University of Miami Law Review

Volume 35 | Number 3 Article 4

5-1-1981

Family Law: The Aftermath of *Canakaris*

Shirley Law Guthrie

Family Law: The Aftermath of *Canakaris*

SHIRLEY LAW GUTHRIE*

Cases decided by the district courts of appeal after the supreme court's landmark decision in Canakaris v. Canakaris *reflect its impact on marriage dissolution law in Florida. The author surveys and critically examines those subsequent cases and concludes that legislation is necessary to establish Florida as a true equitable distribution state and to lend consistency to the division of property by the courts upon dissolution of marriage.*

I. INTRODUCTION

On January 31, 1980, the Supreme Court of Florida decided *Canakaris v. Canakaris*,[1] a case described as an attempt "to bring some stability to the area of law dealing with alimony and the disposition of property in marriage dissolution cases."[2] Before *Canakaris*, Florida was one of the few remaining jurisdictions that distributed marital property according to common law record title.[3] In these jurisdictions, courts award marital property to the

* Law clerk to the Honorable William M. Hoeveler, United States District Judge, Southern District of Florida; J.D. University of Miami School of Law; Member, *University of Miami Law Review*.

1. 382 So. 2d 1197 (Fla. 1980). The *Canakaris* decision was filed January 31, 1980, and clarified by revisions on March 27, 1980. The published opinion did not appear until clarification.

2. Lewis v. Lewis, 383 So. 2d 1143, 1144 (Fla. 4th DCA 1980).

3. The other record title states are Mississippi, Rhode Island, South Carolina, Virginia,

spouse holding record title unless the other party demonstrates a special equity giving rise to an interest in the property.[4] A court may grant a special equity in separately held property only on proof that the spouse without title has contributed substantially in funds or services to the acquisition or improvement of that property.[5] Jointly owned property, on the other hand, is subject to distribution or partition as marital property unless one spouse shows that nonmarital funds purchased the property, and the other spouse cannot show any intention to make a gift of half the property.[6]

Some states follow a community property system of distribution in which property owned before the marriage reverts to its original owner, and property acquired during the marriage is divided either equally or equitably.[7] By judicial decision or by statute, however, a majority of states have adopted a system granting the courts the discretion to provide for an equitable distribution upon divorce.[8] Some of these states phrase the standard for distribution simply in terms of what the court deems "just" or "equitable"—amorphous terms at best.[9] In other equitable distribution states, legislatures have issued guidelines that, although still allowing judicial discretion, assist the courts in more definitively framing the boundaries of an equitable distribution of marital property.[10]

---

and West Virginia. Freed & Foster, *Divorce in the Fifty States: An Overview*, 14 FAM. L.Q. 229, 229 (1981).

4. A special equity is a vested right to a specific piece of property created through an "extraordinary contribution toward its acquisition, either financially or through personal industry and service to the other party." Ball v. Ball, 335 So. 2d 5, 7 (Fla. 1976). *See also* 34 U. MIAMI L. REV. 1227 (1980).

5. A special equity may arise, for example, when a wife's labors nurture her husband's separately owned business. The court may determine that although the wife does not hold record title, she does have a special equity in the business because of her direct contribution to it. *See* Ball v. Ball, 335 So. 2d at 7.

6. *Id.*

7. I. BAXTER, MARITAL PROPERTY § 40:1 (Supp. 1980).

8. *Id.*

9. N.J. STAT. ANN. § 2A:34-23 (West Supp. 1980-1981), for example, provides in part that:

> In all actions where a judgment of divorce or divorce from bed and board is entered the court may make such award or awards to the parties, in addition to alimony and maintenance, to effectuate an equitable distribution of the property, both real and personal, which was legally and beneficially acquired by them or either of them during the marriage.

10. The statutes range in detail from those of states such as Maine, which list a few relevant factors for the court to consider, to those of states such as New York, which give comprehensive and almost exhaustive detail. The Maine statute, for example, advises the

Although Florida is still a record title state, its alimony statute, section 61.08 of the Florida Statutes, lists guidelines to assist courts in a proper determination of alimony. As amended in 1978, the statute also provides that "[t]he court may consider any other factor necessary to do equity and justice between the parties."[11] The statute falls short of making Florida an equitable distribution jurisdiction, however, because it fails to specify that separately

---

court to divide the marital assets as it deems just, after considering all relevant factors, including:

A. The contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as a homemaker;

B. The value of the property set apart to each spouse; and

C. The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.

2. Definition. For purposes of this section only, "marital property" means all property acquired by either spouse subsequent to the marriage except:

A. Property acquired by gift, bequest, devise or descent;

B. Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise or descent;

C. Property acquired by a spouse after a decree of legal separation;

D. Property excluded by valid agreement of the parties; and

E. The increase in value of property acquired prior to the marriage.

ME. REV. STAT. ANN. tit. 19, § 722-A(1) (1981).

