IN THE SUPREME COURT OF FLORIDA

JAMES H. COX, JR.,

Petitioner, Appellant,

vs.

KIMI LEA COX,

Respondent, Appellee.

DOCKET NO.: 84,004

(First DCA Case No.: 91-4159)

An Appeal from a Judgment
of the
FIRST DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT

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INTRODUCTORY STATEMENT

The Respondent, Appellant, KIMI LEA COX, will be referred to as "the Wife" or "Mrs. Cox." The Petitioner, Appellee, JAMES H. COX, JR., will be referred to as "the Husband" or " Mr. Cox".

References to the Record on Appeal will be designated wherever possible by the symbol "R," followed by the page number(s). References to the transcript of the final hearing testimony will be designated by the symbol "T." followed by the transcript page number(s).

ISSUES PRESENTED

I. THE SEPARATION AGREEMENT ENTERED INTO BY THE PARTIES DURING THEIR FIRST DIVORCE SHOULD BE DEEMED ABROGATED BY THEIR RECONCILIATION AND REMARRIAGE 12

A. Historically, Florida courts have held that the unexecuted provisions of a previous marital settlement agreement are abrogated by the reconciliation of the parties. 14

B. The First District Court of Appeal has adopted an "abuse of discretion" test to review the determination of a trial court whether or not to deem a prior marital settlement agreement abrogated by the subsequent reconciliation of the parties. 19

C. The Husband's proposed rule -- that a marital settlement agreement should not be abrogated by subsequent reconciliation unless there is evidence that the parties intended to abrogate that agreement -- is not supported by case law or public policy considerations. 20

D. The facts of this case merit a finding that the parties' Guam marital settlement agreement was abrogated by their subsequent remarriage. 23

E. The First District Court of Appeal did not impermissibly interfere with the trial court's function. 25

II. THE MARITAL SETTLEMENT AGREEMENT SHOULD BE SET ASIDE UNDER *CASTO* CRITERIA. 27

STATEMENT OF FACTS

Wife supplements Husband's statement of facts to include the following information which the Husband has omitted. Additionally, Wife specifically disputes Husband's version of the facts concerning the parties' first divorce and the alleged negotiations between the parties concerning the Husband's military retirement benefits. Incorporated in the following is an accurate description of the testimony concerning that issue.

At the time of the first marriage of the parties in 1978, Mrs. Cox was age 22 and Mr. Cox was age 26. Mr. Cox, who had been in the reserves when the parties were first married, activated his military status in the United States Air Force effective May 1979. He has been on active duty since that date. T16

Mr. Cox holds the rank of major and will be eligible to retire on February 14, 1999. T39 The retirement pay of a person of his present rank, if retiring as of the date of the final hearing, would be approximately $2400/per month. T39

During the first marriage, in furtherance of his military career, Mr. Cox transferred numerous times to various different locations: to Minot, ND, in May, 1979; to Montgomery, AL, in October, 1981; to Tyndall Air Force Base, Panama City, FL, in January, 1982; to Cornell University, Ithaca, NY, in July, 1985; to Guam, in May, 1987; and to Tyndall Air Force Base, Panama City, FL, in May, 1989. T40-41

Except for Mr. Cox's brief stay in Montgomery, AL, each time Mr. Cox transferred to a new location, Mrs. Cox moved along with him. Including her return to Arkansas following the parties' first divorce, she moved six times in twelve years.

T41-42

During the parties' first marriage, Mr. Cox attended graduate school full-time at the expense of the military. The Husband was awarded an M.S. in Hotel Administration from Cornell University in 1987. T38-40

During the first marriage, Mrs. Cox worked part-time for a few months at a day care center in Panama City, FL. She took fifteen hours of school during the two years the parties spent at Cornell. T60 On Guam, she "was only allowed to take one three hour course." T60 Of those hours, 12 could not be counted toward her degree. T60

Mr. Cox handled all of the parties' finances during both of their marriages, paid the bills, and made the major financial decisions. T81, 82, 85-86 Mrs. Cox was unaware of the amount of her Husband's income, unaware of the prospective value of his retirement pay, and unaware that she had any claim to a share in the retirement pay, until some time after the parties' second separation in December, 1990. T53, 72-73, 83

First divorce

At the time the parties were living on Guam and agreed to get a divorce, Mrs. Cox felt pressured by Mr. cox to resolve the divorce quickly and leave. T56-57 She had been propositioned by one of the colonels on the base; she had been expected to be friendly with certain people and not to associate with other people. Mr. Cox, she testified, viewed her response to the unpleasant social situation as a potential career problem for him. "[H]e was afraid I would make him look bad." T54

Mr. Cox found a divorce lawyer through a newspaper advertisement. T25, 54 The parties went together to see that lawyer, who gave them forms to fill out concerning the division of their property and debts. T18; 25-26; 72 The lawyer gave neither of them legal advice and did not discuss their respective rights and potential claims against one another. T25, 30-31, 72 The lawyer explained that the parties had "the option of getting separate attorneys;" that it would be less expensive for them to agree on the terms of their divorce themselves and authorize the lawyer to prepare the necessary documents with the information furnished; and that, in the event they did so, one of them would simply be named as the petitioner in the divorce action. T26, 28-29, 54 The lawyer told them he only handled uncontested divorces, i.e those in which the parties agreed between themselves and furnished him all the information. T72 The parties filled out the forms on their own and Mrs. Cox returned them to the lawyer. T72 Mrs. Cox was designated as the petitioner. T29, 54

Mr. Cox claimed that during the filling out of forms he and Mrs. Cox discussed his military retirement. He claimed that she asked for a share of the retirement and he refused. T19, 28 He also claimed Mrs. Cox's brother, an Arkansas lawyer, discussed the military retirement issue with Mrs. Cox on the telephone during this same period. T27 However, Mr. Cox stated that he did not participate in or overhear the Wife's conversation with her brother and could give no specifics concerning what was said between them. T27-28, 29-30

