

IN THE SUPREME COURT OF FLORIDA

SHERRY PALICTE ZOLD,  
Petitioner,

vs.

JOHN F. ZOLD,  
Respondent.

Supreme Court Case No. SC04-1858  
5th DCA Case No. 5D03-148, 5D03-2117  
Trial Court (Orange County) Case No. DR01-1145

RESPONDENT'S ANSWER BRIEF

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## INTRODUCTION

The Wife, SHERRY PALICTE ZOLD, was the Appellee in the Fifth District Court of Appeal and was the Petitioner at the trial level with respect to a Petition For Dissolution of Marriage. The Petitioner shall be referred to as "Petitioner" or "Wife". The Respondent is JOHN F. ZOLD, the Appellant in the Fifth District Court of Appeal. The Respondent shall be referred to as "Respondent" or "Husband".

The decision of the Fifth District Court of Appeal is included herein as Appendix A and shall be indicated by the abbreviation "App." References to the appellate record shall be indicated by the abbreviation "R". References to the trial transcript shall be indicated by the abbreviation "T". References to the attorney's fees portion of the trial shall be indicated by the abbreviation "TAF."

Pages 33-40 of the transcript of proceedings from August 13, 2001 are included herein as Appendix B. The Wife's Initial Brief contains references to the transcript of those proceedings and the Husband's Answer Brief responds to said references. No part of that transcript was made part of the Record.





STATEMENT OF CASE

The Husband/Respondent supplements the Petitioner's/Wife's Statement of the Case as set forth in her Initial Brief as follows:

The Husband/Respondent filed an appeal from the Final Judgment of Dissolution of Marriage in the Fifth District Court of Appeal, Case No. 5D03-148. (R 1564-1598) While that appeal was pending, a hearing was held regarding attorney's fees. The Final Judgment on Attorney's Fees on Dissolution of Marriage was rendered June 6, 2003. (R 2089-2098) The Final Judgment on Attorney's Fees on Interlocutory Appeal After Remand from Appellate Court was also rendered June 6, 2003. (R 2086-2088)

On June 23, 2003, the Husband filed a Notice of Appeal regarding attorney's fees and requested that appeal be consolidated with Fifth District Court of Appeal Case No. 5D03-148. (R 2099-2113) By order dated July 15, 2003 the appeals were consolidated. (R 1866)

In the Fifth District Court of Appeal Case No. 5D03-148 the Husband challenged:

1. The trial court's finding that the Husband holds a 57.15428% ownership interest in Tri Tech Electronics, Inc.
2. The trial court's authority to enter an order which affects the rights and interests of Tri Tech Electronics, Inc., without having enjoined the corporation as a party.
3. The trial court's ruling requiring the Husband to "buy out" the Wife's interest in Tri Tech Electronics, Inc.,

under financial terms and conditions which are impossible for him to meet.

4. The trial court's attributing corporate K-1 income to the Husband for purposes of determining support obligations.
5. The trial court's attributing income from the Husband's stock ownership as both an asset for distribution and as income for support.
6. The trial court's ordering the Husband to pay monthly support obligations which leave him without sufficient funds with which to support himself.
7. The trial court's award of permanent periodic alimony to the Wife.

In the Fifth District Court of Appeal Case No. 5D03-2117, the Husband raised the issue that the trial court's combined orders requiring him to contribute \$94,000.00 (plus interest) towards the Wife's attorney's fees and costs was an abuse of discretion and was based on findings not supported by competent substantial evidence.

The opinion of the Fifth District Court of Appeal was filed June 25, 2004. (App. 1-6) The appellate court narrowed the issues to just two: (1) the percentage of ownership of Tri Tech Electronics, Inc., held by the two shareholders and the value of the Husband's shares of the corporation's stock and (2) the income available to the Husband from the corporation. (App. 2) As to the value of the Husband's shares of stock, the Court affirmed the lower court's finding that the Husband owned

57.15428% and ruled there was substantial competent evidence in the record to support that finding. (App. 5)

As to the Husband's income, the court vacated the portions of the Final Judgment that made findings as to the Husband's income and the portion ordering support and equitable distribution. The court also vacated the two awards of attorney's fees to the Wife. (App. 5) The court remanded with the following instructions:

1. Make findings as to the amount of income available to John (Husband) for the purposes of support for Sherry (Wife), his child and himself without considering any undistributed Sub Chapter S income to shareholders unless it can be demonstrated that Tri Tech Electronics, Inc., has delayed distributions of cash for purposes other than corporate requirements.
2. Award such amounts of alimony and child support based upon the finding of income available to John.
3. Structure a realistic method of payment of support and equitable distribution and, if awarded, attorney's fees, so that John has the ability to successfully retire the debt with a sufficient remainder for his living expenses. The payments should not be so large as to guarantee John's failure to satisfy the obligations imposed by the judgment. (App. 5-6)

The Petitioner and the Respondent filed Jurisdictional Briefs and this court accepted jurisdiction.

### STATEMENT OF FACTS

The Respondent supplements and disputes the Petitioner's Statement of the Facts as follows:

The parties, SHERRY P. ZOLD and JOHN F. ZOLD, were married in Newport Beach, California, on May 9, 1982. (T 257) The Wife filed the Petition for Dissolution of Marriage on January 26, 2001. (R 1-7) At the time of trial the Wife was 50½ years old (T 366) and Husband was 63½ years old. (T 921)

One child was born of the marriage, John Douglas Zold. He was 15½ years old at the time of trial. (T 271) The parties agreed to joint custody by stipulation during trial. (R 1586-1595; T 555-559)

The Wife is a high school graduate and attended one year of college. (T 259-260) Prior to this marriage, the Wife was employed as a secretary earning \$20,000.00 per year. (T 368) During the marriage, she was a full-time housewife and mother and did not work outside the home. (T 294) Although the Wife has some medical problems, the trial court did not identify any which would prevent her from seeking employment and becoming self-supporting.

In the early years of the marriage the couple moved several times for reasons associated with the Husband's employment. (T 310-313) In 1988, the couple purchased the marital residence which was valued at \$195,000.00 encumbered by a mortgage of \$58,571.00. (R 1584-1585; T 313) This valuation was not disputed.

Also in 1988, the Husband purchased Tri Tech Electronics, Inc.[herein "Tri Tech"] (T823) Tri Tech is a manufacturing company with government defense contracts. (T 210-211) It is incorporated as a Sub-Chapter S corporation with two shareholders, August J. Stanton, an attorney and member of the Florida Bar, and the Respondent, John F. Zold. The Husband's personal tax return and the amended corporate records for 2000, as well as the Husband's 2001 tax return and the 2001 corporate records, show the Husband holds a 40% interest in Tri-Tech and Mr. Stanton holds a 60% interest. (T 710-711, 597)

As a result of the company's election to be taxed as a Sub Chapter S corporation, Tri Tech's annual income is "passed through" to the shareholders in accordance with their ownership percentage. That income is reported as K-1 income on their personal income tax returns and is taxed at the shareholder's individual tax rate. (T 735, 743)

The amount of K-1 income generated by the corporation fluctuated dramatically in the three years prior to trial. As a result, so did the total gross income shown on the Husband's tax returns (R1104-1128):

	<u>1999</u>	<u>2000</u>	<u>2001</u>
K-1 Income:	10,855.00	64,070.00	147,265.00
Total Gross Income:	87,930.00	147,721.00	245,288.00

The Tri Tech shareholders do not actually receive distributions of cash equal to the K-1 income shown on their tax returns. (T 735-736, 743) The corporation's accountant, John Lykkebak, explained that since the time the corporation

was formed, K-1 income has always been shown on the Husband's personal return for tax purposes only. (T 735) Mr. Lykkebak testified the corporation does not distribute total corporate earnings because, "That money was simply not available for distribution".(T 736) The corporation requires the cash be retained as working capital to maintain the business operations and to pay down debt. (T 736)

Historically, distributions were \$5,000.00 per quarter to each shareholder.(T 610) In some years, the cash balance was zero (T 740) and Mr. Stanton had to loan the corporation money. (T 622) In those years, no distributions could be made. In 2001 the Husband received a distribution of \$40,000. (T 748)

The Husband is President and Chairman of the Board of Directors and handles the day to day management of the corporation. At trial several witnesses testified as to the Husband's compensation from the corporation for purposes of establishing his actual income available for support purposes.

