

IN THE SUPREME COURT OF FLORIDA

SHERRY PALICTE ZOLD,
Petitioner,

v.

JOHN R. ZOLD,
Respondent.

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

PETITIONER'S INITIAL BRIEF

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INTRODUCTION

Petitioner, SHERRY PALICTE ZOLD, was Appellee in the District Court of Appeal, Fifth District, and was Petitioner at the trial level with respect to a "Petition For Dissolution Of Marriage." Respondent is JOHN F. ZOLD, and was Appellant in the District Court of Appeal. Petitioner shall be referred to herein as "Petitioner" or "Wife." Respondent shall be referred to as "Respondent" or "Husband." References to Appendix shall be indicated by the abbreviation "App." References to the appellate record shall be indicated by the abbreviation "R." References to the transcript from the attorneys fees portion of the trial shall be indicated by the abbreviation "TAF." All emphasis herein is added by Petitioner unless otherwise noted.

STATEMENT OF CASE

On January 26, 2001, Petitioner filed a Petition for Dissolution of Marriage. (R1-7). Respondent filed his Answer and Counterclaim to Petition for Dissolution of Marriage on February 13, 2001. (R30-9). Petitioner filed an Answer to Counter-Petition for Dissolution of Marriage on May 29, 2001.(R134-36). The Dissolution of Marriage trial was heard over three days, September 13 and 14, 2002, and November 1, 2002. On December 2, 2002, the trial court entered the Final Judgment of Dissolution of Marriage. (R1564-98). Respondent

filed a Motion For New Trial, Rehearing or Amendment of Judgment on December 9, 2002 (R883-935). The court denied this motion on December 17, 2002 (R953). On January 10, 2003, Respondent filed a Notice of Appeal(R1599-636). On June 6, 2003, the trial court entered its Final Judgments on Attorneys Fees on Dissolution of Marriage and on Interlocutory Appeal After Remand from Appellate Court. (R2086-98). On June 23, 2003, Respondent filed a Notice of Appeal. (R2099-113). Respondent appealed the Final Judgment of Dissolution of Marriage, Final Judgment on Attorneys Fees on Dissolution of Marriage, and Final Judgment on Attorneys Fees on Interlocutory Appeal After Remand from Appellate Court. The Fifth District affirmed two issues, stating that the that Husband's 57.125% ownership of Tri Tech was supported by substantial competent evidence and vacated portions of the Final Judgment that included findings of Husband's income and remanded with instructions to, among other things: Make findings as to the amount of income available to Husband for the purposes of support for Wife, his child and himself without considering any undistributed Subchapter S Income to shareholders unless it can be demonstrated that Tri Tech has delayed distributions of cash for purposes other than corporate requirements. (App. 5-6). Petitioner submitted a

brief on discretionary jurisdiction and this Court accepted jurisdiction.

STATEMENT OF FACTS

In the Final Judgment of Dissolution of Marriage, the trial court made the following findings relevant to this Petition:

1. One child was born of the marriage, John-Douglas Zold, born March 16, 1987. (R1564).

2. Shared parental responsibility was in the parties' and child's best interests. (R1564).

3. The following factors influenced the trial court for the equitable distribution set forth in the Final Judgment:

a. The following marital contributions of each spouse, including contributions to the child's care and education and Wife's services as a homemaker.

1) The parties jointly decided that Wife would be a stay at home mother. Wife has been a full time housewife and mother throughout the marriage. She cleaned, cooked, ran errands, did the laundry, household chores, and provided the child's care. She provided the child's religious upbringing.

2) Wife performed her duties well and served Husband in the development and progress of his career.

3) Wife home schooled the child for two years and

attended to his needs on a daily basis since birth.

4) Husband provided well financially for the family.
(R1565).

4. The parties' following economic circumstances:

a. Husband is President, Chairman of the Board of Directors, and General Manager of Tri Tech Electronics, Inc., a business of which he owns over 57 percent.

b. Husband has income exceeding \$245,000 per year as reflected on his 2001 tax return.

c. Wife has been unemployed outside the home for over 20 years and has no desire to re-enter the job market in her 50's.

d. Wife cannot provide income for herself to maintain the marital lifestyle. (R1565-6).

5. It is desirable to retain the family business, Tri Tech, in Husband's control. (R1566).

6. Wife has no understanding, background, or experience in the Tri Tech, *and as a result of conduct exhibited in this case, no possibility of a continuing trusting partnership exists.* The parties demonstrated a lack of harmony in their personal relations; it is difficult to envision that they would have harmony in a business relationship. (R1566).

7. *The uncontradicted documentary evidence reveals that*

Husband is 57.15428% owner of this corporation (400 of the 700 issued shares). This includes:

a. All audited financial statements of the company through 2001.

b. The confirmed representation letters to the auditor signed by Husband verifying the audit facts as true for 2000 and 2001.

c. The K1's for the corporation prior to the filing of this action and up through the initial K1's prepared by the company's CPA and Auditor for 2000 (in March, 2001). (R1566-7)

8. Husband tries to suggest some hidden interest in this business which dilutes his ownership interest to 40 percent. But such interest is not documented in any way, would be illegal, if true, and is inconsistent with the corporation's failure to file a Certificate Pertaining to Foreign Interests (DD Form 4415). Corporations that are engaged to perform defense contracts are required to reflect issued and blind holdings of third party foreign nationals, particularly those who are citizens of hostile nations. 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. The audited financial statements of

the corporation, verified by Husband as President, reflect no shareholder interest by Hyan Atassi. (R1567).

9. The trial court finds Husband's assertions are without merit because the evidence fails to establish the 30% ownership of Mr. Atassi. Further, Husband is coming into the trial court with unclean hands, as he argues that a citizen of a hostile nation is an owner of a corporation that deals in U.S. government defense contracts. The establishment of Mr. Atassi's interest would reduce Husband's ownership interest for purposes of equitable distribution, but would also jeopardize the corporation's contract with the Department of Defense or its contractors, if the legally required disclosures were made. (R1568).

10. Briggs Stahl, CPA, provided uncontested expert testimony on the value of Tri Tech. In his opinion, Husband's ownership interest has a fair market value of \$890,000.00. He performed three different analysis with the following results:

a. Asset Approach - Fair Market value of \$1,555,213 for business as a whole.

b. Income Approach - Fair Market value of \$1,849,696.00 for business as a whole.

c. Market Approach - He could not determine any

actual sales because public data was not available, however, there were two offers to the business in 1999 for \$3.7 million dollars and \$3,950,000.00 which were not accepted. After taxes these offers would support the above two values or higher. (R1569).

11. He provided this valuation based upon the most conservative method, the asset value approach. (R1569).

12. Husband, on his financial affidavits filed throughout this case, valued his interest in the business at \$800,000.00 (based on his claimed reduced share ownership). Converted to the found ownership, this value would exceed \$1,000,000.00. (R1569-70).

