SUPREME COURT OF FLORIDA

CASE NO.: 82,503

DCA-5 CASE NO.: 91-1869

MARY ANN KENNEDY,

Petitioner,

v.

EDWARD M. KENNEDY,

Respondent.
_____/

AN APPEAL FROM THE DISTRICT COURT OF APPEAL

OF THE STATE OF FLORIDA

IN AND FOR THE FIFTH DISTRICT

INITIAL BRIEF ON MERITS

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STATEMENT OF CASE

This is a Petition for Conflict Certoriari to review a decision of the Fifth District Court of Appeal appearing at 622 So. 2d 1033 (Fla. 5th DCA 1993), reversing a judgment entered by the trial judge in a dissolution of marriage. The trial court, after taking testimony and evidence, made an equitable distribution of marital property and awarded the Wife permanent alimony in the amount of $1,000.00 per month. Neither party appealed the equitable distribution. The Husband appealed the award of permanent alimony. The wife appealed a condition imposed by the trial court that the permanent alimony terminate upon cohabitation with a man. The Wife further appealed the failure to award her attorneys fees.

The District Court failed to address either issue raised by the Wife. Nor did it rule that the award of alimony was an abuse of discretion. Instead, it reversed the alimony award for a reason neither raised nor argued by either party, to wit: the failure of the trial court to include in the Final Judgment certain findings of fact allegedly required by Section 61.08 (1), Florida Statutes. The District Court also announced a radical new standard of review for discretionary acts of a trial court which it calls "the Comparable Fairness Doctrine." The Wife sought review by this Court, under its discretionary jurisdiction under Rule 9.030 (a)(2)(A)(iv), Fla. R. App. P., to review decisions of district courts which conflict with decisions of other district courts on the same points of law. This Court has accepted jurisdiction; this Brief on

the Merits is respectfully submitted by the Wife.

The facts of the case and citations to the record are set forth in the appropriate portions of the parties' briefs filed in the District Court, which are attached hereto in the Appendix to this brief. For this reason, they are not being reiterated herein, but rather are being incorporated by reference.

ISSUES PRESENTED

1. DOES THE "DOCTRINE OF COMPARABLE FAIRNESS" ANNOUNCED BY THE FIFTH DISTRICT COURT OF APPEAL DIRECTLY CONFLICT WITH THE STANDARD OF REVIEW FOR DISCRETIONARY ACTS ESTABLISHED BY CANAKARIS V. CANAKARIS, 382 So. 2D 197 (FLA. 1980) AND ITS PROGENY?

YES

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? YES

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? YES

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? YES

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? YES

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

SUMMARY OF ARGUMENT

1. The standard of review of a lower court's exercise of its discretion in the award of alimony is the "reasonableness" test set forth in Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980). If the record contains competent substantial evidence to support the trial judge's award then there is logic and justification for the award and there is no abuse of discretion. The "Doctrine of Comparable Fairness" created by the Fifth District Court of Appeal directly and expressly conflicts with that standard by prescribing an entirely different test of appellate review, i.e., that of comparing the trial court's judgment to the results in other appellate decisions. This pernicious doctrine is fundamentally erroneous and should be rejected by this Court as being wholly incompatible with the rules of appellate review pronounced by this Court in Canakaris v. Canakaris, (supra).

2. Existing case law in Florida holds that if an error is not a fundamental error, then the appellate court cannot utilize such error to reverse a lower court, unless that error is presented for appeal by one of the parties. The failure to include findings of fact in a final judgment is not a fundamental error. For the Fifth District Court of Appeal to utilize the lack of findings of fact in the lower court's opinion to reverse the lower court, when neither party cited this as error, was reversible error, and directly conflicts with prior Florida decisions.

3. Florida recognizes a separation of powers between the legislative and judicial branches of government. The legislature is

free to enact statutes which create or limit substantive rights and duties within constitutional limits. However, the legislature cannot enact statutes which direct or limit courts in the exercise of their purely judicial functions, including procedural functions and adjudicatory functions. While the legislature can mandate that the courts in determining whether to grant alimony shall consider certain enumerated factors, such as those found in Section 61.08 (2), Florida Statutes, the statutory requirement that a judgment include certain findings of fact is an invasion of the purely adjudicatory function of the courts. Any such attempted invasion is merely directory, or if it is deemed mandatory, is held to be unconstitutional. In either case, such a statute cannot be the basis for reversal of a trial court's judgment.

4. If an appellate court determines that a judgment is deficient for failure to include findings of fact, the proper remedy is to remand to the trial court to amend its judgment; the presumption of correctness still attached to the judgment until the burden of the appellant has been met. It is error to reverse the judgment before the appellant has met its burden.

5. Florida case law establishes a rule of law that permanent alimony is not to be conditioned to terminate upon cohabitation by the recipient with a member of the opposite sex. To so condition the award of permanent alimony is an error of law, and directly conflicts with prior Florida decisions.

6. Florida cases hold that it is error to refuse to award attorneys fees to a party to a dissolution action when the other

party has a clearly superior ability to pay. It was error to require the Wife to pay her fees from the meager financial assets awarded to her in equitable distribution. It was error to require the Wife to utilize her support received from the Husband to pay her attorneys fees when the Husband is in a clearly superior financial position to pay the fees.

DISCUSSION

Doctrine of Comparable Fairness

The only error urged by the Husband was that the trial judge **abused his discretion** in awarding the Wife $1,000.00 per month permanent alimony. (See Husband/Appellant's initial brief in Appendix.)

In Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980), this Honorable Court established the standard for review of a judge's discretion in an award of alimony to be:

> "In reviewing the true discretionary act, the appellate court must fully recognize the superior vantage point of the trial judge and should apply the "reasonableness" test to determine whether the trial judge abused his discretion. If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion. The discretionary ruling of the trial court should be disturbed only when his decision fails to satisfy this test of reasonableness." (at 1202-1203)

This standard of review has been reiterated by the courts of Florida in numerous cases since Canakaris; e.g., Zipperer v. Zipperer, 567 So. 2d 916 (Fla. 1st DCA 1990), rev. den. 581 So. 2d 1312; Corey v. Corey, 536 So. 2d 1063 (Fla. 2d DCA 1988); Monarch Cruise Line, Inc., v. Leisure Time Tours, Inc., 456 So. 2d 1278 (Fla. 3d DCA 1984); Haass v. Haass, 468 So. 2d 1053 (Fla. 4th DCA 1985).

In Kuvin v. Kuvin, 442 So. 2d 203 (Fla. 1983), this Honorable Court cited its own prior opinion in Shaw v. Shaw, 334 So. 2d 12 (Fla. 1976), in saying,

> "It is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the testimony and evidence, but rather **the test is whether the judgment of the trial court is supported by competent evidence.**" (emphasis supplied) (at 206)

In Marcoux v. Marcoux, 464 So. 2d 542 (Fla. 1985), this Honorable Court refined the standard, saying,

> "If a reviewing court finds that there is competent substantial evidence in the record to support a particular award, then there is logic and justification for the award...Under these circumstances there is no abuse of discretion." (at 544)

This Honorable Court said in Canakaris,

"Judicial Discretion is defined as:

> "The power exercised by courts to determine questions to which no strict rule of law is applicable, but which, from their nature, **and the circumstances of the case**, are controlled by the personal judgment of the court." (at 1202) (emphasis provided)

It is clear, then, that the standard of review of an award of alimony pursuant to the exercise of judicial discretion is whether reasonable men could differ as to the propriety of the award. That standard is met if the award of the trial court is supported by competent substantial evidence in the record. The role of the appellate court is limited to reviewing the record **in the case before it** to determine if there is substantial competent evidence to support a particular award.

Just as the trial court is limited to the facts before it in making its decision, likewise, the appellate court **cannot go outside the record** presented to the court below, as suggested by

the District Court, to determine if the trial judge properly exercised his discretion. The appellate court cannot substitute its judgment for the trial court's judgment, but merely ensures that the litigants received a fair trial, by ensuring that the trial judge followed the law, and exercised his discretion in a manner free from abuse. It is not the result which is the proper concern of the appellate court, but rather the process. Appellate courts review the process to determine that no reversible errors were made. As Canakaris v. Canakaris (supra) established, there are two area of appellate review: (1) errors of law; and (2) abuses of discretion. There are different **standards** of review attendant to these two areas. But the **purpose** of appellate review is the same in each case: to ensure that the litigants received a fair trial.

Even if another judge may have exercised his discretion differently on the same facts, this is not proof that the action of the trial court was an abuse of discretion. Florida law recognizes that reasonable men may differ in the proper exercise of judicial discretion. That is the nature of discretion. However, Florida law also recognizes that if reasonable men could differ on the issue of the exercise of discretion, the appellate court is bound to uphold the trial court. As stated above in Canakaris v. Canakaris,

> "If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion."

The potential for dissimilar results is inherent in the concept of judicial discretion. Dissimilarity of result does not mean the process was tainted by unreasonableness, or caprice. It means that judicial discretion was exercised. Under the law as set forth above, the burden is on the appellant to show that reasonable men could not differ as to the impropriety of the lower court's exercise of judicial discretion. If two differing results obtained from the same or similar facts, both of which could be deemed reasonable, under Florida law the trial court must be affirmed.

The "Doctrine of Comparable Fairness" turns this standard on its head. Exactly the opposite result will obtain. Under the "Doctrine of Comparable Fairness," unless the appellee can show either (a) that the facts in the other "similar" case were not in fact "similar;" or (b) that the judge in another case acted unreasonably if the results differ from those in the case at hand, the trial court will be reversed because his results were not "fair" when compared with other decisions made by other judges. The concept of "reasonableness" has been eliminated as a standard, and replaced with "comparable fairness." Said another way, under the "Doctrine of Comparable Fairness," if reasonable men differ, the trial judge will be **reversed**. This is antithetical to Florida law.

In addition to discarding the reasonableness standard the "Doctrine of Comparable Fairness" also requires an analysis of other facts before other courts. This is as illogical as saying

that one jury's verdict is controlled by another jury reviewing supposedly similar injuries in another case: whether the award made by the trial court was "outside the range established by precedent for cases based on similar facts," drastically differs from the test of whether there is competent substantial evidence in the record to support the award.

The "Doctrine of Comparable Fairness" reviews the trial court's actions not on the evidence before it in the case at hand, but on the basis of <u>other</u> evidence presented in <u>other</u> cases. This is also antithetical to Florida law. Trial judges are not permitted to take into account evidence adduced in <u>other</u> cases, and appellate courts are not permitted to review trial courts based on evidence in <u>other</u> cases. This Honorable Court in <u>Kelley v. Kelley</u>, 75 So. 2d 191 (Fla. 1954), stated the basic principal of judicial action and appellate review, to wit: cases must be decided on their own facts, not the facts of other cases. Quoting this Honorable Court,

> "It is a part of the fundamental law of this State that the final judgment and final decrees of the Circuit Court are subject to review by this Court on proper proceedings. **It is elemental that in reviewing the actions of Circuit Courts, we are confined to the record produced here. It is from <u>that</u> record that we must determine whether the judgment of the lower court is lawful.** (at 193) (emphasis provided.)
>
> "Even if the court was of the view that the equity cause amounted to harassment of the defendant, **such conclusion was based upon circumstances and facts which were not a part of the record in the cause then being tried and which the court had no right to consider.** (at 193)

Under current Florida law, the lower court's exercise of discretion is to be affirmed if there is substantial competent evidence **in the record before the trial judge** to support the award. The function of the appellate court is not to re-try the case de novo, or to substitute its judgment for that of the trial court. As stated in Corey v. Corey (supra).

