FAMILY LAW
CASE SUMMARIES:
Best of the Year

2016

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***With the greatly appreciated assistance of**

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1. *Bahls v. Bahls*, 193 So.3d 35 (Fla. 4th DCA 2016)

WHERE HUSBAND DID NOT OCCUPY A SIGNIFICANT MANAGEMENT ROLE, THE APPRECIATION OF THE STOCK WAS NOT DUE TO ACTIVE EFFORT BY HUSBAND AND WAS NOT A MARITAL ASSET SUBJECT TO EQUITABLE DISTRIBUTION

The appellant/wife, appealed from various aspects of the Final Judgment of Dissolution of Marriage. The husband worked at Kiewit, Inc. for twelve years before the marriage. At his highest position, there were seven or eight levels of management above the husband. Prior to the marriage the husband purchased a large number of Kiewit shares. He purchased these shares with a bank loan on which he made monthly repayments. An accountant for the husband testified that there had been no payments on the loan other than interest payments. When the husband was terminated from Kiewit, his stock was liquidated. The stock sold for substantially more than the outstanding balance on the loan used to purchase the shares. The trial court found that the appreciation of the stock was passive and therefore not a marital asset subject to equitable distribution.

1. "We affirm on all other issues, but write to address the passivity of appreciation of stock in a marriage."

2. "Determinations of assets as marital or non-marital are reviewed de novo."

3/ "Marital assets are subject to distribution between the formerly married parties. §61.075(1), Fla. Stat. (2015)."

4. "Marital assets include '[t]he enhancement in value and appreciation of non-marital assets resulting either from the efforts of either party during the marriage or from the contribution to or expenditure thereon of marital funds or other forms of marital assets, or both.'"

5. "The enhanced value of stock from a company for which the owning spouse works *can* be considered a marital asset and be subject to equitable distribution."

6. "However, it can also be a non-marital asset if marital effort or assets are not used in so enhancing its value."

7. "The question raised in this appeal is whether the husband exerted the sort of 'effort' required to move the appreciation value from the non-marital category to the marital one."

8. "The details of our prior case law make the answer to that question quickly apparent."

9. "In *Robbie v. Robbie*, 654 So. 2d 616 (Fla. 4th DCA 1995), we held that the appreciation of stock owned by the general manager of the Miami Dolphins-a business enterprise run largely by the husband's family-was a marital asset."

10. "Similarly, in *Pagano*, we held the same with regards to the appreciation of stock owned by the president and operations manager of a family wholesale plumbing supply business. *Pagano*, 665 So. 2d at 371-72."

11. "In *Minton v. Minton*, 698 So. 2d 936 (Fla. 4th DCA 1997), we again held that the appreciation of stock from a family-owned business for which the husband was chief operating officer of two subsidiaries and vice president of two others was a marital asset."

12. "The pattern here is clear."

13. "The case at bar demonstrates neither of the key features in the cases described."

14. "Kiewit is not a business enterprise owned or run by the husband's family."

15. "Nor was the husband in a position of significant authority in the company."

16. "Although he had some supervisory responsibility, the most reasonable description of his position would seem to be 'middle manager.' "

17. "As was the case in *Oxley*, we today avoid a holding that 'would effectively make all spouses partners in the increased value of all non-marital assets that does not result from passive appreciation.'"

18. "Instead, we hold that, because the wife failed to establish that the husband occupied a significant management role in Kiewit, the appreciation of the Kiewit stock was not due to active effort and is therefore not a marital asset."

19. "We fail to see how the rule proposed by the wife-that all appreciation of the stock of a company for which a spouse works is a marital asset-would not force the trial courts to determine exactly how much of the increase in value of a multi-national corporation each and every hourly employee was responsible for."

20. " 'Such a significant expansion … is better left to the legislature to consider."

2. ***Berger v. Berger***, 201 So.3d 819 (Fla. 4th DCA 2016)

TRIAL COURT ERRED IN AWARDING WIFE DURATIONAL ALIMONY RATHER THAN PERMANENT ALIMONY WHERE MARRIAGE WAS A LONG-TERM MARRIAGE AND IN FAILING TO FIND THAT A REBUTTABLE PRESUMPTION EXISTED IN FAVOR OF PERMANENT ALIMONY IN THE CASE OF A LONG-TERM MARRIAGE.

The parties were married for eighteen year marriage. The wife was a 55 year old stay at home mother and husband was a 53 year old full time physician earning a gross annual income of $205,704.00. Prior to filing the wife had not held a job outside the home in over 20 years; upon filing, the wife began working at miscellaneous jobs making $10 - $12 per hour. A vocational expert for the husband testified that the wife could earn $8 to $10 per hour in retail sales or clerical support positions, and that with minimal computer training she could earn between $20,800 and $26,000 per year and with some additional training she could work as a substitute teacher and later a full-time teacher in the public school system. At the time of trial, substitute teachers in the area made $13 per hour, and could work 180 days a year for a yearly income of $16,380. Full-time area teachers started at $39,000, with benefits. The Wife acknowledged she could no longer live a lavish lifestyle, and said she "had no problem with that." The husband was paying the wife $4,279 per month in temporary support.

In the final judgment, the court imputed income to the wife of $18,200, found that she could earn a starting teacher's salary of $39,000 with benefits in a period of approximately two years, and determined her reasonable monthly needs to be $6,000 a month. The court then awarded the wife durational alimony of $4,500 per month for ten years. The wife argued on appeal that the trial court erred in not awarding her permanent alimony, because (1) even though this was a long term marriage, the final judgment did not find that a rebuttable presumption existed in favor of permanent alimony; (2) the court's findings were insufficient to rebut the presumption in favor of permanent alimony; and (3) permanent alimony is appropriate in this case. The District Court held:

1 "The Wife argues that even though the marriage was a long-term marriage under section 61.08, Florida Statutes (2014), the trial court's final judgment did not find that a rebuttable presumption existed in favor of permanent alimony. We agree."

2. "The husband argues that the legislature's creation of durational alimony in 2010 nullified the presumption in favor of permanent alimony for a long-term marriage. However, as the husband recognizes, following the 2010 and 2011 amendments, this court and three of our sister courts have recognized that the presumption in favor of permanent alimony after a long-term marriage still exists. We stand by that recognition."

3. "The wife next argues that the court's findings were insufficient to rebut the presumption in favor of permanent alimony. We agree."

4. "Here, as in [an earlier case] the court's findings give us no guidance as to why permanent alimony was inappropriate. As in [an earlier case] given that the wife here 'does not have a history of full-time employment with benefits and that the court actually imputed income to her, we cannot assume that the trial court made a proper, implicit finding that she has no ongoing need for support on a permanent basis.'"

5. "The wife lastly argues that permanent alimony is appropriate in this case. We agree."

6. "It appears that the trial court's reliance on the husband's vocational expert's testimony that the wife '*could* earn a starting teachers [sic] salary of $39,000 with benefits in a period of approximately two years' was 'based on mere speculation and was not a proper consideration in determining her entitlement to permanent alimony.' The record reflects that the wife never taught school, nor did she have teaching credentials at the time of trial. In the event that the wife gets a teaching job and her income substantially increases, then the issue of alimony may be reconsidered in a modification action."

7. "Further, even if the trial court properly considered the wife's possible career as a teacher, the evidence reflects that her work life expectancy in that career is age sixty-five. When the trial court asked the husband's vocational expert about the wife's work life expectancy the husband's vocational expert responded 'Well, usually to 65. Teaching, they usually go after 20 years, but they try to encourage people to go on DROP after about age 65.' Given that response, the court's finding to cease the wife's durational alimony payments at that age would cause the wife to be unable to meet her needs beyond that age, thus reflecting her ongoing need for support on a permanent basis."

