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SUPREME COURT OF FLORIDA

CASE NO.: 82,503

DCA-5 CASE NO.: 91-1869

MARY ANN KENNEDY,

Petitioner,

vs.

EDWARD M. KENNEDY,

Respondent.

_____/

AN APPEAL FROM THE DISTRICT COURT OF APPEAL

OF THE STATE OF FLORIDA

IN AND FOR THE FIFTH DISTRICT

RESPONDENT'S ANSWER BRIEF

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INTRODUCTORY STATEMENT

The Petitioner is **MARY ANN KENNEDY**, Appellee/Cross Appellant in the Fifth District Court of Appeal Case No. 91-1869, and Petitioner in the Circuit Court, Case No. DR90-5106. The Petitioner will be referred to herein as "WIFE".

The Respondent is **EDWARD M. KENNEDY**, Appellant/Cross Appellee in the Fifth District Court of Appeal Case No. 91-1869, and Respondent in the Circuit Court, Case No. DR90-5106. The Respondent will be referred to herein as "HUSBAND".

The Fifth District Court of Appeal will be referred to herein as "the district court" or "the 5th DCA".

STATEMENT OF CASE

The Husband accepts Paragraph One of the Wife's Statement of Case, but does not agree with the Wife's representations of the district court's disposition of this case as set forth specifically below.

In addition, the Husband adds the following procedural history. This case was considered en banc by the Fifth District Court of Appeal specifically to address the issue of whether the trial court properly ruled that alimony would be automatically terminated if the Wife were to "cohabit" with another man. However, neither that issue nor the attorney fee issue were addressed by the district court because the reversal of the alimony award by the majority opinion renders the cohabitation issue moot and requires the trial court to reconsider the attorney fee issue. Therefore, as Judge Thompson's concurring opinion makes clear, it was not necessary for the district court to discuss those other issues at that point in the proceedings.

The Wife sought discretionary review under Rule 9.030(a)(2)(A)(iv), Fla.R.App.P., asserting a conflict between this decision and the decisions of this court and other district courts of appeal presenting only three (3) specific issues for review. Those issues involve the validity of the "comparable fairness doctrine" and the reversal of the Final Judgment on the basis of the lack of findings. The Wife's jurisdictional brief did not raise either the cohabitation issue nor the attorney fee issue, nor did it raise the issue of the constitutionality of

Section 61.08(1), Florida Statutes.

These issues were raised for the first time in the Wife's Initial Brief on Merits, therefore, the Husband filed a Motion to Strike these additional issues along with a Motion to Toll Time. These motions were denied. In addition, the Husband's Motion to Strike requested this Court to issue an Order requiring the Wife to amend her Initial Brief on Merits to include an appropriate statement of the facts of this case. The Wife's initial brief incorporates, by reference, the facts of the case as set forth in the parties' briefs filed in the District Court. Inasmuch as the Husband's motion was denied, the Husband will refer to the facts as referenced by the Wife.

The Husband specifically disagrees with the Wife's representation of the district court's disposition of this case. The Wife's assertion that the basis for the district court's reversal of the alimony award was due solely to the trial court's failure to include sufficient findings of fact in the Final Judgment is not an accurate representation of the district court's decision. The opinion below clearly states the basis for reversal was due to the trial court's error in its application of the law and that the failure to include sufficient findings only "compounded" that error. [Page two of opinion below] Furthermore, the 5th DCA clearly framed the alimony issue as follows,

> "The issue in this case, simply stated, is whether the trial court erred in its decision to equalize the parties' incomes under the facts of this case. We find that it did and reverse." [Page one opinion below]

ISSUES PRESENTED BY PETITIONER

1. DOES THE "DOCTRINE OF COMPARABLE FAIRNESS" ANNOUNCED BY THE FIFTH DISTRICT COURT OF APPEAL VIOLATE THE STANDARD OF REVIEW FOR DISCRETIONARY ACTS AS ESTABLISHED BY CANAKARIS V. CANAKARIS, 382 SO.2D 1197 (FLA. 1980) AND ITS PROGENY?

2. WAS IT ERROR FOR THE FIFTH DISTRICT COURT OF APPEAL TO REVERSE THE TRIAL COURT ON AN ISSUE NOT PRESENTED FOR APPEAL BY EITHER PARTY, WHEN THAT ISSUE IS NOT ONE CONSTITUTING FUNDAMENTAL ERROR, TO WIT: THE FAILURE OF THE TRIAL JUDGE TO INCLUDE FINDINGS OF FACT IN THE JUDGMENT AS ALLEGEDLY REQUIRED BY SECTION 61.08(1), FLORIDA STATUTES?

3. IS THE REQUIREMENT ALLEGEDLY FOUND IN SECTION 61.08(1) FLORIDA STATUTES, THAT TRIAL JUDGES INCLUDE IN JUDGMENTS AWARDING ALIMONY SPECIFIC FINDINGS OF FACT ON ISSUES ENUMERATED IN SECTION 61.08(2), FLORIDA STATUTES, AN UNCONSTITUTIONAL INVASION OF THE JUDICIARY BY THE LEGISLATURE?

4. IF A JUDGMENT IS DEEMED DEFICIENT FOR FAILING TO INCLUDE FINDINGS OF FACT, IS IT ERROR TO REVERSE THE JUDGMENT, AS OPPOSED TO REMANDING TO THE TRIAL COURT TO AMEND THE JUDGMENT TO INCLUDE THE MISSING FINDINGS OF FACT?

5. WAS IT AN ERROR OF LAW FOR THE TRIAL JUDGE TO CONDITION THE AWARD OF PERMANENT ALIMONY TO TERMINATE UPON COHABITATION WITH A MAN?

6. DID THE TRIAL COURT ABUSE ITS DISCRETION IN FAILING TO AWARD THE WIFE HER ATTORNEY'S FEES?

SUMMARY OF ARGUMENT

1. The "doctrine of comparable fairness" enunciated by the 5th DCA does not directly or expressly conflict with the "reasonableness" standard of appellate review set forth in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980). The opinion below merely elaborates upon the definition of discretion contained in the Canakaris decision and coins a phrase for a concept originally contained in that decision.

2. The Wife asserts that it was error for the district court to reverse the trial court on an issue that was not raised by either party and which does not constitute fundamental error, i.e.--the trial court's failure to include findings in the Final Judgment. However, the district court did not reverse the Final Judgment based solely upon the lack of findings. Even if the lack of sufficient findings was the only error, the district courts have consistently reversed final judgments which do not include specific findings in cases where such findings are required by statute, whether or not that issue was raised by either party.