13. Husband provided repeated financial statements to banks valuing his interest in the business at over \$1.4 million. (R1570).

14. The valuation through the income method would have been higher had it not been for questionable bookkeeping methods used on the tax returns reflecting capital expenditures for a parking lot improvement, air conditioning, and roof repairs which would have increased the corporate income by \$145,000.00. (R1570).

15. *The corporation's available income on its balance sheet increased from \$92,853.00 at year end 1999 to*

*\$196,881.00 at year end 2000 to \$372,908.00 at year end 2001.
(R1570).*

16. The trial court finds that Husband's interest in the shares of Tri Tech to be \$890,000.00. (R1570).

*17. Mr. Stahl also documented Husband's income. In 2001, Husband's income was reflected at \$245,000.00. However, if the questionable bookkeeping entries were not used then his income would have been \$67,000.00 higher or \$312,000.00 as reflected on his return and if his proper ownership interest was used of 57.15428% then his income would have been \$395,000.00.
(R1570).*

18. The trial court did not find Husband's sworn financial affidavits or testimony regarding his income to be credible. As recent as August 26, 2002, Husband stated his net income for the year 2001, and his present income to be \$88,401.00. After giving testimony regarding the \$117,000.00 annual salary of a subordinate, Husband was questioned by the trial court. When asked why a subordinate would make more money than himself, Husband indicated that he earned \$160,000.00 annually. The trial court does not find Husband's testimony regarding his income to be credible. (R1570-1).

The following additional evidence material to this appeal

appears in the record:

Respondent is the person who handles Tri Tech's financial operations. (T502). Respondent is responsible for all of the employees of Tri Tech. (T508). Respondent, in his capacity as President, signed the letters related to the audits.

Respondent testified that his gross income was \$245,388, as reflected in his 2001 tax return. (T495). Respondent's ownership share of Tri Tech as reflected on his 1999 K-1 was 57.142857 percent. (T497). Respondent testified that for the tax year 2000, his ownership interest in Tri Tech was 57.142857 percent. (T497-8).

In addition to his salary, Respondent receives a company vehicle, the company pays the expenses for the vehicle, life insurance, bonuses, and all pass-through taxes. (T503-9).

Respondent testified that he is the person who controls whether distributions take place. (T512-3). Respondent receives the larger Subchapter S distribution than his partners in the corporation. (T524). Respondent testified that there were 700 voting shares and he controlled 400 voting shares. (T535).

Respondent testified that Mr. Atassi, at one time, owned the property where Tri Tech was located, but he did not have a right to own any interest in the company. (T827). Respondent

is the keeper of the records of Tri Tech in the ordinary course of business. (T833). If Tri Tech was sold, Mr. Atassi would not have an interest in the corporation as the corporation is currently organized. (T840). **Respondent is the only person who can issue stock in Tri Tech, and the corporation can issue 300 more shares. (T847).**

August J. Stanton, Respondent's business partner, testified that Tri Tech was purchased in 1988. (T567-8). Mr. Stanton was the attorney involved in the transaction. (T568). Mr. Stanton became involved with Tri Tech when Respondent's other partner could not raise the money for the purchase. (T569). When the corporation was purchased by Respondent and Mr. Stanton, Respondent received 400 shares and Mr. Stanton received 300 shares. (T575-6). There have been no other shares of stock issued by the corporation. (T583-5). Mr. Stanton testified that both he and Respondent receive quarterly distributions from the business in the amount of \$5,000.00. (T619-20). Mr. Stanton testified that Respondent ran the day-to-day operations of Tri Tech. (T643). Mr. Stanton claims that he owns 60 percent of Tri Tech. (T676).

Tri Tech depends on the military for business, and specializes in harnessing and wiring. (T665). Tri Tech obtains work through direct contracts as well as bidding for projects.

(T665-6).

John Lykkebak, Tri Tech' s CPA, testified that he has been the accountant since 1988 when Respondent purchased the corporation. (T695-8). Mr. Lykkebak prepares annual financial statements that are audited. (T700). *According to Mr. Lykkebak's testimony, Respondent owned 400 shares and Mr. Stanton owned 300 shares of Tri Tech stock. (T701, 816).* Mr. Lykkebak amended the K-1s for the years 2000 and 2001, to reflect that Respondent only had a 40% interest in the corporation. (T710-1). Mr. Lykkebak testified that Respondent's salary, as reflected in his 2001 tax return was \$81,459. (T734). According to Mr. Lykkebak, Respondent's total income was \$147,265. (T735). The corporation makes distributions of its earnings to the stockholders. (T740). In the year 2001, Respondent received a payment equal to his tax liability from his 2000 tax return as a distribution. (T742). Respondent also received quarterly distributions. (T742). In the year 2000, Respondent took an additional distribution of \$15,909 from an IRA. (T744-5). The total amount of Respondent's distributions in the year 2001 was \$63,416. (T745-6).

According to Mr. Lykkebak's testimony, in the 2001 audit, the corporation issued 700 shares. (T764-5). In the 2000

audit, the corporation issued 700 shares. (T765-6). In the audit performed on the corporation in 1999, the corporation issued 700 shares. (T766-7). No corrections were made to these audits which were signed by Respondent (T765-7).

Mr. Lykkebak testified that the gross income on Respondent's 2001 tax return, prepared by Mr. Lykkebak, was \$245,388. (T772). The income listed on the 2001 tax return reflected an ownership interest of 40% for Respondent. (T772-6). In the years 1999 through 2001, Mr. Lykkebak listed Respondent's ownership interest in Tri Tech as 57.142857 percent. (T774). If Respondent's ownership was reflected at 57.142857 percent, then Respondent's income from the corporation would have increased from \$156,865 to \$224,093. (T776-7).

ADDITIONAL FACTS FROM ATTORNEYS FEES HEARING

At the hearing on Attorney's Fees, Norman Levin, attorney for Petitioner, testified regarding the fees and costs that were incurred to represent Petitioner. Petitioner was seeking \$78,500 in fees (TAF 14-5) and sought costs in the amount of \$29,787.54 in his representation of Petitioner. (TAF 16). The majority of the costs incurred were for the work of Petitioner's expert, Briggs Stahl and Stahl Consulting Group, which totaled \$21,569.94 (TAF 17-8).

The case involved significant issues related to business valuation, custody, child support, and contested issues on primary residence and parenting provisions. (TAF 18,31). During the pendency of this case, there were three temporary relief hearings and a three day trial. (TAF 18-9). Additionally, numerous depositions were taken and used at trial, including Respondent and John Lykkebak. (TAF 19-20). The fees incurred by Petitioner were due to Respondent requiring Petitioner to prove up every matter in this case. (TAF 32). The total amount of fees billed by Petitioner was \$117,477.64, and Petitioner paid to her attorney \$14,635.20, leaving a balance due of \$102,842.44. (TAF 31-2).