Mrs. Cox disputed this testimony. She stated that, at the time of her first divorce, she never discussed with Mr. Cox or anyone else her entitlement to a share

in Mr. Cox's military retirement benefits. T54, 72 She said she was unaware until after the parties separated for the second time in December, 1990, that she had any property claim to a portion of those benefits. T54, 72

Mrs. Cox said she spoke to her brother, who was a personal injury lawyer, only to request that the brother furnish her with the Arkansas Guidelines for calculating child support, since Guam had no guidelines. T52-53, 59 When he did so, she furnished that information, which involved percentages of income, to Mr. Cox, who did the child support calculations himself. T53 She stated that neither her brother nor the lawyer handling the divorce gave her any advice concerning her rights in general or her right to a share in the Husband's benefits in particular. T53, 72

Substance of first divorce agreement

Under the parties' Guam divorce agreement, Mrs. Cox received primary custody of the children and child support for the four children in the amount of 35% of the Husband's net monthly income. No dollar amount of child support was mentioned in the agreement.

Mrs. Cox also received an additional $100.00 per month in alimony for four (4) years, commencing when she enrolled in college. Mrs. Cox testified that Mr. Cox told her at the time that this was all he could afford and she accepted his representation. T56

Mr. Cox also assumed the payments on the parties' credit card indebtedness including $12,200 for the Toyota van, $5,000 for his Toyota Celica, and other debts

totally approximately $18,000. Marital Settlement Agreement, Exhibit A to Final Judgment and Decree of Divorce, dated 3/2/88, at 4 & 6-7, in Appendix to Husband's Initial Brief in this Court.

The parties also divided their personal property. Both received some furniture. The Husband received, ***inter alia***, the 1985 Toyota Celica, his IRA benefits, five real estate MLP shares, an IBM PC computer and printer, and the monies in the parties' joint bank accounts. The Wife received the 1987 Toyota van, her IRA benefits (which were equal to the Husband's), and her jewelry. Marital Settlement Agreement, Exhibit A to Final Judgment and Decree of Divorce, dated 3/2/88, at 3-5 & 8-9, in Appendix to Husband's Initial Brief in this Court.

The marital settlement agreement by its terms purports to list all community and separate property of the parties. The Husband's military retirement benefits are not included in the list and are not referred to anywhere in the agreement or the decree. ***Id.***

The marital settlement agreement does not contain provision for the survival of the agreement in the event of reconciliation. ***Id.***

Post-divorce reconciliation

Following the divorce, the Wife returned to Arkansas, worked, attended school, and cared for children. T68-70 She also bought a house, borrowing the down payment from her father. T8

The parties remained in communication throughout the period between their

first divorce and remarriage. T50 When Mr. Cox returned to Arkansas for a visit, he stayed with Mrs. Cox. T50 On returning to the United States from Guam, Mr. Cox went to Arkansas "immediately". T32 The parties reconciled shortly thereafter. Mrs. Cox left her college program to move to Panama City, where Mr. Cox had been assigned.

In Panama City, Mrs. Cox attended school for one semester. In June, 1990, she left school to stay at home with the children, and did not return until after the parties separated. T61

Second divorce

At the time of the final hearing, the Wife was attending F.S.U. and had resumed pursuit of a bachelor's degree in elementary education. T51 The Husband expected to retire from the Air Force after 20 years in service, in February, 1999. R39

Stipulation as to child support, rehabilitative alimony, and debts

Prior to the final hearing, the parties entered into an agreement concerning support of the Wife and minor children during the following two and one half years, while the Wife would attend college seeking a degree in Elementary Education. The amount of money paid directly to the Wife for child support and rehabilitative alimony under the agreement does not exceed the amount of child support for which the Husband would be obligated under Florida Child Support Guidelines were he given three of the children's exemptions. The resulting tax benefits are shared by the

parties with Mr. Cox receiving most of the tax benefits derived therefrom. ***See*** T2-3, 45; R82-83, 105.

Each of the parties had cashed in his or her IRAs -- the Wife during the period of the first divorce, the Husband during 1990. The Husband sold the computer after the parties separated. The Husband retained a coin collection valued by him at $1,500.00, part of which he possessed before the parties' marriage. The Wife retained the house she purchased in Arkansas during the parties' first divorce with a down payment borrowed from her father; the house was held out for sale at the amount for which the Wife had purchased it; no offers had been made on the house for seven months preceding the final hearing. As of the final hearing,it was rented for an amount approximately equal to the mortgage payment plus maintenance costs. T78-79 The Husband received the parties' marital residence. R106

Mr. Cox agreed to pay most of the marital indebtedness, including credit cards and loans from credit unions. T6 He testified that the amount of the credit debt had remained fairly constant since the parties' first divorce and that he was able to pay down the indebtedness twice between the first divorce and the second divorce. T34-37 He also testified that he had charged his post-separation TDY expenses on the credit cards and used the subsequent reimbursement to pay other bills. T22

SUMMARY OF ARGUMENT

Mrs. Cox was entitled to a proportionate share of Mr. Cox's military retirement benefits equivalent to one half of the benefits accrued during each of the parties' two marriages. The trial judge did not find that the reconciliation and remarriage of the parties following their first divorce abrogated the marital settlement agreement entered into during that first divorce. Therefore, the trial judge did not equitably apportion the assets acquired by the parties during both marriages. This was error.