The New York statute, in contrast, lists 10 factors to consider:

(1) the income and property of each party at the time of marriage, and at the time of the commencement of the action;

(2) the duration of the marriage and the age and health of both parties;

(3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;

(4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;

(5) any award of maintenance under subdivision six of this part;

(6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;

(7) the liquid or non-liquid character of all marital property;

(8) the probable future financial circumstances of each party;

(9) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party;

(10) any other factor which the court shall expressly find to be just and proper.

N.Y. DOM. REL. LAW § 236 (McKinney Supp. 1980).

11. 1978 Fla. Laws ch. 78-339, § 1 (amending FLA. STAT. § 61.08(2) (1977)). The legislature added these words to the statute in 1978 in apparent reaction to and approval of Brown v. Brown, 300 So. 2d 719 (Fla. 1st DCA 1974). *See* 34 U. MIAMI L. REV. 1227, 1237 (1980).

held property is available for distribution, or that courts may employ lump sum alimony to distribute marital property equitably. In addition, the statute does not address the distinctions between lump sum alimony to reallocate property and alimony for support.

In the past, Florida courts awarded wives permanent alimony for their support almost as of right if the husbands could afford it.[12] More recently, since the inception of no-fault divorce, courts have de-emphasized permanent alimony, recognizing that husbands and wives are "equal partners" in the marital relationship and a wife is not absolutely entitled to a "right in her husband's earnings for the remainder of her life."[13] Instead, courts have awarded lump sum alimony to divide marital assets fairly. For example, in the important case of *Brown v. Brown*,[14] the District Court of Appeal, First District, held that a trial court has the discretion to use lump sum alimony as a tool to adjust the material wealth of the parties upon dissolution of their marriage. The court acknowledged that although one spouse may technically have earned all the parties' assets in the marketplace, the trial court should not denigrate the value of a homemaker's contribution to the marriage partnership. This decision was a step forward in the movement toward equitable distribution, but it did not define what specific factors a court would consider other than the partners' contributions to the marriage. *Brown* also did not distinguish the elements of the various kinds of alimony.

Although the wife in *Brown*, a homemaker for eighteen years, ostensibly needed and deserved a larger alimony award than $17,700 when the husband had a net worth of over $200,000, the wives in two subsequent cases apparently did not. First, in *Cummings v. Cummings*,[15] the trial court awarded the wife lump sum alimony of the husband's interest in the marital home and required the husband to pay the wife's attorney's fees. The District Court of Appeal, Second District, modified the attorney's fees, fixing them at a lower figure. The Supreme Court of Florida reversed, finding that "[t]he parties had been married five years and had no children, and the wife's income was approximately equal to that of the husband, at least during the last few years when both

12. *See* Welsh v. Welsh, 160 Fla. 380, 35 So. 2d 6 (1948); Phelan v. Phelan, 12 Fla. 449 (1868).

13. Beard v. Beard, 262 So. 2d 269, 272 (Fla. 1st DCA 1972).

14. 300 So. 2d 719 (Fla. 1st DCA 1974).

15. 330 So. 2d 134 (Fla. 1976).

parties were public school teachers."[16] Because the wife made "no positive showing of necessity,"[17] the court erred in awarding her lump sum alimony. Second, in *Meridith v. Meridith*,[18] the Supreme Court of Florida reaffirmed its earlier *Cummings* stance by quashing a lump sum award of the husband's interest in the marital home because the wife had made no showing of need for the award. Neither *Cummings* nor *Meridith* discussed what other equitable factors, besides need, might control an award of lump sum alimony.

Between 1976 and 1980, the district courts of appeal were understandably confused in their attempts to deal equitably with distributions of marital assets through lump sum awards. Some courts continued to follow the liberal position of *Brown*;[19] some courts followed what they perceived was the necessity requirement of *Cummings* and *Meridith*.[20]

Canakaris and its companion case, *Duncan v. Duncan*,[21] specifically addressed the distinctions between, and the elements to consider in awarding, the various kinds of alimony. The court may appropriately award lump sum alimony if "the evidence reflects (1) a justification [not need] for such lump sum payment and (2) financial ability of the other spouse to make such payment without substantially endangering his or her economic status."[22] Permanent periodic alimony, on the other hand, turns on "the needs of one spouse for the funds and the ability of the other spouse to

16. *Id.* at 135.

17. *Id.* at 136.

18. 366 So. 2d 425 (Fla. 1978).

19. *See, e.g.*, McAllister v. McAllister, 345 So. 2d 352 (Fla. 4th DCA 1977) (permanent periodic alimony increased to reflect a more equitable distribution); Goldman v. Goldman, 333 So. 2d 120 (Fla. 1st DCA 1976) (wife entitled to lump sum alimony sufficient to compensate her contributions to the marriage).

20. Cornelius v. Cornelius, 382 So. 2d 710 (Fla. 1st DCA 1979). Although the First District receded from its earlier recognition of a homemaker's contribution in *Brown* and strictly followed the *Cummings* and *Meridith* need requirement, it did certify the following question to the supreme court:

> May a trial court, pursuant to Section 61.08(2), Florida Statutes (1977), base an award of lump sum alimony on factors (such as those discussed in *Brown v. Brown*, 300 So.2d 719 (Fla. 1st DCA 1974)) not relating to one spouse's needs and the ability of the other spouse to provide for those needs?