Respondent was ordered to pay Petitioner a lump sump of \$172,088.50 as a part of the Final Judgment of Dissolution of Marriage, which had not been paid by Respondent. (TAF 40,41). Additionally, Respondent was ordered to make monthly payments to Petitioner in the sum of \$1,797.66 per month which had not been paid. (TAF 40, 41-2). Other than the alimony and child support payments, Petitioner had no funds for the payment of attorney's fees to her attorney. (TAF 44).

A.J. Stanton testified that Respondent receives a salary of \$120,000 per year plus distributions from Tri Tech. (TAF 51-2). Respondent continues to receive indirect compensation

in the form of a vehicle and life insurance. (TAF 54-5). In the year 2002, Tri Tech had a profit of more than \$200,000, and Respondent received 40% of that profit in K-1 income. (TAF 61-2).

Respondent testified that he received K-1 income for the year 2002 of \$97,000, and that his gross income for the year 2002 was approximately \$248,000. (TAF 92). Additionally, Respondent withdrew \$56,000 from an IRA. (TAF 94).

The trial court made the following findings at the Attorney's Fees Hearing:

1. This was a complex case because of the illusory value of Respondent's income and his percentage ownership of the corporation. (TAF 111)

2. The illusory value of Respondent's income and his percentage ownership of the corporation made "all of these attorney's fees and hours of trial necessary." (TAF 111).

3. Respondent had not complied with any portion of the equitable distribution that the Court ordered under the illusory reason that he cannot obtain any money and cannot finance his shares. (TAF 111).

4. *Respondent has made no real effort to obtain money or finance his shares to comply with the equitable distribution award.* (TAF 111).

5. There has been no attempt to request that Petitioner subordinate her interest in the shares of the corporation.

(TAF 111)

6. *At trial, when inquiry was made about a subordinate earning \$117,000 annually when Respondent earned between \$80,000 and \$88,000, his testimony was not credible. (TAF 112-3).*

7. *The trial court did not find Respondent's testimony regarding his income to be credible. (TAF 113)*

8. *The trial court did not find Mr. Stanton's testimony regarding Respondent's income to be credible. (TAF 113).*

9. The fees requested by Mr. Levin were reasonable, and Respondent was responsible for \$65,000 of those fees. (TAF 113).

10. Respondent is responsible for \$25,000 of the costs incurred by Petitioner. (TAF 113).

11. Respondent has the ability to pay these amounts. (TAF 113)

12. Petitioner has the need because she has not received the payments pursuant the Final Judgment. (TAF 113).

13. Respondent shall make the payments through a payment plan of \$1,000 per month with interest at the legal rate set by the Comptroller and Legislature. (TAF 113-4).

There was also a hearing on Interim Appellate Fees from Case Number 5D02-242 on a Temporary Relief Order. (TAF 120,122). The interim appeal was affirmed by the Fifth District Court of Appeal in a Per Curiam opinion, upholding the ruling of the trial court (TAF 127-8) and granted attorneys fees and remanded to the trial court to determine the amount. The trial court awarded \$4,000 to Petitioner as a reasonable award of attorney's fees for the Interim Appeal. (TAF 143-4).

Respondent appealed to the Fifth District Court of Appeals and the Fifth District affirmed the trial court on its determination that Respondent was owner of 57.142857% of Tri Tech and the trial court's valuation of this asset. The District Court overruled, deviated from, or ignored the trial court's findings on credibility. From the Appellate Court's opinion, the facts upon which Wife believes the Fifth District announced its rule of law in this case which conflicts with rules previously announced by other courts can be viewed in its opinion rendered herein. The following material facts are stated in the opinion:

Husband, who was sixty-five, and Wife, who was fifty, at the time of trial, have one fifteen year old child. (App. 1). Wife was employed as a secretary making \$20,000 per year prior

to the marriage. (App. 2).

Husband disputed the trial court's finding that his portion of the capital stock is worth \$890,000. He claimed that this value was incorrectly determined by applying a percentage rate of 57.15428, found by the trial court to be his percentage of ownership of the Tri Tech stock. Husband claimed he only owned 40% percent. There is substantial competent evidence in the record to support the trial court's finding that Husband owned 57.15428% of the Tri Tech stock. (App.2)

On November 27, 2002, the trial court ordered Husband to pay Wife: \$172,088.50 within sixty days; \$1,797.66 monthly until \$200,000, plus interest at 7% was paid; \$5,000.00 monthly as permanent alimony; \$520.94 monthly as child support; Premiums on a \$500,000 life insurance policy, the amount of which is unknown; Health and dental insurance; One-half of the child's clothing, schooling, entertainment, and other expenses and uninsured medical expenses. (App. 2). The total for the above sum is more than \$189,406.20.

The only marital asset distributed to Husband, and the only source of income to satisfy the obligations imposed on him by the trial court, was his interest in Tri Tech, the capital stock of which is owned by Husband and one other

stockholder. (App. 2).

The source of all Husband's income is from Tri Tech. (App. 3). Tri Tech and its two shareholders have elected to be taxed under Subchapter S of the Internal Revenue Code, which means that all corporate income is "passed through" to the shareholders in accordance with their percentage ownership of the corporation stock. (App. 3). "Pass through" income would be reported on the shareholders' individual federal income tax returns. (App. 3). Although all of the corporate income must be reported and taxed, the individuals do not necessarily receive distributions of cash equal in amount to the income subject to taxation. (App. 3). Only that amount of cash is distributed in excess of what must be retained for corporate purposes. (App. 3).

Tri Tech's other shareholder is an attorney and the tenor of his testimony at trial does not indicate that Husband is free to treat the corporate cash as his piggy bank, nor to accumulate cash rather than distribute it, especially when the federal income tax on it had been previously paid. (App. 4).

SUMMARY OF ARGUMENT

ARGUMENT I

THE DISTRICT COURT OF APPEAL ERRED IN REVERSING THE TRIAL COURT'S DECISION INCLUDING UNDISTRIBUTED BUSINESS INCOME OF HUSBAND'S S CORPORATION, WHICH HE OWNED OVER 57% AND WHICH HE CONTROLLED DISTRIBUTIONS, IN THE HUSBAND'S INCOME FOR CHILD

SUPPORT, ALIMONY AND ATTORNEYS FEES ISSUES IN THIS CASE UNDER CHAPTER 61, F.S.

The Appellate Court erred in reversing part of the trial court's Final Judgment that included Husband undistributed business income from his Subchapter S corporation of which Husband owned over 57 percent. The evidence presented at trial was that only Husband decides when distributions were made. The trial court did not find Husband's testimony regarding his income or percentage share of the business credible.

