SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 82,503

MARY ANN KENNEDY, FDCA CASE NO. 91-1869

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

RESPONSE TO JURISDICTIONAL ISSUE PRESENTED BY THE PETITIONER

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JURISDICTIONAL ISSUES PRESENTED

I. THE "DOCTRINE OF COMPARABLE FAIRNESS" ENUNCIATED BY THE FIFTH DISTRICT COURT OF APPEAL 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).

II. THE DECISION OF THE DISTRICT COURT TO REVERSE THE FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE AND REMAND FOR FURTHER PROCEEDINGS WAS NOT LIMITED TO THE TRIAL COURT'S FAILURE TO MAKE APPROPRIATE FINDINGS OF FACT AND, THEREFORE, THE DECISION OF THE DISTRICT COURT DOES NOT CONFLICT WITH THE CASES CITED BY THE PETITIONER.

III. REVERSAL OF THE FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE WAS NOT DUE SOLELY TO THE TRIAL COURT'S FAILURE TO INCLUDE FINDINGS OF FACT, AN ERROR WHICH WAS NOT RAISED BY EITHER PARTY, THEREFORE, THE DECISIONS OF THE DISTRICT COURT CITED DO NOT CONFLICT WITH THE CASES CITED BY THE PETITIONER.

SUMMARY OF RESPONSE TO JURISDICTIONAL ISSUES PRESENTED BY THE PETITIONER

1. The "Doctrine of Comparable Fairness" enunciated by the Fifth District Court of Appeal does not directly or expressly conflict with the "reasonableness" standard of appellate review set forth in Canakaris v. Canakaris, 382 So.2nd 1197 (Fla. 1980). The district court decision merely elaborates upon this Court's definition of discretionary power contained in the Canakaris decision and coins a phrase for a concept originally contained in that decision.

2. The decision of the district court to reverse the Final Judgment of Dissolution of Marriage and remand for further proceedings was not limited to the trial court's failure to make appropriate findings of fact and, therefore, the decision of the district court does not conflict with the cases cited by the Petitioner, but was based upon the trial court's failure to consider all of the mandated factors in determining the alimony issue as required by Florida Statutes Section 61.08. The district court remanded to require the trial court to apply the other statutory factors as well as to make findings of fact relative to said factors. Therefore, this decision does not conflict with the decisions cited by the Petitioner or with other decisions on the same issue.

3. Reversal of the Final Judgment of Dissolution of Marriage was not due solely to the trial court's failure to include findings of fact, an error which was not raised by either party, therefore, the decisions of the district court cited do

not conflict with the cases cited by the Petitioner, but was also based upon the trial court's failure to properly consider and apply the mandated statutory criteria, an issue which was raised by the Appellant below. Therefore, the decision is not in conflict with the cases cited by the Petitioner or with other decisions on the same question of law.

DISCUSSION

1. The Petitioner is seeking the jurisdiction of this Court, pursuant to Rule 9.030(a)(2)(A)(iv), Fla.R.App.P., and argues that the "doctrine of comparable fairness" enunciated by the Fifth District Court of Appeal expressly conflicts with the standard for appellate review of discretionary acts set forth by this court in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980). The district court decision does not conflict with Canakaris, but merely elaborates upon the definition of discretionary power contained therein.

The Appellant below argued that the trial judge had abused his discretion by failing to follow the judicial precedent of cases which were factually similar to the case before him. Appellant/Respondent argued that it was neither logical nor reasonable to award $1,000.00 per month in permanent periodic alimony to a healthy, well educated, forty year old woman who had worked almost all of her adult life and who was then employed full time, solely to equalize the income of the parties after divorce. Appellant/Respondent pointed out that the trial court had failed to consider and properly apply all the statutory criteria in determiningg the alimony issue as required by Florida Statute Section 61.08. (See page 17 of Appellant's initial brief)

To support his position, Appellant/Respondent cited seven (7) cases in which, under basically similar factual circumstances, district courts had determined that an award of alimony to a spouse who was not shown to be incapable of self-

support was an abuse of discretion. In arguing that the disparate result reached by the trial court was neither logical nor reasonable and, as such an abuse of discretion, the Appellant/Respondent cited the landmark case of Canakaris v. Canakaris, supra, wherein this Court cautioned that, although trial judges in dissolution cases were to be afforded wide ranges of discretionary power, that power was not without limitation stating,

> "The trial court's discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner. **Judges dealing with cases essentially alike 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]

The decision of the Fifth District Court of Appeal recognizes and adopts this concept, it does not conflict with it. In enunciating a "doctrine of comparable fairness", the district court was not formulating a new and/or different standard for appellate review of discretionary acts but was merely re-stating what this Court had already defined to be the **limitations** of a trial judge's discretionary acts. In Canakaris v. Canakaris, supra at 1203, this court stated,

> "The discretionary power that is exercised by a trial judge is not, however, without limitation, and both appellate and trial judges should recognize the concern which arises from substantial disparities in domestic judgments resulting from basically similar factual circumstances."