8. "Based on the foregoing, we reverse the amended final judgment's award of durational alimony, and remand for the trial court to award the wife permanent alimony in an amount to be determined."

3. ***Brezault v. Brezault***, 199 So.3d 519 (Fla. 4th DCA 2016)

ERROR TO FAIL TO MAKE FACTUAL FINDINGS SUPPORTING A CONCLUSION THAT PERMANENT ALIMONY BASED ON THE PARTIES' LONG-TERM MARRIAGE WAS NOT APPROPRIATE.

During the parties' twenty-two year marriage, the husband didn't work and was stay at home father. The Wife claimed that the husband was underemployed and sought to impute $73,365.12 to him through her vocational expert. The Husband sought permanent alimony and his financial affidavit showed a deficit of $2,719 a month, although such affidavit included no expenses for the parties' child. The trial court found credibility issues with both parties, but accepted the testimony of a vocational expert and imputed income to the husband. The trial court awarded $2,000 month bridge-the-gap alimony for 24 months and $2,000 a month durational alimony for 10 years to run concurrently. The trial court made specific findings that

the husband had proven a need for alimony, and the wife had ability to pay, but the court made no findings regarding the suitability of one type of alimony over another. The District Court held:

1. "The husband argued on motion for rehearing and on appeal that he should have been awarded at least a nominal amount of permanent alimony based on the parties' long-term marriage."

2. "Notably, the trial court made no findings of facts supporting a conclusion that permanent alimony was no appropriate in this case."

3. "As such, we reverse the award of alimony and remand for the trial court to make the required findings of fact under section 61.08, and for further proceedings consistent with this opinion."

FINAL JUDGMENT FAILED TO SET FORTH FINDINGS OF FACT NECESSARY TO SUPPORT ALIMONY AWARD WHERE TRIAL COURT FAILED TO MAKE FACTUAL FINDINGS CORRESPONDING TO EACH OF THE LISTED STATUTORY FACTORS, EVEN THOUGH FINAL JUDGMENT STATED THAT TRIAL COURT CONSIDERED THE REQUISITE FACTORS AND LISTED THEM.

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1. "The wife argues that the final judgment failed to set forth the findings of fact necessary to support its alimony award under section 61.08, Florida Statutes, which provides a specific, non-exhaustive list of factors for the court to consider."

2. "Notably, section 61.08(1) provides, in part that: 'In all dissolution actions, the court shall include findings of fact relative to the factors enumerated in subsection (2) supporting an award or denial of alimony.'"

3. "In this case, although the final judgment stated that the trial court considered the requisite factors and listed them, the trial court failed to make findings of fact corresponding to each of the listed factors. While portions of the final judgment made findings on several of the statutory factors, it did not make factual findings regarding the standard of living during the marriage, the age, physical or emotional conditions of the parties, or the contribution of each party to the marriage. ... In conducting the required evaluation the trial court must make findings of fact regarding *each* listed factor."

4. *Coleman v. Bland*, 187 So.3d 1144 (Fla. 5th DCA 2016)

TRIAL COURT ABUSED DISCRETION IN AWARDING WIFE NO PORTION OF HUSBAND'S PENSION ON BASIS THAT MARITAL PORTION OF PENSION WAS DE MINIMIS

The former wife appeals the trial court's order upon remand. The former husband worked for the Yonkers School Board for approximately 31 years. After 49 weeks of marriage to the former wife, the former husband retired. After a 39-month marriage, the former husband filed a petition for dissolution of marriage. The trial court dissolved the parties' marriage and equitably distributed the marital property, at which point the former wife appealed. The District Court at that time affirmed the dissolution judgment, in all respects except one.

In the earlier appeal, the Court held, "Among the issues in dispute between the parties was the question whether any part of Former Husband's pension was a marital asset. The trial court made no finding in the final judgment concerning whether this asset was marital or non-marital, as required by section 61.075(3), Florida Statutes (2009). Former Wife contends on appeal that the lack of findings constitutes reversible error as to this and other assets; however, as to all except the pension, we find, after our review of the record, that any error was harmless…. The record seems to show that some portion of the pension, although small, was earned during the marriage and should be classified as a marital asset. We therefore reverse as to that issue only and remand for the trial court to hear and to make proper findings on the disposition of the Former Husband's pension." *Coleman v. Bland*, 73 So. 3d 795, 795-96 (Fla. 5th DCA 2011).

Despite the foregoing, "On remand the trial court found the marital portion of the former husband's pension to be de minimis, that should remain his sole property, so it awarded the former wife no portion of the former husband's pension." The Wife appealed again and the Fifth District held:

1. "Determining that the trial court erred in ruling that the value of the marital portion of the former husband's pension plan was de minimis, we reverse."

2. "The standard of review of a trial court's determination of equitable distribution is abuse of discretion. Distribution of marital assets and liabilities must be supported by factual findings in the judgment or order based on competent substantial evidence.'"

3. "Also, 'the trial court's valuation and distribution of the marital assets' is reviewed for abuse of discretion."

4. "The former wife contends that the trial court erred in its de minimis valuation, arguing that … 'The $89.67 might be de minimis to [the former husband]; however, it is clearly not de minimis to [her] as it would increase her $331 per month income by 27.1%.' We agree."

5. "In *Bardowell*, the court observed, "At trial, the wife submitted evidence of a 'retirement forecast' document prepared by the FRS, which stated that, as of December 2004, the husband's current FRS balance was worth $17,438. The document noted that the current FRS balance 'is the present value of your accrued FRS benefit given current years of service.' The FRS documentation provided competent evidence that the present value of the husband's FRS pension was approximately $17,438 as of December 2004. This is not a nominal value. While the trial court would have been within its discretion to value the pension at an amount lower than $17,438 to account for the fact that the pension was not yet vested, that trial court was not free to

ascribe a nominal value to the FRS pension. The trial court's decision to assign a nominal value to the FRS pension was not reasonable or equitable."

6. "Here, as in *Bardowell*, some portion of the pension was earned during the course of the parties' marriage."

7. "Over the course of ten years, the payout of the marital portion of this pension would be roughly $21,600."

8. "Thus, the trial court erred when it determined that the marital portion of the pension was of de minimis value."

9. "Accordingly, we reverse the order entered on September 22, 2014, and remand for the trial court to reconsider the proper disposition of the marital portion of the pension."

5. ***Demmi v. Demmi***, 186 So.3d 1144 (Fla. 1st DCA 2016)

TRIAL COURT ERRED IN ORDERING THAT PARTIES BE EQUALLY RESPONSIBLE FOR PAYMENT OF ALL NON-COVERED MEDICAL EXPENSES FOR CHILDREN WHERE THIS ALLOCATION CONFLICTS WITH ALLOCATION OF PARTIES' RELATIVE FINANCIAL RESPONSIBILITY FOR CHILD SUPPORT

The former wife appealed from a final order of dissolution arguing that the trial court abused its discretion (1) in determining the amount of permanent periodic alimony to be paid to her, (2) in denying her request for attorney's fees, and (3) by ordering the parties to be equally responsible for the payment of all non-covered medical expenses for the minor children. The former wife contends that the trial court erred in ordering the parties to each be responsible for the payment of fifty percent of the non-covered medical expenses of the children because this allocation conflicts with the final judgment's allocation of the parties' relative financial responsibility for child support.

1. " '[A]s a general rule, if non-covered medical expenses of the children are ordered to be separately paid, "absent some logically established rationale in the final judgment to the contrary, [they] must be allocated in the same percentage as the child support allocation."

2. "There is no rationale in the final judgment to the contrary."

3. "Accordingly, we agree with Ms. Demmi on this issue, and reverse this portion of the final judgment.

