IN THE SUPREME COURT OF FLORIDA

VIVIAN WEBB MACAR,

Petitioner,

vs.

ALEX V. MACAR,

Respondent.

CASE NO. SC00-2542

L.T. NO. 2D98-3268

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

PETITIONER'S AMENDED INITIAL BRIEF ON THE MERITS

VIRGINIA R. VETTER
VETTER & HUNTER
4144 N. Armenia Ave., Ste. 210
Tampa, FL 33607
(813) 673-8200
FBN 221902
Attorney for Petitioner

TABLE OF CONTENTS

Table of Citations ii

Preface 1

Statement of the Case and of the Facts 2

Summary of the Argument 10

Argument:

Issue I - **THE *CASTO* FACTORS SHOULD APPLY WHEN A RULE1.540 CHALLENGE IS MADE TO THE VALIDITY OF A MARITAL SETTLEMENT AGREEMENT THAT HAS BEEN INCORPORATED INTO THE FINAL JUDGMENT** 12

Issue II - **APART FROM *CASTO* CONSIDERATIONS, THERE WAS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT VACATING THE AGREEMENT PURSUANT TO RULE 1.540, AND THE DISTRICT COURT EXCEEDED ITS AUTHORITY IN REVERSING THE TRIAL COURT.** 19

Conclusion 27

Certificate of Service 28

Certificate of Compliance 28

Index to Appendix A-1

TABLE OF CITATIONS

Cases — Page

Alabama Hotel Co. v. J.L. Mott Iron Works, 98 So. 825 (Fla. 1924) 22

Baker v. Baker, 394 So.2d 465 (Fla. 4th DCA 1981) 13, 16, 17, 20

Bakshandeh v. Bakshandeh, 370 So.2d 417(Fla. 3d DCA 1979) 20

Belcher v. Belcher, 271 So. 2d 7 (Fla. 1972) 16

Bockoven v. Bockoven, 444 So.2d 30(Fla. 5th DCA 1983) 20

Brighton v. Brighton, 517 So.2d 53(Fla. 4th DCA 1987) 15

Casto v. Casto, 508 So.2d 330 (Fla. 1987) 1, 8, 10, 12-19, 25, 26

Champion v. McDaniel, 740 So.2d 17 (Fla. 1st DCA 1999) 15

Crowley v. Crowley, 678 So.2d 435 (Fla. 4th DCA 1996) 20

DeClaire v. Yohanan, 453 So.2d 375 (Fla. 1984) 15, 21, 25

Del Vecchio v. Del Vecchio, 143 So.2d 17 (Fla. 1962) 13, 16, 17, 24

DeMaggio v. DeMaggio, 317 So.2d 848 (Fla. 2d DCA 1975) 17

Gelfo v. Gelfo, 198 So.2d 353 (Fla.App. 1967) 18

Goodstein v. Goodstein, 649 So.2d 273 (Fla. 3d DCA 1995) 1, 12, 13

Herzog v. Herzog, 346 So.2d 56 (Fla. 1977) 13

Hitt v. Hitt, 535 So.2d 631(Fla. 4th DCA 1988) 15

Kerns v. Kerns, 409 So.2d 137 (Fla. 4th DCA 1982) 17, 20

Kimbrough v. McCranie, 325 So.2d 70 (Fla. 1st DCA 1976) 20

Lacore v. Giralda Bake Shop, Inc., 407 So.2d 275(Fla. 3d DCA 1981) 20

Landis v. Allstate Ins. Co., 516 So.2d 305 (Fla. 3d DCA 1988) 24

Masilotti v. Masilotti, 29 So.2d 872(Fla. 1947) 19

McCormick v. McCormick, 181 So.2d 220(Fla. 2d DCA 1965), cert. denied, 188 So.2d 807, FN2 (Fla. 1966) 19, 24

Miller v. Miller, 134 Fla. 725, 184 So. 672 (1938) 18

Moss-Jacober v. Moss, 334 So.2d 89 (Fla. 3d DCA 1976) 17

Osherow v. Osherow, 757 So.2d 519 (Fla. 4th DCA 2000) 14, 15, 19

Petracca v. Petracca, 706 So.2d 904 (Fla. 4th DCA 1998) 8, 25

Posner v. Posner, 257 So.2d 530 (Fla. 1972) 24

Scales v. Scales, 237 So.2d 50(Fla. 3d DCA 1970) 20

Statutes

§ 61.001(b)(c), Fla. Stat. (1971) 15

Court Rules

Fla. R. App. P. 9.030(a)(2)(A)(vi) 1, 27

Fla. Fam. L.R.P. 12.540. 15

Fla. R. Civ. P. 1.540 . . . . . 9-12, 14, 16-21, 24, 26

Other Authority

10A Fla.Jur. Dissolution of Marriage § 24 (1973) 18

Trawick, Fla. Prac. And Proc., § 26-8 (1998) 19

PREFACE

This case is within the discretionary review of this Court to review a decision of the Second District Court of Appeal rendered on November 3, 2000, which certified a conflict with *Goodstein v. Goodstein*, 649 So.2d 273 (Fla. 3d DCA 1995). Fla. R. App. P. 9.030(a)(2)(A)(vi). The Second District's position, contrary to that held in *Goodstein*, is that overreaching and duress are not grounds for relief under that rule 1.540. The Second District also held that the *Casto* analysis cannot be applied when the initial challenge to a marital settlement agreement, which was incorporated into a final judgment, was made in a rule 1.540 proceeding.