3. The requirement at Section 61.08(1), Florida Statutes, that trial judges include findings in judgments either awarding or denying alimony is not an unconstitutional invasion of the judiciary by the legislature, but rather is a substantive requirement that ensures the guidelines set forth in that statute which a trial judge must consider when determining whether to award alimony are followed and properly applied.

4. The Wife asserts that it was error to reverse the trial court's alimony award for failure to include the requisite findings, as opposed to remanding for an Amended Final Judgment which includes the missing findings. However, as stated above, the district court did not reverse based solely upon the trial court's failure to include findings in the Final Judgment. Reversal was due to the trial court's failure to consider and apply all of the factors mandated by Section 61.08 (2), Florida Statutes, when determining if an award of alimony was proper under the facts of this case. Therefore, the district court properly reversed and remanded for further proceedings which would require the trial court to consider all of the enumerated factors as well as to consider judicial precedent set in cases with similar facts.

5. It was not error, as a matter of law, for the trial judge to condition the award of permanent alimony to terminate upon cohabitation with a man. The Florida legislature has not passed any legislation which prohibits a judge from conditioning alimony in this manner, nor is the case law relied upon by Wife definitive as regards this issue. In light of the well reasoned and logical rationale expressed by the trial judge for having included that provision in this case, it cannot be said that said provision was either an abuse of discretion or an error of law.

6. The trial judge did not abuse his discretion in failing to award Wife attorney's fees. The district courts have consistently held that where the parties depart the marriage in relatively equal financial positions, it is error to award attorney's fees to either party. In the present case, the trial

judge divided the assets equally and the alimony awarded to the Wife has the effect of equalizing the parties incomes. Therefore, it was proper for the trial court to deny the Wife's request for fees.

ARGUMENT

DOCTRINE OF COMPARABLE FAIRNESS

POINT I

DOES THE "DOCTRINE OF COMPARABLE FAIRNESS" ANNOUNCED BY THE FIFTH DISTRICT COURT OF APPEALS VIOLATE THE STANDARD OF REVIEW FOR DISCRETIONARY ACTS AS ESTABLISHED BY CANAKARIS V. CANAKARIS, 382 SO.2D 1197 (FLA. 1980) AND ITS PROGENY?

The Wife has asserted that the "doctrine of comparable fairness" enunciated by the 5th DCA in the opinion below undermines and directly and expressly conflicts with the standard of appellate review of discretionary acts set forth by this Court in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980). This doctrine does not conflict with Canakaris but merely restates what this Court set forth in that landmark opinion to be the limitations upon the discretionary power of trial judges in dissolution matters.

In reversing the award of permanent alimony to the Wife, the 5th DCA noted the disparity between this and other decisions regarding permanent alimony awards and remarked:

> "The essence of justice is that all parties, regardless of gender, race or religion, under similar circumstances, receive substantially the same results in litigation before our courts." [Page three of opinion below; Emphasis supplied by court]

The 5th DCA referred to this principle as the "doctrine of comparable fairness" which merely coins a new phrase for an old concept. This dotrine is not new law nor does it establish a completely new standard of review for discretionary acts. It does not establish a new and "inflexible rule" and it certainly does not conflict with the Canakaris decision, but follows it.

As the Wife states in her Initial Brief, the standard of

appellate review of a lower court's exercise of its discretionary power is the "reasonableness" test. The opinion below does not suggest otherwise. However, the opinion below does recognize that no matter how broad a trial court's discretionary power may be, it does not give trial judges completely free rein to decide what is reasonable under a given set of facts. Reasonableness must be determined within the mandated set of statutory guidelines, if any, or within a set framework in order to assure consistency within our legal system.

For this reason the legislature sets forth guidelines, most notably in the area of family law, to aid trial courts in evaluating what factors to consider when exercising their discretionary authority. For awards of alimony, Section 61.08, Florida Statutes, provides seven (7) factors that a trial court must consider. In applying these factors, courts are not free to pick and choose at random which factors they will consider and which they will disregard, but must consider all the relevant factors.1

In addition to statutory guidelines, trial courts are also guided by decisions in cases rendered previously where a similar set of facts or circumstances were present. Therefore, when reviewing a discretionary act, the appellate court must not only consider if all of the mandated factors were given appropriate weight based on the record before them, but they must also assure that the decision is within the discretionary authority of the trial court based upon judicial precedent set by cases decided

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1 Section 61.08(2) specifically provides, "In determining a proper award of alimony or maintenance, the court shall consider all relevant economic factors, including but not limited to..."

previously.

The standard of appellate review set forth by in the Canakaris decision affords trial judges a wide range of discretionary power. However, this Court also made clear that that power was not without limitation:

> "The trial judge's discretionary power was never intended to be exercised in accordance with whim or caprice of the judge in an inconsistent manner. Judges dealing with essentially alike cases should reach the same result. Different results reached from substantially the same facts comport with neither logic nor reasonableness." Canakaris v. Canakaris, supra at 1203. [Emphasis added]

Therefore, if the decision of a trial court is not in line with other cases decided on similar facts, then the result is not reasonable and constitutes an abuse of judicial discretion. This is the essence of what the 5th DCA decision under review stands for;

> "The doctrine of comparable fairness...is intended to protect both spouses from an unreasonable result and limits the ability of the appellate court to interfere with the trial court's discretion to those cases in which the award is outside the range established by precedent for cases based on similar facts. Canakaris appears to welcome this approach." [Opinion below at page seven]

This principle was not new when it was stated by this Court in the Canakaris decision in 1980 nor is it a "radical new standard" when enunciated by the 5th DCA in the Kennedy decision. This principle goes back to English common law in the form of the doctrine of "precedent" which is defined in Black's Law Dictionary to be,

> "an adjudged case or decision of a court, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law."

This principle is also embodied in the concept of stare decisis which is defined in Black's Law Dictionary to be,

> "Doctrine that, when court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same. Horne v. Moody, 146 S.W.2d 505,509,51."

Recently, the Second District Court of Appeal considered the case of Kremer v. Kremer, 595 So.2d 214 (Fla. 2d DCA 1992) in which an award of alimony to a wife under circumstances substantially similar to the present case was appealed. In discussing the proper standard of review of discretionary acts, the Kremer court quoted Justice Cardoza's analysis of discretion;

> "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. His is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordal necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains." B.Cardoza, The Nature of the Judicial Process, at 141.

In order to determine whether the trial judge abused his discretion in awarding the wife alimony in Kremer, the 2d DCA analyzed cases decided previously with the same or similar facts and found; "**No case cited by the wife supports the permanent alimony award**." Id. at 217. Therefore, the Kremer court held;

> "...without doubt that there was an abuse of discretion in the award of any alimony. **To decide otherwise would foster indefensible inconsistencies in the law in this area**...." Id. at 217.