ARGUMENT II

THE TRIAL COURT DID NOT ERR WHEN IT ATTRIBUTED K-1 INCOME TO RESPONDENT FOR PURPOSES OF COMPUTING SUPPORT OBLIGATIONS WHICH DETERMINATION WAS SUPPORTED IN THE RECORD WITH SUBSTANTIAL COMPETENT EVIDENCE

The trial court did not err by attributing K-1 income to Respondent for purposes of computing child support because the facts at trial supported the trial court's conclusions. Respondent is the President, CEO, and Chairman of the Board, and he is the person who runs Tri Tech. (T501). Respondent handles the financial operations of Tri Tech, is responsible for all of the employees, he signed letters related to the audits, and testified that his gross income, as reflected in his 2001 tax return, was \$245,388. (T495). In addition Respondent receives a company vehicle, life insurance,

bonuses, and all pass-through taxes.

ARGUMENT III

THE APPELLATE COURT ERRED IN ITS OPINION BY ADDING ADDITIONAL CRITERIA TO THE DEFINITION OF INCOME UNDER SECTIONS 61.30, FLA. STAT. AND 61.046, FLA. STAT. AND PLACING THE BURDEN OF PROOF ON PETITIONER

The Fifth District erred by adding additional criteria to the definition of income under sections 61.30, Fla. Stat. and 61.046, Fla. Stat. The Court remanded with instructions for the trial court make findings as to the amount of income available to Husband for support purposes without considering any undistributed Subchapter S income to shareholders unless it can be demonstrated that Tri Tech delayed distributions of cash for purposes other than corporate requirements. The Court by-passed the definition issue of income without providing any statement of authority for its position nor addressing the question of which party has the burden of proving income availability.

ARGUMENT IV

THE APPELLATE COURT ERRED IN ITS OPINION BY SUPERCEDING ITS VIEW OF THE FACTS FOR THE TRIAL COURT'S WHEN THERE WAS SUBSTANTIAL COMPETENT EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURT'S FINDINGS AS TO HUSBAND'S INCOME.

The Appellate Court erred by superceding its view of the facts in place of the trial court's findings by relying on the testimony of Tri Tech's other shareholder when there was

substantial competent evidence to support the trial court's findings. The Court ignored the trial court's determination of credibility of this witness.

ARGUMENT V

THE TRIAL COURT'S COMBINED ORDERS REQUIRING HUSBAND TO CONTRIBUTE TO WIFE'S ATTORNEY'S FEES AND COSTS IS NOT AN ABUSE OF DISCRETION AND IS BASED ON FINDINGS WHICH ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE

The trial court properly awarded attorney's fees and costs to Petitioner because the trial court looked at the parties' relative positions and disparity in incomes when considering Petitioner's only source of income is Respondent's support payments. The trial court made specific findings that Respondent had the present ability to pay attorney's fees and costs, which was supported by substantial competent evidence.

ARGUMENT I

THE DISTRICT COURT OF APPEAL ERRED IN REVERSING THE TRIAL COURT'S DECISION INCLUDING UNDISTRIBUTED BUSINESS INCOME OF HUSBAND'S S CORPORATION, WHICH HE OWNED OVER 57% AND WHICH HE CONTROLLED DISTRIBUTIONS, IN THE HUSBAND'S INCOME FOR CHILD SUPPORT, ALIMONY AND ATTORNEYS FEES ISSUES IN THIS CASE UNDER CHAPTER 61, F.S.

The question presented to the trial court and Appellate Court asked what is Husband's income for the purpose of child support, alimony, and attorneys fees awards. To reach this decision, the trial court first had to resolve the issue of

Husband's ownership interest in Tri Tech Electronics, Inc., a close corporation. The trial court determined that Husband owned 57.15428% of the Tri Tech stock and the District Court affirmed stating that there was substantial competent evidence in the record to support the finding that Respondent owned 57.15428% of the Tri Tech stock and referenced Drakyne v. Drakyne, 460 So. 2d 582, 583 (Fla. 5th DCA 1984). (App. 2).

The Fifth District vacated portions of the Final Judgment that include the findings of Husband's income and remanded with instructions to, among other things:

Make findings as to the amount of income available to Husband for the purposes of support for Wife, his child and himself without considering any undistributed Subchapter S Income to shareholders unless it can be demonstrated that Tri Tech has delayed distributions of cash for purposes other than corporate requirements. (App. 5-6).

The Fifth District's opinion directly conflicts with prior decisions of other district courts in this state. In Zipperer v. Zipperer, 567 So.2d 916 (Fla. 1st DCA 1990), the First District specifically held that pass through income is within the definition of income under Section 61.046. In Martinez v. Martinez, 761 So.2d 433 (Fla. 3d DCA 2000), the

Third District held that no error occurs when the retained income of an S Corporation is included in the calculation of income for the purpose of calculating child support and alimony. In Sohacki v. Sohacki, 657 So.2d 41 (Fla. 1st DCA 1995), the First District held that amounts from a Subchapter S Corporation shown but not paid are to be included in a person's income when the corporation paid the taxes on that person's personal tax return. In McHugh, 702 So.2d 639 (Fla. 3d DCA 1997), the Third District compared its facts to Zipperer, Martinez, and Sohacki and proposed an alternative way of evaluating this issue in cases where the party is a minority shareholder (not the case in our case). In this case, the Fifth District went a step further and indicated that where there is more than one owner in a Sub S corporation or partnership that the rules for analysis are totally different from sole ownership cases and the Court must make specific findings on cash available in every case.

In Zipperer v. Zipperer, 567 So.2d 916 (Fla. 1st DCA 1990), the First District addressed the issue of whether undistributed business profits are income. The trial court failed to include dividend and business income, which was included on Husband's tax return, as part of Husband's income. Husband argued that the court should not include the interest,

dividend, and business income as part of his income because the business would have a loss if he had actually received those funds. The First District disagreed by stating that "Chapter 61 clearly designates 'income'" and found that the definition in section 61.046 included undistributed business income. Id.

In Sohacki v. Sohacki, 657 So.2d 41 (Fla. 1st DCA 1995), the First District revisited the undistributed profits income issue in a child support modification case where, again, the trial court did not include undistributed business income in computing the father's income. The Court stated:

We reverse and remand for reconsideration of these issues, as the trial court apparently felt bound to accept Father's undisputed testimony that he received only approximately \$45,000 in salary and distributions from his Subchapter S corporation, although the corporation generated approximately \$100,000, which Father claimed and paid taxes on, on his personal tax return. See Zipperer v. Zipperer, 567 So.2d 916, 917 (Fla. 1st DCA 1990). Id.