The parties shall be referred to in accordance with their capacity in the marriage. Vivian Webb Macar, was the appellee in the lower tribunal and shall be referred to herein either as "the wife" or as "Mrs. Macar". Respondent, ALEX MACAR, shall be referred to either as "the husband" or as "Mr. Macar". The Record on Appeal shall be designated as "(R:)". The transcripts of the hearings on the wife's Motion for Relief from Judgment shall be designated as follows: May 29, 1998, July 13, 1998, and July 28, 1998, shall be designed as "(T:)"; the June 12, 1998 hearing shall be designated as "(ST:)". The Appendix shall be referred to as "(A-").

STATEMENT OF THE CASE AND OF THE FACTS

The parties to this cause were married on November 23, 1986. They separated the first time in 1994, at which time a dissolution action was filed in the Circuit Court of Hillsborough County, Florida. During this proceeding, the wife had retained the services of an accountant to assist her with the discovery. The parties reconciled, and that case was dismissed. In November, 1996 the parties again separated, and the wife filed the subject action for dissolution . (R:24) Discovery was again conducted, and the wife retained the same accountant who had assisted her in the 1994 dissolution action. Of importance in the wife's discovery efforts was a request of the husband for all documentary evidence to support his claim that certain investment accounts established during the marriage were non-marital. (T:108-09; ST:26-27)

The Final Hearing in the present case was scheduled for October 17, 1997. In August, 1997, the wife retained new counsel. Her new counsel filed several motions, including a Motion for Continuance, scheduling them for hearing on the morning of October 17th. (R:231-263; 269-396) After three and one-half hours of testimony, the Court dissolved an Ex-Parte Injunction entered in a domestic violence case between the parties, which had granted the wife the temporary care of the children. The Court returned the children to the custody of the husband, announcing that it was modifying its previous Temporary Order and was giving the husband the temporary, sole parental responsibility of the parties' three children. (R:233) The court announced that it was denying the Motion for Continuance and that the Final Hearing would commence at

2:00 p.m. and would continue over on the following Tuesday. (R:244)

When the parties returned to the courtroom at 2:00 p.m. on October 17th, the husband's attorney announced that they had a proffered settlement resolving all outstanding issues. (R:245) The Agreement was that the parties would share parental responsibility and the wife would be the secondary primary residential parent. (R:246) The husband agreed to waive child support for twenty-four months. (R:249) and would pay non-modifiable, rehabilitative alimony of $10,000.00. (R:251, 254) The wife would keep the Corvette, valued at $8,000 (R:584), and would transfer her interest in the marital home, which had a net equity of $38,000, (R:584), to the husband. The husband was to contribute $1,000 toward the wife's fees and costs. (R:251) A summary of this distribution, using undisputed values provided by both the husband and the wife's accountant, shows the husband receiving $73,074.00 of $87,374.00 in marital assets. (R:504) Mr. Macar received another $83,509.00 in assets that he claimed were non-marital, the status of which is contested by the Wife. (R:504) An Amended Final Judgment was entered on June 2, 1998, *nunc pro tunc* to November 12, 1997. (R:434)

The wife filed a Notice of Appeal on December 12, 1997, in the Second District Court of Appeal Case No. 97-05402. (R:266) Jurisdiction was relinquished to the trial court on March 6, 1998, (R:397), for the purpose of hearing the wife's Motion for Relief of Judgment. (R:398-404). The Motion alleged the following: Fraud, misrepresentation and overreaching on the part of the husband in that he deliberately misclassified certain marital assets as being non-marital; that the husband had

misrepresented on his Financial Affidavit the value of certain marital assets including financial accounts; that the verbal agreement entered into by the wife was the result of duress; that the Agreement was not knowingly and voluntarily entered into despite the statements to the contrary made during the Final Hearing; and that the Agreement was unreasonable. (R:398-404)

The proceedings on the Motion to Vacate commenced on May 27, 1998 (R:643-664), were continued on May 29, 1998, (T:1-110), and were concluded on June 12, 1998. (ST:1-85)

Mrs. Macar described the sequence leading up to the "agreement" of October 17, 1997. She testified that when she had returned from lunch that day, the attorneys and her husband, Alex, were meeting in a back room. Alex and his attorneys stepped out, and her attorney, Mr. McBath, asked her to come in. (R:647) He relayed the proposed settlement. She described herself as being very confused and thought that in order to retain parental rights for the children, she was supposed to take the offer. (R:647)

Although Mrs. Macar had not felt pressured by her husband at the October 17th meeting, she stammered: "I don't know why I was pressured. I just felt very confused." (T:98) When asked how long she and her attorney had discussed it, she said five minutes at the very most. (R:647)

During the marriage she had no knowledge of their assets because her husband had handled the finances. She had only been permitted to have a joint checking account during the last two years, but even then he would take the checkbook to his

office to pay the bills. She was not allowed to pay any bills. (R:648) She had never had a credit card in her name during the marriage. (T:82)

After the parties' first divorce proceeding in 1994 was initiated, all the mailings and records went directly to Mr. Macar's office. (T:82) Mr. Macar changed the address on his financial accounts and had the statements mailed to his Temple Terrace office. (R:649)