The Husband testified his 2001 total gross compensation, including non-cash benefits, was approximately \$160,000.00 (T 973-974) That figure included: (1) his base salary; (2) his \$40,000.00 distribution; (3) a check to cover his 2000 K-1 tax liability; (4) the cost of the premiums of his life insurance policy; (5) medical insurance for his son, the Wife and himself; (6) cost of a car including insurance and gas and (7) the use of a credit card for business purposes. (T 972- 975) The Husband testified that his 2002 compensation would be

\$20,000.00 less because the corporation was only going to be able to make a \$20,000.00 distribution to each shareholder in 2002. (T 974)

John Lykkebak, the corporation's CPA, has prepared both the corporate tax returns and the Husband's personal returns since the corporation was formed in 1988. (T 695, 698, 699-700) Mr. Lykkebak testified that in 2001 the actual net income the Husband received from the corporation was his gross salary of \$81,459.00, less \$13,061.00 of taxes withheld, and a distribution of \$40,000.00. He also received a check for \$23,416.00 to cover his additional tax liability that resulted from the K-1 pass through income for 2000 which he turned over to the government. (T 747,748) Those numbers show disposable net income of \$108,398.00.

Mr. Stanton, the Husband's partner, testified he understood the Husband's income from the corporation to be approximately \$100,000.00. (T 620) This testimony is corroborated by the Wife. While she could not say exactly what the Husband earned, the Wife testified: "He's always told me he made in the 100's; he's always bragged about it." (T 375)

The Husband's compensation from Tri Tech is the only source of income available to him to satisfy the financial obligations imposed by the trial court. (App. 2) Pursuant to the Final Judgment and the two orders on attorney's fees, the Husband's monthly court ordered obligations include:

\$1,797.66	Payment on balance of \$372,088.00 lump sum distribution
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5,000.00	Permanent alimony
520.00	Child support
<u>1,000.00</u>	Payment towards \$94,000.00 of the Wife's attorney's fees
\$8,317.70	

The Husband was also ordered to pay premiums on a \$500,000.00 life insurance policy, health and dental insurance, and one half of the son's expenses for clothing, schooling, entertainment and uninsured medical expenses. In addition, the Husband was ordered to make a lump sum payment of \$172,088.50 to the Wife as partial payment of her share of the distribution of assets. (App. 2)

At the time of trial there were no savings or checking accounts and no cash on hand attributed to either party. The marital assets were valued at \$1,138,594.00 which the court divided as follows: (R1583-1586)

To Wife:

Marital Home	\$195,000.00
T Row Price IRA	8,610.00
Jewelry	8,000.00
Furniture	20,000.00
1999 Mercury Van	13,450.00
Lump Sum Distribution	372,088.50 (Payable w/interest)
Less Liabilities	<u>( 85,721.00 )</u>
	\$531,427.50

To Husband:

Tri Tech Stock	\$890,000.00
Life Insurance	13,525.00
Less Wife's Dist.	<u>(372,088.50)</u>
	\$531,436.50

The trial court determined that the Husband had the ability to meet these obligations based upon the finding that the Husband's income was \$245,388.00. That determination is based solely on the gross income reported on his 2001 tax



return which is comprised of the following: (R 1120-1128)

Line 7 (Wages, salaries...)	\$ 81,459.00
Line 8(a) (Taxable Interest)	2,242.00
Line 9 (Ordinary Dividends)	.53
Line 13 (Capital Gain)	.00
Line 14 (Other Gains/losses)	(1,540).00
Line 15(a) (IRA Distributions)	15,909.00
Line 17 (K-1 Income from S Corp)	147,265.00

At trial and on appeal, the Husband maintained that because he did not actually receive the full amount of K-1 income shown on his tax returns, it should not have been included as income for purposes of determining support obligations and attorney fee contributions.

At trial and on appeal, the Wife maintained that K-1 income is automatically included in a payor spouse's total income, whether he/she receives it or not. The Wife maintains the K-1 income should be attributed to the Husband in this case, because he has exclusive control over whether or not it is distributed to the shareholders. The Husband rejects that fact as a misinterpretation of his actual trial testimony.

At page eight of her Initial Brief, in the Statement of the Facts, the Wife makes the following representation to this Court;

"Husband testified that he is the person who controls whether distributions take place." Citing pages 512-513 of the trial transcript.

The discussion of distributions referred to in the Wife's Brief begins at page 511 of the trial transcript wherein the Wife's attorney asked the following questions and the Husband

gave the following responses:

Q. "Now, Mr. Zold, you also received distributions in the year 2001, didn't you, sir?"

A. Yes, I did.

Q. And you're the one in your corporation who controls whether or not those distributions take place, isn't that true, sir?

A. No, that's not true. That's totally not true."

(T 511)

At trial, the Wife's counsel attempts to impeach the above quoted testimony with references to page 33 of a transcript of a prior proceeding. At an August 13, 2001, hearing, the Husband was asked who in the corporation controls whether or not distributions take place. He answered, "Me." It is this response which the Wife relies upon for the assertion that the Husband testified he controls distributions. That was not his testimony at trial. Nor is it an accurate representation of his testimony at the August 13, 2001 hearing. (T 511-513)

In preparation of this Brief, the Husband's counsel looked for the transcript of that hearing to determine if the Husband's response was taken out of context and/or if some further explanation of how distributions are determined was given. No transcript of the August 13, 2001 proceeding was made part of this record and the Husband's counsel had no copy thereof.

The undersigned counsel contacted the opposing counsel's

office to request the transcript. Pages 33 through 40 of what are purported to be pages from the transcript of the August 13, 2001 hearing were provided and are attached hereto as Appendix B. The Husband's testimony regarding how (and who) determines whether distributions will be issued was, in fact, taken out of context. The full exchange is:

Q. "And who is it in your corporation who controls whether or not such distributions take place?"

A. Me.

Q. And last year—

A. Through a financial plan that must be approved by the corporate directors."

At trial the Husband's partner, Mr. Stanton, testified the shareholders meet on a regular basis to discuss business. Once or twice a year they mutually determine whether to continue distributions for that year depending on the financial outlook of the corporation at that time. (T 619)

Briggs Stahl, CPA, was retained as the Wife's expert to do a valuation of the Husband's interest in the corporation. (T 146) He determined the corporation had a fair market value of \$1,555,213.00 as of year end 2001. (T 156) This valuation was not disputed.