4. "On remand, the court is directed to reapportion the parties' allocation for uncovered medical expenses based on their relative financial responsibility for the support of their minor children."

6. ***Dickson v. Dickson***, 204 So.3d 498 (Fla. 4th DCA 2016)

ERROR TO AWARD BRIDGE-THE-GAP ALIMONY AND TO FIND THAT PERMANENT ALIMONY WAS INAPPROPRIATE IN CASE INVOLVING 19-YEAR MARRIAGE WITHOUT MAKING FINDINGS SUFFICIENT TO OVERCOME REBUTTABLE PRESUMPTION IN FAVOR OF PERMANENT ALIMONY; TRIAL COURT LACKED RELEVANT EVIDENCE AS TO ALL STATUTORY FACTORS.

The former wife appealed from the final judgment of dissolution of marriage. The parties proceeded *pro se* at trial but did not testify in narrative fashion. Instead, the trial judge asked

each party questions. Their responses revealed: they had three minor children and the wife was a full-time student, pursuing a degree as a surgical technician. She had completed one year of a three-year program and the starting pay for a surgical technician is approximately between $15 and $16.61 an hour. She had no source of income and her monthly expenses were about $2,520. Upon finishing school, she would need to repay student loans. The husband earned $79,221 a year and averaged between $25,000 and $29,000 a year in overtime. His monthly rent and utilities were $500, and his cell phone service cost $110 a month. Ultimately, the wife was awarded $1,640 in bridge-the-gap alimony, and the court stated during the parties' testimony that permanent alimony was inappropriate. The trial court also awarded prospective child support. The wife filed a timely motion for rehearing, arguing that she should have been awarded permanent alimony or durational alimony as well as retroactive child support. The trial court denied the motion. The former wife contended on appeal that the trial court erred in awarding bridge-the-gap alimony and finding that permanent alimony was inappropriate. The District Court found:

1. "An award of alimony will usually not be reversed on appeal absent an abuse of discretion. However, '[w]here a trial judge fails to apply the correct legal rule ... the action is erroneous as a matter of law.'"

2. "Section 61.08, Florida Statutes (2013), governs the award of alimony and provides the following in pertinent part: (1) In a proceeding for dissolution of marriage, the court may grant alimony to either party, which alimony may be bridge-the-gap, rehabilitative, durational, or permanent in nature of any combination of these forms of alimony. In any award of alimony, the court may order periodic payments or payments in lump sum or both...."

3. "The statute recites factors for the court to consider, including the duration of the marriage, the age of the parties, their financial resources and earning capacities, 'educational levels, vocational skills, and employability of the parties and, when applicable, the time necessary for either party to acquire sufficient education or training to enable such party to find appropriate employment."

4. "The statute further provides that 'there is a rebuttable presumption that a ... long-term marriage is a marriage having a duration of 17 years or greater,' and that the 'length of a marriage is the period of time from the date of marriage until the date of filing of an action for dissolution of marriage.'"

5. "The statute describes the different types of alimony. Pertinent to the issue before us, it provides as follows: 'Bridge-the-gap alimony may be awarded to assist a party by providing support to allow the party to make a transition from being married to being single. Bridge-the-gap alimony is designed to assist a party with legitimate identifiable short-term needs, and the length of an award may not exceed 2 years.... Permanent alimony may be awarded to provide for the needs and necessities of life as they were established during the marriage of the parties for a party who lacks the financial ability to meet his or her needs and necessities of life following a dissolution of marriage. Permanent alimony may be awarded following a marriage of long duration if such an award is appropriate upon consideration of the factors set forth in subsection.

6. "Our courts recognize that with respect to long-term marriages, there is a rebuttable presumption in favor of permanent alimony… [N]either age nor a spouse's ability to earn some income alone rebuts the presumption."

7. "A spouse's age is not a valid basis to deny permanent alimony absent evidence that the spouse's youth would allow him or her to earn income sufficient to support a life-style consistent with that enjoyed during the marriage."

8. "As the Fifth District recognized in [an earlier case] 'in almost every case [involving one spouse who has historically been the homemaker in a long-term marriage and a substantial disparity in income], courts have found that permanent alimony was appropriate.'"

9. "The parties were married for nineteen years… As such, this marriage is considered a long-term marriage, and the trial court was required to apply the rebuttable presumption in favor of permanent alimony."

10. "Although the amended final judgment provides that the trial court considered the statutory factors governing the award of alimony, it is apparent from the hearing transcript that the trial judge did not have the relevant information before it to consider all statutory factors."

11. "Additionally, the court's findings were insufficient to overcome the presumption in favor of permanent alimony."

12. "On the contrary, the trial court's statements during the hearing indicate that the court believed either that it could not award permanent alimony based solely on the former wife's age or that the former wife's age trumped all other statutory factors. This, too, was error."

13. "Further, based on the information before it, the trial court erred in finding that bridge-the-gap alimony was appropriate: '[B]ridge-the-gap alimony serves to assist a spouse already capable of self-support during the transition from being married to being single.... A party is not self-supporting because he or she has the opportunity to enter the job market without some evidence of the ability to earn a salary which would allow the party to live in accordance with the lifestyle established during the marriage.'"

14. "At the time of trial, the former wife was two years away from completing a degree program. The trial court awarded bridge-the-gap alimony for this two-year period. However, no evidence existed that the former wife was self-supporting at the time of trial or that she would become self-supporting upon completion of the program."

15. "Additionally, there was no evidence of the parties' standard of living during the marriage."

16. "Based on the foregoing, we reverse and remand for the trial court to apply the rebuttable presumption of permanent alimony. The court may again deny permanent alimony, but it must make the necessary findings--supported by evidence--that would sustain a conclusion that permanent alimony is inappropriate in this long-term marriage."

7. ***Farghali v. Farghali***, 187 So.3d 339 (Fla. 4th DCA 2016)

CLAIM THAT TRIAL COURT ERRED BY FAILING TO MAKE SPECIFIC FACTUAL FINDINGS AS TO DISPOSITION OF SEVERAL OF COUPLE'S ASSETS AND LIABILITIES WAS NOT PRESERVED FOR APPEAL WHERE HUSBAND DID NOT RAISE THIS ISSUE IN MOTION FOR REHEARING.

The husband appealed from two orders arising from his divorce from the wife. The Husband's first assertion on appeal was that the trial court erred in its distribution of the marital property by failing to make specific factual findings as to the disposition of several of the couple's assets and liabilities. However, husband did not provide a trial transcript for appellate review, nor did he alert the trial court to this alleged shortcoming in a motion for rehearing. The District Court held:

1. "The First District Court has held 'a party is not entitled to complain that a judgment in a marital and family law case fails to contain sufficient findings unless that party raised the omission before the trial court in a motion for rehearing.'"

2. "Although we have not expressly adopted this rule before, we do so now."

3. "As the First District pointed out in *Simmons v. Simmons*, 'A trial judge who is made aware of the fact that a required finding was omitted could easily redraft the judgment to include that finding. In contrast, a trial judge who assumes that the form of the judgment was acceptable and learns of the alleged deficiency only after the appeal has been concluded is not likely to be in a position to make the appropriate findings. It would be unrealistic to assume that a trial judge would remember, a year or so later, the value of a car or boat or some item of personal property that was included in an equitable distribution of property. In some cases, the trial courts would be required to begin the process anew, and that would only reward the party who failed to make a timely objection."

4. "Section 61.075(3)(b) requires the trial court to make a finding of the individual value of significant assets but it does not suggest that a failure to make such a finding is an issue that can be raised for the first time on appeal. Like most other legal issues, it must be preserved for review by a timely objection and ruling in the trial court."