Mrs. Macar never signed an income tax return during their marriage until 1994, at the time they first separated. Her husband had always signed her name for her. She was aware at the time of the agreement that they were due a $5,170.00 refund for their 1996 estimated taxes. (R:651) She was not aware at the time, however, that the husband had appropriated it to his own use. (R:651) It was revealed during this hearing that this refund had been applied to Mr. Macar's 1997 return. (T:58; R:651)

The Aerosonic stock was also not listed on the husband's Financial Affidavit, and Mrs. Macar was unaware of this asset at the time of the agreement. (R:652) She had never seen any of the statements on the financial accounts, except through discovery. Mr. Macar had informed her that these accounts were non-marital. (R:652)

Mrs. Macar has a General Education Diploma (GED). Her only vocational training was an introductory course to computers. (R:652) Prior to their marriage she worked as a waitress. (R:533) The Wechsler Intelligence Scale placed her in the low-average range. (R:548) She testified that at the time she entered into the agreement on October 17, 1997, she did not understand what was meant by"non-modifiable

rehabilitative alimony". (R:653)

Mrs. Macar had retained George Snyder, a forensic accountant, to assist her in this proceeding and in the 1994 proceeding. (T:20) The Computation of Net Worth prepared by Mr. Snyder, shows the parties' net assets as being $226,693.00. (T:24; R:584) The assets include the Raymond James account of $27,000.00; the Eaton Vance account of $29,375.00, and the Franklin Funds of $27,127.00. (R:584) These accounts were all designated as “non-marital” on the husband’s financial affidavit. (R:113, 144) The Affidavit had also undervalued the accounts, listing each account as being $25,000.00. (R:144)

Mr. Snyder included the accounts as marital property because there was no indication from the documents provided by Mr. Macar that any of the assets were non-marital. (T:33) Although the wife had requested all documents on each account from its inception, documents had only been provided for the three preceding years. (T:58; R:651) There were no documents produced for any asset that preceded the date of marriage. (T:34, 108)

The Husband was asked what documents he had provided in response to the Request for Production that would substantiate his position that the investment accounts were non-marital. (T:106) He answered that he had "the feeling" that he had produced a copy of the cashier's check for the 1990 sale of the Synklavier. (T:107, ST:32) The Raymond James account was opened at that time, and $55,000.00 or $60,000.00 had gone into the various accounts. (ST:15; T:107) Monies within the Franklin Funds group were moved from fund to fund to maximize profits. (ST:14, 70)

Mr. Macar denied contributing anything further to the annuity account and did not contribute any marital funds to it. (ST:15) All capital gains and distributions and dividends on these accounts were re-invested. (ST:30)

Mr. Macar could not at this hearing identify what, if any, documents he might have previously provided to support his contention that any asset was non-marital. (T;109; ST:27-29)

Mr. Macar had opened the accounts for the children with the proceeds from the sale of his equipment at the Saddlebrook resort. (T:30) He wasn't sure where the accounts were or how much he had invested in them. (ST:31) They were placed under the Uniform Gifts to Minors Act (UGMA), and he had not reported them on his financial affidavit because he thought that they belonged to the children. (ST:31)

The husband believed that he filed his 1996 federal income tax return in August of 1997. He had overpaid the IRS $12,000.00, from marital funds in November, 1996. (ST:33) Mr. Snyder testified that he had not been provided with any documents relating to this overpayment. (T:60) Mr. Macar was "a little foggy" on the $5,170.00 tax refund which he had applied against his own 1997 taxes. (ST:35) The fog persisted when asked whether he had requested permission of his wife to appropriate this sum for his own purposes. (ST:35) The husband had not listed the Aerosonic stock on his Financial Affidavits because it was a premarital asset, and he had forgotten about it. (ST:38)

The testimony was concluded on June 12, 1998, with the Court observing that fundamentally the deal was not fair. The Court had other concerns as well:

> I also have some fundamental concerns about Mrs. Macar's ability to understand what is going on and perhaps even competency based on her demeanor, the manner in which she testifies and I have some serious concerns about it.
>
> I was reviewing my notes and I even had some notes when she was testifying, that she couldn't even tell us why she felt pressure and she is always confused, and I have some serious concerns about that -- " (ST:78)

The trial court announced its ruling on July 13, 1998. (T:112-121). Although the transcript reflects the Hon. Florence Foster presided, this is an error. It was the Hon. Vivian Maye, Circuit Judge, who presided over all hearings on the motion to vacate, including the ruling conference of July 13, 1998.

The Order on Former Wife's Motion for Relief from Judgment was entered on July 28, 1998. (R:509-511) It granted the Motion for Relief of Judgment as to the financial issues, finding in relevant part that:

> 1. That the parties' settlement was fundamentally unfair given the respective situations of the parties, and Mr. Macar had not overcome by substantial competent evidence the presumption that Mrs. Macar lacked adequate knowledge of the parties' assets. (R:509)
>
> 2. Mr. Macar had made incomplete financial disclosure and there were a number of errors in his Financial Affidavit. (R:509)
>
> 3. The psychological tests indicate that the Former Wife is of low-average range intelligence, with reading skills of an eight grade level, math skills at a fourth grade level, and spelling skills at a sixth grade level. The Court has observed her demeanor throughout the many proceedings which have been held. The Court does not know what she understands or what she does not understand but believes that she has probably been confused a majority of the time during these proceedings. (R:510)
>
> 4. The Former Husband controlled the family finances. The Former Wife was not permitted the joint checking account until approximately three years prior to the filing of the instant dissolution of marriage and then was not permitted to write checks without permission.