Inconsistencies in the area of dissolution proceedings is exactly what the doctrine of comparable fairness attempts to

prevent. However, the Wife seems totally unconcerned with disparities in the results and argues instead that the doctrine of comparable fairness will set the current standard of review "on its head" because it would require an analysis of other facts before other courts and would require the trial court's action to be reviewed on the basis of other evidence presented in other cases.

As evidenced by the authority cited above, that is, in essence, exactly the way in which appellate courts must review cases--by comparing the procedure used and the result achieved in the case before them with cases in which substantially similar facts were presented to assure that the case under review falls in line with established precedent and/or rules of law. This is certainly not a radically new concept.

The Wife asserts that under the current state of Florida law, if there are two (2) cases with differing results obtained from the same or similar facts, both of which could be deemed reasonable, the trial court must be affirmed. However, according to this court, if there are two cases with substantially the same facts and different results--the result of the case under review is per se unreasonable. Therefore, the Wife's analysis of the reasonableness test is exactly opposite of what this Court held in Canakaris v. Canakaris, supra at 1203, when it said;

> "Different results reached from substantially the same facts comport with neither logic nor reasonableness."

Inconsistencies in the case law in the area of dissolution proceedings has been a stated concern of this Court as well as of the district courts. This court has warned:

> "...both appellate and trial judges should recognize the concern which arises from substantial disparities in domestic judgments resulting from basically similar factual circumstances." Id. at 1203.

As the 5th DCA pointed out at Page seven of the opinion below, diametrically different results in cases involving the same or similar set of facts;

> "Can only be explained by the luck of the draw of the trial judge or the gender of the higher earning spouse. Neither factor, under a just legal system, should play any role in the outcome of the case."

Therefore, the "doctrine of comparable fairness" is neither a "radical new standard" nor is it a "pernicious doctrine" which conflicts with the established standard of appellate review of discretionary acts. This doctrine aims to achieve a stated goal of this Court--to eliminate substantial disparities in domestic judgments. In a recent article titled, "Findings in Family Law Judgments--The Sequel", the Honorable Bonnie S. Newton of the 6th Judicial Circuit wrote,

> "The comparable fairness concept, [can be] explained as being like "equal protection" under the Constitution, [and] seeks to achieve similar results when the facts are similar." The Family Law Commentator, Vol. XIX, No.4, March 1994, citing Sylvester v. Ryan, 623 So.2d 767 (Fla. 5th DCA 1993).

As it applies to the present case, "the doctrine of comparable fairness" requires that the trial judge recognize the general principle that permanent alimony is reserved for those cases in which an individual does not currently, or in the future, have the capacity for self-support. Woodard v.Woodard, 477 So.2d 631,633 (Fla. 4th DCA 1985)

The "doctrine of comparable fairness" also requires the trial court to recognize that the case law has consistently shown

rehabilitative alimony to be favored over permanent alimony when the spouse is young, healthy and is either currently self-supporting or potentially capable of self-support at some point in the future. Murray v. Murray, 598 So.2d 310 (Fla. 2d DCA 1992); Shea v. Shea, 572 So.2d 558 (Fla. 1st DCA 1990).

In order to aid the courts in determining the ability of a requesting spouse to be, or to become, self-supporting the legislature incorporated into the alimony statute the basic guidelines set forth in the Canakaris decision. Section 61.08(2) requires, as a matter of law, that trial courts not only consider the length of the marriage and the standard of living enjoyed during that time--but also, the age and physical and emotional well being of the parties; their financial condition after distribution of assets; the contribution of each to the marriage including homemaking and child care services; and the time necessary for either to acquire sufficient education or training to enable them to become self-supporting.

The Husband argued in the court below that the trial judge had abused his discretion by failing to properly consider and apply these factors in awarding the Wife alimony under the circumstances of this case. The Husband and the Wife herein were forty (40) and forty-one (41) years old, respectively, at the time of dissolution. The marriage lasted seventeen (17) years2, no children were born of the marriage, neither party has support obligations for anyone but themselves, and both parties are in

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2The couple was originally married in 1973, divorced in December of 1980, and were remarried to each other in August of 1981. The parties separated again in 1990 and the final judgment was rendered in this case in August of 1991.[Appellant's Brief to 5th DCA at page four.]

good health. The parties met in high school, attended and graduated from the same university with the same degree and both were employed full time during almost the entire course of the marriage. [Appellant's Brief to 5th DCA at pages 3,4,5] For almost half the marriage, the Wife actually had a higher income than the Husband. [Appellant's Brief to 5th DCA at page 12] At the Wife's highest income level she was earning almost $35,000.00 per year. In 1989, her employer, (PanAm), offered a buy out program of which the couple mutually agreed to take advantage of and the Wife quit working. [Appellant's Brief to 5th DCA at pages 4,5,6] Two (2) years later, when the couple separated, the Wife went back to work and is now employed as a full time teacher by the Orange County Public School system earning $21,500.00 annually with an additional $6,000.00 in annual income from rental proceeds. The Husband's income at the time of dissolution was $51,250.00. [Appellant's Brief to 5th DCA at pages 5,6] Both parties left the marriage in the same financial position in that the trial court made an exactly equal distribution of the marital assets and liabilities. [Appellant's Brief to 5th DCA at page 2]

It is obvious from the record that the trial court did not give any weight whatsoever to any of the above, but focused only on the duration of the marriage and the standard of living established during the marriage, placing the most emphasis on the standard of living. Instead of determining if the Wife <u>needed</u> permanent alimony, after consideration of all the statutorily mandated factors, the judge concluded the Wife <u>deserved</u> permanent alimony to ensure that she enjoyed the <u>same standard of living</u> as

her ex-spouse upon dissolution. 3

In order to equalize the parties incomes after dissolution, the trial judge considered the monthly incomes and expenses of each and awarded the Wife $1,000.00 per month in permanent periodic alimony. By so doing, he reduced the Husband's monthly net income from $3,160.00 to $2,240.00 and increased the Wife's from $1,430.00 to $2,250.00 and declared [TR 175];

> **"That is within $10 of equalizing their incomes."**
>
> "And all in all, I think this achieves as close as possible to an equal distribution of the assets and allows the parties to maintain a relatively equal standard of living, although neither party will have a standard of living that approaches what they had together during this time." [TR177]

Requiring a forty (40) year old husband to pay $1,000.00 per month alimony-- for the rest of his life-- for the sole purpose of equalizing the parties' incomes after dissolution, creates an unecessary and unwarranted inter-dependence between the two which will make it impossible for either to pick up the pieces and go on with their lives. Not only does this approach ignore the statutory criteria and conflict with almost every case decided within the past five (5) years regarding alimony awards--it also undermines the public policy considerations which this and the district courts have attempted to further regarding such awards.