5. "Because Husband failed to bring the failure-to-make-findings issue to the trial court's attention in a motion for rehearing, and because there is no trial transcript to facilitate our review of the decision below, we are compelled to affirm the trial court's final judgment of dissolution order."

8. **Felice v. Felice,** 194 So.3d 1037 (Fla. 2d 2016)

ERROR TO INCLUDE AS A MARITAL ASSET IN EQUITABLE DISTRIBUTION SCHEME THE PORTION OF VALUE OF FORMER HUSBAND'S PREMARITAL HOME ATTRIBUTABLE TO APPRECIATION AND CONTRIBUTION OF MARITAL FUNDS TO PAY DOWN HOME EQUITY LINE OF CREDIT AND MORTGAGE WHERE PRENUPTIAL AGREEMENT PROVIDED THAT HUSBAND WOULD BE ENTITLED TO ANY AND ALL EQUITY IN PREMARITAL HOME AND THAT WIFE WOULD NOT BE ENTITLED TO ANY INTEREST IN HOME UNLESS GRANTED SUCH INTEREST IN A FORMAL WRITTEN INSTRUMENT.

The Husband appealed from an amended final judgment of dissolution of marriage. First, the Husband argues that the trial court erred in including a portion of the value of the his premarital home as a marital asset in the equitable distribution scheme. On appeal, the Husband argued that the parties' prenuptial agreement clearly provided that he was entitled to any and all equity in his premarital home, including any enhanced value and appreciation, and that the Wife was not entitled to any interest or equity in the premarital home. The District Court held:

1. "In the amended final judgment of dissolution, the trial court relied on four cases from this court, including *Irwin v. Irwin*, 857 So. 2d 247 (Fla. 2d DCA 2003)."

2. "In *Irwin*, this court held that the trial court erred in its interpretation of the prenuptial agreement entered into by the parties. In the agreement, the wife waived and released all rights in the property and estate of the husband, whether he owned it prior to marriage or acquired it during marriage and regardless of title. The trial court concluded 'that, as a consequence of these provisions, there was no marital property to divide."

6. "On appeal, this court concluded that the trial court engaged in an 'overbroad application of the waivers contained in the agreement.' The agreement did not specifically reserve [the husband's] marital earnings as his separate property, and thus did not exclude [the wife's] claim to share in the value of assets purchased with those earnings. *Nor did the agreement waive [the wife's] claim to her rightful share of the marital asset consisting of the enhanced value of [the husband's] separate property that resulted from the contribution of marital funds or labor*."

7 "This court's opinion in *Irwin* was recently disapproved of by the Florida Supreme Court."

8. "In *Hahamovitch v. Hahamovitch*, the supreme court approved a decision by the Fourth District holding that the broad language of the prenuptial agreement waived 'the wife's right to any asset titled in the husband's name that was acquired during the marriage or that appreciated in value due to marital income or efforts during the marriage.' [The Supreme Court further noted], 'In the valid prenuptial agreement in this case, the wife waived and released any and all rights and claims to all property solely owned by the husband at the time of the agreement or acquired in the future. Specifically, the parties contracted that each would "keep and retain sole ownership, control, enjoyment and power of disposition with respect to all property, real, personal or mixed, now owned or hereby acquired by each of them respectively, free and clear of any claim by the other," that "each party agrees that neither will ever claim any interest in the other's property," and if one party "purchases, [a]cquires, or otherwise obtains, property in [his/her] own name, then [that party] shall be the sole owner of same." Accordingly, based on the plain meaning of this language, any property the husband owned at the time of execution of the premarital agreement and any property the husband acquired in his name after the execution of the agreement, including any enhancement in value or appreciation of such properties, are the husband's non-marital assets.'"

9. "The supreme court then briefly addressed the two cases with which the Fourth District had certified conflict: *Irwin*, 857 So. 2d 247, and *Valdes v. Valdes*, 894 So. 2d 264 (Fla. 3d DCA 2004): 'When a prenuptial agreement includes such broad provisions but does not specifically waive a spouse's claim to the other spouse's earnings, assets acquired with those earnings, and the enhanced value of the other spouse's property resulting from marital labor or funds, the Second and Third Districts have held the prenuptial agreement is not sufficient to waive a spouse's right to seek equitable distribution of such assets. However, these distinctions run counter to a prenuptial agreement's actual language that expressly encompasses all property solely owned by one spouse presently and in the future and that expressly waives all of the other spouse's rights and claims in such property.' The supreme court disapproved *Irwin* and *Valdes* 'to the extent they conflict with this decision.'"

10. "The agreement in this case provides that the husband shall be entitled to any and all equity in his premarital home and that the wife shall not be entitled to any interest in the husband's premarital home unless granted such interest in a formal, written instrument."

11. "Even though the agreement does not specifically refer to any right to the appreciation or enhancement of the former husband's premarital home, the broad language of the agreement expressly waives the former wife's rights and claims in the property and is considered to include the appreciated or enhanced value of the property that occurs during the marriage."

12. "In light of the supreme court's *Hahamovitch* decision and by virtue of its disapproval of *Irwin* and *Valdes*, we must reverse the trial court's interpretation of the prenuptial agreement in this case and remand for the trial court to recalculate the equitable distribution

scheme after excluding the $197, 226 amount that represents the appreciated or enhanced value of the former husband's premarital home."
Felice v. Felice, 41 FLW D775 (Fla. 2d DCA 2016)

9. *Ketcher v. Ketcher*, 198 So.3d 1061 (Fla. 1st DCA 2016)

WHERE APPELLATE COURT REMANDED TO TRIAL COURT FOR RECONSIDERATION OF AMOUNT OF ALIMONY, TRIAL COURT EXCEEDED SCOPE OF MANDATE BY ENTERING AMENDED JUDGMENT THAT CHANGED TYPE OF ALIMONY AWARDED FROM PERMANENT TO DURATIONAL -- MOTION TO ENFORCE MANDATE GRANTED

In *Ketcher v. Ketcher*, 188 So. 3d 991 (Fla. 1st DCA 2016), the District Court reversed the original final judgment of dissolution of marriage in this case in part and remanded to the trial court "for additional findings and, if necessary based on those findings, reconsideration of the *amount* of the alimony award" made to the Husband. On remand, the trial court entered an amended final judgment that not only made additional findings required by the District Court's opinion but also changed the *type* of alimony awarded from permanent to durational. The Husband, thereafter, filed a motion to enforce the mandate in which he argued that the trial court exceeded the scope of the mandate by changing the type of alimony awarded. The Wife responded that the trial court did not exceed the scope of the mandate because the court effectively reduced the amount of the alimony award by reducing its duration. The District Court held:

1. "We agree with the former husband."

2. "Accordingly, we grant the motion to enforce the mandate, quash the amended final judgment, and remand for further proceedings consistent with our prior opinion."

3. "We have the inherent authority to enforce the mandate issued in this case."

4. "The mandate is 'the official mode of communicating the judgment of the appellate court to the lower court, directing the action to be taken or the disposition to be made of the cause by the trial court.'"

5. "The lower court must strictly follow the mandate and does not have authority to alter the mandate in any way."

6. "Where, as here, the final judgment is reversed and remanded with specific instructions, the lower court has authority to conduct further proceedings in conformity with the instructions but the court cannot exceed the specific bounds of that instruction."

7. "Our prior opinion specifically and unambiguously directed the trial court to make additional findings concerning the parties' incomes and expenses, and if necessary based on those findings, to reconsider the *amount* of the alimony award."

8. "The opinion did not authorize the trial court to reconsider the type of alimony awarded, and by changing the type of alimony awarded from permanent to durational, the trial court impermissibly exceeded the scope of the mandate."

9. "Accordingly, the amended final judgment must be quashed."