> She was therefore unaware of all of the family finances, notwithstanding the prior dissolution case of which this Court took judicial notice. (R:510)
>
> 5. The Court does not believe that the Fourth District case of *Petracca v. Petracca*, 706 So.2d 904 (Fla. 4th DCA 1998), is controlling, and this Court will adhere to the standards of *Casto v. Casto*, 508 So.2d 330 (Fla. 1987). (R:510)

The Wife dismissed her appeal in Case No. 97-5402 on August 20, 1998. (R:513) On August 24, 1998, the Husband filed a Notice of Appeal from the Order Granting Relief from Judgment. (R:514)

The Husband filed his Notice of Appeal on August 24, 1998. (R:514) The opinion of the Second District Court of Appeal was issued on June 30, 2000, reversing the trial court's order. The wife filed a timely Motion for Rehearing and for Rehearing *en Banc*, and a Motion for Certification of Great Public Importance. An order was entered November 3, 2000, denying the Motion for Rehearing and for Rehearing En Banc. Certification of conflict was granted, and a substituted opinion was issued on November 3, 2000, holding that overreaching and duress are not grounds for relief from a judgment pursuant to rule 1.540. (A-2, 3) Conflict was certified with the opinion of *Goodstein v. Goodstein*, 649 So.2d 273 (Fla. 3d DCA 1995), which held to the contrary. The Mandate was issued on November 29, 2000.

The wife served on November 27, 2000, a Notice to Invoke Discretionary Jurisdiction. This Court's Order Postponing Decision on Jurisdiction and Briefing Schedule was entered on January 11, 2001, directing that Petitioner's Initial Brief be served on or before February 5, 2001. This Initial Brief is submitted pursuant to that Order.

SUMMARY OF THE ARGUMENT

I

THE *CASTO* FACTORS SHOULD APPLY WHEN A RULE 1.540 CHALLENGE IS MADE TO THE VALIDITY OF A MARITAL SETTLEMENT AGREEMENT THAT HAS BEEN INCORPORATED INTO THE FINAL JUDGMENT .

The trial court correctly applied the *Casto* analysis and set aside the financial aspects of the parties' last-minute, verbal agreement, which had been incorporated into the Final Judgment of Dissolution of Marriage. *Casto* does not add new grounds for the vacating of judgments. Rather, it defines the methods by which these grounds can be proven. Furthermore, the successful challenge of postnuptial agreements on the basis of fundamental unfairness, through rule 1.540 proceedings, pre-date *Casto.*

Post- *Casto* rule 1.540 proceedings have been recognized by the First, Third, and Fourth District Courts of Appeal, and the *Macar* decision represents a direct conflict with these cases. It would be against public policy to restrict *Casto* to only those agreements which were made well before the "courthouse steps", where a pre-judgment challenge is possible. The trial court's ruling should be reinstated.

II

APART FROM *CASTO* CONSIDERATIONS, THERE WAS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT VACATING THE AGREEMENT PURSUANT TO RULE 1.540, AND THE DISTRICT COURT EXCEEDED ITS AUTHORITY IN REVERSING THE TRIAL COURT.

Rule 1.540 covers not only "fraud" and "misrepresentation", but also "other acts of misconduct". False financial affidavits and misrepresentations of the designations

and values of assets are, at the very least, "misconduct" or "misrepresentation", if not actual fraud.

The Second District was incorrect in holding that duress and overreaching are not grounds under rule 1.540, and there are numerous Florida cases which hold to the contrary.

The "errors and omissions" made by Mr. Macar are not insubstantial, and the Second District incorrectly substituted its own judgment for that of the trial court when it characterized these errors as such. The District Court further exceeded its authority when it "second-guessed" the trial court on Mrs. Macar's knowledge, or presumed knowledge, of the parties' assets at the time she agreed to this settlement. The trial court's ruling vacating the financial aspects of that settlement should be reinstated.

ARGUMENT

I

THE *CASTO* FACTORS SHOULD APPLY WHEN A RULE 1.540 CHALLENGE IS MADE TO THE VALIDITY OF A MARITAL SETTLEMENT AGREEMENT THAT HAS BEEN INCORPORATED INTO THE FINAL JUDGMENT.

STANDARD OF REVIEW: The standard is one of *de novo* because the District Court of Appeal misapplied the law in reviewing a R.C.P. 1.540 motion to vacate a post-nuptial agreement.

The Second District refused to apply the *Casto* analysis to the issue of the validity of a marital settlement agreement that had been incorporated into a final judgment. It was the Court's opinion that rule 1.540 does not incorporate the *Casto* analysis, and that the only way the wife could obtain relief from that judgment was by direct appeal or pursuant to rule 1.540. The Court further declared:

> We recognize that in *Goodstein v. Goodstein*, 649 So.2d 273 (Fla. 3d DCA 1995), the Third District affirmed an order setting aside a property settlement agreement on the grounds of overreaching and duress, even through the agreement was incorporated into a final judgment. Overreaching and duress are not grounds for relief from a judgment pursuant to rule 1.540. As a result, to the extent our holding cannot be reconciled with the holding of *Goodstein*, we certify conflict with that opinion.