> "While we may not have ordered distribution of marital properties in the same manner as the trial judge had we been sitting as trial judges, it is not the province of this court to reevaluate evidence to arrive at conclusions which we may consider more just or equitable." (at 1064)

The appropriate function of the appellate court is to review the actions of the trial court, to determine if the trial court made any errors or abused his discretion **based upon the record before the trial judge.** In Hamlet v. Hamlet, 583 So. 2d 654 (Fla. 1991), the Fifth District Court of Appeal reversed the trial court's decision regarding the award of alimony. This Honorable Court quashed the decision of the appellate court and reinstated the trial court's judgment, saying:

> "A party seeking relief and claiming that the trial court abused its discretion has the burden of presenting a record that would justify a conclusion that the judgment was arbitrary or unreasonable..."
>
> "(Appellant), in the appeal before the district court, had the burden to show that the judgment entered by the trial court, when taken as a whole, constituted an abuse of the trial court's discretion. This record clearly does not support such a conclusion. Accordingly, we quash the decision of the Fifth District Court of Appeal with directions that the trial court judgment be affirmed." (at 657)

The decision below cites as its rationale the propensity of reviewing courts to reweigh the evidence when it believes a wife has been "short-changed." (See page 7 of decision below) In Walter v. Walter, 464 So. 538 (Fla. 1985), this Honorable Court reversed yet another prior attempt by the Fifth District to modify the standard of review. In Walter, this Court said,

> "In Connor v. Connor, 439 So. 2d 887 (Fla. 1983), when this court stated that "(t)he determination that a person has been 'short-changed' is an issue of fact and not one of law",...That statement was not intended to either broaden or restrict the authority of the district courts of appeal to review the reasonableness of discretionary acts upon admitted facts or the facts taken most favorably to the prevailing party." (emphasis supplied by court) (at 540)

Further, Walter confirmed that the basis for the trial court having the discretion to fashion awards is the unique character of each and every marriage, and thus the unique character of each and every divorce, by stating,

> "We reiterate that "(i) in considering the appropriate criteria for the award of the different types of alimony, it is important that appellate courts avoid establishing inflexible rules that make the achievement of equity between the parties difficult, if not impossible." Canakaris, 382 So. 2d at 1200 (emphasis added **by court**) That statement reflects our recognition that the discretionary authority granted trial judges is necessary because such cases are not susceptible to fixed patterns." (at 540)

In Walter, this Honorable Court again set forth the purpose of review in divorce cases, when it said

> "In reviewing the trial court's disposition of property and award of alimony and support, **the**

> **appellate court's responsibility is to determine from the admitted facts or the facts taken most favorably to the prevailing party (1) whether the rules of law were applied correctly and (2) whether the trial court's discretionary authority was reasonably exercised under the test set forth in Canakaris**...The decision of Kuvin v. Kuvin, 442 So. 2d 203 (Fla. 1983) illustrates the finding of a reasonable exercise of discretion." (at 539) (emphasis added)

The following is an extract from the Wife's Answer Brief found in the appendix:

> "The Wife attempted to find work in the airlines industry at the time of the dissolution of marriage. She learned that her seniority had been irretrievably lost, and the job that had paid her at one time $34,000.00 per year, would now pay her $14,400.00 per year. (TR 47-8)
>
> The Wife had a bachelor's degree in education, which she put to use by obtaining employment as a teacher, with Orange County Schools. The Wife earned at trial $21,250.00, based upon her having no prior experience. The Wife introduced as Exhibit No. 2 the salary scale published by Orange County Schools, showing that in five years, increases from years in service with the degree she possesses, would result in an annual salary of only $21,900.00. (TR 52)

As further facts, Appellee Wife would offer the findings made by the trial court, when it said,

> "What is clear here is that neither party is going to experience the same standard of living. You have lived up to the amount of your income up to this point. You have made in the neighborhood of $70,000.00 a year together, and you've spent about all of that money every year and had a wonderful life. But you are not going to be able to have, each of you, the same amount of money that both of you had together..." (TR 170-1)

> "It is a long term marriage even though there were no children. She, even though she worked during the time of the marriage, in order to keep the parties reasonably equal, a standard of living reasonably equal to that which they enjoyed during the time of their marriage, an award of alimony is going to be necessary." (TR 175)
>
> "It is not possible to maintain for the Wife the standard of living that she enjoyed prior to the divorce, because to do so would impoverish the husband. And he has a greater income; he has an ability to pay alimony. She has the need for income to maintain as much as possible the semblance of standard of living that she had during the time of the marriage, and the only way to achieve that goal is with an award of permanent alimony." (TR 174)

As set forth in the Wife's Appellee's Answer Brief, the record of the trial court contained competent substantial evidence to support the trial court's exercise of discretion in awarding permanent alimony of $1,000.00 per month. Even if appellate judges might differ, so long as the record contains substantial competent evidence to support the award, **it must be affirmed.** If reasonable men could differ, the exercise of discretion cannot be said to have been abused, and the appellate court cannot reverse, as a matter of law.