Id. at 715. The supreme court answered ths question somewhat evasively in Cornelius v. Cornelius, 387 So. 2d 366 (Fla. 1980), by merely referring the First District to *Brown* and *Canakaris*. *See also* Robinson v. Robinson, 366 So. 2d 1210 (Fla. 1st DCA 1979); 34 U. MIAMI L. REV. 1227 (1980).

21. 379 So. 2d 949 (Fla. 1980). *Duncan* was filed on the same day as *Canakaris*.

22. Canakaris v. Canakaris, 382 So. 2d 1197, 1201 (Fla. 1980).

provide the necessary funds."[23] The purpose of rehabilitative alimony is "to establish the capacity for self-support of the receiving spouse, either through the redevelopment of previous skills or provision of the training necessary to develop 'potential' supportive skills."[24] A special equity is not alimony. It is a vested right that "will not arise when the property is acquired from funds generated by a working spouse while the other spouse performed normal household and child-rearing responsibilities."[25]

Florida courts have relied on *Canakaris* extensively.[26] Although the mandate on equitable distribution seems clear, what a case means, of course, is largely determined by what other courts say it means—by "what it will be made to stand for by another later court."[27] During the first ten months following *Canakaris*, the approaches of the district courts of appeal to the equitable distribution problem ranged from a lingering emphasis on need to a closer adherence to the *Brown* and *Canakaris* standards of marital contributions as justification for lump sum alimony. The decisions in all districts evidence a firmer grasp on the distinctions between permanent and lump sum alimony, on the one hand, and special equity on the other.

To help one appreciate the full extent of the impact of *Canakaris* on Florida law, this article will next review how the appellate courts have interpreted *Canakaris* on lump sum alimony and special equity.

II. Lump Sum Alimony

Florida's five appellate districts have generally attempted to follow the teaching of *Canakaris* that lump sum alimony is an acceptable device to distribute marital property fairly, regardless of which spouse holds the record title to the property.

A. *First District*

At first confused about the state of Florida alimony law,[28] the District Court of Appeal, First District, eventually adopted the *Canakaris* rationale in *Collinsworth v. Collinsworth.*[29] In that case,

23. *Id.*
24. *Id.*
25. Duncan v. Duncan, 379 So. 2d 949, 952 (Fla. 1980).
26. Over 70 Florida decisions have cited *Canakaris.*
27. K. Llewellyn, The Bramble Bush 52 (1960).
28. *See* cases cited note 20 *supra.*
29. 386 So. 2d 570 (Fla. 1st DCA 1980).

the trial court awarded the wife forty-three acres, the marital home, and household furnishings as lump sum alimony. The First District affirmed the award, noting that it was no longer necessary to rely only on need and ability to pay to justify an award of lump sum alimony. The court said that the amendment to section 61.08 of the Florida Statutes in 1978 had changed the traditional equation for an award of alimony, "a creature of statute."[30] The First District clarified its opinion on petition for rehearing, finding no reversible error in the trial court's recitation of "special equity," because the trial court had considered other factors that were "proper considerations in making an award of alimony."[31]

B. *Second District*

In the following cases, the District Court of Appeal, Second District, consistently emphasized the equitable distribution aspect of *Canakaris* in determining whether trial courts properly treated awards of lump sum alimony. *MacDonald v. MacDonald*[32] graphically illustrates the import of *Canakaris*. In that case, the Second District vacated an award of the husband's interest in the marital home as lump sum alimony because the wife had obtained full time employment and had made no showing of need for the lump sum award. The court directed the trial court to grant the wife exclusive possession of the home until the parties' children reached majority. It also instructed the trial court to "revisit the issue of permanent alimony since our opinion has thwarted the award of lump sum alimony."[33] The Second District reversed itself on rehearing, however, acknowledging that it had previously been unaware of *Canakaris*, affirming the lump sum award, and noting that the award was consistent with the guidelines of *Canakaris* and amended section 61.08.

In *Perez v. Perez*,[34] the trial judge awarded the wife permanent periodic alimony of $1,000 a month, lump sum alimony of the husband's interest in the marital home, and granted the husband a special equity in other real property held by the couple as tenants by the entirety. The Second District reversed and remanded for further proceedings consistent with *Canakaris*, decided after the trial judge rendered judgment. The Second District disagreed with

30. *Id.* at 571; *see* 1978 Fla. Laws, ch. 78-339, § 1 (amending FLA. STAT. § 61.08 (1977)).
31. 386 So. 2d at 572.
32. 382 So. 2d 50 (Fla. 2d DCA 1980).
33. *Id.*
34. 383 So. 2d 252 (Fla. 2d DCA 1980).

the trial court's conclusion that the husband had a special equity in jointly held property just because he bought it with money he earned during the marriage.[35] The court thus remanded the case to the trial court "to conduct a further hearing on the question of what alimony awards are appropriate in this case under the principles enunciated in *Canakaris v. Canakaris*."[36]