A long line of Florida cases, beginning with ***Weeks v. Weeks***, 197 So. 393 (Fla. 1940) and ***Miller v. West Palm Beach Atlantic Nat. Bank et al.***, 194 So. 230 (Fla. 1940), holds that the executory provisions of a marital settlement agreement will be deemed abrogated by a subsequent reconciliation of the parties, absent evidence that the parties intended otherwise. The First District Court of Appeal, in reversing the trial judge in this case, held that the proper standard to apply in evaluating a trial judge's determination of whether to find that reconciliation abrogates an unexecuted provision of a marital settlement agreement is "abuse of discretion," focusing on the circumstances of each particular case.

The Husband's position is that a prior marital settlement agreement should not be abrogated upon reconciliation absent evidence that the parties intended it to be abrogated. This formulation has not been employed in Florida and is contrary to public policy.

Whether the determination concerning the abrogation of an agreement by reconciliation is based on legal rules or on a discretionary consideration of many

factors, the facts of this case compel the determination that the parties' first marital settlement agreement should have been deemed abrogated by their remarriage.

The Husband has argued that the First District Court's decision was in fact an impermissible reweighing of the factors considered by the trial court and that the First District Court took a "piecemeal" approach toward analyzing the trial court's decision. To the contrary, the record demonstrates that the trial court failed to perform any equitable distribution analysis and that the First District Court of Appeal, not the trial court, was evaluating the overall fairness of the result, as required by ***Canakaris v. Canakaris***, 382 So. 2d 1197 (Fla. 1980).

As an independent point, which the Wife argues in the alternative, the Wife should have been entitled to have the prior marital settlement agreement set aside on the grounds set forth in ***Casto v. Casto***, 508 So. 2d 330 (Fla. 1987).

ARGUMENT

I. THE SEPARATION AGREEMENT ENTERED INTO BY THE PARTIES DURING THEIR FIRST DIVORCE SHOULD BE DEEMED ABROGATED BY THEIR RECONCILIATION AND REMARRIAGE

The trial court denied Mrs. Cox any share in Mr. Cox's military retirement benefits. In so doing, the court addressed only the argument that the marital settlement agreement from the parties' first divorce should have been set aside due to "concealment by the husband" or "real lack of knowledge by the wife at the time the agreement was reached." R104. The court ignored the Wife's contention that, under present Florida law, the well-settled rule that a subsequent reconciliation voids a marital settlement agreement applies to reconciliation by remarriage after divorce.

In the instant case, if the parties' prior agreement, incorporated in the Guam divorce decree, was voided by the parties' remarriage, then Mr. Cox's prospective retirement benefits which accrued during the combined period of both marriages would be marital assets subject to equitable distribution. ***See*** Florida Statutes, § 61.076 (1991). No facts in this case were adduced which justified awarding the Wife less than half of that marital asset. Therefore, the court below should have awarded the Wife a proportionate share of those benefits, which would have been 26.5% of those benefits.[1] Florida Statutes, § 61.076.

[1] During the parties' first marriage, the Husband reactivated his military status effective May,1979. The parties were divorced in March,1988. Thus, eight years and ten months of the Husband's military service occurred during the parties' first marriage.

The parties were remarried in November,1989. The final hearing was held in July, 1991. Thus, an additional one year and eleven months of the Husband's military service (continued...)

As the Wife has contended throughout these proceedings, the longstanding rule in Florida has been that, absent evidence of a contrary intention, a subsequent reconciliation will void a prior marital settlement agreement. This rule is subject to a narrow exception concerning terms contained in an agreement which the parties have already executed or complied with prior to the reconciliation. Those executed terms may not be affected by a subsequent reconciliation, absent a reconveyance or other affirmative evidence of intention to disavow the execution.

The First District Court of Appeal [hereinafter First DCA] rejected this characterization of Florida law. Rather, the First DCA adopted an "abuse of discretion" test concerning the determination whether a prior marital settlement agreement should be deemed abrogated by a subsequent reconciliation. The court found that the trial judge had abused his discretion in failing to abrogate the agreement entered into by the parties during their previous divorce.

The Husband's argument concerning the effect of reconciliation on a prior marital settlement agreement is unclear. In the First DCA, Husband argued that the Florida rule is that abrogation should be found only in the presence of additional, special circumstances, such as "fraud, concealment, and undue influence." Husband's Answer Brief in the First DCA at 17. (Of course, under present Florida law, a

[1](...continued)
occurred during the parties' second marriage.

A total of ten and one half years of the Husband's military service occurred during the marriage. The Husband is eligible to retire at twenty years. One-half of 10.5 years divided by 20 years = one half of 53% = 26.5%.

separation agreement can be set aside on such grounds, whether or not the parties have reconciled; therefore, in Husband's view, the reconciliation would be irrelevant.) Here, however, Husband argues that "in the event of reconciliation or remarriage a prior marital settlement should be considered valid and enforceable unless the parties by their subsequent actions demonstrate an intent to rescind or abandon the agreement." Husband's Initial Brief to this Court at 23.

A. Historically, Florida courts have held that the unexecuted provisions of a previous marital settlement agreement are abrogated by the reconciliation of the parties.

In 1940, this Court held,

> It appears to be well settled that reconciliation of husband and wife and resumption of marital relations for any period of time will render a previous contract and settlement of property rights void[.]

Weeks v. Weeks, 197 So. 393, 395 (Fla. 1940) (***citing Dillon v. Dillon***, 103 Neb. 322, 171 N.W. 917; ***Cole v. Waldrop***, 204 Ky. 703, 265 S.W. 174; ***Harrison v. Harrison***, 201 Mo. App. 465, 211 S.W. 708; ***Carl v. Carl***, 166 N.Y.S. 961; ***Graves v. Graves***, 174 N.Y.S. 615; ***Ahrens v. Ahrens***, 67 Okl. 147, 169 P. 486, 40 A.L.R. 1229).