Goodstein involved the appeal from the trial court's granting of the wife's petition to set aside a property settlement agreement and entering an amended final judgment. The basis for the court's setting aside the agreement was overreaching and duress. The Third District held that the trial court had correctly applied the *Casto*

standard where there was competent substantial evidence to support the trial court's findings of fact that the agreement was "the result of the Husband's overreaching and duress", citing to *Herzog v. Herzog*, 346 So.2d 56 (Fla. 1977). *Goodstein*, 649 So.2d at 275.

Casto v. Casto, 508 So.2d 330 (Fla. 1987), established the grounds for setting aside postnuptial agreements. These standards had earlier been applied to ante-nuptial agreements in *Del Vecchio v. Del Vecchio*, 143 So.2d 17 (Fla. 1962). Pursuant to *Casto*, there are two separate grounds by which a postnuptial agreement may be vacated or modified:

> 1. By establishing that it was reached under fraud, deceit, duress, coercion, misrepresentation, or overreaching. This has been described as the "direct method" because it involves affirmative proof of fraud, misstatements, deceit, etc. *Baker v. Baker*, 394 So.2d 465, 466 (Fla. 4th DCA 1981).
>
> 2. The second or "indirect method", consists of multiple elements:
>
> A. First, the challenging spouse must establish that the agreement makes an unfair or unreasonable provision for that spouse, given the circumstances of the parties. Considering the parties' relative ages, health, education and financial status, the trial court may find that the agreement is facially unreasonable because it does not adequately provide for the challenging spouse and is, consequently, unreasonable.

B. Once the challenging spouse has established that the agreement is unreasonable, a presumption arises that there was concealment on the part of the defending spouse or a presumed lack of knowledge by the challenging spouse of the other's spouse's finances at the time the agreement was reached. The burden then shifts to the defending spouse, who may rebut the presumptions by showing either:

1) that there was a full, frank disclosure to the challenging spouse before the agreement was signed; or

2) the challenging spouse had a general and approximate knowledge of the character and extent of the marital property sufficient to obtain a value by reasonable means, and had a general knowledge of the income of the parties. The test is the adequacy of the challenging spouse's knowledge at the time of the agreement and whether that spouse was prejudiced by the lack of information. *Casto*, 508 So.2d at 333.

The wife's challenge to the agreement in *Casto*, however, was made prior to the final judgment. Consequently, it was not a rule 1.540 proceeding. Nonetheless, the applicability of the *Casto* analysis in such proceedings has been recognized not only by the Third District, but also by the First and Fourth Districts.

Osherow v. Osherow, 757 So.2d 519, 522 (Fla. 4th DCA 2000), was an appeal by the wife from the trial court's denial of her rule 1.540 motion to vacate an agreement on the basis of duress and extortion. The Fourth District affirmed the denial of the Wife's motion based on the premise that the trial court has the ultimate

discretion in deciding whether to vacate the agreement, and the appellate court found no abuse of discretion.

The *Osherow* case is significant because it referred to *Casto* for the requisite grounds to vacate an agreement. See also *Brighton v. Brighton*, 517 So.2d 53, 55 (Fla. 4th DCA 1987)(court utilized *Casto* grounds, reversing a post-judgment order setting aside an agreement on the basis that it did not meet the *Casto* requirements.)

The First District also used the *Casto* test in reviewing an order granting a motion to set aside a marital settlement agreement that had been incorporated into the final judgment. *Champion v. McDaniel*, 740 So.2d 17, 19 (Fla. 1st DCA 1999). The trial court's order was reversed, however, because the challenge was not filed within one year of the judgment. Still, the First District referred to *Casto* in determining that even if the petition had been timely filed, the facts of the case did not substantiate a finding of fraud under *Casto*.

Public policy favors the termination of litigation. This, however, must be weighed against the public policy of filing accurate financial affidavits, which must take priority in dissolution actions. *DeClaire v. Yohanan*, 453 So.2d 375, 376 (Fla. 1984); Fla. Fam.L.R.P. 12.540.

It must also be weighed against the public policy of promoting the amicable settlement of disputes that have arisen during the marriage and of mitigating the potential harm to the spouses and their children caused by the dissolution of the marriage. § 61.001(b)(c), Florida Statutes (1971); *Hitt v. Hitt*, 535 So.2d 631, 633(Fla. 4th DCA 1988).

Courts regularly approve marital settlement agreements. This is to be encouraged. But settlements must also meet the proper requirements of fairness and disclosure. *Belcher v. Belcher*, 271 So. 2d 7, 10 (Fla. 1972). Unfortunately, they frequently occur "on the courthouse steps", at a point where there is no opportunity prior to final hearing to challenge the settlement. The fact that settlements occur at the last minute should nevertheless not be discouraged. Parties resolving their differences voluntarily is always preferable to a court 's resolving their future. The likelihood of compliance with an agreement is far greater than that with a judgment determined by the court. A settlement establishes an important step in cooperation between the parties for the benefit of all concerned, particularly that of the minor children.

It is illogical and contradictory to the principles of fairness and disclosure to restrict *Casto* to those cases where the parties have reached a settlement well before the courthouse steps. Not only does this restriction not encourage last-minute settlements, it may well discourage them.