The decision of the Fifth District Court of Appeal simply re-stated this principle and in so doing coined a phrase by which

to identify it. Furthermore, the decision of the district court re-affirmed what the legislature had already recognized when it adopted the 1991 amendment to Florida Statute Section 61.08(1) requiring findings of fact to support determinations by trial judges of the alimony issue. Restating the principle quoted above, the Fifth District Court of Appeal noted,

> "The essence of justice is that all parties, regardless of gender, race or religion, under similar circumstances, receive substantially the same result in litigation before our courts. This concept of comparable fairness can be achieved only if the appellate court can determine the factors (and the weight given those factors) by the various courts within our jurisdiction. We can do this only if trial courts make proper findings of fact as required by law." (See pages 3,4 of decision below) [Emphasis supplied by court]

The doctrine enunciated by the Fifth District Court of Appeal does not require, as Petitioner has claimed, consideration of matters outside the record, nor does it limit a trial judge's discretion to fashion awards based upon unique situations which may be present in many dissolution cases. What the comparable fairness doctrine does require is for trial judges to fashion awards within the range established by precedent for cases **where basically similar facts are present**, which, as the district court noted is an analysis Canakaris "appears to welcome".

Therefore, the decision of the district court simply follows the dictum of this Court contained in the Canakaris decision and does not conflict with either that decision or its progengy.

2. The Petitioner's second ground for jurisdiction is that the district court decision conflicts with other decisions in

that, upon determining that a judgment lacks written findings, established case law holds that the case is to be remanded with instructions to amend the judgment to include the required written findings and not to remand for further proceedings.

The Fifth District Court of Appeal did not reverse and remand for additional proceedings solely based upon the lack of sufficient findings of fact. The decision states,

> "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." (See page 2 of decision below) [Emphasis supplied by court]

While it is true that in the majority of cases decided after the 1991 amendment to Section 61.08(1) in which trial courts failed to include sufficient findings, the district courts have reversed and remanded with instructions to amend the final judgment to include the required findings in order to make meaningful review possible and in order to comply with Section 61.08(1). See for example Jacques v. Jacques, 609 So.2d 74 (Fla. 1st DCA 1992); Moreno v. Moreno, 606 So.2d 1280 (Fla. 5th DCA 1992); Walsh v. Walsh, 600 So.2d 1222 (Fla. 1st DCA 1992).

However, in this case the district court has reversed the Final Judgment of Dissolution of Marriage and remanded for further proceedings because the trial judge **failed to apply the law as well as having failed to include sufficient findings**. In order to correct this error, the trial judge will have to re-consider the alimony issue applying all of the mandated statutory criteria. In addition, consistent with the opinion issued by the

district court, the trial judge will be required to consider the range of alimony awards established by judicial precedent set in cases with similar factual circumstances. This may require further proceedings in addition to amending the final judgment to include findings.

The cases relied upon by the Petitioner either do not deal with the same question of law* or deal solely with situations in which the only reason for remanding was because the judgment under review lacked sufficient findings.** This is not the case herein and, therefore, the district court decision does not conflict with the cases cited by the Petitioner or with other cases on the same issue.

The district court decision is, however, in accord with other decisions in which district courts have determined that the trial court had abused its discretion as well as having failed to make appropriate findings. In those situations, as in this case, district courts have reversed and remanded for further proceedings consistent with the opinion issued. See for example

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* See Daon Corporation v. Blankenstein, 444 So.2d 85 (Fla. 3rd DCA 1984) and Rodewald vs. Lawton, 394 So.2d 1143 (Fla. 4th DCA 1981) which deal with granting a new trial, pursuant to Florida Rule of Civil Procedure 1.530(f).

**See Strickler v. Strickler, 548 So.2d 740 (Fla. 1st DCA 1989); Moorman v. Moorman, 577 So.2d 726 (Fla. 1st DCA 1991); Clance v. Clance, 576 So.2d 746 (Fla. 1st DCA 1991); B&H Construction and Supply Co., Inc. v. District Board of Trustees of Tallahassee Community College, Florida, 542 So.2d 383 (Fla. 1st DCA 1989).

Fontana v. Fontana, 617 So. 2d 418 (Fla. 1st DCA 1993); Hemraj v. Hemraj, 620 So.2d 1300 (Fla. 4th DCA 1993); Bussey v. Bussey, 611 So.2d 1354 (Fla. 5th DCA 1993).