What is disputed is the percentage of stock ownership the Husband held for purposes of equitable distribution. The Wife maintains the Husband held a 57.15428% (herein 60%) interest. The Husband maintains he did hold a 60% interest when the corporation was initially formed, however, ownership interests

changed and at the time of trial his interest had been reduced to 40%. The trial court relied upon prior years' corporate records and pre-amended K-1's for the year 2000 and found:

"The uncontradicted documentary evidence reveals that the husband is 57.15428% owner of this corporation (400 of the 700 issued shares)." (R 1566-7)

At trial, the Husband introduced documentary evidence showing his ownership interest had changed from 60% to 40% by virtue of a unique set of circumstances which were set in motion in 1996. This evidence is in the form of legally binding agreements, legal opinions from outside counsel, corporate records and correspondence between the shareholders:

1. 1988 Incorporation Agreement (R 1337-1340)
1. 1997 Letter of Agreement (R 1356-1357)
2. Legal opinion letters dated February 19 and 20, 1997 (R 1416-1422)
3. Letter dated September 27, 2000 (R 1335-1336)
4. Letters dated March 15<sup>th</sup> & 23<sup>rd</sup>, 2001 (R 1416-1422)
5. 2000 corporate tax return and amended K-1's (R 976-1022)
6. 2001 corporate tax return and K-1's (R 976-1041)

The trial court ignored the existence of these documents and found the Husband's interest to be 57.15428% based on the doctrine of unclean hands. (R1566-1567) On appeal, the Husband argued the clean hands doctrine does not apply because the record does not support a conclusion that the Husband acted illegally or fraudulently during these proceedings as regards

the change in his ownership percentage. The Husband outlined these facts in his Brief to the Fifth District Court of Appeal. Those facts, as testified to at trial, are condensed herein.

Seven hundred shares of stock were initially issued when Tri Tech was first formed. The Husband was issued 400 shares and Mr. Stanton acquired the other 300. This created a 40/60 ownership interest with Husband owning 60%. (T 575-577)

The other 300 shares were not initially issued. However, a third party, Hayan Atassi, was given an option to acquire those shares. This is evidenced by the original 1988 Incorporation Agreement which was introduced into evidence as the Husband's Exhibit #2. (R 1337-1340) Paragraph 13 of this document provides, "The parties agree that Hayan Atassi shall have the option to acquire 30 percent..." (T 828)

At the time this Agreement was entered into, the Husband believed Mr. Atassi to be a citizen of the United Kingdom. (T 831) Mr. Atassi had not exercised his option and no shares had been issued to him when, in 1996, the Husband heard from a third party that Mr. Atassi was a Syrian national. (T 831) The Husband immediately called for a meeting to verify Mr. Atassi's citizenship, wherein it was confirmed Mr. Atassi was a Syrian citizen.(T 831-832)

The Husband took immediate action to protect the corporation from the possibility of losing its government contracts. He threw Mr. Atassi off the premises, told him never to come back and began the purchase of the buildings and

repayment of the loan. (T 832) In response, Mr. Atassi threatened to evict the corporation from its headquarters, a building which he (Atassi) owned. (T 584) Mr. Atassi also made a demand to exercise his option and have 300 shares (30%) of Tri-Tech issued to him, pursuant to the Incorporation Agreement. (T 583)

This raised serious issues for Tri-Tech. As the trial court notes in the Final Judgment, government regulations prevent certain foreign ownership interests of companies which deal in government defense contracts. (R1566-1567)

To assure the corporation took appropriate action, the Husband requested a legal opinion from Martin Stamp of Kilgore/Pearlman. (T 835) Mr. Stamp's response, as reflected in legal opinion letters dated February 19 and 20, 1997, was that Tri-Tech had to honor the agreement with Mr. Atassi. (T 837-838; R 1416-1422)

In order to comply with government regulations and, at the same time, in order to protect the corporation from legal action by Mr. Atassi for breach of contract, a resolution was reached whereby Mr. Stanton acquired Mr. Atassi's interest. (T 675)

This is documented by a 1997 Letter of Agreement signed by all three parties, Stanton, Atassi and the Husband. (R 1356-1357; T 590) By virtue of that Agreement, Mr. Stanton acquired the outstanding 300 shares which changed the ownership interests to a 60% share to Mr. Stanton and 40% to the Husband.

In the three years following the 1997 Agreement, no adjustments were made on the corporate books to show the change in ownership percentages, despite Mr. Stanton's written demands for same. (T 595-596; R1335-1336; R 1416-1422) One of those letters, dated September 27, 2000, was published in open court by the Wife's expert, Mr. Stahl. That letter states, in pertinent part:

"The acquisition agreement provides that I (Stanton) am the owner of 60 percent of Tri-Tech Electronics, with you (Husband) holding 40 percent. I previously have explained to you that I control the interests of Hayan Atassi's shares.... I am concerned that a substantial disparity has developed over the years as a result of distributions to yourself that must be adjusted for."(T 196)

Mr. Stahl acknowledged the letter showed the clear intent of Mr. Stanton to enforce the terms of the 1997 Agreement which gave Mr. Stanton a 60% interest in Tri Tech. (T 194) However, in March of 2001, the corporate records had still not been changed to reflect the correct ownership interests.

Mr. Stanton made two more demands as reflected in letters dated March 15<sup>th</sup> and 23<sup>rd</sup>, 2001. (T 712) As a result, Mr. Lykkebak finally corrected the corporate records in March of 2001 by amending the 2000 K-1's to reflect Mr. Stanton's 60% ownership and the Husband's 40%. The corporation's accountant testified that the amended 2000 K-1's and the 2001 K-1's

reflect the accurate ownership percentages at the time of trial of 60% to Mr. Stanton and 40% to the Husband. (T 710-711)

#### SUMMARY OF ARGUMENT

##### ARGUMENT I

IT WAS NOT ERROR FOR THE DISTRICT COURT TO VACATE THE TRIAL COURT'S FINDINGS IN THE FINAL JUDGMENT AS TO THE HUSBAND'S INCOME IN WHICH \$147,265.00 OF UNDISTRIBUTED BUSINESS INCOME WAS ATTRIBUTED TO THE HUSBAND FOR PURPOSES OF SUPPORT AND ATTORNEY'S FEES

The trial court improperly attributed \$147,265.00 of undistributed business income to the Husband in determining his income for support and attorney fee awards. The evidence presented at trial was that the Husband only owned 40% of the corporation and did not have exclusive control to determine when distributions were made. The evidence also shows that even if the Husband did have such control, the corporation could not distribute all of its retained earnings and remain viable. Therefore, it was not error for the appellate court to vacate the findings as to the Husband's income and remand with instructions to make findings as to the amount of income available to the Husband without considering any undistributed Sub Chapter S income unless it can be shown it was not distributed for purposes other than corporate requirements.

##### ARGUMENT II

THE DISTRICT COURT ERRED BY HOLDING THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURT'S FINDING THAT THE HUSBAND OWNED 57.15428% OF THE STOCK IN TRI TECH CORPORATION

The trial court found that the Husband owned 57.15428% of



the stock in Tri Tech corporation and the appellate court found there was substantial competent evidence to support this finding. In its ruling the trial court claims the documentary evidence that the Husband owned a 57.15428% share was uncontradicted. The record shows this statement is not accurate. The Husband introduced documentary evidence and witness testimony to support his assertion that the percentage of his stock ownership had been reduced to 40% by virtue of a 1997 Letter of Agreement. The trial court ignored this evidence and ruled the Husband's share to be greater than claimed based on the doctrine of unclean hands. Evidence was introduced at trial that the Husband did nothing fraudulent toward the Wife as regards these proceedings in that the conduct asserted took place more than four years before the filing of the Petition of Dissolution of Marriage in this matter.

### ARGUMENT III

THE APPELLATE COURT DID NOT ADD ADDITIONAL CRITERIA TO THE DEFINITION OF INCOME UNDER SECTIONS 61.30 AND 61.046 FLA. STAT.

The Appellate Court's instructions to the trial court on remand were to make findings as to the amount of income available to the Husband for the purposes of support and attorney fee contributions without considering any undistributed Sub Chapter S income unless it can be demonstrated that the corporation has delayed distributions for purposes other than corporate requirements. These instructions follow the definition of Business Income at Section 61.302.