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3 The 5th DCA determined, "The record in the instant case shows that the trial judge felt consideration of the first two factors enumerated in section 61.08(2)--i.e., the standard of living established during the marriage and the duration of the marriage--required that he equalize the incomes of the parties, not simply as a discretionary matter but as a legally obligatory one. In other words, once the trial court determined this to be a long term marriage, he automatically divided the incomes so as to allow each party the nearest equivalent to the marital standard of living. This approach completely ignores [the] other statutory criteria...." [Opinion below at pages 1,2; Emphasis supplied by court]

Decisions of this and the district courts indicate that-- when the criteria shows it to be appropriate-- awards of lump sum or rehabilitative alimony are favored over permanent alimony. In such a way, the courts can assure that divorcing couples are not needlessly bound to each other financially after dissolution, as well as assuring that every individual be encouraged to strive forward financially rather than being dependent upon another human being for support for the rest of their life. See Diffenderfer v. Diffenderfer, 491 So.2d 265 (Fla. 1986); Tronconi v. Tronconi, 466 So.2d 203 (Fla. 1985); Evans v. Evans, 443 So.2d 233 (Fla. 1st DCA 1983)

In Geddes v. Geddes, 530 So.2d 1011, 1017 (Fla. 4th DCA 1988), the appellate court remarked,

> "Ideally, in a society of equal rights and opportunities, all adult members of society should be able to take care of themselves."

While it is true that every dissolution case presents its own unique set of circumstances, when it comes to the issue of alimony the cases can generally be lined up into two (2) distinctly different categories. In the line of cases where courts have consistently found awards of permanent alimony to be proper, the factual scenario is typically that in which the wife has given up her own education and/or career building opportunities to remain at home and raise the children, handle the domestic chores, and assist in the development of her husband's career. Generally, these cases involve long term marriages where middle-aged or older women find themselves facing divorce, often times in poor or failing health, with no adequate means of support. The woman usually has not developed any

marketable skills which will enable her to obtain a position which pays well enough to enable her to maintain any semblance of a lifestyle consistent with that which she had become accustomed during the marriage. See Askegard v. Askegard, 524 So.2d 736 (Fla. 1st DCA 1988); Priede v. Priede, 474 So.2d 296 (Fla. 2d DCA 1985); Garrison v. Garrison, 351 So.2d 1105 (Fla. 4th DCA 1977); McAllister v. McAllister, 345 So. 2d 352 (Fla. 4th DCA 1977).

On the other end of the spectrum are those cases involving shorter term marriages or marriages with no children in which the wife is relatively young and healthy and has the ability to be self-supporting. In these cases the courts have consistently held that awards of permanent alimony are improper and the fact that the husband may have a higher income than the wife does not justify an award of permanent alimony. See Siegel v. Siegel, 564 So.2d 226 (Fla. 5th DCA 1990); Rezner v. Rezner, 553 So.2d 334 (Fla. 4th DCA 1989); Griffith v. Griffith, 528 So.2d 1325 (Fla. 5th DCA 1988); Murray v. Murray, supra; Campbell v. Campbell, 432 So.2d 666 (Fla. 5th DCA 1983); Snider v. Snider, 371 So. 2d 1056 (Fla. 3rd DCA 1979), cert.denied, 383 So.2d 1202 (Fla. 1980); Peck v Peck, 291 So.2d 211 (Fla. 4th DCA 1973), cert.denied, 301 So.2d 776 (Fla. 1974); Ennis v. Ennis, 613 So.2d 564 (Fla. 5th DCA 1993)

Probably the best and most complete discussion of this issue can be found in Geddes v. Geddes, supra, wherein the 4th DCA recognized that in cases which present the set of circumstances described above:

> "virtually all would agree that a permanent support obligation by one spouse to the other outside of marriage would be inappropriate notwithstanding the

disparity that may exist in their respective incomes." [Emphasis added]

In Kremer v. Kremer, supra at 214, the appellate court reversed an award of permanent alimony to a young and healthy wife after a six (6) year childless marriage, stating;

> "We recognize that the ex-husband's income is far greater than that which the wife could reasonably expect to earn and that the standard of living they enjoyed during the marriage was substantially higher than that which the wife could reasonably be expected to sustain for herself without substantial permanent alimony. However, those aspects are not sufficient justification for a permanent alimony award." [Emphasis added]

As with disparities in the parties' incomes, neither does a long term marriage, in and of itself, justify an award of permanent alimony. In Hann v. Hann, 629 So. 2d 918 (Fla. 2d DCA 1993), the marriage lasted fifteen (15) years during most of which the wife was employed full time as school teacher earning between $28,000.00 to $30,000.00 annually. Even though this was a long term marriage and the husband earned twice as much as the wife, the appellate court reversed the award of permanent alimony and remanded for entry of an award of rehabilitative alimony. Even though the wife had a serious medical condition, had given up her former job to move with the family to Florida, had a child to care for, and was unemployed at the time of dissolution, the appellate court held that because she had provided support during most of the marriage and because she intended to return to Missouri to find another teaching position, the award of permanent alimony was an abuse of discretion.

In Cornell v. Smith, 616 So.2d 629 (Fla. 4th DCA 1993), the 4th DCA reversed an award of permanent alimony to a young, healthy wife after a childless marriage noting that the wife had

failed to cite any case with similar facts where an award of permanent alimony was upheld, something the wife in Kremer v. Kremer, supra, was also unable to do. Even though the husband in Cornell was an attorney earning approximately $81,000.00 a year and even though the wife would not be able to maintain the marital lifestyle without permanent alimony, the court reversed stating:

> "...our own research indicates that the courts of this state have consistently held that mere disparity in incomes is not sufficient to justify an award of permanent alimony where the wife is relatively young and her earning capacity has not been impaired as a result of the marriage." Cornell v. Smith at 630.
>
> In Kremer, the 4th DCA also noted ;
>
> "No case cited by the wife supports the permanent alimony award. All such cases appear to have involved marriages of substantially greater duration, wives of more advanced years, marriages which produced a child or children, or other circumstances different from this case." Id. at 217.

Not only were the 4th DCA and the wives in Kremer and Cornell unable to find any case to support an award of permanent alimony to a young, healthy, self-supporting childless woman, but the Wife in this case has also failed to do so. Every case cited by the Wife involves a long term marriage which produced two (2) or more children where the wife did not work outside the home during the marriage, but instead raised the children and tended to the homemaking chores.

For example, in Womble v. Womble, 521 So.2d 149 (Fla. 5th DCA 1988) for example, the wife had not worked from 1967, when the couple's first child was born, until 1980 when she went to work for $4.00 an hour as a physical therapist. DeCenzo v.