However, where an agreement contains terms that the parties have already executed or complied with prior to the reconciliation, e.g. by transferring title to real property, then this Court found that those executed terms ***may*** not be affected by a subsequent reconciliation, absent a reconveyance or other affirmative evidence of

intention to disavow the execution. ***Miller v. West Palm Beach Atlantic Nat. Bank et al.***, 194 So. 230 (Fla. 1940).

In ***Miller***, the husband and wife had entered into a separation agreement, whereby the wife released all interest in the husband's property and, in consideration for this release, the husband conveyed a house and certain lots to the wife. Thereafter, the parties reconciled. However, the wife never reconveyed an interest in the property back to the husband. After the wife's death, the husband contested her will leaving the land to a trustee, arguing that the deed was voided by the reconciliation. The court held that the conveyance was in the nature of a "voluntary settlement" and therefore would not be voided by a subsequent reconciliation.

> Being an executed contract and in the nature of a settlement, ***and title and right of possession having passed***, the subsequent reconciliation does not abrogate the deed[.]

Miller v. West Palm Beach Atlantic Nat. Bank et al., 194 So. at 231-232 (emphasis added).

The ***Miller*** court quoted ***Dudley v. Fifth Ave. Trust Co.***, 115 App. Div. 396, 100 N.Y.S. 934, ***affirmed***, 188 N.Y. 565, 80. N.E. 1109, to explain the distinction:

> The ***[Dudley]*** court, in holding that [a marital settlement] contract [in which the wife assigned the husband's life insurance policy to the husband], ***the benefits of which were not to be realized until sometime in the future***, was abrogated by subsequent reconciliation, made the following statement:
>
> "If the wife in consideration of the separation agreement, had conveyed to a trustee, or other person, a piece of real estate, the title and right of enjoyment and possession would have passed at once to the grantee, and would not have reverted by the mere fact of reconciliation, without a reconveyance."

Miller v. West Palm Beach Atlantic Nat. Bank et al., 194 So. 230, 231, ***quoting Dudley v. Fifth Ave. Trust Co.***, 115 App. Div. 396, 100 N.Y.S. 934, ***affirmed***, 188 N.Y. 565, 80 N.E. 1109 (emphasis added).

This exception to the general rule that reconciliation voids a prior property settlement agreement has been a narrow one. In ***Zullo v. Zullo***, 317 So. 2d 453 (Fla. 3d DCA 1975), ***writ discharged***, 342 So. 2d 77 (Fla. 1977), as part of a property settlement agreement the husband executed a release and quit claim deed to a purchase money note and mortgage; the parties subsequently reconciled. In the divorce action that followed, the release and quit claim deed were held to be voided by the reconciliation and the husband was entitled to his one-half interest in the note and mortgage.

The results in ***Zullo*** and ***Miller*** suggest that the distinction is not merely between executed and non-executed provisions but, as ***Dudley*** holds, between agreements in which the benefit has been realized and those in which benefits are to be realized in the future. Since ownership of the note and mortgage conveyed a prospective benefit, Mr. Zullo would be entitled to receive his share of the prospective mortgage payments. ***Zullo v. Zullo***, 317 So. 2d at 454.

In ***Carter v. Carter***, 309 So. 2d 625 (Fla. 3d DCA 1975), ***Delgado v. Cota De Lopez***, 546 So. 2d 1075 (Fla. 3d DCA 1989), and ***Thomas v. Thomas***, 571 So. 2d 499 (Fla. 1st DCA 1990), the rule that reconciliation voids a waiver of property rights made in a prior settlement agreement was held to apply to remarriage following

divorce, as well as to reconciliation following legal or actual separation.[2]

In ***Carter***, the surviving spouse's homestead rights were awarded a divorced wife who had resumed living with her husband, the court recognizing the existence of a post-divorce common law marriage. In ***Delgado***, inheritance rights of a surviving spouse, waived in a previous marital settlement agreement and divorce, were awarded a surviving husband, whose subsequent remarriage to his wife was held to have voided the waiver of those rights in the marital settlement agreement.

In ***Thomas***, the court found not only that the duration of the parties' previous marriage should be considered in awarding alimony to the wife but also that property transferred to the husband in the property settlement agreement preceding the parties' first divorce should be considered marital assets subject to equitable distribution in the second divorce.

> Under the principle enunciated in ***Weeks***, and the extension of that principle to remarriage of the parties to each other, ***see Delgado***; ***Weston***, the 1985 property settlement agreement entered into in this case should be considered void by virtue of the parties' remarriage to each other. Therefore, the trial court abused its discretion in failing to set aside the prior property settlement agreement, for purposes of an equitable distribution of the marital assets in this case.

Thomas v. Thomas, 571 So. 2d at 506.

A majority of other jurisdictions appear to follow the rule concerning abrogation of executory provisions of a prior settlement agreement by virtue of the reconciliation

[2] Other cases hold that remarriage following divorce voids alimony and child support provisions agreed upon in the previous divorce, ***e.g.***, ***Weston v. Weston***, 483 So.2d 822 (Fla. 3d DCA 1986); ***Mills v. Mills***, 460 So.2d 545 (Fla. 1st DCA 1984).

of the parties.

> Most courts hold that where the parties to a separation agreement thereafter reconcile their differences and resume the marital relationship, the separation agreement is terminated so far as executory obligations thereunder are concerned, but the separation agreement is not abrogated so far as executed provisions of the agreement are concerned.

Yeich v. Yeich, 399 S.E.2d 170, 172-173 (Va. App. 1990), (***citing*** 1 ***Nelson on Divorce and Annulment*** § 13.14 (2d ed. 1945); 1 ***Lindey on Separation Agreements and Antenuptial Contracts*** § 9.05 (Rev. ed. 1990); ***Brazina v. Brazina*** , 558 A.2d 69 (N.J. Super. Ct. 1990); ***Kaminsky v. Kaminsky***, 364 S.E.2d 799 (W. Va. 1987); ***Carlton v. Carlton***, 329 S.E.2d 682 (N.C. App. 1985)). ***See also In re Estate of Adamee***, 230 S.E.2d 541 (N.C. 1976); ***Miller v. Miller***, 616 P.2d 313 (Mont. 1980); Annotation, "Reconciliation as affecting separation agreement or decree," 35 A.L.R.2d 707.