The Wife asserts the additional requirement, "that the

funds be available to the payor" is not required by statute and no authority is cited for this proposition. The availability requirement is, in fact, required by statute. Florida Statutes 61.08 (2)(g) requires trial courts consider, among other things, "All sources of income available to either party" when determining alimony awards. The statutes and case law assume the availability requirement. A court cannot issue support orders to a spouse who does not have the financial resources available to fulfill such obligations.

#### ARGUMENT IV

THE APPELLATE COURT DID NOT ERR IN ITS OPINION BY SUPERCEDING ITS VIEW OF THE FACTS FOR THE TRIAL COURT'S FINDINGS

While appellate courts are reluctant to disturb the findings of a trial court, it becomes their duty to do so when findings, and awards based upon those findings, are not supported by substantial, competent evidence. The record, as a whole, does not support the trial court's finding that K-1 income attributed to the Husband for support purposes and attorney fee awards could be distributed by the corporation without jeopardizing corporate operations. Nor does the record support a finding that the Husband had available income of over \$245,000.00 for support and attorney fee contributions. Testimony of the Husband and his witnesses was that his net disposable income from the corporation was approximately \$100,000.00 annually and this testimony was corroborated by the Wife.

#### ARGUMENT V

THE TRIAL COURT'S COMBINED ORDERS REQUIRING THE HUSBAND TO CONTRIBUTE TO THE WIFE'S ATTORNEY'S FEES AND COSTS IS AN ABUSE OF DISCRETION AND THE APPELLATE COURT PROPERLY VACATED THOSE AWARDS

The Fifth District Court of Appeal determined the trial court's findings, as regards the Husband's income, was not supported by competent substantial evidence. Findings regarding income are the basis for the entire equitable distribution scheme, including attorney's fees awards. Once the findings as to income are vacated, all other orders which were based upon that finding must also be vacated and the awards re-evaluated. If the parties are left, after remand, in substantially equal financial circumstances, no attorney's fees should be awarded.

#### ARGUMENT I

IT WAS NOT ERROR FOR THE DISTRICT COURT TO VACATE THE TRIAL COURT'S FINDINGS IN THE FINAL JUDGMENT AS TO THE HUSBAND'S INCOME IN WHICH \$147,265.00 OF UNDISTRIBUTED BUSINESS INCOME WAS ATTRIBUTED TO THE HUSBAND FOR PURPOSES OF SUPPORT AND ATTORNEY'S FEES

The ultimate issue presented to this Court is what constitutes "income" in dissolution proceedings under Chapter 61, Florida Statutes. A trial court's findings as regards the parties' income is the basis for the entire equitable distribution scheme. Each spouses' income is considered to determine all other issues including alimony, child support, attorney fee issues and the method in which distribution payments are made. Determining what is properly included as "income" is probably the most important finding the trial court makes.

"...the extent of the parties' income from all sources and the reasonable income-earning abilities of the parties are essential parts of the equation..." Brock v. Brock, 690 So.2d 737, 742 (Fla. 5<sup>th</sup> DCA 1997)

In the present case, the issue is whether "pass through" income from Tri Tech, a Sub Chapter S corporation, and a one time IRA distribution shown on the Husband's personal tax return were properly attributed to him in determining his ability to meet the financial obligations imposed by the combined orders of the trial court.

At trial, the Husband introduced evidence and testimony regarding his actual compensation which supports his net disposable income during the course of the marriage was approximately \$100,000.00. The Wife did not dispute this. In fact, she confirmed it. However, she characterized all evidence as to the Husband's actual income as irrelevant. (T 727-728)

The Wife has maintained throughout these proceedings that the statutory definition of income and appellate court decisions require the total amount of K-1 income shown on the Husband's personal tax return must be attributed to him for support purposes and attorney fee awards, whether he receives it or not, citing; Martinez v. Martinez, 761 So.2d 433 (Fla. 3<sup>rd</sup> DCA 2000); Zipperer v. Zipperer, 567 So.2d 916 (Fla. 1<sup>st</sup> DCA 1990) Rehearing Denied; Sohacki v. Sohacki, 657 So.2d 41 (Fla.

1<sup>st</sup> DCA 1995)

The Husband contends each of these cases is distinguishable from the present case, but they all stand for the proposition that income is not **automatically** attributable to a payor spouse just because it appears on their tax return. If income, whether in the form of K-1, investment or bonus, is not available to the payor on a regular and recurring basis for both current and future support obligations, it cannot be included in his/her income. McHugh v. McHugh, 702 So.2d 639 (Fla. 4<sup>th</sup> DCA 1997), Lauro v. Lauro, 757 So. 2d 523 (Fla. 4<sup>th</sup> DCA 2000), Rehearing Denied

This very issue was the subject of a recent Florida Bar Journal article titled, *What Defines Income Under F.S. Ch. 61/From a Business Perspective*. FLBJ/November 2004, pages 66-69. Although not controlling authority, the article is helpful in analyzing this issue. The authors break down the statutory definition and applicable case law into a simple premise, "that anything of value received or capable of being received constitutes income" **with the following exceptions:**

- 1) **that which is not recurring or is sporadic;**
- 2) **that which is not available;**
- 3) **that which does not reduce the actual living expenses of the party;**
- 4) **that which has not already been distributed as a marital asset;**

5) that which does not reduce the value of existing assets or cannot be valued. FLBJ/November 2004 at 68.

In the present case, the trial court based its determination that the Husband had \$245,388.00 available for support and attorney's fees contributions based solely on the gross income shown on his 2001 income tax return. It did not apply the guidelines set out by the appellate courts to determine if any of that income should have been excluded under one of the exceptions carved out by the statutes or the case law.

This resulted in a finding that the Husband had income available for support purposes in an amount more than double what the evidence shows he actually earned during the course of the marriage. The Fifth District Court of Appeal properly vacated the trial court's findings as to the Husband's income. Using the applicable guidelines, almost half of the income attributed to the Husband should have been excluded.

The first exception is obvious. Income which is a one time payment is not reliable and/or is not recurring can not be included to determine future support obligations. See Skipper v. Skipper, 654 So.2d 1181 (Fla. 3rd DCA 1995) Rehearing Denied; Shrove v. Shrove, 724 So.2d 679 (Fla. 4<sup>th</sup> DCA 1999); Vergara v. Vergara, 831 So.2d 251 (Fla. 3<sup>rd</sup> DCA 2002); Lauro v. Lauro, 757 So.2d at 526 (Fla. 4<sup>th</sup> DCA 2000).

In the present case, \$15,909.00 of non-recurring income in

the form of an IRA distribution was improperly attributed to the Husband. Since this was neither regular nor recurring, it should not have been included in his income.

Furthermore, the \$147,265.00 of K-1 income shown on the Husband's personal tax return for the year 2001 was almost double the corporate income of the **combined** two years prior to trial. In 1999, the Husband's portion of the K-1 income was only \$10,855.00 and it was only \$64,070.00 in 2000. (R1104-1128) The trial court should have taken this into account. Lauro v. Lauro, 757 So.2d at 526 (Fla. 4th DCA 2000).

In Lauro, the husband was an airline pilot. The trial court found his income, for support purposes, to be \$76,000.00 as reflected on his income tax return at the time of trial in 1997. However, the record showed his income in the prior three years was \$60,000.00, \$66,000.00 and \$52,000.00. The husband explained the increase in his salary in 1997 was because he had worked more overtime that year to avoid being home because of the marital problems. In addition, this income would not be available in the future because his employer had hired additional pilots.