DeCenzo, 433 So.2d 1316 (Fla. 3rd DCA 1983) involves a twenty-seven (27) year marriage which produced five (5) children.

The Wife also cites the case of Halberg v. Halberg, 519 So.2d 15 (Fla. 3rd DCA 1987) as being "analogous" to the present case, when in reality, the facts in Halberg are completely opposite to those presented herein-- other than the fact that both were long term marriages. The Wife represents that the wife in Halberg, as with the Wife in the present case, was a full time school teacher. That is not accurate. According to the opinion, the wife in Halberg,

> "worked intermittently on a part-time basis at the preschool day care center in which she owned an interest, but earned no more than $12,000 annually during the marriage." Id. at page 16. [Emphasis added]

Furthermore, in Halberg the couple had two (2) children and Husband earned over $400,000..00 annually in his law practice. In addition to the enormous disparity in their income earning potential, it was highly unlikely that the wife could be, or could ever become, self-supporting because she had a serious mental disorder, had required psychiatric care during the marriage, had attempted suicide on several occasions and recent to the time of dissolution had required hospitalization.

O'Neal v. O'Neal, 410 So.2d 1369, 1372 (Fla. 5th DCA 1982), is yet another case relied upon by the Wife which actually presents facts opposite to those in the present case. In O'Neal the marriage lasted thity-two (32) years and produced three (3) children. The Wife did not work outside the home during the marriage. The Husband was a career Air Force officer which required the Wife to move the family fifty-two (52) times during the marriage. Regardless of the wife's age and her lack of

employment experience, she was NOT awarded permanent alimony, but was awarded rehabilitative alimony of $200.00 per week, which neither party appealed. The issue presented for appeal before the 5th DCA was the trial court's subsequent denial of the wife's petition to modify the award of rehabilitative alimony to permanent alimony due to her failing health problems.

The Wife relies upon the above cases to support her position that "Where a wife's income capacity is such that she cannot achieve the standard of living enjoyed during the marriage, she is entitled to permanent alimony". [The Wife's Initial Brief on Merits at page 19] While the standard of living established during the marriage is an appropriate consideration, it is only one of the seven statutorily mandated factors that must be considered and there is no requirement that the standard be the exact same after divorce as it was during the marriage. Furthermore, no case law or statute has ever suggested that each party must leave the marriage with the exact same income as the other. In fact this court has said just the opposite, "a trial court need not equalize the incomes of the parties". Trial judges must simply assure neither party goes from "misfortune to prosperity or from prosperity to misfortune". Canakaris v. Canakaris, supra at 1204.

Considering the Wife's post dissolution income in this case, even without alimony, her income would afford her a similar, if not exact, lifestyle as during the marriage.4 However, because

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4 While married, the couple shared an annual income of approximately $70,000--$35,000 per party. Wife's post-dissolution income, without alimony, would be $28,000. This is not that far away from her portion of the marital income and is surely sufficient to enable her to maintain a comfortable lifestyle as a

the Husband had more income than the Wife, the Court determined that post dissolution each party should have equal incomes. This was never the law and no case cited by the Wife can support this result.

In all of the cases cited by the Husband herein--whether long or short term marriages, whether or not there were children born of the marriage, and whether decided before or after the trial court's decision in this case--each of the district courts have consistently held firm to the principle that a relatively young adult who is in good health and is capable of self-support shall not be entitled to permanent alimony. 5

The public policy reasons are clear--wherever possible, a divorcing couple should be allowed to divide their assets and carry on with their lives without the obligation of--or dependence upon--permanent support. Diffenderfer v. Diffenderfer, supra. In an article published last year in The Family Law Commentator titled, "No Children--No Alimony?", the author points out;

> "alimony in not often an appropriate remedy where a couple has no children. The courts seem to look at such marriages as more of a partnership dissolution. They divide the assets and liabilities that the partnership accrues, and tells the couple to part ways..." Family Law Commentator, Vol. XIX, No.4, December 1993.

The cases of long term marriages where the wives were completely dependent, financially, upon their husbands are fast disappearing. In today's society when more and more women have

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single, childless adult.

5In the few cases decided recently which fall into the "grey area" the courts have made specific findings to support any departure from this standard. See Gregoire v. Gregoire, 615 So.2d 694 (Fla. 2d DCA 1992)

joined the work force, when women are fast gaining equality in the job market, and when we have even recognized that women are capable of combat duty in the military, the concept of a woman being dependent on her ex-spouse for support for the rest of her life is archaic. It is all the more so when the parties involved are the same age, have the same level of education, have similar income earning capacity, and leave the marriage with an equal division of assets.

However those are the exact circumstances in which the trial judge awarded permanent alimony in this case. The judicial precedent set by cases with substantially similar facts simply does not support this result. Therefore, the district court's reversal of the alimony award based upon a comparable fairness analysis was not error.

FINDINGS OF FACT

POINT II

WAS IT ERROR FOR THE FIFTH DISTRICT COURT OF APPEAL TO REVERSE THE TRIAL COURT ON AN ISSUE NOT PRESENTED FOR APPEAL BY EITHER PARTY, WHEN THAT ISSUE IS NOT ONE CONSTITUTING FUNDAMENTAL ERROR, TO WIT; THE FAILURE OF THE TRIAL JUDGE TO INCLUDE FINDINGS OF FACT IN THE JUDGMENT ALLEGEDLY REQUIRED BY SECTION 61.08, FLORIDA STATUTES?

POINT IV

IF A JUDGMENT IS DEEMED DEFICIENT FOR FAILING TO INCLUDE FINDINGS OF FACT, IS IT ERROR TO REVERSE THE JUDGMENT, AS OPPOSED TO REMANDING TO THE TRIAL COURT TO AMEND THE JUDGMENT TO INCLUDE THE MISSING FINDINGS OF FACT?

In points two and four raised by the Petitioner, the Wife asserts that it was error for the district court to reverse the trial court for the failure to include specific findings in the final judgment. The Wife claims reversal on these grounds to be

error because:

> (1) the issue was not raised by either party and does not constitute a fundamental error; and
>
> (2) where a judgment is deemed deficient for lack of findings of fact, the judgment should not be reversed, but the matter should simply be remanded to the trial court to amend said judgment to include the missing findings.

Because these issues overlap in the discussion of both the facts and the law, the Respondent's response thereto has been consolidated.

At the outset it must be pointed out that the award of alimony was not reversed solely on the basis that the Final Judgment did not contain specific findings of fact. The first sentence of the opinion below clearly states the issue and the ruling as follows:

> "The issue in this case, simply stated, is whether the trial court erred in its decision to equalize the parties' incomes under the facts of this case. We find that it did and reverse."