The rule promotes important public policy objectives. As noted in ***Carter v. Carter***, "'the policy of the law and of the courts is to lend assistance and protection to . . . married couples in extending or renewing a lawful union.'" 309 So. 2d at 628.

By encompassing property distribution as well as alimony and child support, the rule promotes reconciliation by protecting the remarrying spouses from being prejudiced by a subsequent divorce. Since the role of the courts is to fashion an overall scheme that is fair to both parties, the courts should be free to reconsider equitable distribution in a later proceeding in which circumstances may dictate a different result as to alimony or child support. ***See McMahan v. McMahan***, 567 So. 2d 976, 979-980 (Fla. 1st DCA 1990) (where change in federal law required reduction

of wife's entitlement to husband's military retirement benefits attributable to disability pay, the trial court should reconsider the entire equitable distribution scheme to avoid prejudice to the wife).

B. The First District Court of Appeal has adopted an "abuse of discretion" test to review the determination of a trial court whether or not to deem a prior marital settlement agreement abrogated by the subsequent reconciliation of the parties.

The First DCA correctly pointed out that its precedents have followed an "abuse of discretion" standard. In ***Mills v. Mills***, 460 So. 2d 545 (Fla. 1st DCA 1984), the court's decision turned on "the particular circumstances of [the] case" and also on one of the terms of the agreement itself, providing "that only 'matters dealing with property division shall continue to be binding' in the event of reconciliation." ***Id.*** at 546. The court expressly stated:

> We do not conclude that, as a matter of law, reconciliation abrogates all settlement agreements.

Id.

In ***Thomas v. Thomas***, 571 So. 2d 499 (Fla. 1st DCA 1990), an "abuse of discretion" standard was applied. However, somewhat confusingly, the abuse found by the court seemed to flow as much from the trial court's failure to follow ***Weeks***, which ***does*** conclude as a matter of law that reconciliation abrogates all executory provisions of a prior settlement agreement, as from the trial court's failure to consider the wife's contributions to the first marriage, the wife's present circumstances, and other factors. ***Id.*** at 506.

The First DCA noted that the "abuse of discretion" approach is most in keeping with the precepts of ***Canakaris***. Indeed, the factors considered by that court in ***Thomas*** and in the instant case are analogous to those held relevant in ***Canakaris*** to the making of a fair determination, such as the contributions of the wife made during ***both*** marriages, the assets available to both spouses, the earning capacity of both spouses, and the genuineness of the reconciliation.

C. The Husband's proposed rule -- that a marital settlement agreement should not be abrogated by subsequent reconciliation unless there is evidence that the parties intended to abrogate that agreement -- is not supported by case law or public policy considerations.

Wife has found no authority for adopting the test proposed by the Husband to this court, i.e. that a prior agreement should ***not*** be abrogated by subsequent reconciliation absent express evidence of intent to abrogate. It is difficult to imagine why such a rule would be considered superior, particularly where, as here, the agreement does not contemplate reconciliation.

In general, the abrogation of a previous agreement would render the trial court better able to fashion relief addressing the parties' circumstances as they appear before the court in a subsequent dissolution proceeding, without the baggage of an earlier agreement made under conditions that may since have greatly changed.

Contrary to the Husband's contention below, there is no compelling need for finality as to the non-executed provisions of an agreement, when the parties reconcile before the benefits from the property rights at issue would be realized. ***Miller v. West Palm Beach Atlantic Nat. Bank et al.***, 194 So. 230, 231 (Fla. 1940) (citations

omitted); see Husband's Answer Brief in the First DCA at 18. The rule protects against the dangers of non-finality where necessary by providing that executed provisions of the agreement are not abrogated by subsequent reconciliation.

It is not reasonable to require affirmative expressions of intention on the part of a reconciling couple to abrogate their previous agreement, at least where the previous agreement is silent on the issue of reconciliation. In Florida, traditionally, the intention of the parties has become a factor in the court's determination when there is evidence of intention. Courts have looked to the language of the agreement for provisions concerning the effect of reconciliation. ***Mills v. Mills***, 460 So. 2d 545 (Fla. 1st DCA 1984). Courts have also looked to the conduct of the parties after reconciliation. In ***Miller***, provisions of the wife's will were cited as evidence of her intention to continue to be bound by the agreement. ***Miller v. West Palm Beach Nat. Bank et al.***, 194 So. at 232.

However, in the absence of any expressions of intent, either in the agreement or by affirmative conduct thereafter, Florida courts have presumed that property settlement agreements are abrogated by virtue of the reconciliation of the parties. ***Carter v. Carter***, 309 So. 2d 625, 628 (Fla. 3d DCA 1975) (if even a common law marriage is established following divorce, agreement voided); ***Weeks v. Weeks***, 197 So. 393 (Fla. 1940); ***Thomas v. Thomas***, 571 So. 2d 499 (Fla. 1st DCA 1990).

Affirmative conduct or express language has been required to negative this presumption. Thus, in ***Zullo v. Zullo***, 317 So. 2d 453 (Fla. 3d DCA 1975), the failure of the wife to reconvey an interest in the mortgage to the husband after the parties'

reconciliation was not considered evidence of the parties' intention that the conveyance to the wife survive their reconciliation.