The appellate court reversed the findings as regards to the husband's income because there was no evidence that the income in 1997, which was substantially greater than the prior three years, would continue. The Fourth District Court of Appeal instructed the trial court to consider the prior years' income when it considered this issue on remand. Lauro v. Lauro,

757 So.2d at 526 (Fla. 4th DCA 2000).

In the present case, even if the K-1 income from Tri-Tech should be attributed to the Husband, the large discrepancy in that income from year to year requires further findings to determine if the \$147,265.00 was one sporadic good year or if it would be recurring and a sum the Husband could depend on for future support obligations.

The issue over which there is the most controversy involves the second exception listed in the Bar Journal article, that the income must be "available". The appellate case law suggests this requires a case by case determination of whether, and to what extent, the party has to actually obtain or control the income. Oxley v. Oxley, 695 So.2d 364 (Fla. 4<sup>th</sup> DCA 1997) As Amended on Denial of Rehearing; McHugh v. McHugh, 702 So.2d 639 (Fla. 4<sup>th</sup> DCA 1997); Martinez v. Martinez, 761 So.2d 433 (Fla. 3rd DCA, 2000); Zipperer v. Zipperer, 567 So.2d 916 (Fla. 1st DCA, 1990) Rehearing Denied

In Oxley, the husband was the beneficiary of a trust which required all the income be distributed. The husband elected not to accept all of the monthly income he was entitled to receive. The Fourth District Court of Appeal held that the husband could not elect to put aside a portion of his income for savings and investments and have it be exempt from consideration for purposes of child support. In that case the Fourth District Court of Appeal held that all of the trust income was attributable to the husband whether he decided to



use it or not. Oxley v. Oxley, 695 So.2d 367 (Fla 4th DCA 1997).

Conversely, in McHugh, the husband did not have control of the funds at issue. That case, like the present case, involved Sub Chapter S income. In McHugh, the husband was only a 10% shareholder and had no access to, or control over, whether K-1 income was retained by the corporation or distributed to the shareholders. The Fourth District Court of Appeal held that the K-1 income was properly excluded in such cases. McHugh v McHugh, 702 So.2d at 641-642 (Fla. 4th DCA 1997).

Although the Wife maintains that the K-1 income is automatically included in determining income, she asserts that even if determinations are to be made on a case by case basis, and even if the McHugh rule is applicable, the Husband's K-1 income should still be included. The Wife claims that, unlike the situation in McHugh, the Husband, in the present case, has exclusive control over whether distributions are issued to the shareholders.

The Husband disagrees and so did the Fifth District Court of Appeal. Despite the Wife's representations in her Brief to this Court, the record does not support that the Husband has exclusive control over distributions. The Husband's trial testimony is that it is "totally not true" that he controls whether distributions take place. (T 511) The testimony from the Husband's partner is that the shareholders mutually determine whether to continue distributions for any given year

based on the economic condition of the corporation at the time.  
(T 619)

On appeal to the Fifth District Court of Appeal, the Wife also misrepresented the Husband's testimony as regards whether the corporation had cash available for distribution. The Appellate Court points this out in its decision:

Sherry's brief states: "Appellant (John) testified that there was over \$250,000.00 immediately available for distribution to shareholders." No citation to the record appears for that statement and although we have reviewed the voluminous record in order to locate the statement, we have not found it. (App. 4-5)

These misrepresentations are crucial to appellate review, since both go to the core of the Wife's argument: that the Husband had exclusive control over the disposition of substantial corporate retained earnings and did not distribute those funds for the purpose of shielding income from the Wife in these proceedings.

The Fifth District Court of Appeal determined the record did not support such a conclusion. (App. 5) The Fifth District Court of Appeal held further that even if the Husband did have control of distributions, other factors must be taken into account when dealing with a Sub Chapter S corporation. There is the viability of the business, responsibility to creditors and employees and fiduciary duties to shareholders. (App. 3-4)

One cannot make the bold assertion that just because a party has control of the corporation, it follows he must have unfettered access to the retained earnings shown on a balance sheet at year end.

In his concurring opinion in Anson v. Anson, 772 So.2d 52, 56-58 (Fla. 5th DCA 2000), Judge Peterson recognized a corporation must maintain working capital to conduct business and, as a separate legal entity, a corporation has the ability to manage its own business as it best determines. Judge Peterson wrote the majority opinion for the Fifth District Court of Appeal in this case stating:

"When a corporation has more than one shareholder, an officer/shareholder has a fiduciary duty to all shareholders. The corporation is not the personal piggy bank for any one shareholder simply because that shareholder may have a controlling interest in the corporation and is also the chief executive officer. Financial responsibilities to creditors and employees must be satisfied before distributions to shareholders take place if a corporation is to remain viable. Once the distributions are found to be possible, the distributions must be pro-rata in accordance with the percentage of ownership of the capital stock of the corporation. **Court ordered obligations in marital litigation should not place an ex-marital partner in the position of having to**

***breach a corporate fiduciary obligation in order to avoid the possibility of a court finding that partner contemptuous".*** (App. 3-4) [Emphasis Added]

In the present case, the record showed the corporation could not distribute the entire amount of year end cash on hand and remain viable. In fact, there were situations where the year end balance was zero. (T 740) The corporation's accountant testified that during the entire history of operations of Tri Tech, the corporation never distributed all of the K-1 income shown on the shareholders individual returns. Mr. Lykkebak further testified that during the course of the company's history, retaining the earnings did not result in the corporation building up any substantial equities, it simply allowed the corporation to "sustain operations" and pay down debt. (T 743-744) When asked what would happen if the shareholders distributed that cash, Mr. Lykkebak testified:

Answer: "Bankruptcy.

Question: And by that you mean?

Answer: They would be out of business. They wouldn't be able to pay their creditors or the bank." (T 739)

Since the corporation is the sole source of the Husband's income, requiring distribution of the total corporate earnings to fulfill the court ordered financial obligations would be killing the goose that lays the golden egg. If the retained earnings were distributed, but the corporation became defunct,

the end result is financial disaster for both parties, as well as the minor child. The Fifth District Court of Appeal realized this inevitable reality and found:

"The record does not support the trial court's determination that these amounts (K-1 income) could be distributed by the corporation to the shareholders **without jeopardizing corporate operations.**" (App. 5)

[Emphasis Added]

The Fifth District Court of Appeal determined that because the money was not available to the Husband, it should not have been included in calculating his income for purposes of support obligations and contributions to the Wife's attorney's fees. This ruling must be upheld.

If trial courts were mandated to automatically attribute Schedule K-1 income to a payor spouse to determine support obligations and attorney fee awards, it would open a floodgate of post-dissolution litigation by payor spouses similarly situated to the Husband herein, who would be unable to meet their court ordered financial obligations. This would engender further litigation in contempt and/or modification proceedings.

In the present case, the record supports that the Husband's net disposable income from the corporation was approximately \$100,000.00. The combined Orders of the trial court require the Husband to make monthly payments of \$8,317.70 to, or on behalf of, the Wife and the minor child. On a yearly basis, that totals \$99,812.40 leaving the Husband with less

than \$200.00 a year to support himself. And this is without consideration of the court ordered lump sum payment to the Wife of \$172,088.50 which would require the Husband to borrow that money, thereby incurring additional costs in interest payments on that loan.

Finally, automatically attributing K-1 income to a payor spouse creates another quagmire for the parties and the courts in terms of enforcement of the court's orders. A court, in a dissolution proceeding, does not have jurisdiction to require a corporation to distribute retained earnings to a payor spouse so he/she could fulfill court ordered obligations. Nor could a court order a payor spouse in his/her capacity as majority shareholder to do so. Feldman v. Feldman, 390 So.2d 1231 (Fla. 3<sup>rd</sup> DCA 1980); Ashourian v. Ashourian, 483 So.2d 486 (Fla. 1<sup>st</sup> DCA 1986), Rehearing Denied March 10, 1986

Even if courts did have that authority, such an order could potentially jeopardize the financial viability of the very entity which is the sole source of the family's income. That is the very issue in the present case.