If the proper standard of review had been exercised by the District Court, the award of permanent alimony would necessarily have been sustained.

The judgment of the trial court is clothed with a presumption of correctness. Under the principles established by Canakaris v. Canakaris, (supra), the trial court is given the task of weighing the evidence, resolving disputes of fact, and fashioning an

equitable results, utilizing the concepts of equitable distribution and some form of alimony. To quote Canakaris,

> "Dissolution proceedings present a trial judge with the difficult problem of apportioning assets acquired by the parties and providing necessary support. The judge possesses broad discretionary authority to do equity between the parties and has available various remedies to accomplish this purpose..."

The award of permanent alimony was clearly justified. Section 61.08, Florida Statutes, authorizes the trial judge to grant permanent alimony to a spouse in a proceeding for dissolution of marriage. The statute directs the trial judge to consider "all relevant economic factors" including some economic factors specified in the statute itself, and grants the trial court the discretion "to consider any other factor necessary to do equity and justice between the parties." Section 61.08(2), Florida Statutes. The first of those economic factors specified in the statute is the standard of living established during the marriage. Section 61.08(2)(a), Florida Statutes.

It is clear from the record and the judgment that the trial judge made his award of permanent alimony based upon the economic factors contained in the statute. He speaks of the standard of living of the parties. He found that the parties had a long term marriage, albeit one with a hiatus of several months when the parties divorced each other in 1980. He found that both parties contributed to the marriage. He found that both parties had appropriate employment at the time of the trial.

Most importantly, the trial judge found that the Wife had a

need for permanent alimony, and the Husband had the ability to pay. These are the criteria to be utilized in awarding permanent alimony. Quoting Canakaris,

> "Permanent period alimony is used to provide the needs and necessities of life to a former spouse as they have been established by the marriage of the parties. The two primary elements to be considered when determining permanent alimony are the needs of one spouse for the funds and the ability of the other spouse to provide the necessary funds. The criteria to be used in establishing this need include the parties' earning ability, age, health, education, the duration of the marriage, the standard of living enjoyed during its course, and the value of the parties' estates. (at 1201-2)

The trial judge, in making his award of permanent alimony below, discussed these factors, when he said,

> "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." (TR 177)

and

> "I view this as a 17 year marriage. Because of the brief interlude during which the parties were divorced, it's a long term marriage where alimony is appropriate, and my decision is based upon the statutory language which requires me to do my dead level best to preserve the standard of living of both parties."
>
> "The law does not say that because the wife is self supporting in the sense that she is gainfully and admirably employed. She is a school teacher and she is doing the best for society and she is making the best and highest attainment of her education. She is teaching school. But that's a relatively low paying job. She is able to support herself on that

> income, and yet it does nothing to maintain the standard of living that she previously had."
>
> "So the best I can do is try to balance those incomes as best I can. And I do so by dividing the assets of the parties equally and providing her with an addition to that income... (TR-Rehearing 19-20)

Appellant argues that it was an abuse of discretion to award the wife below permanent alimony because

> "The Appellant is young, health and has demonstrated an ability, throughout the marriage. to be self supporting. There are no children of this marriage. Throughout the sixteen (16) year marriage, the Appellee worked full time outside the home earning more than Appellant for almost half of that time. Both spouses have equivalent degrees from the same University and both are currently employed." (Appellant's brief, p. 21)

Appellant implies that the Wife has the ability to earn the $34,000.00 she earned in the airline industry. However, this is contrary to the finding of the trial court. Appellant's argument also refuses to recognize the standard of living achieved during the marriage as a factor to be considered in awarding permanent alimony.

Florida law is clear. Where the wife's income earning capacity is such that she cannot achieve the standard of living enjoyed during the marriage, she is entitled to permanent alimony. Canakaris (supra); Mann v. Mann, 555 So.2d 1293 (Fla. 3d DCA 1990); Hallberg v. Hallberg, 519 So.2d 15 (Fla. 3d DCA 1987); Womble v. Womble, 521 So.2d 149 (Fla. 5th DCA 1988); O'Neal v. O'Neal, 410 So.2d 1369 (Fla. 5th DCA 1982).

Womble is illustrative of the fallacy of Appellant's argument.

In Womble, the husband argued successfully at the trial court that the wife was self supporting because she could earn some level of income, and no permanent alimony was awarded. The wife appealed an award of only rehabilitative alimony, contending that it should have been permanent. The Fifth District Court of Appeal reversed the trial court, finding an abuse of discretion in failing to award permanent alimony, because the level of income earning capacity of the wife would never afford her the lifestyle achieved during the marriage.

An even more analogous case may be Hallberg, in which a wife who was a full time teacher was held entitled to permanent alimony because her income earning capacity did not enable her to maintain the lifestyle achieved during the marriage. Thus, said the court, "permanent alimony commensurate with the living standards established by the husband, rather than rehabilitative alimony, is warranted."

Finally, the appellate court, in O'Neal, said the following:

> "A person is not self supporting simply because he or she has a job and income. The standard of living must be compared with the standard achieved during the course of the marriage. A divorced wife is entitled to live in a manner reasonably commensurate with the standard established by the husband during the course of a long term marriage. A court must base an award of alimony to a wife upon the ability of her husband to pay that award and her financial need in light of the standard of living enjoyed during the marriage."

This language was relied upon by the court in De Cenzo vs. De Cenzo, 433 So.2d 1316 (Fla. 3d DCA 1983), when it reversed a low award of permanent alimony and required the trial court to increase

it. In De Cenzo, the wife was a nurse in what the court described as a "well-paying position". Nevertheless, the appellate court increased the amount of alimony awarded to the wife because of the standard of living achieved during her marriage to Dr. De Cenzo.