3. The Petitioner argues that by reversing the Final Judgment of Dissolution of Marriage on the grounds that it lacked sufficient findings, the district court decision conflicts with existing case law which holds that if an error is not a fundamental error, then the appellate courts cannot use that error to reverse a lower court unless the error is presented for appeal by one of the parties.

This position is totally without merit and completely ignores the fact that the Final Judgment of Dissolution of Marriage was reversed for an error of law properly raised and addressed by the Appellant in his initial brief, to wit; that the trial judge abused his discretion by failing to properly consider and apply the mandated statutory criteria of Section 61.08. (See page 2 of decision below).

The Petitioner has interpreted the district court decision as having reversed the final judgment **solely** because of the trial judge's failure to include the requisite findings of fact and argues that this issue was not raised by either party and therefore should be deemed abandoned or waived. The Petitioner contends that,

> "appellate courts must review discretionary acts in light of the facts in the record taken most favorably to the prevailing party, the failure of the judgment to contain specific findings of fact is harmless error at best..." (Petitioner's jurisdictional brief at page 8)

At the outset, even before the 1991 amendment to Section 61.08(1) requiring specific findings, appellate courts have remanded cases for clarification in which judgments lack sufficient findings to make meaningful appellate review possible. This was done in B&H Construction and Supply Co., Inc. v. District Board of Trustees of Tallahassee Community College, Florida, supra, a non-dissolution case cited and relied on by the Petitioner.

Furthermore, in another case cited and relied upon by the Petitioner, Clance v. Clance, supra at page 748, the dissent makes clear that neither party to that appeal had raised the issue of the absence of specific findings, however, the majority reversed and remanded for the issuance of an amended final judgment containing adequate findings regardless of the lack of an objection thereto and the dissent agrees this was proper.

Finally, the proposition espoused by the Petitioner is that regardless of the mandate for findings contained at Section 61.08(1), if same are absent an appellate court should review the facts in the record in the light most favorable to the prevailing party. This position would require appellate courts to ignore the legislative mandate and would allow trial courts to defy the statutory requirement. Furthermore, since the adoption of the 1991 amendment, this proposition has been expressly rejected by the district courts. In Jacques v. Jacques, supra at 75, the First District Court of Appeal refused to rely on oral statements which were not reduced to writing in the final judgment, holding

that without findings of fact they were unable to reach a reasoned decision on the merits and that by failing to reduce its reasons to writing in the final judgment, the trial court had violated Section 61.08(1). See also Walsh v. Walsh, supra; Moreno v. Moreno, supra; Burston v. Burston, 604 So.2d 900 (Fla. 2d DCA 1992); Miller v. Miller, 598 So.2d 317 (Fla. 1st DCA 1991); Fontana v. Fontana, supra.

Therefore, the district court's decision on this issue does not conflict with the cases cited by the Petitioner or with existing case law. In the first instance, the case was not reversed for the grounds claimed by the Petitioner and, therefore, the cases cited by her do not deal with the same question of law. Furthermore, the district court was within its authority to require specific findings of fact relative to the mandated factors contained at Section 61.08, without which meaningful appellate review of the alimony issue is not possible.

CONCLUSION

The Petitioner's claim that the "comparable fairness doctrine" conflicts with exisiting case law and is a "legal quicksand" is without merit. This doctrine does not establish a new standard of appellate review, but simply re-states this Court's definition of the limitations of a trial judge's discretionary power.

As the Fifth District Court of Appeal makes clear, when courts arrive at diametrically different results in cases dealing with essentially similar facts, such result can only be explained by "the luck of the draw of the trial judge or the gender of the higher earning spouse." In Canakaris v. Canakaris, supra at 1203, this Court recognized that "different results reached from substantially the same facts comports with neither logic nor reasonableness". The district court simply re-iterated that statement and coined a phrase to embody that principle.

The Petitioner's concern that the "comparable fairness doctrine" will work to destroy the discretion and sound judgment of trial judges to do equity based upon the record before them, overlooks that there is no equity or justice in a system when one judge uses his discretion to require an ex-husband to pay permanent periodic alimony of $1,000.00 per month to a healthy, forty-year old woman who is capable of self-support, while other judges consistently deny alimony under basically the same circumstances. This is exactly the kind of disparate result this Court cautioned against, but that was the result in this. The

district court recognized this and reversed the Final Judgment of Dissolution of Marriage. In so doing, the district court may have coined a new phrase, but it certainly did not adopt a completely new standard of appellate review.

Therefore, this decision does not conflict with existing case law of this court or of other district courts of appeal and the Respondent urges this court to deny jurisdiction.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a copy of the foregoing has been furnished by mail to B. Paul Katz, Esquire, 4 Old Kings Road North, Suite B, Palm Coast, Florida 32137, Attorney for Petitioner, this 29th day of October, 1993.

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