Stith v. Stith[37] also demonstrates the Second District's reliance on *Canakaris* to reverse a trial court's award of lump sum alimony. In *Stith*, the trial court awarded the wife a lump sum of $240,000 payable in installments of $1,000 per month for twenty years. The husband, who had an after-tax income of $50,000, contended that the award to the wife should have been permanent periodic alimony and not lump sum, since lump sum alimony would not terminate on death or remarriage. On the other hand, the wife described herself as a typical homemaker, forty-six years old at the time of the divorce, having a college degree and a teacher's certificate but little work experience. After twenty-three years of marriage her total assets, including her interest in the marital home, consisted of $50,000. Her husband's assets included two life insurance policies, one for $215,850 payable to a trust, and one for $25,000; his net assets totalled $140,000. Because it appeared that the trial court had awarded the lump sum alimony to provide for the wife in the event of her husband's death,[38] the Second District reversed the lump sum award and directed the trial court to award permanent periodic alimony of $1,000 per month and a lump sum award of the two life insurance policies. The life insurance policies, however, would revert to the husband or his designee if the wife died or remarried. The Second District indicated its discomfort with the size of the trial court's award stating, "[a] lump sum award of $240,000 to the wife on the facts in this case simply cannot be justified as an equitable distribution of property acquired during the marriage."[39] The Second District thus permitted the husband to maintain his financial position and denied his wife the right to divest him of his net assets.[40]

---

35. The court declared, however, that there could be a constructive trust of the wife's interest in favor of the husband. *Id.* at 253.

36. *Id.*

37. 384 So. 2d 317 (Fla. 2d DCA 1980).

38. The trial court secured the $240,000 award by having the husband name the wife as irrevocable beneficiary of the revocable trust to which the large policy was payable, and having him maintain a separate $25,000 policy payable to the wife. *Id.* at 318.

39. *Id.* at 320.

40. The court apparently did not consider that the lump sum award was payable over a

Yet in *Bullard v. Bullard*[41] the same court reversed a final judgment that permitted the husband, a doctor, to retain most of the assets he had accumulated in his name during the marriage. The court said that the trial court had made its awards before the Supreme Court of Florida decided *Canakaris*, a case that

> approved and adopted a new philosophic concept for this state—that a wife who labors at home while her husband pursues material gain is a contributing partner in property acquired during the marriage, and can be equitably compensated by awarding her certain assets as lump sum alimony when the partnership is dissolved.[42]

The Second District briefly noted the similarity of the facts in this case to *Canakaris*: a lengthy marriage of a doctor to a wife "who worked, helped him through medical school, assisted in his early practice and then turned full time attention to home and family."[43] For some unstated reason, this housewife was more deserving of a lump sum award than the wife in *Stith*.

The Second District case that exemplifies court-achieved equitable distribution is *Neff v. Neff*.[44] In *Neff*, the wife worked in long hours every day, in addition to her household tasks, to help her husband build a successful chain of restaurants. The trial court denied her a special equity in the business, awarded her $800 per month permanent periodic alimony, and lump sum alimony of the marital home and another parcel of real estate. The Second District reversed and remanded for reconsideration in light of *Canakaris*, stating that *Canakaris* and *Duncan*

> marked the dawn of a new era for a Florida wife who has labored beside her husband in achieving material goals. . . . *Canakaris* confirms the fact that marriage may indeed be a partnership in the economic area and that each partner is entitled to a fair share of the fruits of their combined industry, whether performed in the office, the factory, the fields or the home.[45]

The essence of the court's opinion was that Mrs. Neff deserved an equitable share of the business she had helped create, no matter

---

20-year period and thus would not have affected the husband's assets any more than would permanent periodic alimony.

41. 385 So. 2d 1120 (Fla. 2d DCA 1980).

42. *Id.* at 1121.

43. *Id.*

44. 386 So. 2d 318 (Fla. 2d DCA 1980).

45. *Id.* at 319.

whether that share came from her special equity or a lump sum award.[46]

C. *Third District*

Although the District Court of Appeal, Third District, has not articulated as consistent an interpretation of *Canakaris* as has the Second District, equity is the underlying theme in most recent Third District opinions. For example, in two recent cases, the Third District reversed alimony awards, including lump sum awards, because the husband could not afford them. First, *Blum v. Blum*[47] held that the trial court had abused its discretion when it ordered the husband to pay alimony and support of over $4,000 a month. In that case, the husband was an osteopathic physician earning approximately $4,200 a month, after taxes. His net assets consisted of his half-interest in the townhouse owned by the couple. He owned a 1976 four-door Mercedes, titled in joint names and driven by his wife. He drove a two-door Mercedes, titled in his wife's name only. The Third District noted that if the husband complied with the final judgment, he would be left "with next to nothing—about $50 a week—to live on himself, without discharging any of his other responsibilities and obligations."[48] In addition, since the final judgment had awarded the wife the four-door Mercedes and did not award the husband the two-door Mercedes, Dr. Blum would have been without a car to drive.[49] Accordingly, the Third District reversed the alimony and support awards, with instructions that the trial court reduce them. The Third District also awarded the husband the two-door Mercedes as lump sum alimony, acknowledging that "[w]hile it was appropriate . . . to award the four-door car to Mrs. Blum, it was entirely unfair and inequitable to decline reciprocally to grant to Dr. Blum the wife's two-door, which he was driving."[50]

Second, in *Parham v. Parham*,[51] the Third District reviewed a

---

46. The court found that above and beyond normal marital duties, Mrs. Neff had contributed her bookkeeping services to her husband's business. The court said that her contribution could have been rewarded by the use of lump sum alimony without the need for tracing her services directly to each restaurant in the chain, as would be required under special equity principles. *Id.* at 319.