This case is analogous to the case at bar, because Mrs. De Cenzo meets most of the criteria urged by counsel for Appellant, in that she was "young, healthy and has demonstrated an ability, throughout the marriage, to be self support... Throughout the ... marriage the Appellee worked full time outside the home. Both spouses have ... degrees from (a) University and both are currently employed." (Appellant's brief, p. 21)

Nevertheless, it was the disparity in income earned by Dr. De Cenzo and Mrs. De Cenzo, and the lifestyle achieved during the marriage, which led the court to conclude that despite her nursing job being "well-paying", it did not pay enough to allow the Wife to continue to live in the lifestyle she enjoyed during the marriage. Thus, permanent alimony was required in a sufficient amount to do that. That was the law then; that is the law now.

The "Doctrine of Comparable Fairness" as enunciated by the Fifth District Court of Appeals violates the standards of review of discretionary acts in the cited authorities, and should be quashed by this Honorable Court, and the award of permanent alimony reinstated.

Fundamental Error

Under Florida law, when an issue is not addressed in a brief,

either by raising it as a point on appeal, or by briefing it, it is deemed abandoned, or waived, and the lower court's ruling, which is clothed with the presumption of correctness, is deemed final as to the parties. City of Opa-Locka v. Metropolitan Dade County, 247 So. 2d 755 (Fla. 3d DCA 1971); City of Miami v. Steckloff, 111 So. 2d 446 (Fla. 1959).

In Hillsborough County Aviation Authority v. Walden, 196 So. 2d 912 (Fla. 1967), a proceeding for declaratory relief, the trial court passed upon the constitutionality of a statute. Appellant filed a notice of appeal in the District Court, but it did not assign as error the ruling on the constitutionality of the statute. Nor did it argue this point in its brief. Nevertheless, the District Court, sua sponte, transferred the case to the Supreme Court on the theory that the trial court passed on the constitutionality of the statute. The Supreme Court returned the case to the District Court. Quoting the Supreme Court:

> "The trial court did (pass on the validity of the statute), but this holding has never been assigned as error nor has it even been argued in any appellate brief. There is simply no jurisdiction vehicle to bring the matter here."

There is a recognized exception to this rule, however, in cases of fundamental error. A review of Florida authorities on the issue of fundamental error reveals the following:

In Sanford v. Rubin, 237 So. 2d 134 (Fla. 1970), this Honorable Court said:

> "Fundamental error,"...is error which goes to

> the **foundation of the case or to the merits of the cause of action. The Appellate Court should exercise its discretion under the doctrine of fundamental error very guardedly."** (emphasis added) (at 137)

In City of West Palm Beach v. Cowart, 241 So. 2d 748 (Fla. 4th DCA 1970) the court instructed us that,

> "The decisional definition of fundamental error in civil cases relates to the existence of the cause of action, the right to recover, or the jurisdiction of the trial court, and this is not waivable." (at 750)

The Third District Court of Appeal in Wagner v. Nottingham Associates, 464 So. 2d 166 (Fla. 4th DCA 1985), said,

> "We have held that such a (fundamental) error arises only when it affirmatively appears that it could not have been cured below if met with a timely objection... Stated another way, fundamental error occurs when, no matter what was or could have been said by the other side at the trial, the resulting judgment is fatally and incorrectly flawed." (at 170)

The case below does not fall into any of these categories of errors. The error was the failure of the judge to follow a procedure enacted by the legislature for the **convenience** of the courts and the litigants. Judge Harris said it this way in the opinion below:

> "And since the amendment is primarily intended to make appellate review more meaningful, the appellate court can insist on its application whether or not the parties raise it as an issue." (at page 3 of majority opinion)

Prior to the enactment of the statute, there was no fundamental right to announced findings of fact. Judges had no obligation to set forth written findings of fact on any issue. The appellant had the duty to present a record which showed an absence

of competent substantial evidence to support the court's decision. Reviewing courts have long had the ability to review the record presented to it, including the transcript, to determine the presence of competent substantial evidence. As established in Walter v. Walter (supra), the appellate court had a duty to review discretionary acts in light of the **facts in the record taken most favorably to the prevailing party**, not in light of announced findings of fact. It clearly cannot be said, therefore, that the failure to set out written findings of fact by the trial court is fundamental error. In fact, in a case strikingly similar to the case at bar, as seen from the excerpt below, the Fifth District Court of Appeal, in Odham v. Peterson, 398 So. 2d 875 (Fla. 5th DCA 1981), approved 428 So. 2d 241 (Fla. 1983), said the following on the subject:

> "The Volusia County Code, Section 51-11(A)(4), provides six criteria upon which evidence must be presented to warrant a special exception. There was evidence on each of these factors in the record before the circuit court supporting a finding in favor of a special exception and it is not the function of either certiorari or appellate review to re-weigh the board's determination of the weight of the evidence..." (citations omitted)
>
> "...It is not an essential requirement of law that every fact finder make a formal written finding as to each factual determination. **A conclusion includes an implied finding as to all factors necessary to that conclusion.** Therefore, the board's failure to specifically state its findings, as contemplated by the ordinance, is not such a departure from essential requirements of law as to have required the circuit court to have quashed the board's grant of a special zoning exception." (at 877) (emphasis provided)

Several district courts of appeal have determined that it would greatly assist them in appellate review if trial courts will make specific findings. However, this Honorable Court has never receded from Walter v. Walter (supra), which does not require written findings of fact in a review of a trial judge's discretionary acts. Nor has the Fifth District Court of Appeal ever receded from Odham v. Peterson, and determined that the absence of findings of fact in a judgment constitutes fundamental error.