The Wife argues that the McHugh rule and the Fifth District Court of Appeal's ruling in this case have the potential to create significant inequity because such rulings would allow a person to accumulate savings and not recognize those savings as income for support purposes. The Husband agrees those concerns should not be overlooked. So do the appellate courts.

The ruling in Oxley v Oxley, 695 So.2d at 367 (Fla. 4th DCA 1997) As Amended on Denial of Rehearing makes clear a party may not reject authorized, regular and continuing distributions over which the party has clear control and have that income excluded for support purposes in a dissolution proceeding. Likewise, the rulings in McHugh v. McHugh, 702 So.2d at 641,642 (Fla. 4th DCA 1997) and Lauro v. Lauro, 757 So.2d at 526 (Fla. 4th DCA 2000) make clear a court cannot impose support obligations based upon funds the payor spouse does not have control over or access to on a regular and continuing basis.

The Fifth District Court of Appeal acknowledged the conflicting interests of the parties in this case and issued an opinion that counter-balances those interests in a manner that avoids inequity to both parties. The Fifth District Court of Appeal's opinion follows precedent set by the other appellate courts of this state which allow for a case by case determination to establish whether the payor spouse actually receives the income attributed to him to assure he is capable of meeting current and future support obligations.

At the same time, the Fifth District Court of Appeal's opinion provides guidance to assist trial courts in making such determinations where Sub Chapter S corporations are involved. Specifically, the Fifth District Court of Appeal's instructions on remand require undistributed corporate earnings be excluded **unless it is shown earnings are not being distributed for other than corporate purposes.** This protects both parties and

assures the payee spouse is not shortchanged in the manner the Wife suggests.

Whether there is an attempt to shield income by retaining corporate earnings rather than distributing them can easily be determined by looking at the corporate financial records to ascertain if distributions are feasible. By looking at the corporation's historical records, trial courts can also determine whether (and what size) distributions the corporation made in the past to see if any significant change was made during the time the parties began to encounter marital difficulties.

In the present case, during the time these proceedings were pending, the Husband received a distribution of \$40,000.00. That was the largest ever issued by the corporation and twice the usual amount. This does not evidence an attempt to shield income from a divorcing spouse.

Another factor to consider, as required by Florida Statutes 61.08, is the standard of living during the time the spouse was a Sub Chapter S shareholder. Such a consideration is especially true in cases as the one herein, where the corporation was the sole source of the parties' income for most of the marriage.

In the present case, the couple had modest household furnishings (T282), an average automobile (R1584), a moderately valued home which needed substantial repairs (R1584-1585, T349) and the family's only vacations were when they accompanied the



Husband on business trips. (T 331-332) Furthermore, the couple had no savings or checking accounts and no cash on hand at the time of dissolution. (R1583-1586) This is not indicative of an income history of close to a quarter of a million dollars during the thirteen years the Husband was a shareholder of Tri Tech.

Finally, the K-1 income should have been excluded for purposes of support and attorney's fees contributions because it had already been considered as part of the equitable distribution scheme. The corporation's accountant testified that Tri-Tech did not distribute the total amount of year end cash on hand, but rather retained those funds in the corporation for business purposes. As the Fifth District points out in Anson v. Anson, 772 So.2d at 54-55 (Fla. 5th DCA 2000), when a corporation retains earnings, rather than distributing them as dividends to shareholders, the value of the outstanding capital stock should appreciate in value.

The Husband's share of Tri-Tech stock was considered a marital asset, of which the Wife received a fifty percent share. The undistributed K-1 income for the year 2001 was taken into account in determining Tri Tech's value for distribution purposes. Very simply, the money can't be in two places at the same time.

Either: (1) the corporation appreciated in value due to the re-investment of earnings back into it during the course of the marriage and the Wife benefits from the appreciation

realized therefrom through equitable distribution; or (2) the Husband received that income during the course of the marriage which the couple used to maintain their lifestyle and thus it is appropriate to consider it in determining support obligations. Not both. See Haas v. Haas, 552 So.2d 221, 224 (Fla. 2<sup>nd</sup> DCA 1989), Rehearing Denied, holding that the husband's business can be used for support rather than equitable distribution, however injustice would result if that same asset were considered for both property distribution and support obligations. See also Diffenderfer v. Diffenderfer, 491 So.2d 265 (Fla. 1986)

On appeal, the Wife countered that Diffenderfer and its progeny do not apply because the Wife was not actually awarded an interest in Tri Tech. This distinction is a smoke screen. The entire value of the Husband's interest was considered as a marital asset for distribution purposes. The manner in which it was distributed, outright or in equalizing payments, does not alter that fact.

Based upon the above, the record does not support the trial court's finding that the Husband's reasonable earning ability for current and future support purposes is \$245,288.00. Nor does it support the Husband had control of or access to the retained earnings of the corporation to meet the court ordered obligations. Therefore, it was not error for the appellate court to vacate the trial court's findings as to the Husband's income.

For the reasons stated above, the Husband respectfully submits this court must uphold the decision of the Fifth District Court of Appeal. Most significantly, where "pass through" income is at issue, this court's affirmance of the opinion issued by the Fifth District Court of Appeal would provide future trial courts with a clearly enunciated rule of law and guidelines to assist in evaluating the evidence to assure determination of the parties' income can be resolved in a way that is equitable to both parties and in a consistent manner throughout the appellate courts. This court's affirmance would clarify the standard and eliminate the confusion which has created the lengthy appellate process in this case.

#### ARGUMENT II

THE DISTRICT COURT ERRED BY HOLDING THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURT'S FINDING THAT THE HUSBAND OWNED 57.15428% OF THE STOCK IN TRI TECH CORPORATION

The Wife maintains the shareholders' ownership interests were 60% to the Husband and 40% to Mr. Stanton at the time of trial. The Husband does not dispute that he did originally hold a 60% interest. However, the Husband maintains that at the time of trial his ownership interests had been reduced to 40%. The trial court did not accept the Husband's claim that his interest had been reduced to 40% and found the Husband's ownership interest to be 57.15428%.

The appellate court affirmed, holding there was

substantial, competent evidence in the record to support that finding. The Husband respectfully submits the trial court's findings are not supported by, and actually conflict with, the record in this matter. Specifically:

1. The trial court stated there was "**uncontradicted documentary evidence**" that Husband owned 57.15428% of the corporation. (R1566) However, the record does, in fact, contain legally binding agreements, legal opinions from outside counsel, corporate records and correspondence between the shareholders which evidence the change in Husband's ownership interest to 40%. [R1337-1340; 1356-1357; 1416-1422; 1335-1336; 979-1041)
2. The trial court further states, "The Husband tries to suggest some **hidden interest** in the business which dilutes his ownership interest to 40%. **But such an interest is not documented in any way...**" ( R1566-1567) [Emphasis Added] The record does, in fact, contain documentary evidence of a third party's involvement with the corporation from its inception. The 1988 Incorporation Agreement of Tri-Tech Electronics, Inc. evidences that Hyan Atassi had an option to purchase the 300 outstanding shares of the corporation's stock. (R1337-1340) The validity of Mr. Atassi's interest was confirmed in legal opinion letters to the corporation dated February 19 and 20, 1997, which are also part of the

record. (R1416-1422)