In actuality, the grounds provided in *Del Vecchio* and *Casto* are not in conflict with or in addition to those set out in rule 1.540. As observed in *Baker*, the *Casto* analysis is actually two methods by which agreements can be modified or set aside: The direct method, and the indirect method. The direct method is by an affirmative showing of fraud, deceit, misrepresentation, overreaching, coercion, etc. *Baker*, 394 So.2d at 466. This is essentially the same basis as provided by rule 1.540(b)(3): "Fraud, misrepresentation or other misconduct".

The second ground, or "indirect method", provides the vehicle for a party to present a rebuttal presumption that the other party concealed information, i.e. "Fraud, misrepresentation or other misconduct", by showing that the agreement is facially unreasonable. This "indirect method" can be analogized to the imputing of income through evidence that the spouse spent $100,000 while claiming income of only $30,000. As with the imputation of income, there are cases where direct evidence is simply unavailable.

Challenging postnuptial agreements on the basis of unreasonableness through a rule 1.540 motion pre-date *Casto*. The Second District case of *DeMaggio v. DeMaggio*, 317 So.2d 848, 850 (Fla. 2d DCA 1975), was an appeal from the denial of a rule 1.540 motion to set aside a settlement agreement. The Second District, citing to *Del Vecchio,* found that the facts gave rise to a presumption of fraud. The presumption of fraud arose not only from the circumstances under which the agreement was signed but from the "grossly disproportionate" settlement of the marital assets. The denial of the motion was reversed, with directions to set aside the agreement.

The 1982 case of *Kerns v. Kerns*, 409 So.2d 137 (Fla. 4th DCA 1982), involved a post-judgment motion to vacate a settlement agreement which had been incorporated into the final judgment. The petition alleged that the agreement was inequitable to the wife and its benefits disproportionate to the husband. The petition had been dismissed by the trial court. The Fourth District reversed the dismissal, commenting:

> It has become equally well established, however, that if such an agreement is unreasonable on its face then a presumption of concealment

> arises and the burden shifts to the proponent of the agreement to prove its validity. *Del Vecchio v. Del Vecchio*, 143 So.2d 17 (Fla. 1962); *Baker v. Baker, supra*. . . . .

The Third District case of *Moss-Jacober v. Moss*, 334 So.2d 89 (Fla. 3d DCA 1976), was another case wending its way to the appellate court via a post-judgment action to set aside a settlement agreement on the basis of unconscionability. In affirming the trial court's order setting it aside, that Court noted:

> The law is well established that a separation, support or property settlement agreement obtained by fraud, overreaching, concealment, duress or coercion is not binding and a court which has entered a decree based upon, or incorporating, such an agreement may set aside and annul it. See *Miller v. Miller*, 134 Fla. 725, 184 So. 672 (1938); *Gelfo v. Gelfo*, Fla.App. 1967, 198 So.2d 353 and 10A Fla.Jur. Dissolution of Marriage § 24 (1973). ...

It is apparent from the foregoing cases that even before *Casto*, the courts have used those same grounds to grant relief under rule 1.540 from an unfair or disproportionate marital agreement. The Second District erred in refusing to apply *Casto* to the present case, and the trial court ruling should be reinstated.

II

APART FROM *CASTO* CONSIDERATIONS, THERE WAS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT VACATING THE AGREEMENT PURSUANT TO RULE 1.540, AND THE DISTRICT COURT EXCEEDED ITS AUTHORITY IN REVERSING THE TRIAL COURT.

STANDARD OF REVIEW: The standard of review is one of *de novo* because the Second District exceeded the appropriate standard in reviewing a discretionary act of the trial court.

The Second District decided that there was no basis under rule 1.540 for relief from judgment because the trial court had not specifically found fraud on the part of the husband and because there was no newly discovered evidence. The Court further declared that overreaching and duress are not grounds for relief from a judgment under that rule. This is not correct. To quote from Trawick:

> Fraud has not been precisely defined because of its many varieties and the fear that definition would lead to circumvention. It is an act or omission of the successful party that results in a judgment obtained by misrepresentation, artifice, trickery, duress, coercion, overreaching or circumvention. Misrepresentation and other misconduct have been included as grounds for relief in conjunction with fraud to give wide scope to the basis for relief and to eliminate artificial distinctions between types of misconduct. Trawick, Fla. Prac. And Proc., § 26-8 (1998).

Overreaching and duress have long been recognized as grounds for relief under rule 1.540 by the Florida Supreme Court and several District Courts, including the Second District. *Masilotti v. Masilotti*, 29 So.2d 872, 873 (Fla. 1947); *McCormick v. McCormick*, 181 So.2d 220, 222 (Fla. 2d DCA 1965), cert. denied, 188 So.2d 807,

FN2 (Fla. 1966)(recognizing duress); *Osherow v. Osherow,* 757 So.2d 519 (Fla. 4th DCA 2000)*; Kerns v. Kerns*, 409 So.2d 137, 138 (Fla. 4th DCA 1982); *Baker v. Baker*, 394 So.2d 465, 466 (Fla. 4th DCA 1981); *Bockoven v. Bockoven*, 444 So.2d 30, 32 (Fla. 5th DCA 1983); *Bakshandeh v. Bakshandeh*, 370 So.2d 417, 418 (Fla. 3d DCA 1979).

