. Miceli, 533 So.2d 1171 (Fla. 2d DCA 1988); Pfleger v. Pfleger, 558 So.2d 198 (Fla. 2d DCA 1990).

The other approach utilized by some courts requires the trial judge to allocate that portion of the enhanced value of a non-marital asset solely attributable to the expenditure of marital funds or labor. Distribution is then based upon the

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[15] Other than the dissent in the present en banc opinion, the undersigned has been unable to locate any reported appellate decision which has attempted to analyze the enhancement issue under the new statute.

percentage of the asset's enhancement which the judge has "allocated" to be attributable to marital funds or labor. Increases which are attributable to market forces or inflation do not appear to be included in the "marital" aspect of the allocation. This approach has been used by various panels of the First, Second and Fifth District Courts of Appeal. See, Crapps v. Crapps, 501 So.2d 661 (Fla. 1st DCA), rev. den., 511 So.2d 297 (Fla. 1987); Thomas v. Thomas, 571 So.2d 499 (Fla. 1st DCA 1990); Kincart v. Kincart, 572 So.2d 530 (Fla. 2d DCA 1990); Wright v. Wright, 505 So.2d 699 (Fla. 5th DCA 1987); Keller v. Keller, 521 So.2d 273 (Fla. 5th DCA 1988).[16]

Under the facts of this case, this Court may not find it necessary to embrace either approach because there was competent substantial evidence to support the trial court's determination no matter which analysis is used. Should the Court decide to address the issue, it is respectfully suggested that the "threshold" analysis is by far the better approach to be adopted by this Court than is the "allocation" approach. Under the "threshold" standard, distributions of enhanced non-marital assets will be relatively easy for the trial judges who will be required to make these decisions. A "threshold" standard makes practical sense because it allows a predictable method of valuation which will be subject to meaningful appellate review. For example, in a case

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[16] Likewise, there are some decisions which address both approaches, and it is difficult to determine which, if either analysis, the court has applied. See, e.g., Sanders v. Sanders, 492 So.2d 705 (Fla. 1st DCA 1986); Turner v. Turner, 529 So.2d 1138 (Fla. 1st DCA 1988).

like this one, real estate appraisers could testify to the value of the property before marital labor or funds were expended upon it. Likewise, he or she could testify to its value on the date of filing or other date the judge may determine pursuant to Fla. Stat. § 61.075(6).[17] The trial judge would have a relatively easy job in determining what part of the enhanced value constitutes a marital asset under this approach. He or she would simply be required to subtract the non-marital value from the enhanced value to determine that portion which constitutes a marital asset.

Under the allocation approach utilized by some courts, however, a trial judge would be faced with an evidentiary nightmare. He or she would, as a first step, still be required to perform the arithmetic the "threshold" test would require. However, the trial judge would then have to determine which portion of the asset's enhanced value was attributable to the infusion of marital funds or labor. While this state's judiciary is certainly well qualified, it is doubtful that the hundreds of circuit court judges who will be required to make the decisions are well-schooled or well-versed enough in economics, accounting, marketing, et cetera, to meaningfully perform such an extraordinary function.

Some people may be tempted to suggest that a trial judge could make these decisions based upon testimony of so-called "experts". Given the fact that economics and market forces are

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[17] See also, Bauzon v. Bauzon, ___ So.2d ___, 16 FLW D2825 (Fla. 1st DCA November 6, 1991).

typically explained by theory, as opposed to hard facts, a trial judge may be left to choose between one hypothesis or another. Given the fact that Florida courts typically frown upon legal results based on speculation and guesswork,[18] it is difficult to understand why such an approach should be imposed upon the circuit bench. At a minimum, adoption of such an approach would complicate rather than simplify the entire dissolution process. Moreover, predictable results with the ability to obtain meaningful appellate review would become illusory at best.

Regardless which approach this Court adopts, it is clear that the decision of the Second District concerning the assessment of the enhanced value of the two real estate partnerships should be reversed.[19] The undisputed evidence of record in this case is

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[18] See, e.g., Voelker v. Combined Insurance Co. of America, 73 So.2d 403 (Fla. 1954).