Further, express language in an agreement that reconciliation would not void that agreement is not determinative. In ***Weston v. Weston***, 483 So. 2d 822 (Fla. 3d DCA 1986), express language that reconciliation would not void the agreement was deemed to apply ***only*** to child support arrearages already accrued before the parties' reconciliation; the reconciliation was held to "put an end to the husband's responsibilities to further pay moneys pursuant to" the agreement and the divorce, notwithstanding the express language in the agreement. 483 So. 2d at 822. (This holding is consistent with the majority rule that non-executed provisions of an agreement will be voided by reconciliation.)

In addition, public policy concerns militate against requiring "factual proof of intent" to abrogate a prior property settlement agreement by reconciliation:

> The criticism of this approach is that while intent is easily determined where the parties clearly indicate by their words or conduct that they intend their reconciliation to rescind the agreement, intent is not easily discernible where the parties indicate nothing whatever about their intentions. . . . ***The question of intent must be viewed in light of the circumstances under which the reconciliation takes place. If the parties clearly expressed their intent concerning the effect of the reconciliation on the agreement, they necessarily would reopen old wounds which have only begun to heal. Given the fragile balance of emotions that may exist during the reconciliation, this approach is unacceptable.***

Yeich v. Yeich, 399 S.E.2d 170, 172 (Va. App. 1990) (citation omitted) (emphasis added).

Logically, the fact of reconciliation is evidence of the intent to abrogate an agreement predicated on the parties living apart from one another. If there is other express evidence concerning the parties' intentions, it should be considered, but the absence of other evidence should not preclude parties from re-entering a full marital partnership.

D. The facts of this case merit a finding that the parties' Guidelines marital settlement agreement was abrogated by their subsequent remarriage.

If the law is that reconciliation abrogates the executory provisions of a prior marital settlement agreement, absent evidence of intention otherwise, then the result obtained in the First District Court in this case should be affirmed.

> Where a trial judge fails to apply the correct legal rule . . . the action is erroneous as a ***matter of law***. This is not an abuse of discretion.

Canakaris v. Canakaris, 382 So. 2d 1197, 1202 (Fla. 1980).

If, instead, a ***Canakaris***-type analysis should be performed to determine whether the trial court's failure to abrogate the prior agreement was an abuse of discretion, then this case offers a text-book example of a situation in which a previously executed marital settlement agreement should be deemed abrogated by subsequent remarriage. There is no evidence of the parties' intention that the agreement survive their reconciliation and remarriage. The agreement itself makes no reference to survival in the event of reconciliation. There is no dispute that the reconciliation was genuine. Since the Husband is not yet eligible to retire, his

retirement pay is an expectancy only; the benefits cannot be realized until sometime in the future, as in the situation distinguished by the court in ***Miller***. 194 So. at 231.

Mrs. Cox made substantial contributions to the family during both marriages. Throughout the parties' first marriage, Mrs. Cox supported Mr. Cox's military career to the complete subordination of her separate interests. She kept house, cared for four children, and uprooted herself every other year to move to a strange town. During both marriages, Mrs. Cox attended college very part-time and very sporadically, losing credits earned at other schools when she transferred to a school in a new location, again in furtherance of Mr. Cox's career.

If the Guam agreement is enforced, Mrs. Cox is prejudiced by virtue of the parties' reconciliation, a result contrary to public policy. The parties' reconciliation resulted in the disruption of Mrs. Cox's educational plans and delayed her entry into her field of employment for several years. Further, Florida courts cannot require the Husband to pay for the college tuition of the four children, as he had agreed to do in the parties' first divorce. This provision of the earlier marital settlement agreement would appear to be abrogated by the parties' remarriage, since it appears to be an incident of child support. ***See Weston v. Weston***, 483 So. 2d 822 (Fla. 3d DCA 1986). Should the Wife wish to assume the obligation to pay for the children's tuition, she will have no source of funds related to the marriage from which to do so.

In the second divorce, although Mr. Cox assumed the parties' joint debts, he also retained approximately $2,000 per month for his own use, increasing to $2,280 per month when Mrs. Cox's car was paid off in June, 1992. T6; R105, 82-83 Mrs.

Cox and four children will share $1,520 per month.[3]

In the long range, the financial future of Mr. Cox is much brighter than his Wife's. In 1999, he can retire with a generous pension of $2,400 per month (enhanced by possible promotions in rank before he retires and by cost of living increases thereafter), and utilize his graduate degree and experience to obtain a "middle management position" in his field, quite possibly accumulating additional pension benefits. T40 Mrs. Cox will enter the job market at age 38 with four children to care for and no accrued pension benefits.

Additional factors are present in this case. There is disputed testimony as to whether the Wife was aware at the time of the first divorce that she could claim any entitlement to the Husband's retirement pay. The Wife's statement that she was not aware of her right is supported by the fact that the agreement, which purports to list all the property of the parties, does not include any reference to the retirement pay. Further, there is undisputed testimony that the Wife had no idea of the value of the prospective benefits, which in fact, were the parties' single most valuable asset at the time of the first divorce and remained so at the time of the second divorce.

E. The First District Court of Appeal did not impermissibly interfere with the trial court's function.

The Husband argues that First District Court of Appeal substituted its judgment for the trial court's judgment concerning the propriety of awarding the Wife a share of

[3] The Husband's monthly income and the Wife's household monthly income quoted here do not include the tax refund benefits to each party attained by restructuring support to include alimony as well as child support. **See** R82-83

the Husband's retirement benefits. In the Husband's view, the First District Court analyzed the retirement benefits issue "piecemeal" while the trial court considered all aspects of the parties' circumstances in fashioning relief. Further, the Husband suggests that the trial court fairly apportioned the assets and liabilities of the parties by denying the Wife any share in those benefits.