There are two cases in which this Honorable Court remanded cases in which the judgments on their faces did not allow the Court to determine if **errors of law** had been made. Ombres v. Ombres, 596 So. 2d 956 (Fla. 1991); Thompson v. Thompson, 576 So. 2d 267 (Fla. 1991). Both of these cases dealt with errors of law, not discretionary acts. The question was whether the trial court erroneously calculated the value of goodwill in determining the value of marital property. However, the issue was properly presented by the parties, and this defect was not deemed by this Honorable Court to be fundamental error requiring reversal. Instead, the cases were **remanded** to the trial judge to clarify if the appropriate rule of law was utilized in the calculations.

The Wife does not argue that if properly brought for review an absence of findings of fact can be remedied by the Court; rather she argues that this does not constitute **fundamental error.** Therefore, unless properly presented as error by the parties, the absence of findings of fact cannot be utilized by the Court to

reverse an otherwise valid judgment. Ombres and Thompson are not support for the proposition that the lack of written findings of fact in a judgment is **fundamental error** which can be corrected on the court's own motion. Walter and Odham clearly suggest the opposite.

The statute in question (Section 61.08, Florida Statutes) only governs alimony. There is an equitable distribution statute which has criteria in it and which also requires findings of fact to be placed in the judgment. Section 61.075, Florida Statutes. Also, the child support statute requires specific findings of fact if the trial court is to deviate from the guidelines. Section 61.30, Florida Statutes.

In other issues of equity, however, where trial courts exercise judicial discretion, these statutes do not govern. This Honorable Court has not receded from the rule set forth in Walter v. Walter, nor has it ever disapproved the rule more expressly stated in Odham v. Peterson. Under these circumstances, how can the absence of written findings be **fundamental error**? On the record presented below, a record containing competent substantial evidence to support the exercise of discretion by the trial court, the failure of the judgment to contain specific findings of fact is harmless error at best-- not fundamental error.

Unconstitutionality of the Statutory Requirement that Judgments Contain Findings of Fact

The statute in question, being Section 61.06 (1), Florida Statutes, is an unconstitutional intrusion by the legislature into the judicial process, to the extent that it **mandates** to the Court the contents of a judgment. There is no question that the legislature can determine the substantive issues to be considered in arriving at an award of alimony. The issue of under what circumstances alimony is to be awarded ar substantive issue, and the legislature can enact laws governing substantive issues.

But the legislature cannot enact statutes which intrude on the Supreme Court's exclusive rule making authority regarding judicial procedure, or which go to heart of the adjudicatory process itself.

In Huntley v. State, 339 So. 2d 194 (Fla. 1976), this Honorable Court struck down an attempt by the Legislature to make the presentence investigation report mandatory in all cases, which the legislature had enacted as Section 921.231, Florida Statutes (1974). This was deemed to be an unconstitutional invasion of the Court's rule making authority.

In State v. Smith, 260 So. 2d 480 (Fla. 1972), this Honorable Court affirmed a ruling by the First District Court of Appeals that a statute which gave a criminal defendant a right to an interlocutory appeal was unconstitutional, likewise invading the Court's exclusive rule making authority.

This Honorable Court has promulgated a rule of civil procedure

requiring findings be included in Temporary Injunctions. Rule 1.610 (a)(2), Fla. R. Civ. P. It is within the sole province of this Honorable Court to likewise promulgate a procedure requiring findings to be included in any Judgment or Order determining child support, alimony, or equitable distribution in a dissolution of marriage. However, the legislature cannot so intrude on the Court's rule making authority. To the extent that Section 61.08 (1) appears to so require, authorities in this state indicate that either the statute is directory and not mandatory- Huntley v. State (supra); Simmons v. State, 36 So. 2d 207 (Fla. 1948)-or it is unconstitutional. Haven Federal Savings and Loan Association v. Kirian, 579 So. 2d 730 (Fla. 1991); Watson v. First Florida Leasing, Inc., 537 So. 2d 1370 (Fla. 1989).

In either case, the statutory "mandate" cannot form the basis for reversible error for failure to comply with its directive. It is an error of law for the Fifth District Court of Appeal to reverse on the ground that the trial judge failed to comply with this provision.

Reversal v. Remand

If a reviewing court believes that a judgment under review is lacking sufficient findings of fact it is improper to reverse and remand for additional proceedings, and by doing so grant a new trial. The proper course is to remand with instructions to the judge entering the deficient order to amend the order under review.

As has been seen above, this Honorable Court in two cases,

Ombres v. Ombres (supra), and Thompson v. Thompson (supra), was faced with a judgment from below proceedings which did not afford the Court the ability to determine whether legal error had occurred. However, this Honorable Court did not reverse the lower court in those cases; it merely remanded to the lower court to correct the perceived deficiencies in the judgment.

In Rodewald v. Rodewald, 394 So. 2d 1143 (Fla. 4th DCA 1981), the lower court had granted a new trial without specifying the grounds therefor as required by Rule 1.530 (f), Fla. R. Civ. P. Instead of reversing the order, the District Court merely relinquished jurisdiction to the trial court for entry of an order stating the reasons for granting the new trial. It did not reverse the trial court. This same procedure was followed in the third district in Daon Corporation v. Blankenship 444 So. 2d 85 (Fla. 3d DCA 1984). See also Moorman v. Moorman, 577 So. 2d 726 (Fla. 1st DCA 1991); B&H Construction and Supply Co. Inc. v. The District Board of Trustees of Tallahassee Community College, Florida, 542 So. 2d 382 (Fla. 1st DCA 1989).