[19] The Second District in the present case used neither approach, and instead, relied upon an "innovative" method to allocate the enhanced value of the real estate partnerships. Using a formula similar to that recognized by this Court in Landay v. Landay, 429 So.2d 1197 (Fla. 1983), the majority determined that the only enhancement in value of these properties was the amount that the Husband's share of the mortgage debt on the property was reduced during the marriage. Under this "innovative" approach relied upon by the majority, the court evidently concluded that equity could be accomplished between the parties by giving the Wife a credit for one-half of the amount that the debt was reduced during the marriage, a sum of $4,347.50. (R. 285, 312, 321, 137-138) Therefore, under the Second District's "equity", in excess of $80,000.00 of marital funds were paid on the Husband's partnership interests during the marriage to which the Wife was to receive a credit of a mere fraction of that amount. Moreover, with respect to the two properties, the Husband kept his entire interest. The inequity of the Second District's approach could not be more obvious. During the marriage, more than $65,000.00 was contributed

that in excess of $60,000.00 of marital assets were spent to maintain the partnerships through the service of debt. Those funds would have been distributed to the Husband in the form of salary or bonuses had they not been used to service the debt on the properties. Likewise, those funds were generated from the Husband's active participation in his law practice. The parties also paid the Husband's debt for capital contributions, brought into the marriage. (R. 285, 312, 321, 137-138)

The Second District has previously held that the determination of whether an asset is marital or non-marital for purposes of equitable distribution is a question of fact. See, Macaluso v. Macaluso, 523 So.2d 615, 617 (Fla. 2d DCA 1988). Thereafter, as a matter of law, marital assets must be considered for equitable distribution purposes. It then becomes a matter of sound judicial discretion based upon equitable principles as to the amounts each party is to receive. Id. Under the "threshold" approach, there was ample evidence in the record for the judge to conclude that the highly leveraged investments, almost 100% financed, purchased shortly before the marriage, were enhanced in value because of the contribution of marital funds.

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to the partnerships from the deduction of the law firm. (R. 92, 959) The parties also paid the debt that the Husband brought into the marriage for his initial capital contributions. (R. 285, 312, 321, 137-138) Thus, for a marital expenditure in excess of $80,000.00, the Second District believed it was "equitable" to give the Wife a credit for $4,347.50. The Second District's "innovative" version of equity also does not address how the partnerships could have been maintained in the absence of the marital contribution nor how they would have appreciated in the absence of those contributions.

Alternatively, if the trial court relied upon the allocation approach, he likewise could have properly concluded that the amount the investment was enhanced by the infusion of marital funds were the amounts stated in the final judgment of dissolution. See, Hickman v. Hickman, 572 So.2d 1021 (Fla. 2d DCA 1991); Graff v. Graff, 569 So.2d 811 (Fla. 1st DCA 1990) (each case holding that enhancement in the value of land owned prior to the marriage, attributable to the marital funds used to pay off mortgage on the land was a marital asset subject to equitable distribution). See also, Fredel v. Fredel, 531 So.2d 981 (Fla. 3d DCA 1988), rev. den., 548 So.2d 988 (Fla. 1989) (increase in value of stock resulting from active trading during the course of the marriage constitutes a marital asset subject to equitable distribution). This Court should reverse the decision of the Second District and order reinstatement of the final judgment on remand.

ARGUMENT

II.

THE SECOND DISTRICT ERRED WHEN IT REVERSED THE TRIAL COURT'S ATTORNEY'S FEE AWARD CREATING A NEW STANDARD TO REVIEW FEE AWARDS BASED SOLELY UPON CONSIDERATIONS OF THE WIFE'S FINANCIAL CIRCUMSTANCES AND NOT THE RELATIVE FINANCIAL CIRCUMSTANCES OF THE PARTIES.

The Second District reversed, in toto, the attorney's fee award to the Wife. The majority opinion states that there was no showing that the Wife lacked a present ability to pay substantial fees, and instead, the court relied upon her earning ability in excess of $50,000.00 per year. Likewise, the court noted that the Wife's one-half interest in the parties' two boats had a value in excess of $50,000.00.[20] The majority concluded there was no reasonable basis in the record to find that the Wife was at a financial disadvantage in obtaining legal assistance.