There is no evidence in the record to show that the trial court, in arriving at its conclusion, performed any analysis relating to equitable distribution. The only reason the trial court offered for denying the Wife any share of the military retirement benefits was the brief duration of the second marriage. (The parties started living together in August, 1989, were remarried in November, 1989, and separated at the end of December, 1990. T.20, 75) There is no indication that the court assessed the post-divorce standard of living of the parties or the Wife's long-term prospects for rehabilitation. ***Holcom v. Holcom***, 505 So. 2d 1385, 1387-1388 (Fla. 1st DCA 1987).

It is clear that the court did not consider awarding the Wife a share of the military retirement benefits accrued during the first marriage since the court found those benefits to be non-marital assets. At no point did the court evaluate the Wife's contributions to the first or second marriage, the degree to which the Husband's future prospects resulted from the Wife's efforts and cooperation, whether the Wife's financial prospects had been harmed by the parties' remarriage, or any of the other factors suggested in ***Thomas v. Thomas*** or by the First DCA in this case. It was the trial court, not the First DCA, that considered the retirement benefits question in a piecemeal fashion.

Further, the denial to the Wife of any share in the parties' most valuable marital asset was not fair. The assumption by the Husband of marital indebtedness did not justify denying the Wife a share of his retirement benefits. That assumption was voluntarily made by the Husband and was balanced by many other factors: the Husband's substantial income and secure employment prospects; the Wife's present unemployability, uncertain job prospects, and responsibility for raising the four children; and the Husband's receipt of title to the marital residence and entitlement to the children's exemptions for the next four years. There was also evidence that the Husband had run up $4,000.00 in credit card debt by taking cash advances earlier in the same month in which the parties separated. T.70-71

The only equitable distribution analysis performed concerning the parties' assets and liabilities occurred by the voluntary agreement of the parties. That agreement did not include any consideration of the prospective military retirement benefits. ***Carr v. Carr***, 522 So. 2d 880, 883 (Fla. 1st DCA 1988). Nor were the retirement benefits considered as a source for paying rehabilitative alimony or any other financial obligation assumed by the Husband. ***Littleton v. Littleton***, 555 So. 2d 924, 926 (Fla. 1st DCA 1990). The First DCA, then, was performing the equitable distribution analysis that the trial court had failed to perform.

II. THE MARITAL SETTLEMENT AGREEMENT SHOULD BE SET ASIDE UNDER *CASTO* CRITERIA.

The Husband's military retirement benefits were and remain the only significant asset accumulated during both of the marriages of the parties. The absence of any reference to those benefits in any of the Guam divorce documents supports the Wife's

claim that the Guam marital settlement agreement should be set aside for unfairness pursuant to ***Casto v. Casto***, 508 So. 2d 330 (Fla. 1987).

The First District Court did not reach this issue but rather considered some of the same criteria relevant to a ***Casto*** analysis as grounds for finding that the parties' prior marital settlement agreement should be abrogated. The Wife requests that the Court consider this issue, if the Court does not hold that the parties' first marital settlement agreement was voided by their remarriage.

The pertinent grounds for setting aside a marital settlement agreement are set forth in ***Casto v. Casto*** and reiterated in ***Thomas v. Thomas***, 571 So. 2d 449 (Fla. 1st DCA 1990). These require the challenging spouse to show that the agreement

> makes an unfair or unreasonable provision for that spouse, given the circumstances of the parties. Once the unreasonableness of the agreement has been established, "a presumption arises that there was either concealment by the defending spouse or a presumed lack of knowledge by the challenging spouse of the defending spouse's finances at the time the agreement was reached."

Thomas v. Thomas, 571 So. 2d 499, 505 (Fla. 1st DCA 1990), ***quoting Casto v. Casto***, 508 So. 2d at 333. "The burden then shifts to the defending spouse to show (a) a full, frank disclosure regarding the value of all marital property and the income of the parties, or (b) a general knowledge by the challenging spouse of the extent of the marital property sufficient to obtain a value by reasonable means, as well as a general knowledge of the income of the parties." ***Thomas v. Thomas***, 571 So. 2d at 505.

> "The test in this regard is the adequacy of the challenging spouse's knowledge at the time of the agreement and whether the challenging spouse is prejudiced by the lack of information." ***Casto***, 508 So. 2d at 333. [Other citations

omitted.]

> In ***Casto***, the supreme court reiterated that the critical test in determining the validity of marital agreements is whether there was fraud or overreaching on one side, or whether the challenging spouse did not have adequate knowledge of the marital property and income of the parties when the agreement was reached. ***In addition, the court cautioned that courts must realize that parties to a marriage are not dealing at arm's length.*** Therefore, trial judges must examine the circumstances carefully to determine the validity of such agreements. ***Casto***, 508 So. 2d at 334.

Thomas, 571 So. 2d at 505 (emphasis added). Interpreting ***Casto***, the ***Thomas*** court also pointed out that presence or absence of counsel is a factor that should be considered in the trial court's determination concerning the validity of an agreement.

In this case, the trial court mischaracterized the sequential analysis to be performed. The trial court made no finding concerning whether the agreement was unfair. Further, the trial court apparently held it to be the ***Wife's*** burden to "establish any concealment by the husband [or] real lack of knowledge by the wife at the time the agreement was reached." R104

In this case, the Guam agreement appears, on its face, unfair to the Wife. The Husband, a major in the Air Force with a master's degree, assumed the share of payments on the marital indebtedness[4] attributable to his unemployed Wife, who possessed a high school diploma and no job skills. He was to pay 35% of his income for the support of four children. He was to pay an additional $100.00 per month

[4] The Husband testified that he had been able to pay down the indebtedness twice between the first divorce and the second divorce. T34-37

(deductible to him and taxable to the Wife) for four years to commence when the Wife attended college. He also received three of the four children's tax exemptions. The parties' remaining property appears to be divided either evenly or in a manner somewhat more favorable to the Husband. Marital Settlement Agreement, Exhibit A to Final Judgment and Decree of Divorce, dated 3/2/88, at 3-5 & 8-9, in Appendix to Husband's Initial Brief in this Court.