In Martinez v. Martinez, 761 So.2d 433 (Fla. 3d DCA 2000), the Third District faced the undistributed profits income issue in a dissolution proceeding. Husband owned a

construction company which he started and developed during the marriage and argued that the trial court erred by imputing him the retained income of his S Corporation for purposes of calculating alimony and child support. The Appellate Court rejected Husband's argument stating:

Former husband next contends that the trial court erroneously imputed to him the retained income of his construction company, an S- corporation, for alimony and child support purposes. We disagree and find that the record supports the award, and amount of, child and spousal support. Id.

In the present case, Respondent argued to the Fifth District that the court should not follow these cases but should follow the opinion of the Third DCA in McHugh v. McHugh, 702 So.2d 639 (Fla. 3d DCA 1997). In McHugh, the Third District compared its facts to Zipperer, Martinez, and Sohacki. Wife sought to have \$247,000 in Schedule K-1 income of an S corporation attributed to Husband. The trial court did not include the Schedule K-1 income because this income was not received by Husband but was retained by the corporation for purpose of building the business. **The trial court based its ruling on the fact that Wife did not present any evidence that Husband had access to the K-1 income, and Husband**

testified that he had no access and no ability to control distributions. Id. (Emphasis added).

A review of these decisions indicates two rules applied to this income issue in Florida: 1) Statutory Definition Rule which indicates that business income, even if undistributed is income for support purposes, recognizing that a party receives an economic benefit whether the profits are distributed or not, and 2) The McHugh Rule which says that where the shareholder establishes that the shareholder has no access to K-1 undistributed income of a business and that even if the item meets the definition of income, that item will not be recognized as income for support purposes.

The McHugh Rule creates significant inequity because the holding allows a person to accumulate savings and not recognize that savings as income for support purposes. However, for the instant case, this Court does not need to address this issue because in McHugh, the District Court relied on the uncontradicted facts that Husband, as a 10% owner, had no access to funds retained in the corporation and could not control distributions. In the instant case, Husband was found to be a majority shareholder of the business.

In the case at bar, the trial court determined that Husband is a majority shareholder (57.15428%), specifically

rejecting Husband's argument that he is only a 40% shareholder and delineating specific facts explaining its findings; found that Husband is President, Chairman of the Board of Directors, and General Manager of Tri Tech; relied on CPA testimony that documented Husband's income as at least \$245,000.00 and if the questionable bookkeeping entries were not used then his income would have been \$67,000.00 higher or \$312,000.00, as reflected on his return, and if his proper ownership interest of 57.15428% was used, then his income would have been \$395,000.00. (R1570); that it did not find Husband's sworn financial affidavits or testimony regarding his income to be credible (R1570-1)(TAF 113); that the Court did not find Mr. Stanton's testimony regarding Respondent's income to be credible (TAF 113) *and that Respondent testified that he is the person who controls whether distributions take place,* (T512-3) and that he receives the larger Subchapter S distribution than his partners in the corporation. (T524).

A shareholder with majority ownership and control can manipulate income. The McHugh Rule would encourage payors, who are shareholders in S corporations, to favor their own long term financial interests over their children's and former spouse's need for support until the obligation period is over. The shareholder would have incentive to keep most or all of

his shareholder income as retained earnings by the corporation.

Under either of the above rules, the trial court should have been affirmed. The Fifth District did not mention or discuss the statutory definitions and did not mention any analysis of the definitions. The Appellate Court further ignored the analysis set out in McHugh and ignored the trial court's findings of fact and superimposed its own factual determinations which was inappropriate. The trial court should have been affirmed on these issues.

ARGUMENT II

THE TRIAL COURT DID NOT ERR WHEN IT ATTRIBUTED K-1 INCOME TO RESPONDENT FOR PURPOSES OF COMPUTING SUPPORT OBLIGATIONS WHICH DETERMINATION WAS SUPPORTED IN THE RECORD WITH SUBSTANTIAL COMPETENT EVIDENCE

Respondent argued that the trial court erred by attributing corporate K-1 income to him for the purposes of determining support obligations when this finding was not supported by competent evidence and did not comport with controlling legal opinions.

The facts at trial supported the trial court's conclusions. Respondent is the President, CEO, and Chairman of the Board, and he is the person who runs Tri Tech. (T501). Respondent is the person who handles the financial operations of Tri Tech. (T502). Respondent is responsible for all of the

employees of Tri Tech. (T508). Respondent, in his capacity as President, signed the letters related to the audits.

Respondent testified that his gross income, as reflected in his 2001 tax return, was \$245,388. (T495). Respondent's ownership share of Tri Tech as reflected on his 1999 K-1 was 57.142857 percent. (T497). Respondent testified that for the tax year 2000, his ownership interest in Tri Tech was 57.142857 percent. (T497-8). In addition to his salary, Respondent receives a company vehicle, the company pays the expenses for the vehicle, life insurance, bonuses, and all pass-through taxes. (T503-9).

Respondent testified that he is the person in the corporation who controls whether distributions take place. (T512-3). Respondent testified that there were 700 voting shares and he controlled 400 of those shares. (T535). Respondent has the controlling vote for the corporation (T539), because Respondent owns 400 of the 700 shares of stock in the corporation. Respondent runs the day-to-day operations, and he is in complete control of the company. (T540).

The real issue is what is income for support purposes under Florida law: Section 61.30 defines Gross Income as:

(2) Income shall be determined on a monthly basis for the obligor and for the obligee as follows:

(a) Gross income **shall include, but is not limited to**, the following items:

1. Salary or wages.
2. Bonuses, commissions, allowances, overtime, tips, and other similar payments.
3. **Business income from sources such as self-employment, partnership, close corporations, and independent contracts. "Business income" means gross receipts minus ordinary and necessary expenses required to produce income.**
4. Disability benefits.
5. All workers' compensation benefits and settlements.
6. Unemployment compensation.
7. Pension, retirement, or annuity payments.
8. Social security benefits.
9. Spousal support received from a previous marriage or court ordered in the marriage before the court.
10. Interest and dividends.
11. Rental income, which is gross receipts minus ordinary and necessary expenses required to produce the income.
12. **Income from royalties, trusts, or estates.**

13. Reimbursed expenses or in kind payments to the extent that they reduce living expenses.

14. Gains derived from dealings in property, unless the gain is nonrecurring.

(b) Income on a monthly basis shall be imputed to an unemployed or underemployed parent when such employment or underemployment is found to be voluntary on that parent's part, absent physical or mental incapacity or other circumstances over which the parent has no control. In the event of such voluntary unemployment or underemployment, the employment potential and probable earnings level of the parent shall be determined based upon his or her recent work history, occupational qualifications, and prevailing earnings level in the community; however, the court may refuse to impute income to a primary residential parent if the court finds it necessary for the parent to stay home with the child.

(c) Public assistance as defined in s. 409.2554 shall be excluded from gross income. Id.