Once again, with all due respect to the Second District, the majority appears to have overlooked substantial case law from this Court and other district courts of appeal concerning the assessment of attorneys' fees in a dissolution proceeding. Had the Court relied upon the principles of law expressed in those cases, it could only have concluded that the trial judge did not abuse his discretion in granting the Wife's claim for fees and costs.

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[20] It should be noted that the husband was granted possession and title to the $98,000.00 sailboat.

Florida courts have long recognized the basic principle relied upon by the majority of the district court below, that the purpose of Fla. Stat. § 61.16 is to ensure that both parties will have similar ability to secure competent legal counsel. The analysis does not stop there, however. As this Court stated in Canakaris, it is not necessary for one spouse to be completely unable to pay attorneys' fees in order for the trial court to require the other spouse to pay fees. A trial court may properly award attorneys fees to avoid an inequitable diminution of the physical sums granted to a spouse. The comparative financial positions of the parties is relevant to a determination as to who is to pay fees. Florida Statutes § 61.16 also requires the Court to examine the relative financial resources of both parties prior to making a decision concerning attorneys' fees. See also, Kuse v. Kuse, 533 So.2d 828, 829 (Fla. 3d DCA 1988); Hudgens v. Hudgens, 411 So.2d 354, 355 (Fla. 2d DCA 1982).

Where the record demonstrates that one party's financial position is superior to the other's, it has been held to be an abuse of discretion not to require the spouse with the greater financial ability to pay the other's attorneys' fees. See, Greeley v. Greeley, 583 So.2d 1078, 1080 (Fla. 1st DCA 1991); Martinez-Cid v. Martinez-Cid, 559 So.2d 1177, 1178 (Fla. 3d DCA 1990); Davis v. Davis, 547 So.2d 309, 310 (Fla. 4th DCA 1989). Conversely, if the parties are in relatively equal financial positions after equitable distributions of assets, then each party should be required to pay their own fees. See, e.g., Garrett v.

Garrett, 559 So.2d 613 (Fla. 3d DCA 1990); Ball v. Ball, 554 So.2d 629 (Fla. 4th DCA 1989); Seitz v. Seitz, 471 So.2d 612, 615 (Fla. 3d DCA 1985).

When determining the relative financial positions of the parties, earning capacity is a financial resource which the court should consider when attempting to determine that party's ability to pay attorneys' fees. See, Nisbeth v. Nisbeth, 568 So.2d 461 (Fla. 3d DCA 1990). Courts should consider not only a party's earning capacity, but likewise, should review a party's net worth and previous record of income production. See, Blackburn v. Blackburn, 513 So.2d 1360 (Fla. 2d DCA 1987). Florida courts have held that in situations where the Husband's net worth is merely twice that of the former Wife and his income approximately three times that of the former Wife, it has been an abuse of discretion not to award attorneys' fees to the Wife. See, Givens v. Givens, 560 So.2d 392 (Fla. 4th DCA 1990). In fact, disparity of income is often a factor relied upon by the district courts of appeal to justify an attorney's fee award. See, e.g., Nelson v. Nelson, ____ So.2d ____ 16 FLW D2820, 2821 (Fla. 2d DCA November 8, 1991); White v. White, 575 So.2d 767 (Fla. 2d DCA 1991).

Florida courts have also stated that the party requesting fees and costs need not be completely unable to pay for them in order to be entitled to such an award. See, e.g., Kaylor v. Kaylor, 390 So.2d 752 (Fla. 4th DCA 1980). A trial court may order a Husband to pay all of the Wife's attorneys' fees even where the Wife has sufficient funds to pay her fees. See, Heller

v. Kuvin, 490 So.2d 245, 246 (Fla. 3d DCA 1986). See also, Alfrey v. Alfrey, 553 So.2d 393 (Fla. 4th DCA 1989).