However, the principal asset of the marriage, the Husband's prospective military retirement benefits, remained solely the Husband's property. This asset is not listed on the schedules in the settlement agreement.

During the first marriage, while the Husband was accruing retirement benefits and receiving a master's degree, the Wife, a full-time homemaker, made no preparation to be self-supporting or to provide for her support in old age. The $100 per month rehabilitative alimony she received in the first divorce was to be paid to her only when she commenced college and then for only four years. Her ability to complete college within that time, absent some further unidentified assistance, would have been problematic. She apparently was expected to commence her undergraduate education while caring for four children, three of whom were quite young. Had she completed college as contemplated in the agreement, at age 35 or 36, she would be seeking employment in her field as a beginner.

The Husband, on the other hand, would be able to retire, would receive all of his retirement benefits (estimated by him as of 1990 to amount to $2,400.00 per month), and would be able to commence, while still in his forties, a new career with

the prospect of obtaining a second retirement fund. In view of the circumstances of these parties, this agreement is unreasonable in its provision for the Wife.

Once unreasonableness is shown, the burden shifts to the Husband to show "a full, frank disclosure of the value of ***all*** marital property and the income of the parties, or . . . a general knowledge [on the wife's part] of the extent of the marital property sufficient to obtain a value by reasonable means, as well as a general knowledge of the income of the parties." ***Thomas v. Thomas***, 571 So. 2d at 505 (emphasis added). Mr. Cox did not satisfy this burden. The testimony is in dispute as to whether the retirement benefits were even mentioned between the parties. The Wife's testimony that no such discussion took place is supported by the fact that the retirement benefits are not listed on the property schedules in the Guam marital settlement agreement, while such other retirement-connected benefits as the parties' IRAs are listed.

Mr. Cox answered "yes" when asked whether Mrs. Cox was "aware of all [his] assets and liabilities when [the parties] got divorced" in 1988. T19 However, there is no evidence of any conversations between the parties concerning this matter. The Husband did not state what the Wife was told or how she came to be aware of this information.[5] According to him, the **only** discussion concerning his military retirement

[5] The Husband argued in the First DCA that the Wife knew the amount of the Husband's income since she calculated the amount of child support. However, the Guam divorce documents do not include a dollar amount of child support, only a percentage.

The Husband argues here that the parties bought houses together and filed joint income tax returns. The former event would not necessarily result in the Wife's learning (continued...)

benefits was the Wife stating she wanted a share and his refusing to give her a share. T28

Mrs. Cox testified without contradiction that she had no idea of the amount of her Husband's income. She also stated that she was unaware of the value of the retirement benefits until the final hearing in the second divorce. T58 She stated, also without contradiction, that her Husband handled all the finances and that she took his word for what he said he could afford to pay. Further, she testified that, since the parties' second separation, she has been receiving psychological counselling to overcome her habit of passively accepting her information and her view of the world from whatever her Husband chose to tell her. T85-86

The only other evidence of Mrs. Cox's awareness of "the extent of the marital property" and "general knowledge of the income of the parties" is contained in the Guam divorce documents. These do not state the Husband's income, do not list the military retirement benefits as property, and do not assign any value to those benefits.

The parties to a marriage do not deal at arm's length. The circumstances of the making of this agreement evidence the dominant spouse exploiting the passive ignorance of the submissive spouse. It is clear from the Husband's version of the parties' "negotiation" that ***he*** was aware that his Wife had a claim to the retirement

[5](...continued)
anything about the Husband's income. The latter point does not meet the Husband's burden to prove that the Wife had general knowledge of the income or extent of the assets of the parties. In light of the manner in which the Husband concedes the Guam divorce was accomplished, it is most likely that Mrs. Cox's experience of signing the parties' joint tax return amounted to a form and a pen thrust in front of her with the instruction to "sign here."

benefits, even though the Wife was not. He claimed he just said "no" and she gave in. The attendant circumstances underscore the exploitation. Mr. Cox found the lawyer. The parties went together to see the lawyer. The divorce process took only about one week. Mr. Cox did not dispute Mrs. Cox's characterization of the unpleasant events leading up to their decision to divorce or Mr. Cox's concern that she leave quickly so as not to hurt his career.

Further, Mr. Cox's version of the Guam divorce negates the significance of Mrs. Cox's being nominally represented by counsel. Mr. Cox said they saw the lawyer together. Mr. Cox said the only advice given by the lawyer was that they could obtain a no-fault divorce using one lawyer or obtain separate lawyers. Mr. Cox said it was cheaper to do it themselves. Mr. Cox said the lawyer indicated the amount of the fee was based on his preparing the divorce forms only. Mr. Cox said that the terms of the agreement did not change between the time they filled out the forms and the entry of the divorce decree.

These facts cannot meet the Husband's burden under ***Casto*** of proving "full, frank" disclosure of all marital property and income. They also fail to meet his alternative burden of proving that Mrs. Cox had "general knowledge . . . of the extent of the marital property sufficient to obtain a value by reasonable means, as well as a general knowledge of the income of the parties." The greater weight of the evidence is that Mrs. Cox did not know that the retirement benefits were included in the "marital property". The evidence is undisputed that she did not know the amount of Mr. Cox's income or the value of the retirement benefits. The Guam agreement should have

been set aside on ***Casto*** grounds, as well.

CONCLUSION

For all of the foregoing reasons, the judgment of the First District Court of Appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing memorandum with attachments was furnished by hand delivery to Carroll M. McCauley, Esq., 36 Oak Ave., Panama City, FL 32401, this 15 day of February, 1995.

Pamela Dru Sutton

Pamela Dru Sutton