The lower court decision comes to the appellate court clothed with a presumption of correctness. The appellant has the duty and burden to prove to the reviewing court from the record below that the lower court committed error or abused its discretion. In the absence of that burden being carried, the judgment should not be reversed. If the court cannot determine from the record and the judgment, and needs the lower court to review its own judgment to assist the reviewing court, the proper course is to remand, not to

reverse. In Home Development Co. of St. Petersburg v. Bursani, 168 So. 2d 131 (Fla. 1964), this Honorable Court was faced with this situation when called upon to review a decision of the Second District Court of Appeal. The following appears in that case:

> "Further consideration of the record proper indicates that our final decision in the jurisdictional question would be facilitated by, and this court's duty to preserve harmony and uniformity among the decisions of the appellate courts of this State could be more readily performed by, an expression of the appellate court of the theory and reasoning upon which its judgment is anchored, and particularly the theory and reasoning of its disposition of the questions mentioned above. In these circumstances it does not seem unreasonable to request the appellate court to do so... (citations omitted)
>
> Accordingly, request is respectfully made to the District Court of Appeal, Second District, that it reconsider the cause and particularly the questions mentioned earlier herein, and adopt an opinion setting forth the theory and reasoning upon which a decision in the cause is reached; and **jurisdiction is relinquished to that Court, temporarily, for that purpose,** upon completion of which this court will proceed to determine whether or not the cause should be reviewed here under Article V, Constitution of Florida." (emphasis provided) (at 134)

One of the omitted citations from this quoted language is State v. Bruno, 104 So. 2d 588 (Fla. 1958), in which the Supreme Court made the following comment:

> "Except in an order granting a motion for new trial the courts of this state are not required to state the grounds of reasoning upon which orders, judgments or decrees are based. Yet, for the reasons above expressed, for others not mentioned, and in fairness to the litigants and the appellate courts, the trial courts are **urged** in all future appealable orders, to set forth the grounds or

> reasoning followed in arriving at the conclusion reached...
>
> The practical solution to this problem seems to be that we should therefore... **relinquish control of this cause to the trial court, temporarily, for the sole and only purpose of having the trial court enter an order setting forth therein the grounds upon which it granted the motion to quash the information."** (emphasis added) (at 591)

In one case, Strickler v. Strickler, 548 So. 2d 740 (Fla. 1st DCA 1989), the court did reverse a Final Judgment of Dissolution which did not include findings of fact or conclusions of law which would permit meaningful review. In Strickler, however, the judgment did not contain any language regarding the relief sought by Mrs. Strickler below, and in fact, did not even purport to grant the dissolution of marriage. The Final Judgment was reversed and **remanded to the lower court with instructions to the trial court to enter an amended final judgment containing the missing findings of fact and conclusions of law regarding the issues before the lower court.**

It appears clear then, that **IF** the court finds that the failure to made findings of fact should, on the record of this case, be remedied by the trial court, the proper remedy is not to reverse, but merely to remand, or to relinquish jurisdiction to the trial court to enter an amended judgment including the findings of fact. For the Fifth District Court of Appeal to have reversed on that ground was legal error and directly conflicts with the above cited decision.

Cohabitation

A condition in an award of alimony which terminated the alimony upon the wife's cohabitation with a male was deemed improper and struck down by the appellate court in Condren v. Condren, 475 So.2d 268 (Fla. 2d DCA 1985). Quoting the Court,

> "Finally, we find that the portion of the final judgment providing for termination of alimony upon the wife's cohabitation with a male is improper. Accordingly, we order the trial court to strike that condition upon remand. Dominik v. Dominik, 390 So.2d 81 (Fla. 3d DCA 1980); see also Wambst v. Wambst, 391 So.2d 375 (Fla. 3d DCA 1980); Sheffield v. Sheffield, 310 So.2d 410 (Fla. 3d DCA 1975)." (at 270)

In Sheffield, the court held that the mere fact that the former wife had entered into a living arrangement with another man which could be deemed a "defacto marriage" was not in itself, without more, a sufficient basis for a modification of alimony.

This is not to say that if the wife were to cohabit with a male who provided her some support, that the husband would have no avenue for relief. The Fifth District Court of Appeal, in numerous cases, has decided that support given to or received from a cohabitor, is a factor to be considered in a petition for downward modification of an award of alimony. Pill v. Pill, 559 So.2d 364 (Fla. 5th DCA 1990); Schneider v. Schneider, 467 So.2d 465 (Fla. 5th DCA 1985); Bentzoni v. Bentzoni, 442 So.2d 345 (Fla. 5th DCA 1983); Kristensen v. Kristensen, 433 So.2d 598 (Fla. 5th DCA 1983).

However, it is the support given or received, not the fact of cohabitation, which is the critical factor. The mere fact of cohabitation does not give rise to a modification or termination of

alimony, either rehabilitative or permanent. Therefore, the portion of the order below which terminates the Wife's permanent periodic alimony "if the Petitioner cohabits with another man" is error, and must be reversed.

The error is an error of law, not merely an abuse of discretion. In Canakaris, this Honorable Court makes the distinction, saying,

> "Where a trial judge fails to apply the correct legal rule, as when he refuses to terminate periodic alimony upon remarriage of the receiving spouse, the action is erroneous **as a matter of law**. This is not an abuse of discretion. The appellate court in reviewing such a situation is correcting an erroneous application of a known rule of law. (at 1202) (Emphasis supplied by court)

Clearly, the condition imposed by the trial court, that the wife's permanent alimony terminate upon her cohabitation with a man was error, and must be reversed.