In the present case, the trial court conducted a hearing concerning the issue of attorneys' fees which lasted anywhere between eight to nine hours. Thereafter, the trial court ordered the Husband to pay the Wife's attorneys' fees and costs. The trial court's order made various findings of fact in accordance with the criteria enunciated by this Court in Standard Guaranty Insurance Co. v. Quanstrom, 555 So.2d 828 (Fla. 1990) and Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985). Specifically, the court found that the rate of the Wife's attorney was reasonable. Likewise, the order found that the number of hours expended on the litigation were reasonable given the complexity and nature of the case.[21] Therefore, procedurally, the order has satisfied the necessary requirements imposed upon the trial court. See, Gamba v. Gamba, ____ So.2d ____ 16 FLW D2633 (Fla. 4th DCA October 9, 1991).

Moreover, the findings of fact contained within the order are supported by competent substantial evidence. As noted in the Statement of the Case and Facts, the Wife's attorney's billings are contained in the record as is the expert testimony supporting the reasonableness of the rate and the reasonableness of the hours spent in the litigation. Admittedly, there was

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[21] There was also ample evidence presented during the fee hearings from which the trial court could have concluded that the litigation was unnecessarily protracted due to the tactics of the husband. Confer, Wrona v. Wrona, ___ So.2d ___, 16 FLW D3074 (Fla. 2d DCA December 11, 1991).

conflicting evidence presented by the Husband. Evidently, the trial court simply found the evidence presented by the Wife to be more credible, and it should not be disturbed on appeal.

There, likewise, was substantial competent evidence to support the trial court's determination that the Husband was in a superior position to the Wife so as to require him to pay attorneys' fees. The Husband's earning history during the course of the marriage demonstrated that his annual earnings were four to five times greater than that of the Wife's. The Husband's net worth was more than double (in excess of $400,000.00) than that of the Wife.[22] That determination was calculated on a post-equitable distribution basis. Likewise, the Husband was awarded two of the major marital assets, the "Evtide" sailboat and the marital residence on Bayshore Boulevard. Those assets had a combined value which well exceeded $200,000.00 and could be characterized as "liquid" assets. Indeed, the Husband even suggested that he sell the "Evtide" in order to pay the attorney's fee award. (R. 1931, 1940)

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[22] The Husband certainly attempted to present conflicting evidence regarding his earnings and net worth. The Husband's attempt to underestimate these figures in the face of testimony that he himself put before the trial judge which showed his past earnings to be far greater than those shown in his amended financial affidavit, resulted in the trial judge striking "as a sham" the amended affidavit. (R. 1860) Given what the trial judge could have perceived as a complete lack of candor by the Husband, and that the assessment of credibility was purely for the judge, he was clearly within sound judicial authority to accept the net worth figures relied upon by the Wife.

The review of the award of attorneys' fees and costs in this case should have been very easy for the Second District. The trial court was required to make two separate sets of findings of fact. The first addressed the reasonableness of the fees. The second concerned the respective financial position of the parties. The trial court concluded that the fees were reasonable and that the Husband's financial ability far exceeded the Wife's. This record is replete with substantial competent evidence to support those findings. Thereafter, the Second District merely had to determine if no other reasonable judge would have ordered the Husband to pay fees in this case. Based upon this record, that should have been an easy decision to make. The trial court's decision simply cannot be characterized as an abuse of discretion. This Court should reverse the decision of the Second District with instructions on remand to reinstate the award of fees and costs to the Wife.

CONCLUSION

The decision of the en banc majority of the Second District in this case clearly demonstrates that the court overlooked numerous fundamental principles of law concerning dissolutions in the State of Florida. The distribution plan fashioned by the trial judge was more than amply supported by competent substantial evidence in the record. Simply stated, the Second District had no basis to dismantle the distribution fashioned by the trial judge, reweigh the evidence and create a new distribution scheme. Likewise, that court erred when it looked solely to the financial resources available to the Wife to determine that she was not entitled to fees. It was clear that the trial court correctly looked to the relative financial positions of the parties, and after having done so, appropriately required the Husband to pay the Wife's fees. This Court should reverse the en banc decision of the Second District with instructions on remand to reinstate the remedies fashioned by the trial judge.

Respectfully submitted,

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AMENDED CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by HAND DELIVERY to **Raymond A. Alley, Jr., Esquire,** 805 W. Azeele, Tampa, Florida 33606; and **George K. Rahdert, Esquire,** 535 Central Avenue, St. Petersburg, Florida 33701, on January 9, 1992.

George A. Vaka, Esquire