Section 61.046(7) defines income as:

(7) **"Income" means any form of payment to an individual, regardless of source, including, but not limited to:** wages, salary, commissions and bonuses, compensation as an independent contractor, worker's compensation, disability benefits, annuity and retirement benefits,

pensions, **dividends**, interest, royalties, trusts, and any other payments, made by any person, private entity, federal or state government, or any unit of local government. United States Department of Veterans Affairs disability benefits and unemployment compensation, as defined in chapter 443, are excluded from this definition of income except for purposes of establishing an amount of support. Id.

The Appellate Courts have interpreted this language under circumstances similar to our case.

In Zipperer v. Zipperer, 567 So.2d 916 (Fla. 1st DCA 1990), the First District faced the issue of whether undistributed business profits were income in reversing a denial of modification of alimony, where the trial court failed to include in Husband's income the dividend and business income showing on his tax return. The Appellate Court stated:

The husband maintains on appeal that interest, dividend and business income should not be attributed to him because he only reports it for tax purposes and, were he to receive it, he would actually suffer a loss. Id.

The Court disagreed, considered the definition of income and stated that "Chapter 61 clearly designates "income" and found that the definition in section 61.046 included undistributed business income.

In Sohacki v. Sohacki, 657 So.2d 41 (Fla. 1st DCA 1995), the First District revisited the issue in a child support

modification case where, again, a trial court did not include undistributed business income in computing the Father's income. The Court stated:

We reverse and remand for reconsideration of these issues, as the trial court apparently felt bound to accept Father's undisputed testimony that he received only approximately \$45,000 in salary and distributions from his Subchapter S corporation, although the corporation generated approximately \$100,000, which Father claimed and paid taxes on on his personal tax return. See Zipperer v. Zipperer, 567 So.2d 916, 917 (Fla. 1st DCA 1990) (determining in alimony modification proceeding that interest, dividend, and business income was properly attributed to husband as "income" under chapter 61, despite his claim that the income was only reported for tax purposes and not actually received), rev. denied, 581 So.2d 1312 (Fla. 1991). Id.

In Martinez v. Martinez, 761 So.2d 433 (Fla. 3d DCA 2000), the Third District faced the issue in a dissolution proceeding. Former husband was the owner of a construction company, which he started and developed during the marriage. Former Husband argued that the trial court erred in imputing to him the retained income of his S-Corporation for purposes of calculating alimony and child support. The Court rejected this argument stating:

Former husband next contends that the trial court erroneously imputed to him the retained income of his construction company, an S- corporation, for alimony and child support purposes. We disagree and find that the record supports the award, and amount of, child and spousal support. See §61.046(4), Fla. Stat. (1997); §61.08(2)(g), Fla. Stat. (1997); §61.30(2)(a), Fla. Stat. (1997); Sohacki v. Sohacki,

657 So. 2d 41 (Fla. 1st DCA 1995); Zipperer v. Zipperer, 567 So. 2d 916 (Fla. 1st DCA 1990). Id.

In the instant case, Respondent is President, CEO, and majority shareholder of the corporation. By his own testimony, he has complete control of what money is and is not paid out. The evidence further showed that additional monies needed during the years of litigation were paid, as needed, for Husband.

The trial court made the following findings of fact as to Respondent's income:

Mr. Stahl also documented the Husband's income. In 2001 the Husband's income was reflected at \$245,000.00. However, if the questionable bookkeeping entries were not used then his income would have been \$67,000 higher or \$312,000.00 as reflected on his return and if his proper ownership interest was used of 57.15428% then his income would have been \$395,000.00. . . The Court did not find the Husband's sworn financial affidavits or testimony regarding his income to be credible. As recent as August 26, 2002, the Husband has stated his net income for the year 2001, and his present income to be \$88,401.00. After giving testimony regarding the \$116,000.00 annual salary of a subordinate, Mr. Zold was questioned by the Court. When asked why a subordinate would make more money than he did, the Husband indicated that he earned \$160,000.00 annually. The Court does not find the Husband's testimony regarding his income to be credible. . . In addition to the income reflected thereon, the Husband receives an automobile and all related expenses paid by the business, health insurance, life insurance and other perquisites. (R1570-1, 1573).

This case clearly shows business income. There is a close

corporation owned by two shareholders and operated by Husband. The income in this situation is determined by **gross receipts minus ordinary and necessary expenses required to produce income**. The business tax returns received in evidence show that the calculations of profit on the business tax returns follows this same definition. If anything, the tax return includes some things, like depreciation, that should be not recognized as ordinary and necessary expenses. The tax return provides a conservative number for the income figure used by the court.

There was evidence shown that the cash on hand in the business during the last two years had grown *from \$92,853.00 at year end 1999 to \$196,881.00 at year end 2000 to \$372,908.00 at year end 2001. (R1570)*. The trial court was reasonable to determine that the corporation was hoarding money to avoid support in this case. There was further evidence that the two shareholders were attempting to manipulate the stock ownership to make it look like Husband was not in control. The Court specifically stated:

Husband tries to suggest some hidden interest in this business which dilutes his ownership interest to 40%. But such interest is not documented in any way, would be illegal, if true, and is inconsistent with the corporation's failure to file a Certificate Pertaining to Foreign Interests (DD Form 4415). Corporations that are engaged to perform defense

contracts are required to reflect issued and blind holdings of third party foreign nationals, particularly those who are citizens of hostile nations. 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. The audited financial statements of the corporation, verified by Husband as President of the corporation, reflect no shareholder interest by Hyan Atassi. (R1567).

*The trial court finds Husband's assertions are without merit because the evidence fails to establish the 30% ownership of Mr. Atassi. **Further, Husband is coming into the trial court with unclean hands**, as he argues that a citizen of a hostile nation is an owner of a corporation that deals in U.S. government defense contracts. The establishment of Mr. Atassi's interest would reduce Husband's ownership interest for purposes of equitable distribution, but would also jeopardize the corporation's contract with the Department of Defense or its contractors, if the legally required disclosures were made. (R1568).*

Based upon the evidence presented at trial, the trial court properly considered the income received by Respondent.

There was substantial competent evidence of Respondent's income through the introduction of income tax returns and the testimony of the CPA, Briggs Stahl, and the other evidence received for the trial court to reach its conclusion. When there is substantial competent evidence to support the ruling of the trial court, the appellate court should uphold the trial court's judgment. Cerra v. Cerra, 820 So.2d 398 (Fla. 5th DCA 2002); Morse v. Morse, 796 So.2d 1200 (Fla. 3d DCA 2001).

ARGUMENT III

THE APPELLATE COURT ERRED IN ITS OPINION BY ADDING ADDITIONAL CRITERIA TO THE DEFINITION OF INCOME UNDER SECTIONS 61.30, FLA. STAT. AND 61.046, FLA. STAT. AND PLACING THE BURDEN OF PROOF ON PETITIONER

The Fifth District erred in its opinion by adding additional criteria to the definition of income under sections 61.30, Fla. Stat. and 61.046, Fla. Stat.