3. Finally, the trial court found, "The Husband insists that a Syrian national, Hyan Atassi, is a 30% shareholder in Tri Tech, **although there are no documents that evidence the exercise of that option.**" (R 1566-1567)

[Emphasis Added] At trial, neither the Husband, his partner nor the corporation's accountant ever testified Mr. Atassi was a 30% shareholder. The testimony was that **Mr. Stanton** acquired Mr. Atassi's interest. The 1997 Letter of Agreement is evidence of Mr. Atassi's **attempt** to exercise his option which the corporation could not allow **because of** his status as a citizen from a hostile nation. To comply with government regulations, and to avoid a legal claim by Mr. Astassi for breach of contract, Mr. Stanton acquired Mr. Atassi's interest. Because Mr. Stanton and Mr. Atassi had other business dealings together, they agreed to work out compensation to Mr. Atassi for the value of his option **outside of corporate involvement.** (T 612,675)

The trial court ignored that these documents were ever made part of the record and based its determination on the equitable doctrine of "clean hands". The trial court suggests the Husband acted in a manner that was fraudulent towards the Wife, illegal and borderline treasonous against the government of the United States of America. The Husband's actions do not support such a finding. Nor do his

actions support the clean hands doctrine applies as regards the change in his ownership interest.

The clean hands doctrine, as stated by the trial court in the Final Judgment, is available in marriage actions regarding fraud and deceit. Ryan v. Ryan, 277 So.2d 266, 272 (Fla. 1973) (R 1567-1568) There is no evidence the Husband attempted to hide illegal foreign interests from the government. The record clearly shows just the opposite. The shareholders took every appropriate measure possible to assure the corporation **was not** in violation of government regulations.

Furthermore, the clean hands doctrine requires the conduct complained of must be directly related to the matter with which the party seeks relief. Therefore, there must be a showing of intent to defraud the soon to be ex-spouse as regards matters concerning the proceedings at hand. Ryan v. Ryan, 277 So.2d at 273 (Fla. 1973).

The Incorporation Agreement whereby Mr. Atassi was given an option to purchase 30% of the corporation was entered into in 1988, thirteen years prior to the filing of the Petition for Dissolution of Marriage in this matter. The circumstances which prompted Mr. Atassi to attempt to exercise that option took place in 1996, five years prior to the filing of the Petition for Dissolution of Marriage. The Agreement whereby Mr. Stanton acquired Mr. Atassi's interest was entered into in 1997, four years prior to the filing of the Petition for Dissolution of Marriage. The record contains evidence which clearly shows

there was a legally binding change of ownership interests in 1997 which was, due to facts and circumstances totally unrelated to this case, not reflected in the corporate documents until 2001.

Therefore, the finding that the Husband intended to defraud the Wife in these proceedings by fraudulently diluting his ownership interest in Tri-Tech is simply not supported by the record. As such, the clean hands doctrine does not apply and cannot be the basis for the trial court's ruling that the Husband owns more than the 40% interest that the shareholders of Tri Tech have legally agreed to be Husband's ownership interest.

Finally, the trial court made meaningful appellate review impossible by creating a climate of confusion regarding what evidence it determined reliable as a basis for its findings. Huber v. Huber, 687 So.2d 42,43 (Fla. 5<sup>th</sup> DCA 1997) Rehearing Denied

The trial court found the Husband's 2001 tax return the only reliable evidence of his income, disregarding all other testimony and evidence introduced by the Husband on that issue. However, when it came to evidence of ownership percentages for purposes of equitable distribution, the court ignored that same document. Instead, the trial court relied upon prior year's records and the 1999 and pre-amended 2000 K-1's as a basis for finding the Husband's share to be 60%. To add to the confusion, the trial court relied upon year end 2001 records as

controlling to establish the corporation's fair market value, but not controlling to determine the percentage of the Husband's interest therein. This makes it impossible for an appellate court to review the record to determine the appropriateness of the trial court's reliance upon the evidence contained therein.

### ARGUMENT III

THE APPELLATE COURT DID NOT ADD ADDITIONAL CRITERIA TO THE DEFINITION OF INCOME UNDER SECTIONS 61.30 AND 61.046 FLA. STAT.

The Wife asserts that the Fifth District Court of Appeal's ruling adds additional criteria to the statutory definitions of income under Chapter 61 Florida Statutes. She specifically challenges the instructions on remand to the trial court which require the lower court make findings as to the amount of income available to the Husband for the purposes of spousal and child support without considering any undistributed Sub Chapter S income to shareholders. (App. 5-6) The Wife asserts:

"The construction that the Fifth District placed on the term income in this case added additional requirements contained nowhere in the statutes, 'that the funds be shown to be available to the Payor.' No authority is cited for this proposition." (Wife's Initial Brief at 34)

It is difficult to imagine why authority should be needed for a common sense requirement. If the funds are not available to the payor spouse, how can that person fulfill his financial obligations to the payee spouse? Surely, the legislature did



not intend courts to issue support orders to a spouse who did not have the financial resources available to fulfill such obligations.

However, there is authority for the availability requirement at Florida Statutes 61.08(2)(g) which requires that a trial court, in determining a proper award of alimony or maintenance, shall consider all relevant economic factors including, but not limited to, "All sources of income **available** to either party." [Emphasis Added]

Furthermore, the appellate court's instructions did not change or alter the statutory language of Section 61.0467 which defines income as "any form of payment to an individual, regardless of source...". Payment assumes one actually received compensation and will have access to that compensation to fulfill both current and future obligations.

Finally, the instructions did not change or alter the language of Section 61.302 as it applies to business income. That section defines business income as:

"Business income from sources such as self-employment, partnerships, close corporations and independent contracts. 'Business Income' means gross receipts **minus ordinary and necessary expenses required to produce income.**" [Emphasis Added]

In the present case, Tri Tech's accountant testified the income in question, the 2001 year end retained earnings, was required to stay within the corporation in order to pay their

creditors and stay in business. (T 739) Although the Wife claims the Husband testified there was \$250,000.00 of cash available for distribution, that statement does not appear anywhere in the record. (App. 5)

The Wife further asserts that because Tri Tech's year end balance sheet showed \$372,908.00 of corporate cash on hand, the corporation had sufficient funds to make larger distributions. Evidence and testimony were introduced at trial which shows legitimate business reasons for the corporation not distributing the entire amount of year end cash on hand.

In December of 2001, Tri Tech was prepaid for material for a government contract to outfit the F18 EF Aircraft. (T 873, 878) That payment increased the cash on hand in the corporate account by \$243,000.00. (T 873) This cash was required to stay in the corporate accounts for future expenses involved with the contract.

For the Wife to assert that just because there is cash on hand at year end, it automatically becomes "business income" to which a shareholder has access for personal use oversimplifies every business model and manner of thinking. Even if the Husband had control to distribute all of the cash in the retained earnings account to the shareholders, it would have been a serious breach of his fiduciary duty to the corporation to do so. If the corporation was unable to meet its contractual obligations because it distributed the cash set aside for that purpose, a whole other set of legal complications would be

initiated. The appellate court recognized this and held:

"The record does not support the trial court's determination that these amounts could be distributed by the corporation to the shareholders without jeopardizing corporate operations". (App. 5)

This ruling does not conflict with the statutory definition of income at either Sections 61.30, 61.08 or 61.046 Fla. Statutes and specifically follows the definition of business income as set forth at Section 61.302.