47. 382 So. 2d 52 (Fla. 3d DCA 1980).

48. *Id.* at 55.

49. *Id.* n.5.

50. *Id.* at 55. The decision, in effect, awarded reciprocal lump sum alimony: one car to the wife, and the other to the husband.

51. 385 So. 2d 107 (Fla. 3d DCA 1980).

trial court's alimony provisions as a whole and found them wanting. In *Parham*, the husband appealed a final judgment requiring him to pay $650 a month permanent periodic alimony, which would survive his death as a charge on his estate, and awarding his one-half interest in the marital home to his wife. His liabilities exceeded his assets, and his earnings as a dental technician amounted to $448 a week. The wife, who was in good health, had assets totalling over $15,000, and she intended to seek employment. The Third District found that the award to the wife of the husband's interest in the marital home would reduce his "modicum of financial well-being . . . to financial misfortune."[52] Since this result would not be consistent with *Canakaris*, the court reversed the lump sum award, requesting that the trial court grant the wife's request for partition. The Third District remanded the permanent alimony issue to the trial court for adjustment of the size of the alimony payment and deletion of the part of the final judgment that made the permanent alimony a charge against the husband's estate.

Cuevas v. Cuevas[53] is an interesting example of the Third District's deference to a trial court's use of lump sum alimony to attain equitable distribution. *Cuevas* concerned the breakup of a marriage of sixteen years between a housewife and a co-owner of a cabinet company. At the time of the dissolution the housewife was fifty-five and had been working as a barmaid for a year. She admitted earning $3,200 a year, plus tips. Her future earning capacity was limited by her lack of skills and a physical condition that prevented her from standing for long periods of time. The husband, on the other hand, owned fifty percent of a business worth approximately $300,000 and earned $290 a week. He also received an annual bonus of $1,200. The trial court awarded the wife $100 a week in permanent alimony, the jointly owned marital home, and Georgia real property titled only in the husband's name. Because the trial court did not explain its reasons for the lump sum awards, the Third District inferred "that the trial judge awarded the husband's interest as lump sum alimony to ensure an equitable distribution of property acquired during the marriage."[54] The award was proper, in light of *Canakaris*, since "the wife had no separate property, assets or savings of her own and the husband had the ability

52. *Id.* at 109.
53. 381 So. 2d 731 (Fla. 3d DCA 1980).
54. *Id.* at 732.

to make such a conveyance without substantially endangering his economic status."[55]

Similarly, in *Epstein v. Epstein*,[56] the Third District upheld a rather generous lump sum award to the wife. In that case, the court concluded that, under *Canakaris*, the awards of installments due on the sale of a franchise and the husband's interest in the marital home, "although admittedly on the high side,"[57] were within the discretion of the trial court based on the "substantial competent evidence in this record."[58]

In two recent cases, the Third District did not defer to the trial judge's discretion and reversed lump sum awards without referring to *Canakaris* in the first case, and by expressly following the principles of *Canakaris* in the second. In *Weiner v. Weiner*,[59] the court reversed an award to the wife of valuable artifacts that were part of the household funishings. The court stated that the record disclosed no agreement of the parties, no explicit lump sum award, no special equity, and no request for partition. Since these were the only means by which a court could dispose of property on dissolution of marriage, the award was improper.[60] The dissent disagreed and relied on *Canakaris* for the proposition that the award was "sustainable as lump sum alimony to assure an equitable distribution of property acquired during the marriage."[61] The dissent also disagreed with the Third District's increase of permanent alimony from $750 a week to $1,200 a week and suggested that the wife was a woman of considerable wealth.[62] Thus, although the court did not infer a lump sum award here, as it did in *Cuevas*, perhaps it chose not to do so because it viewed such an award as inequitable.

In the second case, *Rosen v. Rosen*,[63] the court affirmed the trial court's award of the parties' marital home as lump sum alimony to the wife but reversed a grant to her of $125,000 in cash. Since the cash award derived from the husband's personal funds,

---

55. *Id.*

56. 386 So. 2d 1200 (Fla. 3d DCA 1980).

57. *Id.* at 1201.

58. *Id.*

59. 386 So. 2d 1251 (Fla. 3d DCA 1980).

60. *Id.* at 1253.

61. *Id.* at 1253-54.

62. The trial court had awarded the wife a quarter of a million shares of stock in her husband's company as a special equity. *Id.* at 1254 (Nesbitt, J., concurring in part and dissenting in part).