Rule 1.540(b)(3), Florida Rules of Civil Procedure provides for relief from judgment for fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party. The rule provides for equitable relief and should be liberally construed. *Lacore v. Giralda Bake Shop, Inc.*, 407 So.2d 275, 276 (Fla. 3d DCA 1981). It does not contemplate merely affirmative misrepresentation. "Misconduct" includes the omission of a material fact. *Crowley v. Crowley*, 678 So.2d 435 (Fla. 4th DCA 1996) (wife failed to disclose that the husband was about to be fired); *Baker,* 394 So.2d at 465 (husband's inaccurate designation of his office and equipment as being non-marital constitutes fraud and deception); *Kimbrough v. McCranie*, 325 So.2d 70 (Fla. 1st DCA 1976)(falsely stating the amount of damages); *Scales v. Scales*, 237 So.2d 50, 51 (Fla. 3d DCA 1970) (allegation that secreting of assets and false representations as to husband's net worth constitute grounds for a rule 1.540 motion for fraud).

The Motion for Relief of Judgment filed by Mrs. Macar alleged fraud, misrepresentation and overreaching on the part of Mr. Macar concerning misrepresentations on his financial affidavit and in his answers to interrogatories, and alleged newly discovered evidence. (R:398-404) The misrepresentations concerned

the classification of certain marital assets as being non-marital; the failure to list certain assets, and the wrong valuation of certain assets. The motion also alleged coercion and duress; that it was unfair and inequitable to the Wife, who did not have a general and approximate knowledge of the parties' assets.

The importance of accurate financial affidavits is evidenced by Rule 12.540, Florida Family Law Rules of Procedure, which provides that rule 1.540 shall govern general provisions concerning relief from judgement, "except that there shall be no time limit for motions based on fraudulent financial affidavits in marital or paternity cases." The purpose of rule 12.540 was to expand the time limits under rule 1.540 after this Court's decision in *DeClaire v. Yohanan*, 453 So.2d 375, 380 (Fla. 1984). The husband had filed a false financial affidavit in *DeClaire*. Because this Court found that such fraud was intrinsic and not fraud on the court, the action to set aside the property settlement agreement was barred by the one-year time limitation of rule 1.540. The trial court in the *Macar* case heard testimony on three different days. It listened to both parties and their witnesses, including the wife's accountant. The court found that the agreement was indeed fundamentally unfair and that Mr. Macar had not overcome the presumption that Mrs. Macar lacked adequate knowledge of the parties' assets.

The District Court opinion ignored a significant fact when it held that Mrs. Macar had, or should have had, adequate knowledge of the parties' assets. The trial judge placed considerable emphasis on evidence that Mrs. Macar is of low-average range intelligence. Her reading skills are at an eighth- grade level, her math skills at

a fourth- grade level, and her spelling skills are at a sixth-grade level. The trial court observed her demeanor throughout the various proceedings and was of the opinion that she was probably confused a majority of the time. (R:510)

Secondly, while the record reflects that extensive discovery was taken, the testimony and evidence presented at the hearing on the motion to vacate reflected that the husband had *not* provided the documentation necessary for the wife's counsel to confirm that the investment accounts were indeed marital. These accounts comprised the bulk of the parties' assets. The District Court opinion noted that he had produced three years' worth of documents on the disputed investment accounts but that the wife had not sought to compel any additional discovery prior to trial. The three years' worth of documents, of course, did not comply with the wife's request for production or interrogatories because no documents were produced to support Mr. Macar's contention that the investment accounts were non-marital. The District Court erroneously concluded that this constituted substantial compliance with discovery and disclosure requests.

This finding exceeds the role of an appellate court. A motion to vacate is within the sound legal discretion of the trial court based upon the particular facts of the case. The trial court had observed Mrs. Macar and her confusion. Its determination that the wife did not have sufficient information at the time she entered the agreement should not be disturbed unless it is clear that there is an abuse of discretion. *Alabama Hotel Co. v. J.L. Mott Iron Works*, 98 So. 825 (Fla. 1924). It is not an abuse of discretion if there is substantial competent evidence to support the trial court's ruling.

There were two substantial assets which Mr. Macar had erroneously designated and undervalued. The trial court found that two investment accounts, valued by the husband at $25,000.00 each were not "non-marital". Furthermore, his valuations were short by as much as $4,000 each. The trial court also found that Mr. Macar had failed to list a $5,270.00 joint tax refund on his financial affidavit, which the evidence showed he had appropriated to his own use. The fact that he had misappropriated it to his own use is not only misconduct but also, incidentally, constituted newly discovered evidence. (R:651) The husband had also failed to list the children's UGMA accounts. (St:31)

The District Court referred to these errors as a "few mistakes or omissions", implying that the errors were not fraud because they were insignificant and would not have made a substantial difference. Should the three investment accounts prove to be marital, Mr. Macar would have misrepresented the marital estate by $83,509.00. This is in addition to the $5,170.00 tax refund and an unknown amount in the children's investment accounts. Considering that the husband had contended that the marital estate was only $89,274.00, this sum is hardly inconsequential. (R:504)

The record reflects that Mr. Macar never did reveal the amounts in the children's accounts. While these accounts were for the benefit of the children, they were nonetheless marital property and should have been accounted for. The wife's lack of knowledge of these accounts at the time she made the verbal agreement deprived her of the opportunity to have any control over the maintenance of these accounts.