The opinion below also makes clear that reversal was due to the trial court's misapplication of the law and the failure to include the requisite findings only "compounded" that error.

> "We find, therefore, that the court erred in its application of the law by failing to consider all of the mandated factors in determining the alimony issue and compounded that error by failing to make findings of fact relative to all of these said factors." [Emphasis supplied by court]

Even if the district court had reversed based solely upon the lack of findings in the Final Judgment, that decision does not conflict with the decisions rendered by this or the other district courts wherein a Final Judgment was deemed deficient for lack of the requisite findings--whether or not the issue was

raised by one of the parties.

The cases cited by the Husband herein are all in accord--failure to include findings in a final order, pursuant to a statute that specifically requires same constitutes reversible error.6 The 1991 amendment to Section 61.08(1) requiring findings in all orders either awarding or denying alimony is applicable to the Final Judgment in the present case. As the district court held, since that amendment was effective July 1, 1991, and the Final Judgment was not entered until August of 1991, pursuant to judicial precedent set in Fogg v. Southeast Bank, N.A., 473 So.2d 1352 (Fla. 4th DCA 1985) the amendment applies to this case. See also Pelton v. Pelton, 617 So.2d 714 (Fla. 1st DCA 1992) and Reed v. Reed, 597 So.2d 936 (Fla. 1st DCA) (due to the remedial nature of the amendment to Section 61.30, dealing with child support guidelines, it was applicable to proceedings pending when the amendment took effect).

That being so, the cases cited by the Wife in support of her position that it was error to reverse the alimony award, rather than to just remand for an Amended Final Judgment, are inapplicable in that they do not deal specifically with the findings requirement of Section 61.08(1) nor do they involve cases dealing with any other statute that specifically requires findings be included in a final order. Where a statute does specifically require findings, failure to include same has

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6 In her Family Law Commentator article, Judge Newton notes that where a statute requires findings be made, "...judgments or orders which fail to have findings are per se reversible error." Family Law Commentator, Vol. XIX, No. 4, March 1994

consistently resulted in reversal by the district courts.7

All of the recent decisions dealing with this issue make perfectly clear that the district courts will not hesitate to reverse a Final Judgment when the trial court fails to include the requisite findings. In a computer aided search of cases decided since the 1991 amendment to Section 61.08(1) when into effect, counsel for the Husband was able to find twenty three (23) cases dealing with the lack of findings in the Final Judgments regarding alimony, equitable distribution, attorney's fees, and/or child support.8 In each and every case, the appellate court reversed the Order, or that part of the Order dealing with the specific award where the trial court had failed to include the requisite findings.

> "Because the lower court's order lacks written findings of fact to support the alimony award, we are unable to reach any reasoned decision in regard to whether any of the points appellant raised requires reversal on the merits...In failing to reduce its reasons to writing in the final judgment, the trial court violated...Section

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7 Moorman v. Moorman, 577 So.2d 726 (Fla. 1st DCA 1991) cited by the Wife is the only case that the Husband was able to find wherein a Final Judgment that lacked the required findings was not reversed, but was only remanded so that the trial judge could set forth his basis for the decision.

8 See for example; Cloud v. Cloud, 586 So.2d 492 (Fla. 1st DCA 1991); Prom v. Prom, 589 So.2d 1363 (Fla. 1st DCA 1991); Burston v. Burston, 604 So.2d 900 (Fla. 2d DCA 1992); Barker v. Barker, 596 So.2d 1187 (Fla. 1st DCA 1992); Glover v. Glover, 601 So.2d 231 (Fla. 1st DCA 1992); Spillert v. Spillert, 603 So.2d 700 (Fla. 1st DCA 1992); Nicewonder v. Nicewonder, 602 So.2d 1354 (Fla. 1st DCA 1992); Levine v. Best, 595 So.2d 278 (Fla. 3rd DCA 1992); Neal v. Meek, 591. So.2d 1044 (Fla. 1st DCA 1991); Wollschlager v. Veal, 601 So.2d 274 (Fla. 1st DCA 1992); Moreno v. Moreno, 606 So.2d 1280 (Fla. 5th DCA 1992); Goosby v. Goosby, 614 So.2d 692 (Fla. 1st DCA 1993); Nash v. Nash, 624 So.2d 370 (Fla. 3rd DCA 1993); Bussey v. Bussey, 611 So.2d 1354 (Fla. 5th DCA 1993); Saare v. Saare, 610 So.2d 628 (Fla. 1st DCA 1992); McMonagle v. McMonagle, 617 So.2d 373 (Fla. 5th DCA 1993); Perrett v. Perrett, 621 So.2d 571 (Fla. 1st DCA 1993); Collinsworth v. Collinsworth, 624 So.2d 287 (Fla. 1st DCA 1993).

61.08(1), Florida Statutes (1991)." Jacques v. Jacques, 609 So.2d 74 (Fla. 1st DCA 1992)

"We reverse a final judgment of dissolution. In denying alimony, the trial court omitted the findings of fact mandated by Section 61.08(1), Florida Statutes." Hemraj v. Hemraj, 620 So.2d 1300 (Fla. 4th DCA 1993);

Whether or not the lack of findings was raised as an issue by one of the parties in each of these cases is difficult to ascertain from the opinions. In Plyler v. Plyler, 622 So.2d 573 (Fla. 5th DCA 1993) it is clear that the issue was not raised by the parties and in other cases it is clear that the issue was raised. However, not one of the cases specifically refused to reverse for the failure of one of the parties to raise the lack of findings as an issue on appeal.

Because the requirement of findings is intended to make appellate review more meaningful and because in many instances, the lack of findings makes review impossible, the appellate courts have the right--and the duty--to insist that statutes requiring findings be complied with by the trial courts, whether raised by the parties or not. The right of the district courts to insist that such statutes are complied with cannot be waived by a party to an appeal simply for the failure to raise the issue.

CONSTITUTIONALITY OF FINDINGS REQUIREMENT OF SECTION 61.08(1)

POINT III

IS THE REQUIREMENT ALLEGEDLY FOUND IN SECTION 61.08(1), FLORIDA STATUTES, THAT TRIAL JUDGES INCLUDE IN JUDGMENTS AWARDING ALIMONY SPECIFIC FINDINGS OF FACT ON ISSUES ENUMERATED IN SECTION 61.08(2), FLORIDA STATUTES, AN UNCONSTITUTIONAL INVASION OF THE JUDICIARY BY THE LEGISLATURE?