10. "Having said that, we recognize that the mandate-compliant findings made by the trial court on remand concerning the parties' incomes and expenses suggest that the former

husband's need for alimony and the former wife's ability to pay are considerably less than what was reflected in the original final judgment."

11. "Those findings--if supported by the record--might justify a nominal or reduced permanent alimony award, but they do not justify the trial court's decision to exceed the scope of the mandate by changing the type of alimony awarded."

12. "Accordingly, for the reasons stated above, we grant the former husband's motion to enforce the mandate, quash the amended final judgment, and remand for further proceedings consistent with our prior opinion."

10. ***Koscher v. Koscher,*** 201 So.3d 736 (Fla. 4th DCA 2016)

REMAND OF NOMINAL AMOUNT OF PERMANENT PERIODIC ALIMONY AWARDED TO WIFE TO BE REVISED AFTER TRIAL COURT IMPUTES INCOME TO HUSBAND.

The husband was unemployed at the time of the dissolution and the wife requested that the trial court impute income to him when calculating alimony. The trial court found that the husband was involuntarily unemployed, but also found that he had not engaged in a diligent effort to obtain employment. The trial court still refused to impute income noting that it did not find evidence showing what the imputed income should be. Based on the evidence at trial, the court determined that the actual amount of permanent periodic alimony that should be paid to the Wife was $11,000 per month, but the court ordered $100 a month in nominal alimony because of the Husband's lack of salary impeded his present ability to pay alimony. The court also found that the husband was "deliberately unemployed" and the parties estimated their collective net worth to be between $3.7 and $3.8 million. The Wife argued that the trial court's award of $100 per month in alimony is contradicted by the unchallenged evidence presented at trial and is insufficient because it forces her to deplete her marital assets to maintain her standard of living. Additionally, she argues the future award of $11,000 was an abuse of discretion because it did not cover her basic needs and was not supported by the evidence in the record. The District Court held:

1. "The purpose of imputed income is to determine the amount that a spouse is *able* to earn, above and beyond what the spouse *actually* earns. Nominal alimony is therefore inappropriate in a situation like here, where the paying spouse has the ability to pay more if he/she was to earn the amount the court has determined could be earned through diligent efforts."

2. "Upon remand, the trial court is to impute income to the husband. It must then revisit the amount of permanent periodic alimony to be awarded to the wife, commencing with the date of initial dissolution of marriage. That amount may be more than the $11,000 per month; it certainly will be more than $100 per month. "

3. "The trial court must make factual findings relative to *all* of the factors set forth in section 61.08(2), Florida Statutes (2016), in determining the proper amount of alimony. One of these factors is 'the earning capacities, educational levels, vocational skills, and employability of the parties.' Another factor is 'the financial resources of each party, including the non-marital and the marital assets and liabilities distributed to each.'"

11. **Mills v. Mills,** 192 So.3d 515 (Fla. 5th DCA 2016)

TRIAL COURT ERRED IN FAILING TO CLASSIFY $100,000 OF AN OVER $200,000 INVESTMENT LOSS AS HUSBAND'S NON-MARITAL LIABILITY WHERE THE $100,000 WAS OBTAINED THROUGH HOME EQUITY LOAN OF WHICH WIFE HAD NO KNOWLEDGE AND FOR WHICH HUSBAND FORGED WIFE'S SIGNATURE AND WHICH WAS ULTIMATELY PAID OFF WITH FUNDS FROM HUSBAND'S MARITAL RETIREMENT ACCOUNT

The former wife appealed from the amended final judgment dissolving her 37-year marriage to the former husband. She argued that the trial court failed to classify $100,000 of the $245,475 loss incurred in the Florida State Bank investment as a non-marital liability. The husband was on the board of directors of the bank, which was a startup in 2007. He was required, as a board member, to make financial investments in the bank. The wife was aware that the husband was involved with the startup but she was not aware of the size of the investment. The husband testified he had an obligation to fund the startup, but he didn't have the funds. Without the wife's knowledge he took out a loan against the marital home for $100,000. The husband admitted that he signed the wife's name on the loan application. The wife learned of the loan when the lender called and threatened to take the marital home if the loan was not repaid. The loan was then paid off with funds from the husband's marital retirement accounts. Ultimately, the couple lost all of their investment for a net loss of $245,475. The wife argued that the net $245,475 loss should have been assigned as the non-marital liability of the husband in the equitable distribution, because he forged her signature on the loan application for the $100,000. The trial court disagreed. The District Court found:

1. "[The trial court's] conclusion constitutes error."

2. "[E]xpenditures and investment decisions which do not rise to the level of misconduct will not support an unequal distribution of marital assets.'"

3. "However, liabilities incurred by forgery or unauthorized signature of the other spouse's name are non-marital liabilities are the sole burden of the spouse committing the fraud unless the liability was subsequently ratified by the other spouse."

4. "Former Husband admitted that he forged Former Wife's signature on the loan because he did not think she would agree to sign it herself."

5. "And, there was no evidence to suggest Former Wife ratified the loan."

6. "Thus, the loan was a non-marital liability of Former Husband."

7. "Nevertheless, the loan was paid off using marital funds from the Former Husband's retirement accounts."

8. "Because the $100,000 principal from the loan was within the $245,475 in losses incurred in the Florida State Bank investment, the trial court should have classified $100,000 of the $245,475 loss as the non-marital liability of the Former Husband."

9. "Failing to do so is reversible error."

10. "Accordingly, we reverse that portion of the final judgment distributing the losses on the Florida State Bank investment equally and remand for the purpose of allocating $1000,000 of the losses as a non-marital liability of Former Husband."

12. ***Palmer v. Palmer,*** 198 So.2d 1035 (Fla. 1st DCA 2016)

AFTER COURT HAS DETERMINED TO AWARD ATTORNEY'S FEES TO WIFE BASED ON SIGNIFICANT DISPARITY IN NON-MARITAL ASSETS, COURT MAY NOT PROPERLY DENY FEES ACCRUED AFTER THE WIFE'S REJECTION OF A SETTLEMENT OFFER.

The issue raised in this appeal was whether a trial court that has determined to award attorney's fees to the wife based on a significant disparity in non-marital assets may deny fees accrued after the former wife's rejection of a settlement offer. The denial was based solely on the trial court's determination that the rejection of the settlement offer was unreasonable. The District Court found:

1. "In *Aue v. Aue*, 685 So. 2d 1388 (Fla. 1st DCA 1997), we determined 'there is no authority for denying attorney's fees in dissolution cases solely for the failure to accept an offer of settlement.' Because we determine *Aue* is applicable in this case, we reverse."

2. "Section 61.16, Florida Statutes (2011), states in pertinent part: 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...."

3. "In *Rosen v. Rosen*, 696 So. 2d 697, 700 (Fla. 1997), the Florida Supreme Court interpreted this section to mean that a trial court may consider relevant circumstances of an individual case, but 'the financial resources of the parties are the primary factor to be considered.'"

4. "The court went on to say other relevant circumstances to be considered are: "[T]he scope and history of the litigation; the duration of the litigation; the merits of the respective positions; whether the litigation is brought or maintained primarily to harass (or whether a defense is raised mainly to frustrate or stall); and the existence and course of prior or pending litigation."
Id."

5. "In *Aue*, we reviewed a trial court's order denying attorney's fees pursuant to this statutory section where 'its decision was not based upon the parties' earnings, but on its finding that the former wife was "unreasonable" in declining the former husband's support offer.'"

6. We specifically stated that while there may be special circumstances to consider in addition to the parties' financial positions when determining entitlement to attorney's fees, no authority existed for denying fees solely based on the failure to accept an offer of settlement."