The Appellate Court remanded this matter to the trial court with instructions that the trial court make findings as to the amount of income available to Husband for Wife's support, their child, and himself without considering any undistributed Subchapter S income to shareholders unless it can be demonstrated that Tri Tech delayed distributions of cash for purposes other than corporate requirements.

As noted in Argument II, the Appellate Court did not address or mention the statutory definitions or existent case law on this issue in its opinion.

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.

The tax return received in evidence uses a virtually

identical definition for business income as used in section 61.30, the gross receipts minus ordinary and necessary expenses required to produce income. This piece of evidence, alone, provides a prima facie basis of competent evidence for the court to rely upon. At a minimum, should the court continue to require an availability requirement in addition to the statutory definition, then this should be viewed as an affirmative defense where the party in control of the entity has the burden to show that the income is not available rather than to impose this burden on the party who has no access to the evidence.

The Appellate Court, in rendering its ruling, has completely by-passed this definition issue for business income and has provided no statement of authority for its position.

Additionally, in its remand instructions, the Fifth District does not address who has the burden of proof as to this fact. As addressed in Argument II, the trial court already determined that the tax returns reflected gross receipts minus ordinary and necessary business expenses needed to generate income and the trial did not believe testimony from Husband or his partner and nor did Husband and Mr. Stanton convince the trial court that this evidence adequately reflected income as defined under the statutes.

The Appellate Court blatantly ignores the fact that all evidence related to such matter is solely within the possession of Husband and his compatriots if the Court, on remand, mandates that Wife has this additional burden. Husband testified at trial that he controlled the distributions and payments from the corporation.

If the Court's remand instructions require Wife bear this burden, the non-owning party in all Subchapter S cases are forced to hire accountants to perform the equivalent of an audit on the corporate accounts and the owning party is encouraged to store cash without accountability. The party with lesser assets and no access to resources would have a major financial burden.

Wife has made the argument, based upon the available evidence, that "the gross receipts minus ordinary and necessary expenses required to produce income" provides a showing of significant income. The uncontradicted evidence showed that the corporation increased its cash holdings during the last two years, before the dissolution, by approximately \$300,000.00. The trial court found Husband's and Mr. Stanton's explanations not credible and not believable. Under this circumstance, Husband has not met his burden of proof, even if this requirement is appropriate.

If the Appellate Court determines that adding this additional requirement to the statutory definitions is appropriate, then the Appellate Court should also set forth a procedure that once the non-owning party shows that "the gross receipts minus ordinary and necessary expenses required to produce income" is proven to exist, that the controlling party would have an affirmative burden to show lack of availability.

That is exactly what happened in this case. The Court did not find that Husband had met such burden and the trial court's position should be affirmed.

ARGUMENT IV

THE APPELLATE COURT ERRED IN ITS OPINION BY SUPERCEDING ITS VIEW OF THE FACTS FOR THE TRIAL COURT'S WHEN THERE WAS SUBSTANTIAL COMPETENT EVIDENCE IN THE RECORD TO SUPPORT THE TRIAL COURT'S FINDINGS AS TO HUSBAND'S INCOME.

Initially, the Appellate Court affirmed the trial court's ruling related to Husband's percentage of ownership finding that there was substantial competent evidence in the record to support the trial court's finding that Husband owned 57.15428% of the corporate stock citing Drakyne v. Drakyne, 480 So.2d 582, 583 (Fla. 5th DCA 1984).

The Appellate Court, however, ignored the second point set forth in Drakyne v. Drakyne, 480 So.2d 582, 583 (Fla. 5th DCA 1984), which was:

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. Rather the test is whether the judgment of the trial court is supported by competent substantial evidence. Kuvin v. Kuvin, 442 So.2d 203 (Fla. 1983). (emphasis added).

The trial court's purpose is to weigh the individual witnesses' credibility, and in the present case, the trial court did not find Husband or his witnesses to be credible on the issue of the ownership of Tri Tech or Husband's income. The trial court, as finder of fact, is to resolve conflicts in the evidence and weigh the credibility of witnesses, and great deference is to be afforded to the finder of fact because it has first hand opportunity to see and hear the witnesses testify. A.D. v. Dept. of Children and Families, 837 So.2d 1078 (Fla. 5th DCA 2003). An appellate court is not permitted to reweigh the credibility of a witness and evidence. Cole v. Cole, 723 So.2d 925 (Fla. 3d DCA 1999). Such ruling is in direct conflict with the above precedent recognized by this Court.

In its ruling, the Appellate Court specifically attempts to rely on the testimony of Tri Tech's other shareholder stating:

"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, especially when the federal income tax on it had been previously paid." (App. 4).

In doing so, the Court has specifically ignored the trial court's determination of credibility of this witness.

The trial court made specific findings on credibility:

"The Court did not find the Husband's sworn financial affidavits or testimony regarding his income to be credible. As recent as August 26, 2002, the Husband stated his net income for the year 2001, and his present income to be \$88,401.00. After giving testimony regarding the \$117,000.00 annual salary of a subordinate, the Court questioned Mr. Zold. When asked why a subordinate would make more money than he did, the Husband indicated that he earned \$160,000.00 annually. The Court does not find the Husband's testimony regarding his income to be credible. (R1570-1571).

The trial court made the following relevant findings at the Attorney's Fees Hearing:

A. This was a complex case because of the illusory value of Appellant's income and his percentage ownership of the corporation. (TAF 111)

B. That at trial, when inquiry was made about a subordinate earning \$117,000 annually when Appellant earned between \$80,000 and \$88,000, his testimony was not credible. (TAF 112- 113).

C. That the trial court did not find Mr. Stanton's testimony regarding Appellant's income to be credible. (TAF 113).

The trial court rejected the testimony of A.J. Stanton

and Husband regarding the amount of Husband's income and what was available to Husband.

The Appellate Court has specifically overruled and relied upon the testimony of Mr. Stanton in reaching its conclusion even though the trial court specifically rejected that same testimony. This violates the law of this Court and every district.

The Appellate Court erred in ignoring the trial court's findings, evaluation of the evidence, and determination of credibility.