The Wife asserts that the requirement that findings be

included in Final Judgments found at Section 61.08(1) is an unconstitutional invasion of the judiciary by the legislature. This requirement does not simply regulate a ministerial act, as the Wife implies, but rather constitutes a substantive rule which ensures that the statutory guidelines contained at Section 61.08(2) are not only properly considered, but also are properly applied. As such it is not an improper invasion of the judiciary.

This findings requirement is not unique to Section 61.08(1), but is a provision contained in many other statutes. 9 In each of these statutes the legislature, in its law making capacity, sets out guidelines which must be considered when the trial judge is making his/her determination on the specific issue. Trial judges must consider the testimony and evidence before them, determine what they believe to be factual, and then must apply the guidelines to the facts before them. As the 5th DCA stated in the opinion below, "Testimony is not a fact until the trial judge says it is a fact." Therefore,

> "When the trial judge selects which testimony is believed as true and puts that in writing, findings are created. Findings may be viewed as the reasons for the resulting orders, or more accurately, as the result of the court applying the testimony to the law." Family Law Commentator, Vo. XIX, No. 4, page 8, March, 1994.
>
> "findings as to whether or not each element has been proven are findings of legal sufficiency or insufficiency." Family Law Commentator, Vol.XIX, No.4, March 1994.

In addition, the district courts have acknowledged that the requirement that findings be included in the Final Judgment helps to facilitate more meaningful appellate review.

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9 See for example, Sections 61.14(5); 61.13(1)(d)(3); 31.13(1)(b); 61.30(1)(a) and (b); 61.075; 57.105(1).

> "We do, however, find that the final order by the trial judge is devoid of certain findings necessary to facilitate meaningful appellate review or to comply with specific statutory requirements. We must, therefore, reverse and remand to the trial court to make further findings...." Walsh v. Walsh, 600 So.2d 1222 (Fla. 1st DCA 1992)
>
> "However, because the trial court failed to include specific findings....meaningful appellate review is precluded. Accordingly we reverse and remand for further proceedings." Miller v. Miller, 589 So.2d 317 (Fla. 1st DCA 1991)

However, those are not the only purposes for this provision. Requiring written findings in the Final Judgment or Order assures that the reasons for the trial court's decision are clearly expressed and further assures that the decision was arrived at after proper consideration of the facts as they apply to all of the statutorily mandated factors. Therefore, the findings requirement of Section 61.08(1) is an enforcement mechanism properly enacted by the legislature to assure compliance by the trial courts with the substantive issues to be considered when determining awards of alimony.

COHABITATION

POINT V

WAS IT AN ERROR OF LAW FOR THE TRIAL JUDGE TO CONDITION THE AWARD OF PERMANENT ALIMONY TO TERMINATE UPON CONHABITATION WITH A MAN?

The Petitioner contends that under Florida law permanent alimony cannot be conditioned to terminate upon the recipent cohabitating with a member of the opposite sex. The Florida legislature has not passed any legislation which prohibits a judge from conditioning alimony in this manner and the cases

cited by the Wife are not definitive of the issue because they were decided on very specific grounds.

Those cases do not hold that it is error, as a matter of law, to condition alimony upon cohabitation with a member of the opposite sex. The only case which seems to suggest the condition to be improper as a matter of policy is Condren v. Condren, 475 So.2d 268 (Fla. 2d DCA 1985). However, the 2d DCA in Condren fails to give any reasoning or rationale for ordering the trial court to strike the condition upon remand. The Condren court simply states the condition to be improper citing as authority Dominik v. Dominik, 390 So.2d 81 (Fla. 3d DCA 1980); Wambst v. Wambst, 391 So.2d 375 (Fla. 3d DCA 1980); and Sheffield v. Sheffield, 310 So.2d 410 (Fla. 3d DCA 1975). Each of these cases are distinguishable.

Sheffield does not involve a condition in a final order, rather, the issue in Sheffield is whether it is proper to modify or terminate alimony payments on the grounds that the recipient is involved in a de facto marriage. The 3rd DCA reversed the trial court's order terminating alimony on those grounds, but it did so based on the application of contract principles of law. See also Buchan v. Buchan, 550 So.2d 556 (Fla. 5th DCA 1989)

The two (2) cases relied upon by the Petitioner which hold a condition in the Final Judgment to be improper, do so based upon language that is overly broad or restrictive. In Dominik, supra, the language of the condition was that alimony terminate upon "cohabitation with another adult". In Wambst, supra, the condition prohibited any male adult from staying overnight in the parties' former marital home.

In the present case, the Final Order provides alimony will terminate if the Wife "cohabits with another man". Black's Law Dictionary defines "cohabitation" as;

> "To live together as husband and wife. The mutual assumption of those marital rights, duties and obligations which are usually manifested by married people, including but not necessarily dependent on sexual relations."

Therefore, unlike the cases above, the Final Order in this case is clear. However, the issue is not. On the one hand are the public policy considerations. The trial judge expressed it well when he concluded that it cannot be the case where the legislature would mandate the court

> "to take an action which would have the economic effect of undermining the institution of marriage in the state of Florida."[Appellant's Reply Brief to 5th DCA page 4]

Or, as the dissent in Schneider v. Schneider, 467 So.2d 465, 468 (Fla. 5th DCA 1985) observed,

> "...we expect too much when we require a person to support an ex-spouse who has "married" another legally or illegally...Once cohabitation with a new partner is established, an ex-spouse may be legally compelled to continue paying support, but few will accept it even stocially as their duty."

On the other hand, of course, is the principle that courts should not place overly broad restrictive provisions upon the personal life of an adult. Those who would argue against such restrictions would point out that there is a remedy available in that the paying spouse can petition for modification in the event the receiving spouse enters such a relationship. However, at a time when this and the district courts have clearly expressed concern about the cost of litigation of dissolution matters and about the over-burdened judicial system, requiring yet another legal proceeding to request termination of alimony upon

cohabitation adds yet another proceeding to the system and incurs yet additional legal fees and expenses for the parties.

Therefore, it would appear to follow that if our legal system requires alimony to automatically terminate upon re-marriage, it should also require alimony to automatically terminate upon "cohabitation", as defined above. However, as the 1st DCA stated in DePoorter v. DePoorter, 509 So.2d 1141,1144 (Fla. 1st DCA 1987), "....Florida jurisprudence does not accord legal status to the concept of de facto marriage."

This issue raises a myriad of legal questions some of which were addressed in a 1983 Bar Journal article titled "Post-Dissolution cohabitation; the Best of Both Worlds?", 57 Fla.Bar.J., 656 (1983). Exactly what status should be accorded such relationships was discussed by the 5th DCA in Lowry v. Lowry, 512 So.2d 1142,1143 (Fla. 5th DCA 1987). In that case the 5th DCA was prepared to seek an en banc reconsideration of the Schneider decision, however the element of estoppel being present, the Court did not actually reach a decision on the issue. But the language of the majority opinion in Lowry makes it apparent that the 5th DCA disfavors continued alimony upon cohabitation;

> "It is invidious and illogical for the law to discriminate against those who enter into de jure marriages and favor those who enter into de facto marriages instead. There may be a problem of proof in establishing a de facto marriage, but once such a "marriage" is established, it should have the same legal consequences in support matters as would a de jure marriage."