#### ARGUMENT IV

THE APPELLATE COURT DID NOT ERR IN ITS OPINION BY SUPERCEDING ITS VIEW OF THE FACTS FOR THE TRIAL COURT'S FINDINGS

The Wife argues the appellate court erred in ignoring the trial court's findings, evaluation of the evidence and determination of credibility as to the issue of the Husband's income. The Wife cited Deakyne v. Deakyne, 460 So.2d 582 (Fla. 5<sup>th</sup> DCA 1984) and Kuvin v. Kuvin, 442 So.2d 203 (Fla. 1983) for the proposition that it is not the function of the appellate court to substitute its judgment for that of the trial court through re-evaluation of the evidence. While that is true, the appellate courts have also held:

"And while appellate courts are reluctant to disturb the findings and judgments of a trial court, particularly in respect to financial awards, **it nevertheless becomes our duty to do so when an award is clearly not supported by substantial, competent**

**evidence.**" (Emphasis Added) DeHart v. DeHart, 360 So.2d 1285, 1286 (Fla. 2nd DCA 1978) Rehearing Denied. See also, Misdraji v. Misdraji, 702 So.2d 1292, 1294 (Fla. 3<sup>rd</sup> DCA 1997), Rehearing Denied

In this case, the Wife claims it was error for the appellate court to overrule and rely on the testimony of the Husband's partner, A.J. Stanton, in reaching its conclusion even though the trial court rejected that same testimony. The Fifth District Court of Appeal did not rely solely upon Mr. Stanton's testimony to vacate the trial court's findings as to the Husband's income. The appellate court considered the record in its entirety.

Even with the credibility issues, there was no evidence to support the ultimate finding that the Husband had over \$245,000.00 available for support and attorney fee contributions. The Husband and his witnesses testified his net disposable income from the corporation was closer to \$100,000.00 and the Wife's testimony corroborated that.

In DeSanto v. DeSanto, 621 So.2d 560, 561 (Fla. 2nd DCA 1993) the court held, even viewing the evidence in the light most favorable to the wife, the trial court's determination of his ability to pay the amounts ordered was not supported by substantial, competent evidence. In that case there was also a credibility issue as regards the husband's testimony. However, the wife in that case, as in the present case, corroborated at least a portion of the husband's testimony concerning his

income.

At trial, the only testimony by Mr. Stanton regarding the Husband's income was that he understood it to be approximately \$100,000.00. (T 620) The Wife testified she didn't know exactly what the Husband's salary was, but he had always told her it was in the 100's and he had always bragged about it. (T 375)

At trial, Mr. Stanton also testified to corporate operations, ownership interests, distributions and how it is determined they will or will not be issued in any given year. That is the testimony the Fifth District Court of Appeal relied on in its opinion:

"Tri Tech's other shareholder is an attorney and the tenor of his testimony at trial does not indicate that John is free to treat the corporate cash as his piggy bank, nor to accumulate cash rather than distribute it..." (App. 4)

In addition to Mr. Stanton's testimony, corporate records and it's earning history, as well as testimony from the corporation's CPA, indicated the corporation simply could not distribute all of the retained earnings and never had in the past. There was more than enough evidence to conclude, as the Fifth District Court of Appeal did, that the record does not support the trial court's determination that the K-1 income could be distributed by the corporation to the shareholders without jeopardizing corporate operations. (App. 5)

In this case, the trial court's interpretation of the

testimony and evidence regarding what amounts are properly included in the Husband's income shows the confusion generally surrounding this issue. Instead of making findings based on the guidelines discussed herein, the trial court based support obligations exclusively on the gross income shown on the Husband's 2001 income tax return.

There is nothing in this record, other than one entry on line 22 of the 2001 tax return, to support a finding that the Husband ever earned anywhere near in the neighborhood of \$245,000.00. That finding is not supported by competent, substantial evidence but is, in fact, in direct contradiction to all the evidence and testimony, including that of the Wife.

The appellate court did not come to its conclusion by substituting its judgment as to credibility of just one witness, but rather from a review of the record as a whole which does not support the ultimate finding that the Husband's income was in excess of \$245,000.00.

#### ARGUMENT V

THE TRIAL COURT'S COMBINED ORDERS REQUIRING THE HUSBAND TO CONTRIBUTE TO THE WIFE'S ATTORNEY'S FEES AND COSTS IS AN ABUSE OF DISCRETION AND THE APPELLATE COURT PROPERLY VACATED THOSE AWARDS

Attorney fee awards in dissolution cases do not stand alone or in a vacuum, but are part of the overall distribution scheme fashioned by the trial court. Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980).

The Fifth District Court of Appeal determined the trial court's finding as regards the Husband's income in this case

was not supported by competent substantial evidence. Findings regarding income are the basis for the entire equitable distribution scheme. Once those are vacated, all other orders which were based upon that finding must also be vacated. Since all remedies are interrelated, it would be inappropriate to reverse one without giving the trial court the opportunity to reconsider others. Jones v. Jones, 419 So.2d 760, 762 (Fla. 5<sup>th</sup> DCA 1982).

In Schiller v. Schiller, 625 So.2d 856, 862 (Fla. 5<sup>th</sup> DCA 1993), the court reversed the equitable distribution award and held:

"Since the judgment must be considered as an integral whole rather than separate pieces, the trial court's new scheme of equitable distribution may require a change in alimony."

Likewise, having vacated the findings as to the husband's income, whether an attorney fee award to the wife is proper will depend on the new findings and the new distribution scheme. It has long been held that when the parties leave the marriage in substantially equal financial circumstances, it is an abuse of discretion to award one party attorney's fees against the other. Therefore, the Fifth District Court of Appeal in Schiller instructed the trial court, on remand, that in revisiting the attorney's fee award if the parties are left, after reconsideration of the dissolution awards, in substantially equal financial circumstances, no attorney's fees

should be awarded. Schiller v. Schiller, 625 So.2d at 862 (Fla. 5th DCA 1993).

Based upon the above, it was not error, but was required, that the appellate court vacate the two awards of attorney's fees and remand with instructions to make additional findings to determine the amount of income actually available to the Husband for the purpose of support and attorney fees contributions. If, after reconsideration, the parties are left in substantially equal circumstances, the trial court should be instructed to issue an order requiring each party be responsible for his/her own costs and fees.

#### CONCLUSION

The Respondent respectfully requests this Court:

1. Affirm that portion of the opinion issued by the Fifth District Court of Appeal which vacates the portion of the Final Judgment of Dissolution of Marriage that makes findings as to the Husband's income, the portion of the Final Judgment of Dissolution of Marriage ordering support and equitable distribution and the two awards of attorney's fees to the Wife.
2. Affirm the instructions on remand to the trial court and



issue further instructions requiring the trial court issue an order requiring each party be responsible for his/her own costs and fees if, after reconsideration, the parties are left in substantially equal financial circumstances.

3. Vacate that portion of the Final Judgment of Dissolution of Marriage which finds the Husband's share of the corporation to be 57.15428% based on the unclean hands doctrine and the portion of the Fifth District Court of Appeal opinion which affirmed that finding.

**CERTIFICATE OF COMPLIANCE**

I, CHARLES W. WILLITS, certify that the font used in this Respondent's Answer Brief is Courier New (12 point) type.

\_\_\_\_\_  
CHARLES W. WILLITS  
Attorney for Respondent/Husband

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail delivery to Norman D. Levin, Esquire, 165

West

Jessup Avenue, Longwood, Florida 32750, Attorney for  
Petitioner/Wife, this \_\_\_\_ day of January, 2005.

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IN THE SUPREME COURT OF FLORIDA

SHERRY PALICTE ZOLD,

Petitioner,

vs.

JOHN F. ZOLD,

Respondent.

Supreme Court Case No. SC04-1858  
5th DCA Case No. 5D03-148, 5D03-2117  
Trial Court (Orange County) Case No. DR01-1145

RESPONDENT'S APPENDIX ANSWER BRIEF

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