Attorneys Fees

In her initial pleading the wife sought attorney fees and costs from the husband. Such an award is authorized by Section 61.16, Florida Statutes. The trial court refused to permit the wife to prove and receive an award of attorney fees and costs. The wife contends this is error.

According to Section 61.16, Florida Statautes, the court may, after considering the financial resources of both parties, order a party to pay a reasonable amount for attorneys fees and costs. Canakaris cites Cummings v. Cummings, 330 So.2d 135 (Fla. 1976) as

providing the rationale for an award of attorneys fees. It is to ensure that each party have equal access to competent legal representation. Canakaris recognized that the statute requires an analysis of the relative financial conditions of the parties, but Canakaris, and its progeny, do not require that the party seeking fees is totally unable to pay those fees. All that is required is that one party be in a superior position to pay them. Deakyne v. Deakyne, 460 So.2d 582 (Fla. 5th DCA 1984): DiPrima v. DiPrima, 435 So.2d 876 (Fla. 5th DCA 1983).

In DiPrima, the wife sought an award of attorneys fees from the trial court. The court found that her reasonable fees incurred amounted to $40,000.00 to $44,000.00. It then ordered the husband to pay only a part of those fees: $15,500.00. The wife appealed, and the appellate court required the husband to pay all of the fees, despite the fact that the wife was awarded $3,000.0 per month permanent alimony, and an equitable distribution of marital assets with a value of between $645,270.00 and $688,270.00, including income earning assets. In other words, the Wife clearly had the ability to pay for her attorneys fees. Yet, this court required the husband to pay because his ability was superior in comparison.

This reasoning and result has obtained in other cases and other appellate districts. Benson v. Benson, 519 So.2d 1098 (Fla. 3d DCA 1988); Barry v. Barry, 511 So.2d 649 (Fla. 4th DCA 1987); Martinez-Cid v. Martinez-Cid, 559 So.2d 1177 (Fla. 3d DCA 1990); Bryan v. Bryan, 442 So.2d 362 (Fla. 1st DCA 1983).

In the case at bar, the trial court made an equitable

distribution of marital assets. The court totalled the value of the marital assets, and determined that each party was entitled to retain assets worth one-half of the total, with each party to receive assets worth $37,456.00. The actual in kind distribution made by the court favored the husband, so the court made a lump sum alimony award to the wife, payable in monthly installments of $100.00. However, the wife received no liquid assets other than her IRA of $3,512.00. The wife has no assets from which to pay attorneys fees unless she depletes her IRA and incurs a substantial penalty.

In contrast, the husband received liquid assets totalling approximately $15,000.00, including

1) The husband's IRA with a value of $7,400.00;

2) The husband's 401K retirement plan with a value of $4,778.00; and,

3) The balance in the parties savings account of $2,833.00.

In Henning v. Henning, 507 So. 2d 164 (Fla. 3d DCA 1987), the lower court made an equal distribution of marital assets by granting the wife the marital home, and granting the husband everything else. The lower court refused the wife's claim for attorneys fees, based upon the equitable distribution of marital assets. The appellate court reversed, holding that the wife could not be made to deplete her assets to pay attorneys fees.

The husband's income is more than twice that of the wife. The husband has a much greater income earning capacity, with a current

base income of $51,250.00 per year (TR 93), which exceeds the wife's by $30,000.00 per year. The husband was required to pay $1,000.00 per month alimony, which has an after-tax net effect on the husband of $720.00 per month, or $8,600.00 per year. Even after adjusting the parties' income by the alimony award, the husband's income exceeds the wife's income by over $12,000.00 per year, without considering his ability to earn a bonus.

Considering, the relative estates and incomes of the parties, the husband clearly has the superior ability to pay attorneys fees and costs. The failure to award the wife her attorneys fees and costs was an abuse of discretion under the cases cited. The court should reverse that part of the final judgment, require the husband to pay the wife's attorneys fees, and remand to permit the wife to prove up the attorneys fees and costs pursuant to applicable law.

CONCLUSION

The Fifth District Court of Appeal erred as a matter of law when it created out of whole cloth the "Doctrine of Comparable Fairness" as the proper standard for reviewing a discretionary act. Under the "Comparable Fairness Doctrine", if the exercise of discretion differs from some other judge's exercise of discretion on the same or similar facts, even if both results are reasonable, the second exercise must be reversed.

If there is substantial competent evidence in the record to support the decision of the trial judge, the decision is held to be reasonable. If it is reasonable, the exercise of discretion must be affirmed by the appellate court. That is the law of Florida, established by Canakaris and its cited progeny. The "Doctrine of Comparable Fairness" is an erroneous rule of law, and should be firmly disapproved by this Honorable Court, and with it, the decision of the Fifth District Court of Appeal reversing the trial court's award of Permanent Alimony to the Wife.

The trial court erred as a matter of law in conditioning the permanent alimony to terminate upon "cohabitation with a man." This is directly contrary to Florida law, and this provision should be stricken from the award of permanent alimony.

Finally, the failure to award attorneys fees when the Husband has the clearly superior ability to pay was an abuse of discretion, as it was unsupported by substantial competent evidence in the record. This is especially true if the award of permanent alimony is ultimately reversed, but is still true if the award of permanent

alimony to the Wife is affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Charles Willits, Esquire, 1407 East Robinson Street, Orlando, Florida 32801; this 14 day of March, 1994.

CHIUMENTO, KATZ & GUNTHARP, P.A.

By: _____

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