7. "The Second District in *Levy v. Levy*, 900 So. 2d 737, 748 (Fla. 2d DCA 2005), cited our *Aue* decision with approval and stated, "Although trial courts have authority pursuant to section 61.16 to deny fees for various forms of *litigation misconduct* in proceedings for dissolution of marriage, 'there is no authority for denying attorney's fees in dissolution cases solely for the failure to accept an offer of settlement.'"

8. "The Fourth District, however, in *Hallac v. Hallac*, 88 So. 3d 253, 256 (Fla. 4th DCA 2012), held that fees to a spouse who has demonstrated financial need may be limited based on the failure to accept a settlement offer which 'was significantly better than anything she could have received at trial.'"

9. "The court held rejection of a settlement offer by itself was sufficient to limit fees, even where the trial judge had noted 'that she didn't think that the case had been over-litigated on either side.' *Hallac*, 88 So. 3d at 256."

10. "The Fourth District in *Hallac* distinguished our holding in *Aue* based on two considerations: 1) in *Aue* there had been a denial of all fees rather than just a denial of those incurred after the settlement offer; and 2) that *Rosen*, which was decided by the supreme court after *Aue*, contemplated a reduction in fees based on the unreasonable rejection of a settlement offer."

11. "The Fourth District's attempt in *Hallac* to distinguish our holding in *Aue* (on the basis that there was not a denial of all fees) is inconsistent with our holding that there was no statutory authority to limit the fees to a needy spouse based *solely* on the rejection of an offer of settlement."

12. "We also do not read *Rosen* to adopt a general rule that effectively provides that rejections of offers to settle may be the sole reason for limiting fees in all family law cases."

13. "Offers of judgment are not specifically mentioned in *Rosen*."

14. "The holding in *Rosen* is that the financial resources of the parties is the primary consideration for the award of attorney's fees in dissolution cases, but after considering ***all*** the circumstances surrounded the suit, the court may exercise its inherent powers and deny fees in order to provide justice and ensure equity between the parties."

15. "In fact, the factors for consideration mentioned in *Rosen* related to the overall method by which the litigation was handled."

16. "The court recognized that a review of the entire course of the litigation and special circumstances may require equity to override financial considerations."

17. "Isolated consideration of settlement offers was not contemplated."

18. "Emphasis on offers of settlement which are not proscribed and authorized by statute is also problematic because of the potential involvement of the court in information related to settlement offers, attorney client privilege, and other confidential items."

19. "In reaching the decision, we are not unmindful of the policy considerations raised by Judge Polen in his concurrence in *Oldham v. Oldham*, 683 So. 2d 579, 581 (Fla. 4th DCA 1996). [Therein] 'he argued that there is a need to bring economic sanity to dissolution litigation and that there should be 'some economic incentive on the non-fee paying spouse to critically and realistically evaluate settlement offers.'"

20. "While we do not disagree with these sentiments, the issue of attorney's fees in family cases is complicated."

21. "Economic sanity needs to be balanced against the needs of the spouse with less financial ability to obtain competent counsel."

20. "Unbridled discretion to review settlement offers and motivations without guidance, like what occurred in this case, is unworkable."

21. "We, therefore, declare conflict with *Hallac* to the extent that it determines that rejection of a settlement offer may be the sole basis for overriding a determination of an award of financial need in denying attorney's fees accrued after the rejection."

22. "Essentially the trial judge in this case, much like the court in *Hallac*, applied a portion of the offer of judgment statutes to dissolution proceedings."

23. "This should be a legislative decision."

24. "The court should only exercise the power to reduce fees when it would be inequitable not to do so after a review of all circumstances."

13. *Richardson v. Knight*, 197 So.3d 143 (Fla. 4th DCA 2016)

TRIAL COURT ERRED IN ACCEPTING AN ORAL MARITAL SETTLEMENT AGREEMENT, READ IN OPEN COURT BY HUSBAND'S ATTORNEY AND ORALLY AGREED TO BY WIFE'S ATTORNEY, AS VALID AND INCORPORATING IT, IN THE FORM OF A TRANSCRIPT OF THE PROCEEDINGS, INTO THE FINAL JUDGMENT.

The Husband appealed from the trial court's final judgment of dissolution of marriage, terminating his marriage to the Wife. On the day of the final hearing, the Husband's attorney explained to the trial judge that the parties' had agreed to a marriage settlement agreement ("MSA"), and then read the relevant terms of the agreement into the record in open court. Thereafter, the Wife's attorney stated that the MSA as read by the Husband's attorney was correct. The court rendered a final judgment incorporating the terms of the parties' stated settlement, and attached a transcript of the proceedings from the final hearing to serve as the MSA. Thereafter, the Husband hired new counsel and filed a combined motion for new trial, rehearing, and, alternatively, amendment of the final judgment. The trial judge denied the motion. The District Court held:

1. "Because neither appellant nor appellee reduced the MSA to writing, or gave sworn testimony at the final hearing indicating their assent to its terms, we reverse."

2. "[W]hether an agreement constitutes a valid contract is a matter of law subject to de novo review."

3. "In its final judgment, the trial court included the preamble that it had 'reviewed the file in this cause, the [MSA] entered into by the parties … [and had] taken sworn testimony of the parties.'"

4. "It is clear from the transcript that the trial judge never asked the parties on the record if they agreed to and understood the terms of the MSA, or if they had discussed the terms with their attorneys."

5. "Rather, the parties' attorneys did almost all of the talking at the hearing, with appellant's attorney taking the lead."

6. "Simply put, the record shows that the trial court did not take any sworn testimony from the parties, despite what was stated in the final judgment."

7. "Generally, '[a]n agreement announced in open court is an enforceable settlement agreement.'"

8. "This rule holds true for MSAs in dissolution of marriage actions."

9. "However, an oral MSA that is read into the record requires more than a mere recitation of the terms by the parties' attorneys to be valid and enforceable."

10. "In *Chovan v. Chovan*, 90 So. 3d 898, 899-900 (Fla. 4th DCA 2012), the parties reached a settlement agreement after initiating dissolution proceedings, and the trial judge had the former wife's counsel recite the agreement on the record. The trial court then requested that the parties submit a proposed final judgment, which the former wife's attorney later did. The trial court ultimately adopted the former wife's proposed final judgment without change,' and the former husband appealed, arguing that the final judgment was inconsistent with the terms of the agreement discussed at the hearing."

11. "In that case, we found that the agreement stipulated to on the record was a valid and enforceable agreement, and affirmed only the portion of the final judgment that accurately reflected the terms discussed at the hearing."

12. "We did so because both parties had indicated their understanding of and assent to those terms on the record: 'Florida courts do not take lightly agreements made by husband and wife concerning spousal support…. [And it is the] well-established policy in Florida that settlement agreements are highly favored in the law… Here, the parties began the dissolution proceeding only to promptly reach a settlement agreement. The trial court then had the former wife's counsel recite the agreement on the record. The trial court asked each party whether they had discussed the terms with their lawyer and had all of their questions answered. Both parties responded in the affirmative. The trial court then requested the parties to collaboratively submit a proposed final judgment."

13. "Likewise, in *Roskind v. Roskind*, 552 So. 2d 1155, 1155-56 (Fla. 3d DCA 1989), the Third District upheld an oral settlement agreement under circumstances somewhat similar to the case presently before the court."

14. "There, during trial 'the parties and their attorneys announced to the trial judge that they had reached a settlement,' and the husband's counsel read the agreement into the record. After this recitation, the wife affirmed her understanding and 'unequivocally agreed' to the settlement, after being specifically asked by the judge whether she: 1) understood the agreement; 2) had an opportunity to speak with her attorneys; 3) entered into the agreement freely and voluntarily; and 4) had any questions. The wife later objected to the written settlement agreement and refused to sign it. Ultimately, the trial court entered a final judgment incorporating the agreement as announced to the judge, and the Third District affirmed, [holding], 'A stipulation properly entered into the record, where there is a clear understanding of the finality of that agreement, is an effective and enforceable settlement notwithstanding that it is subject to reduction to a written document…. The record is clear that after the terms of the agreement were read into the record, [the wife] affirmed her understanding and unequivocally agreed.'"