63. 386 So. 2d 1268 (Fla. 3d DCA 1980).

not acquired during the marriage, the cash award was inappropriate under the rationale of *Canakaris*. In the court's analysis, permanent periodic alimony is still generally preferable to lump sum alimony, as the Supreme Court of Florida stated in *Yandell v. Yandell*,[64] and lump sum alimony is advisable only in special circumstances—the "special equities" of *Yandell*.[65] The *Rosen* court acknowledged, however, that although *Canakaris* disapproved of the term *special equity* in the context of lump sum alimony, it "very significantly expanded the range of circumstances under which lump sum may be justified, either instead of, or in addition to, a periodic provision."[66] Applying the *Canakaris* standards to *Rosen*, the court concluded that the husband had the ability to pay, but even though the award of his interest in the marital home was justified, "[t]here is *no* cognizable 'justification'—that is to say, no 'good reason' or useful purpose"[67]—for the cash award, especially since the husband inherited his liquid assets from his family. Thus, the *Brown v. Brown*[68] standards did not apply, nor did such possible justifications as the parties' desire to avoid unpleasant future contact, the wife's need for security against the husband's death, the husband's inability to make periodic payments, or the wife's need for a cash award.[69] In remanding the award for alteration from lump sum to periodic alimony, the court noted that periodic alimony may be modified, and that "[b]y successfully challenging the lump sum award, [the husband] has taken the chance that any such modification may be upward."[70]

In *Archibald v. Archibald*,[71] however, there was sufficient justification for a lump sum award of $50,000. The Third District affirmed that award and an award of $750 per month in permanent alimony. It also upheld the trial judge's refusal to grant the wife a special equity in the husband's Jamaican hotel. The trial court had found that the husband had acquired this hotel without using any marital funds[72] and that the wife had received half the proceeds

64. 39 So. 2d 554 (Fla. 1949).

65. *Id.* at 556-57. The Supreme Court of Florida said in *Yandell* that lump sum alimony is desirable only when the husband can pay the award without jeopardy to his business or livelihood, and when other considerations, such as the wife's assistance in accumulating marital property, warrant the award.

66. 386 So. 2d at 1271.

67. *Id.*

68. 300 So. 2d 719 (Fla. 1st DCA 1974).

69. 386 So. 2d at 1272.

70. *Id.* n.8.

71. 390 So. 2d 1213 (Fla. 3d DCA 1980).

72. In fact, the husband bought the hotel in question with no cash investment. *Id.* at

from the sale of another Jamaican hotel before the couple's separation. Combining two theories enunciated in *Canakaris*—the equitable distribution theory and the discretionary review theory—the Third District concluded that the trial judge was "in the best position to make an equitable distribution of any assets acquired during the marriage."[73]

D. *Fourth District*

Just as the Third District in *Rosen* mentioned the wife's need as one factor to consider in awarding lump sum alimony, the requirement for a positive showing of need initially persisted in the District Court of Appeal, Fourth District. For example, in *Costich v. Costich*,[74] the Fourth District affirmed a lump sum award of the marital home to the wife, a schoolteacher earning $250 weekly. The court noted that the husband earned $16,500 annually as the operator of a gasoline station and received $6,590 in dividends from stock valued at approximately $85,000. In addition, the husband owned a business with a book value of $41,000.

The court stated that

> In any determination to award alimony, regardless of its character, there must be demonstrated a need on the part of the recipient spouse as well as the ability of the other spouse to satisfy that need. Once this need and ability have been established the court must next consider the type of alimony most appropriate under the circumstances of each case.[75]

The court added, however, that in determining whether to award lump sum alimony, a court must apply the standards of *Canakaris*, justification and financial ability to pay. Because the trial court's award of the marital home was "both equitable and just,"[76] the Fourth District affirmed the award. From this opinion it was not clear whether the Fourth District had implicitly subjected lump sum alimony awards to four standards: need, ability to meet the need, justification, and financial ability to maintain economic position.

In a second opinion filed on the same day, *Lewis v. Lewis*,[77]

1214.

73. *Id.*

74. 383 So. 2d 1141 (Fla. 4th DCA 1980).

75. *Id.* at 1143.

76. *Id.*

77. 383 So. 2d 1143 (Fla. 4th DCA 1980).

however, the Fourth District remarked that "the requirement that there be some positive necessity to justify such an award would no longer seem applicable."[78] The court indicated some doubt that the supreme court in *Canakaris* had expressly receded from its position in *Cummings* and *Meridith*. The court emphasized that, in any event, under either a liberal or a conservative interpretation of *Canakaris*, the lump sum award of property to the wife was within the trial court's discretion. The court found that the wife, a part-time teacher earning $154 every two weeks, had a positive need for the award; the husband, although lacking the ability to make periodic payments on his income of $214 a week, could meet the wife's need through the lump sum grant. Under the more liberal interpretation of *Canakaris*, "a view we believe more nearly reflects the rationale of the decision,"[79] the court found the award equitable and just. Although a trial court does not have "unbridled discretion," there was "logic and justification for the result so that the trial judge's exercise of his discretion passes the test."[80] The test is apparently whether the trial court acted reasonably when it awarded lump sum alimony.[81] From the tone of these two opinions, one can conclude that, at least at first, there was still uncertainty in the Fourth District, and that the supreme court had not entirely succeeded in its attempt "to bring some stability to the area of law dealing with alimony and the disposition of property in marriage dissolution cases."[82]