It was within the trial court's discretion to determine whether the extent of the husband's compliance with discovery and disclosure was sufficient to provide the wife with a general and approximate knowledge of the marital assets, particularly given evidence of the wife's limited mental capability. The trial court had the benefit of reviewing the documentation provided, listening to the witnesses and observing their demeanor. It determined that Mr. Macar's financial disclosure was *not* sufficiently complete to overcome the presumption that Mrs. Macar lacked an adequate knowledge of the parties' assets.

The District Court's opinion presents the appearance that the Court substituted its judgment as to witness credibility for that of the trial court. This is not the role of the reviewing court. It is submitted that the District Court exceeded its powers of review by substituting its judgment not only as to the significance of the "few errors", but also as to the extent of Mrs. Macar's knowledge at the time of the settlement. This is erroneous, and the trial court's order should be reinstated.

Assuming, *arguendo*, that Mr. Macar's false financial affidavit, with its omissions and mistakes, do not rise to the level of fraud, it certainly constitutes "misrepresentation or other misconduct" under rule 1.540. It does not matter that the trial court order did not specifically find "fraud" or "misconduct". If there is anything in the record to support the court's ruling, the appellate court *must* affirm it. *Landis v. Allstate Ins. Co.*, 516 So.2d 305 (Fla. 3d DCA 1988). Further, if there is ample and competent evidence to support the trial court's exercise of discretion, the appellate court cannot interfere with that determination. *Posner v. Posner*, 257 So.2d 530 (Fla.

1972); *Del Vecchio v. Del Vecchio*, 143 So.2d 17, 20 (Fla. 1962); *McCormick v. McCormick*, 181 So.2d 220 (Fla. 2d DCA 1965). There was ample evidence in the record to support vacating the agreement pursuant to rule 1.540.

Although the trial court found no coercion by the husband, the record supports the trial court's finding that the husband had misrepresented the parties's assets on his financial affidavit. (R:509) There was also ample evidence to support a finding of "other misconduct" in that the husband, unbeknownst to the wife, had appropriated the 1996 tax refund, which was marital asset, to his own use.

The Second District did not specifically approve the decision of *Petracca v. Petracca*, 706 So.2d 904 (Fla. 4th DCA 1998), but it noted that the circumstances were somewhat similar in that the parties in both cases had been involved in extensive litigation. *Petracca* held that *Casto* limits setting aside settlement agreements to those cases where there is a claim of fraud , coercion, or inadequate disclosure of financial resources. *Id.* at 913. The Second District implied that Mrs. Macar should have discovered the omission prior to entering the verbal agreement.

It is submitted that this overlooks the basic intent of rule 12.540 and the mandatory disclosure of 12.285, Florida Family Law Rules of Procedure, which is that each party to a dissolution has the obligation to reveal *all* assets and debts. The fact that Mrs. Macar's trial attorneys did not, for whatever reason, move to compel Mr. Macar's complete answers to interrogatories and request for production does not excuse him from the omissions and misrepresentations on his financial affidavit. These accounts were set up during the marriage and were presumably marital. Trial

by ambush is not the *modus operandi* of Florida courts. As this Court commented in *DeClaire*:

> . . . When an issue is before a court for resolution, and the complaining party could have addressed the issue in the proceeding, such as attacking the false testimony or misrepresentation through cross examination and other evidence, then the improper conduct, even though it may be perjury, is intrinsic fraud and an attack on a final judgment based on such fraud must be made within one year of the entry of the judgment. 453 So.2d at 380.

Mrs. Macar's trial attorneys may have relied on the fact that Mr. Macar had no such supporting evidence when he failed to produce the information in response to the discovery requests. It was, after all, his burden to prove a non-marital status of the assets.

Interestingly, Mr. Macar never produced any supporting evidence even at the hearing on the Motion to Vacate.

The trial court's ruling was based on evidence which falls within the parameters of rule 1.540. Aside from the issue of the *Casto* analysis, the District Court erroneously substituted its judgment for that of the trial court in determining otherwise. The trial court's ruling should be reinstated.

CONCLUSION

Petitioner requests that this Court assume jurisdiction pursuant to Rule 9.030(a)(2)A(vi), Florida Rules of Appellate Procedure and reinstate the order of the trial court vacating the settlement agreement as it related to the financial issues of the parties.

Respectfully submitted,

VIRGINIA R. VETTER
VETTER & HUNTER
4144 N. Armenia Ave., Ste. 210
Tampa, FL 33607
(813) 673-8200
FBN 221902
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Amended Initial Brief has been served by regular U.S. mail on February 8, 2001, on Peter J. Hobson, Attorney for Respondent, at PO Box 291100, Tampa, FL 33687-1100.

VIRGINIA R. VETTER
VETTER & HUNTER
4144 N. Armenia Ave., Ste. 210
Tampa, FL 33607
(813) 673-8200
FBN 221902
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief has been prepared in Times New Roman 14-point proportional font, in accordance with Rule 9.210(a)(2), Florida Rules of Appellate Procedure

VIRGINIA R. VETTER
VETTER & HUNTER
4144 N. Armenia Ave., Ste. 210
Tampa, FL 33607
(813) 673-8200
FBN 221902
Attorney for Petitioner

APPENDIX

INDEX TO APPENDIX

Document	Item No.
Order of November 3, 2000	A-2
Opinion of Second District Court of Appeal, November 3, 2000	A-3