15. "These cases establish that in order for an oral MSA announced in open court to be valid and enforceable, the trial judge must obtain clear and unequivocal assent to the MSA from each party on the record, and must also confirm that each party has discussed the MSA with their attorney and fully understands the terms."

16. "We dispelled any doubt concerning the necessity of obtaining explicit consent to an oral MSA on the record when we decided *Loss v. Loss*, 608 So. 2d 39 (Fla. 4th DCA 1992). There, we made clear on rehearing that: 'While it might seem to some that we are splitting hairs, Mrs. Loss's suggestion that Dr. Loss nodded his head in agreement and failed to protest as the trial judge discussed the proposed terms, is not enough. *The trial court must elicit express consent to all terms on the record in dissolution proceedings*.'"

17. "Because the transcript of the final hearing was insufficient to constitute an enforceable MSA, a valid MSA was therefore never entered and filed with the court."

18. [Further], Section 61.075(1) lists ten separate factors for the trial court to consider when determining the equitable distribution of assets and liabilities in a dissolution of marriage action, and whether the equitable distribution should be equal or unequal."

19. "Here, the equitable distribution in the final judgment is not supported by factual findings with reference to the factors listed in section 61.075(1), as required by section 61.075(3) when 'a stipulation and agreement has not been entered and filed.'"

20. "While compliance with the written findings of fact requirements established in section 61.075(3) is not necessary when the parties have reached a valid agreement regarding equitable distribution… these requirements must be met when there is no much agreement and a distribution scheme is ordered by the court."

21. "We agree with appellant that the trial judge erred by accepting the oral MSA as valid and incorporating it into the final judgment, because it was not based upon either parties' testimony or sworn statements."

22. "We therefore reverse and remand this matter to the trial court for further proceedings with specific instructions that, in the event the parties are unable to reach an agreement, the trial court include the findings of fact mandated by section 61.075(3) in any equitable distribution it may impose."

14. ***Salituri v. Salituri***, 184 So.3d 1250 (Fla. 4th DCA 2016)

EQUITABLE DISTRIBUTION DETERMINATION CONTAINED NUMEROUS ERRORS, INCLUDING FAILURE TO VALUE ALL ASSETS AND DEBTS, FINDING THAT HUSBAND'S CORPORATION COULD NOT BE A MARITAL ASSET BECAUSE WIFE WAS NOT AN OFFICER AND HAD NO OWNERSHIP INTEREST IN CORPORATION AND TRIAL COURT'S ADJUDICATION OF PROPERTY OWNED BY A NON-PARTY.

The trial court determined that the Husband's corporation was not a marital asset because the Wife was "not an officer" and had "no ownership interest in the corporation." The trial court also adjudicated the property rights of a non-party. The District Court reversed:

1. "On equitable distribution, the trial court made a number of errors, including: (1) The trial court failed to value all of the assets and debts, contrary to section 61.075(3), Florida Statutes (2014); (2) The trial court found that the husband's corporation was not a marital asset because the wife was 'not an officer' and had 'no ownership interest in the corporation.' "

2. "A corporation can be a marital asset even though one spouse is the sole incorporator."

3. "The trial court erroneously ordered that the Delray Beach rental property be sold."

4. "The husband's father owned 50% of the unit."

5. "The court did not have jurisdiction to adjudicate the property rights of the father, who was not a party to the dissolution action."

6. "There was no pleading seeking partition and the husband did not acquiesce to it at trial."

7. "We remand to the circuit court to reconsider all issues except its jurisdiction and the fact that the marriage is irretrievably broken."

15. ***Sherlock v. Sherlock***, 199 So.3d 1039 (Fla. 4th DCA 2016)

IT WAS NOT AN ABUSE OF DISCRETION TO IMPUTE INCOME TO HUSBAND FROM HIS REAL ESTATE AND FINANCIAL HOLDINGS, EVEN THOUGH THOSE ASSETS INCLUDED NON-LIQUID ASSETS

The Husband conceded that imputing income to him from his liquid assets was proper, but argued on appeal that the trial court erred by imputing investment income to him from his

non-liquid assets. The husband complained that the trial court's ruling requires him to liquidate his assets and invest the proceeds to earn a 3% return. The District Court held:

1 "[W]e review a court's determination of whether certain assets should be available sources of income for an abuse of discretion."

2. "It is well-settled that a court should impute income that could reasonably be earned on a former spouse's liquid assets."

3. "When a party receives an asset in equitable distribution that will result in immediate investment income, that income should not be excluded for purposes of determining alimony."

4. "Moreover, 'when a spouse with under-earning investments has the ability to generate additional earnings--without risk of loss or depletion of principal--but fails to do so, it is fair for a court to impute a more reasonable rate of return to the under-earning assets, comparable to a prudent use of investment capital.'"

5. "The law is not clear, however, on the issue of whether a trial court should impute income based on non-liquid assets."

6. "We have held that a trial court should not impute income from the home that a spouse occupies after the divorce."

7. "Moreover, a Second District case suggests, but does not directly hold, that a party should not be required to change the character of an asset to maintain the standard of living established during the marriage."

8. "Judge May's concurrence in *Levine v. Levine* illustrates the issue, explaining that 'no Florida case has yet held that a non-liquid asset must have income imputed to it.'"

9. "But Judge May expressed concern that a spouse could strategically maneuver to receive non-liquid assets in equitable distribution so as to benefit his or her claim for alimony."

10. "In this case, the trial court did not abuse its discretion in denying the husband's request for permanent periodic alimony."

11. "Although the court should not have imputed income to the husband based on his current residence (which cannot be expected to produce income so long as he lives there), the trial court otherwise did not abuse its discretion in imputing income to the husband from his real estate and financial holdings, even though those assets included non-liquid assets."

12. "*Canakaris* instructs that a trial court may consider the value of a party's estate in determining the party's need for alimony."

13. "For purposes of establishing party's need, the *Canakaris* decision does not limit a trial court's consideration of a party's financial situation to the party's liquid estate."

14. "Likewise, section 61.08(2)(i) requires the court to consider income available to a party through investments of any assets, not merely liquid assets."

15. "Here, the trial court properly imputed a reasonable rate of return of 3% to the husband's real estate and financial assets, which had a present value of about $1.2 million."

16. "While the court should not have imputed income based on the equity in the husband's residence, this equity (about $33,000) represented only a small portion of the husband's net worth and accounted for less than $1,000 of the $36,422 in annual income that the trial court imputed to the husband."

17. "Accordingly, we consider the trial court's imputation of income from the equity in the husband's current residence to be harmless error under the facts of this case."

18. "Discretion is abused only where no reasonable person would take the view adopted by the trial court."

19. "The *Canakaris* reasonableness standard is flexible enough to allow for the trial court to consider a party's non-liquid assets for purposes of imputing income."

20. "A contrary rule would simply encourage spouses with substantial non-liquid assets to engage in strategic gamesmanship, such as delaying the liquidation of their assets, for purposes of advancing or defending alimony claims."

21. "Notably, the trial court's imputation of income applied only to the husband's financial and real estate assets, which are typical investment assets."

22. "The trial court's ruling did not require the husband to liquidate any tangible personal property."

23. "Likewise, the court's ruling did not require the husband to invade the principal of his assets, but rather imputed a reasonable return to the husband's net real estate and financial holdings."

24. "The husband complains that the trial court's ruling would require him to liquidate assets, but *Rosecan* suggests that a spouse should be required to change the character of an underperforming investment asset."