In later cases, the Fourth District dropped the language of need and instead adopted a "reasonableness" test, blending the *Canakaris* theories of justification and the reasonable discretion of a trial judge. The Fourth District test centers on a finding of justification that is not unreasonable. In *Bird v. Bird*,[83] for example, the Fourth District acknowledged that although the trial court erred by employing the confusing term "special equity" in connection with lump sum alimony, there was justification for the lump sum award in the husband's harassment of and violence toward the wife. The award was "not unreasonable," and it "ensure[d] equity

78. *Id.* at 1145.

79. *Id.*

80. *Id.*

81. The Fourth District, in this and other early opinions interpreting *Canakaris*, emphasized the reasonable bounds of a trial court's discretion. Such discretion is reasonable, according to *Canakaris*, "[i]f reasonable men could differ as to the propriety of the action taken by the trial court. . . ." 382 So. 2d at 1203.

82. 383 So. 2d at 1144.

83. 385 So. 2d 1090 (Fla. 4th DCA 1980).

and justice between the parties."[84]

Similarly, in *Nusbaum v. Nusbaum*,[85] the court applied its reasonableness test to a lump sum award of $125,000 in cash. The court concluded that the grant was justified under *Canakaris*, and that the husband was able to pay the sum. Moreover, the trial court's action was not "arbitrary, fanciful or unreasonable"[86] in attempting to ensure equity and justice between the parties.

Two recent cases in the Fourth District demonstrate the permissible extent of a trial court's reasonable discretion. In *Gaster v. Gaster*,[87] the trial court awarded permanent alimony to the wife in a twenty-year marriage, but refused to grant her request for the marital home as lump sum alimony. The wife and husband were both forty-four at the time of the dissolution; their financial positions were far apart. The husband, a stockbroker, earned in excess of $100,000 a year while the wife had been a homemaker for eighteen years. The husband's net worth varied between $150,000 and $250,000. The wife, who was disabled because of a back problem, apparently had no assets but her half-interest in the jointly owned marital home. The Fourth District affirmed the permanent alimony award and the refusal to grant lump sum alimony. The court stated that *Canakaris* "would seem to authorize, under appropriate circumstances, an award of lump sum alimony to ensure an equitable distribution of property acquired during the marriage."[88] The discretion of a trial court, however, defines the limits of an equitable distribution. "Having tested that exercise of discretion by application of the *Canakaris* 'reasonable man' inquiry and finding that reasonable men could disagree, our authority to deal with that aspect of the judgment is exhausted."[89]

The *Gaster* decision raised the question of how unreasonable a trial court must be before the Fourth District will reverse.[90] *Gerber*

---

84. *Id.* at 1092 (quoting *Canakaris*, 382 So. 2d at 1200).

85. 386 So. 2d 1294 (Fla. 4th DCA 1980).

86. *Id.* at 1295.

87. 391 So. 2d 687 (Fla. 4th DCA 1981) (on rehearing).

88. *Id.*

89. *Id.* at 687-88.

90. In a number of cases following *Canakaris*, the Fourth District simply affirmed lump sum awards according to the standards delineated in the case. *See, e.g.*, Bashaw v. Bashaw, 382 So. 2d 1352 (Fla. 4th DCA 1980); Hays v. Hays, 384 So. 2d 56 (Fla. 4th DCA 1980); Liefer v. Liefer, 384 So. 2d 261 (Fla. 4th DCA 1980). The court in *Bashaw*, for example, indicated that under former supreme court cases the award of real estate would have been erroneous, but "the Supreme Court, in a landmark decision, appears to have approved the trial Judge's course of conduct in this case." 382 So. 2d at 1353.

v. Gerber[91] answered that question. In that case, a wife who had never worked and had only a high school education received $30 a week in rehabilitative alimony in addition to child support, but no lump sum alimony. She was expected to pay all expenses on the marital home. When the home was sold she would receive half the proceeds from the sale of the house and a credit for the mortgage payments representing principal. The husband, on the other hand, owned a business producing an annual net taxable income of $17,000. Over the years, his business corporation had paid a number of the couple's expenses directly, and "[t]hese economic benefits were not reflected on the tax returns."[92] The Fourth District reversed the final judgment in its entirety, holding, in part, that the alimony award was inadequate and should have been permanent instead of rehabilitative. "The financial aspects of the judgment appealed from demonstrate an abuse of discretion in failing to provide for even minimal sustenance to the wife and three minor children."[93] Given the vast difference between the husband's resources and the wife's award, the trial court had not done equity and justice.