ARGUMENT V

THE TRIAL COURT'S COMBINED ORDERS REQUIRING HUSBAND TO CONTRIBUTE TO WIFE'S ATTORNEY'S FEES AND COSTS IS NOT AN ABUSE OF DISCRETION AND IS BASED ON FINDINGS WHICH ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE

In the Final Judgment of Dissolution of Marriage, the trial court made findings of fact about Respondent's income which we have cited in the prior arguments:

At the hearing on Attorney's Fees, the trial court made the following findings of fact:

This was a complex case because of the illusory value of Respondent's income and his percentage ownership of the corporation. . . That Respondent had not complied with any portion of the equitable distribution that the Court

ordered under the illusory reason that he cannot obtain any money and cannot finance his shares. . . That there has been no real effort by Respondent to obtain money or finance his shares to comply with the equitable distribution award. . . That at trial, when inquiry was made about a subordinate earning \$117,000 annually when Respondent earned between \$80,000 and \$88,000, his testimony was not credible. . . That the trial court did not find Respondent's testimony regarding his income to be credible. . . That the trial court did not find Mr. Stanton's testimony regarding Respondent's income to be credible. . . That Respondent has the ability to pay these amounts. . . That Petitioner has the need because she has not received the payments pursuant the Final Judgment. . . That Respondent shall make the payments through a payment plan of \$1,000 per month with interest at the legal rate set by the Comptroller and Legislature. (TAF 111-4).

Awards of attorneys fees in dissolution of marriage

actions are governed by Section 61.16, which states:

(1) The court may from time to time, after considering the financial resources of both parties, order a party to pay a reasonable amount for attorney's fees, suit money, and the cost to the other party of maintaining or defending any proceeding under this chapter, including enforcement and modification proceedings and appeals. . . In all cases, the court may order that the amount be paid directly to the attorney, who may enforce the order in that attorney's name. In determining whether to make attorney's fees and costs awards at the appellate level, the court shall primarily consider the relative financial resources of the parties, unless an appellate party's cause is deemed to be frivolous.

§61.16(1), Fla. Stat. (2002).

Respondent argued that he was being ordered to make payments of \$8,317.70 per month to Petitioner, but fails to mention that the lump sum monthly payments in the amount of

\$1,797.66 have never been paid. Respondent's only payments are the alimony and child support, which total \$5,520.04 per month. The trial court made findings at the time of trial and the hearing on attorney's fees regarding Respondent's income that were supported by substantial competent evidence.

Based upon the trial court's findings, after considering the alimony award of \$5,000.00 per month, Respondent has a net monthly income of \$10,301.21, with an excess of \$4,451.17 after considering the expenses on his financial affidavit. (R1580). Respondent, through his Supplemental Brief, states that his income increased from 2001 to 2002 from \$245,388 to \$246,653, providing him a greater surplus. (Supp Brief of Respondent at 16-7). Even in the best light to Respondent, his income still exceeds \$205,000.00 per year with Petitioner at \$60,000 per year. With tax savings from alimony payments, the net cost of this payment is less than \$39,000 per year.

Respondent cited Misdraji v. Misdraji, 702 So.2d 1292 (Fla. 3d DCA 1997) to argue that the current income must be considered. However, Misdraji dealt with an unequal distribution of assets, awarding Wife the marital home in that case. Id. In the present case, the distribution of assets was equal, after considering the equalization payment that the trial court ordered. Otherwise, Wife has no assets. Respondent

has violated the trial court's order and not paid Petitioner any of her distribution.

Respondent cited Ariko v. Ariko, 475 So.2d 1352 (Fla. 5th DCA 1985). This case is distinguishable because, in Ariko, the Court held that Wife had "substantially the same ability to pay her attorney as did the Husband" and reversed an award of attorneys fees. Id. In the present case, Respondent has a significant surplus at the end of each month based upon his income, while Petitioner has a significant deficit at the end of each month because her only source of income is the support payments received from Respondent. Respondent has not made the payments to Petitioner that would equalize the distribution of assets, and Petitioner does not have liquid assets from which to pay her attorney's fees and costs. Respondent's reliance on Naugle v. Naugle, 632 So.2d 1146 (Fla. 5th DCA 1994) is also inapplicable because in that case, the parties' incomes were equalized. In the present case, Petitioner's gross income is \$60,000.00 and Respondent's gross income is over \$200,000.00. The parties' incomes are not equalized as in Naugle.

In the present case, the trial court properly awarded attorney's fees and costs to Petitioner because the trial court looked at the parties' relative positions and disparity

in incomes when considering Petitioner's only source of income is Respondent's support payments.

The trial court made specific findings that Respondent had the present ability to pay attorney's fees and costs, Petitioner had the need for attorneys fees "**especially in light of the fact that the funds that this Court thought Mrs. Palicte would be getting she has not received**", and set forth a payment plan that took into consideration the current income of Respondent and his financial position. (TAF 113). (Emphasis added). The trial court found that the full amount of fees incurred by Petitioner were reasonable, but ordered Respondent to pay \$65,000 for the fees and \$25,000 for the costs. (TAF 113-4). An award of attorneys fees and costs is based on the parties' current financial position and should be upheld when there is substantial competent evidence to support the award. Newnum v. Weber, 715 So.2d 306 (Fla. 5th DCA 1998). The uncontradicted evidence was that Respondent's income was in excess of \$200,000 per year, and Petitioner's only source of income was from the support that she received as a part of the Final Judgment. The parties have a substantial disparity in their incomes which justifies the award of fees. Meighen v. Meighen, 813 So.2d 173 (Fla. 2d DCA 2002) (Matter remanded for

trial court to award to Wife more than the 50% that was awarded by the trial court).

The Court must also look at the parties' ability to pay for their attorneys. In the present case, the total amount of fees incurred by Petitioner was \$117,477.64, and Petitioner paid her attorney \$14,635.20, leaving a balance due of \$102,842.44. (TAF 31-2). The instant case is a classic case for fees to be awarded to the impecunious spouse because Petitioner is not able to pay a majority of her attorneys fees. Kelberman v. Kelberman, 710 So.2d 709 (Fla. 5th DCA 1998).

Petitioner would have to invade her assets if required to pay her own attorneys fees, due to the disparity of her income, as well as the monthly deficit that Petitioner incurs from the support that she receives, despite the fact that Respondent would have a surplus based on his income even if he made all the payments ordered by the trial court. Margulies v. Margulies, 645 So.2d 54 (Fla. 4th DCA 1994); Flemming v. Flemming, 742 So.2d 843 (Fla. 1st DCA 1999). The Fifth District, again, imposed its fact finding over the trial court. The attorneys fees orders should be reinstated.

CONCLUSION

Petitioner requests that this Court affirm the Final Judgment of Dissolution of Marriage entered by the trial court. Petitioner requests that this Court affirm the Final Judgment on Attorneys Fees on Dissolution of Marriage and Final Judgment on Attorneys Fees on Interlocutory Appeal after Remand from Appellate Court entered by the trial court. In the event that this Court affirms the Fifth District's opinion on remand, then the Petitioner requests that this Court specify the procedure for the remand and the party which has the burden of proof on this issue.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by facsimile and U.S. Mail to Charles Willits, Esq., 1407 E. Robinson St., Orlando, FL, 32801, this ____ day of December, 2004.

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CERTIFICATE OF COMPLIANCE

I, AMY HAMLIN, CERTIFY THAT the font used in this
Jurisdictional Brief is Courier New (12 point) type.