25. "As the trial court noted, the husband 'chooses not to seek income from many of his assets.' "

26. "For example, the husband chose to keep empty lots worth $300,000 that produce no income."

27. "It would be unfair to require the wife, whose net worth is about half of the husband's net worth, to use her post-dissolution income to support the husband simply because he chooses not to use his assets in a manner that would produce the income necessary to support him."

28. "To the extent the husband cannot obtain adequate rental income to support himself, he could easily sell his real estate holdings and--without invading the principal--reinvest those assets at a reasonable rate of return so as to earn a level of income that would meet his needs."

29. "Under the *Canakaris* standard, we cannot say that no reasonable person would have denied the husband's request for alimony."

16. ***Stark v. Stark***, 192 So.3d 632 (Fla. 5th DCA 2016)

TRIAL COURT ABUSED DISCRETION IN AWARDING WIFE A COMBINATION OF DURATIONAL ALIMONY AND PERMANENT ALIMONY RATHER THAN SOLELY AWARDING PERMANENT ALIMONY WHERE MARRIAGE WAS A LONG-TERM MARRIAGE AND EVIDENCE FAILED TO DEMONSTRATE THAT WIFE'S NEED OR HUSBAND'S ABILITY TO PAY WOULD BE MATERIALLY DIFFERENT AT THE END OF THE DURATIONAL PERIOD THAN IT WAS AT THE TIME THE JUDGMENT WAS ENTERED.

The Wife appealed from an amended final judgment dissolving her 27-year marriage to the Husband. The trial court awarded the Wife $7,000 in bridge-the-gap alimony for eight months, followed by durational alimony of $4,900 per month for nine years, and $100 per month in permanent alimony. This was a long-term marriage where the Husband was the primary wage earner. For the majority of the marriage, the Wife was a homemaker (the parties have three children, all of whom have reached the age of majority). The parties were fifty-four years old and in good health. The obligation to pay the marital debt was placed almost entirely on the Husband. The trial court determined that the Husband's adjusted gross income over the four-year period

immediately preceding trial averaged in excess of $200,000 per year. It imputed income of between $45,000 and $65,000 per year to the Wife. The wife does not challenge the amount of alimony awarded, but she argues that the trial court erred in awarding a combination of durational and permanent alimony rather than solely awarding permanent alimony. The District Court held:

1. "The material facts support an award of permanent periodic alimony."

2. "The trial court's factual findings regarding the parties' income and/or imputed income are supported by the record."

3. "Based on these findings, the trial court properly concluded that the Wife had an actual need for alimony and the Husband had the ability to pay alimony."

4. "Durational alimony has been described as 'an intermediate form of alimony between the bridge-the-gap and permanent alimony.'"

5. "The Legislature has authorized its use following a marriage of long duration 'if there is no ongoing need for support on a permanent basis."

6. "Here, the evidence failed to demonstrate that the Wife's need or the Husband's ability to pay would be materially different at the end of the durational alimony period than it was at the time the amended final judgment was entered."

7. "As a result, we conclude that the trial court abused its discretion in failing to make the entire $5000 alimony award following the bridge-the-gap alimony period (post January 31, 2016) permanent alimony."

17. ***Thomas v. Nance***, 189 So.3d 1040 (Fla. 2d DCA 2016)

PROVISION ALLOWING HUSBAND TO BUY WIFE'S SHARE OF THE MARITAL HOME AT RATE OF $100 A MONTH CONSTITUTED ABUSE OF DISCRETION, WHICH WAS COMPOUNDED BY REQUIREMENT THAT WIFE RELINQUISH HER ENTIRE INTEREST IN HOME BY QUITCLAIM DEED WITHIN 30 DAYS OF ENTRY OF JUDGMENT.

The Wife sought appellate review of the final judgment of dissolution of her marriage to the Husband. The parties resolved all issues between them except for the disposition of the marital home, which was the most significant asset held by the parties. The Husband inherited the home from his mother during the marriage, but he added the Wife's name to the deed and she contributed to the upkeep and maintenance of the home during their 22-year marriage. The parties agreed the home was marital, the amount of equity was $50,000, and that each should receive half that amount.

Because they had few assets, neither party could buy out the other's share of the home. The Wife suggested that the house be sold so they could each take their interest. The Husband objected because he wanted to keep the home he inherited from his mother. The magistrate recognized the sentimental value of the home for the Husband and recommended that the Husband keep the home and pay the Wife for her interest. The magistrate asked the Husband how much he could pay the Wife each month toward her interest in the home. He said he thought he could afford $100 per month. Without questioning him any further, and with no reference to or discussion of the Husband's income and expenses, the magistrate recommended that he pay the wife $100 per month until the $25,000 balance was paid off. Then, despite the extended payment plan, the magistrate recommended that the wife be required to quitclaim her interest in

the home to the husband within 30 days of entry of a final judgment. The trial court adopted the recommendations without discussion. The District Court held:

1. "We affirm all aspects of the final judgment except the provision that permitted the Husband to pay the Wife her $25,000 interest in the marital home at the rate of $100 per month."

2. "As to that single issue, we reverse and remand for reconsideration."

3. "This decision, which effectively deprives the Wife of her present interest in the marital home, constitutes an abuse of discretion."

4. "'Discretion ... is abused when the judicial action is arbitrary, fanciful, or unreasonable.'"

5. "The payment plan authorized by the trial court, which requires the Wife to wait more than twenty years to receive her share of the marital assets, is patently unreasonable."

6. "In this regard, this case is quite similar to that of *Posner v. Posner*, 39 So. 3d 411 (Fla. 4th DCA 2010). There, the trial court ordered the wife to pay an equalizing payment of $85,413 to the husband at a rate of $100 per month, finding that the wife could not afford to pay more." On appeal, the Fourth District noted that at that rate it would take more than seventy years for the wife to pay the debt to the husband. The court concluded that 'to deprive the husband of the majority of the assets of the marriage for the rest of his life is an abuse of discretion.'"

7. "In reversing and remanding for reconsideration of that award, the Fourth District counseled: We further require that the trial court refashion the repayment of this amount so that the husband is not foreclosed from a more expeditious repayment of the amount of the equalization payment. This could be accomplished by various methods. Those may include, but are not limited to: providing a shorter payout period, including a lump sum repayment after a few years; repayment from the sale of various of the wife's assets, particularly the marital home; or allowing the amount to be reduced to judgment so that the husband is permitted to collect it from the wife's assets. Except for the option of simply reducing the equalizing payment to judgment, the court should retain specific jurisdiction over the future repayment provisions to account for changed circumstances. The court cannot, however, retain jurisdiction to change the amount of the original equalization payment, which is a set property division between the parties."

8. "In other words, the sentimental interest of one party in marital property cannot take priority over financial fairness to the other party."

9. "Here, like the rulings in *Posner* and *Evans*, the trial court's order giving the Husband 20.83 years to pay the Wife for her present interest in the marital home constitutes an abuse of discretion."

10. "This abuse of discretion is compounded by the requirement that the Wife relinquish her entire interest in the home by quitclaim deed within thirty days of the entry of the judgment."

11. "Accordingly, we reverse the final judgment as to this issue."

12. "On remand, as discussed in Posner, the trial court shall reconsider the award of this asset in light of the other available options, including having the Husband obtain a mortgage or line of credit to pay the Wife, requiring the Husband to sell the home to pay the Wife, or reducing the amount to judgment so the Wife may collect against the Husband's other assets, if there are any."

13. "We also caution that if the trial court elects to refashion the payment plan on remand, it must consider whether to impose interest payable to the Wife on the unpaid balance, and it should retain jurisdiction over any repayment provisions to account for any future change in circumstances."