As with Lowry, the 5th DCA was also prepared to address this issue en banc in the present case, however, the reversal of the award of alimony rendered the issue moot as it applies herein.

For that reason, the issue was never addressed by the district court in the appeal below. Therefore, the Husband cannot respond as regards what position the 5th DCA might have taken if this issue had been reviewed by them.

As to the the position taken by the trial court, the Wife asserts that the trial judge's inclusion of this provision in the Final Judgment was error as a matter of law. However, the Wife did not cite any mandatory authority that would prevent a trial judge, as a matter of law, from including such a provision in a Final Judgment. It follows, therefore, that the imposition of that provision was a discretionary act which cannot be reversed without a showing that it was arbitrary, unreasonable or without logic. Canakaris v. Canakaris, 382 So.2d 1197, 1202 (Fla. 1980).

The trial judge made clear his reasons for including that provision were so as not to create economic disincentives to the institution of marriage by allowing an ex-wife to circumvent termination of alimony by cohabitating with a man in a relationship akin to marriage without legitimizing that relationship. [Appellant's Reply Brief at page seven] This purpose is both logical and reasonable.

However, once the alimony award was reversed by the district court this issue became moot as it applies to these parties.

ATTORNEY'S FEES

POINT VI

DID THE TRIAL COURT ABUSE ITS DISCRETION IN FAILING TO AWARD THE WIFE HER ATTORNEYS FEES?

The Wife asserts that the trial court erred by failing to

award her trial attorney's fees. As discussed in detail at Point I herein, the trial judge was meticulous in making an exactly equal division of the marital assets. Furthermore, by awarding the Wife $1,000.00 per month in permanent alimony, the trial court actually came within $10.00 of equalizing the income of the parties after dissolution. That being so, there was no abuse of discretion in the trial judge's requiring each party to pay their own fees.

Whether or not attorney's fees are to be awarded in dissolution proceedings is based upon the need of the requesting spouse and the ability of the other to pay those fees. See Section 61.16, Florida Statutes. It is a firmly established principle of law that:

> "Where the parties depart the marriage in realtively equal economic circumstances, it is error to award attorney's fees to one party." Sizemore v. Sizemore, 487 So.2d 1080, 1081 (Fla. 5th DCA 1986).

See also Zulywitz v. Zulywitz, 473 So.2d 275 (Fla. 5th DCA 1985); Flanders v. Flanders, 516 So.2d 1090 (Fla. 5th DCA 1987); Bible v. Bible, 597 So.2d 359 (Fla. 3d DCA 1992); Murray v. Murray, supra; Benekos v. Benekos, 557 So.2d 942 (Fla. 2d DCA 1990); Curry v. Curry, 621 So.2d 690 (Fla. 2d DCA 1993).

Therefore, in the present case, there was clearly no abuse of discretion in the trial court's denial of fees to the Wife. Although the Wife raised this issue on appeal to the 5th DCA, the issue was not addressed by the district court because reversal of the alimony award requires the trial court to reconsider the entire Final Judgment. Perhaps the 5th DCA should have made clear that upon remand, both the alimony and attorney's fee issue should be addressed as the 1st DCA did in Pelton v. Pelton,supra;

> "In light of the need to recalculate the figures determining an appropriate child support award, the trial court is directed to re-evaluate the parties' relative financial resources for purposes of resolving the issue of a reasonable attorney's fees and costs."

However, for the purposes of this proceeding and in response to the issue as raised by the Wife, it was not an abuse of discretion for the trial court to deny the Wife's request for fees in light of the exact equal distribution of the assets combined with the fact that the trial court's award of alimony to the Wife equalized the parties' post-dissolution incomes.

CONCLUSION

The Fifth District Court of Appeal did not err as a matter of law when it enunciated the "doctrine of comparable fairness". That doctrine merely coins a phrase for a principle which is taken directly from the language of this Court in the landmark decision of Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980). Furthermore, the doctrine enunciated by the district court is in keeping with the stated goals of this Court--to eliminate substantial disparities in domestic judgments arising out of the same or similiar facts. This doctrine does not set a new standard of appellate review, but requires only that appellate courts consider if the trial court's decision comports with logic and reasonableness by determining if it was decided in a manner consistent with judicial precedent set by cases decided previously with substantially the same set of facts and circumstances. It is obvious that in the present case, the trial court's award of alimony to the Wife was neither logical nor reasonable in light of the judicial precedent set forth herein.

In reversing the trial court's award of permanent alimony to the Wife, the 5th DCA decision did not err by reversing an issue not presented by either party on appeal. The issue presented--and the issue on which the trial court was reversed--was that it was error to equalize the parties' incomes after divorce through an award of permanent alimony under the facts of this case.

However, if the district court had reversed solely on the basis of the trial court's failure to include the required findings, that would not constitute error. Pursuant to the 1991

amendment to Section 61.08, Florida Statutes, findings are required to support an award or denial of alimony and, therefore, failure to include same is reversible error. Almost every case decided since the 1991 amendment was adopted has reversed decisions in dissolution proceedings where the trial court failed to include specific findings under one of the sections of Chapter 61 that specifically requires same.

Furthermore, that portion of Section 61.08(1) which requires the findings be included in the Final Judgment is not an unconstitutional invasion by the legislature of the judiciary, but is a proper enactment of a substantive requirement which assures that the statutory guidelines are properly considered and applied.

The last two (2) issues raised by the Wife, that of cohabitation and attorney's fees, were not addressed in the proceeding below because the reversal of the alimony award rendered the cohabitation issue moot and required reconsideration by the trial court of the attorney fee issue. However, the trial court did not err on either point. It was clearly proper to deny the Wife's request for attorney's fees and costs due to the fact that the parties departed the marriage in exactly equal financial circumstances. As to the cohabitation issue, in light of the fact that there is no mandatory authority specifically preventing a trial court from including such a provision in a Final Judgment and in light of the well reasoned and logical rationale expressed by the trial judge for having included that provision in this case, it cannot be said that the provision terminating alimony upon the Wife's cohabitation with another man either an error of

law or was an abuse of discretion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail/hand delivery to B. Paul Katz, Esquire, 4 Old Kings Road North, Suite B, Palm Coast, Florida 32137, Attorney for Wife, this 5th day of April, 1994.

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