E. *Fifth District*

The terms *equity* and *justice* figure prominently in the interpretation of *Canakaris* given by the District Court of Appeal, Fifth District. In *Baker v. Baker*,[94] for example, the Fifth District stated that "[i]n granting lump sum alimony the trial court should be guided by all relevant circumstances to ensure equity and justice between the parties as that principle is set forth in *Canakaris v. Canakaris*."[95] In *Baker*, the court reversed a lump sum award of real property to the wife, because the award was excessive.

> We are of the opinion that an award of lump sum alimony that leaves the husband virtually without anything and creates an instant estate of the value of in excess of $100,000.00 in the wife was an abuse of discretion, particularly where the needs of the wife would be more properly provided for through an award of permanent periodic alimony.[96]

---

91. 392 So. 2d 317 (Fla. 4th DCA 1980).
92. *Id.* at 318.
93. *Id.* at 319.
94. 388 So. 2d 233 (Fla. 5th DCA 1980).
95. *Id.* at 234.
96. *Id.*

In *Cowan v. Cowan*,[97] the Fifth District relied extensively on *Canakaris* for its equitable distribution standard. That case involved the dissolution of a thirty-seven-year union between a sixty-eight-year-old retired army general and his fifty-eight-year-old wife. The wife had a degree in business administration but had not worked since 1944. She had contributed approximately $40,000 to the marriage from sources independent of the marriage relationship. The husband, at the time of the dissolution, had a gross annual income of $71,340. The trial court awarded the wife $270 a week in permanent periodic alimony and denied the wife lump sum alimony of the husband's interest in the marital home. The Fifth District reversed the denial of lump sum alimony, stating that "General Cowan's business or employment will not be affected to any extent by an award of his equity in the house to his wife."[98] To do equity and justice, the trial court should have awarded lump sum alimony. The Fifth District also remanded the permanent alimony award for reconsideration based on *Canakaris*. The court pointed out that the wife had to live on $270 a week while the husband received $1,170 a week, after alimony expenses. Although the trial court on remand need not ensure equality in the financial positions of the parties, it should reduce the disparity in positions, so that "neither spouse [would pass] automatically from prosperity to misfortune."[99]

Similarly, in *Kirchman v. Kirchman*,[100] the Fifth District described lump sum alimony as a kind of alimony "used to balance assets acquired during the marriage between the parties."[101] Although it appeared that the trial court had attempted "to do equity between the parties to give the wife a portion of the husband's assets,"[102] the court had failed. The Fifth District disagreed with the portion of the trial court's judgment awarding periodic alimony. The wife had requested a special equity in the capital stock of her husband's business. Instead of granting lump sum alimony to apportion the stock, which he had acquired during the marriage, the trial court "awarded alimony from the husband to the wife in the amount of $2,500.00 per month for six months; $2,000.00 for the next thirty months; $1,500.00 for the next twenty-four months

97. 389 So. 2d 1187 (Fla. 5th DCA 1980).
98. *Id.* at 1188.
99. *Id.* at 1189 (quoting *Canakaris*, 382 So. 2d at 1204).
100. 389 So. 2d 327 (Fla. 5th DCA 1980).
101. *Id.* at 330.
102. *Id.* at 329.

and $600.00 for the next one hundred eighty months."[103] The trial court did not specify the kind of alimony awarded. After examining the record, the Fifth District concluded that the award could not be permanent alimony "because that kind of alimony continues throughout the unremarried life of the recipient"[104] unless terminated by the recipient's lack of need or the donor's inability to pay. The award was not rehabilitative alimony, "because there is no specific finding by the trial court regarding the need for rehabilitation or a plan to do so."[105] Rather, the award was like lump sum alimony, but there was no indication from the record that the trial judge intended to grant lump sum alimony equivalent to the desired special equity in the stock. The court remanded the case

> for entry of a proper judgment dealing specifically with the issues of alimony and special equity in the shares of stock. Should the evidence support it and the trial judge in his sound discretion deems it proper, a distribution of the assets of the parties can be effected through the use of lump-sum alimony paid periodically.[106]

The court did, however, affirm the portion of the final judgment awarding to the wife the husband's interest in the marital home.

The tenor of decisions such as *Kirchman* is that the Fifth District, like Florida's other district courts of appeal, adheres to the equitable distribution concept of *Canakaris*. These decisions instruct trial courts that they may, in their discretion, use lump sum alimony rather than special equity to divide marital assets fairly. Across Florida's five districts, the appellate courts pay great deference to the reasonable discretion of the trial judge. Such deference, however, can lead to seemingly inconsistent results. In one case a spouse may receive only rehabilitative alimony;[107] in another case with similar facts, a spouse may receive not only permanent alimony, but possibly lump sum alimony also.[108] Even assuming that Florida has become an equitable distribution state by judicial fiat, inconsistencies such as these must reoccur, in the absence of legislative guidelines.

---

103. *Id.*

104. *Id.* at 330.

105. *Id.*

106. *Id.* at 331.

107. *See, e.g.*, Capps v. Capps, 392 So. 2d 581 (Fla. 3d DCA 1980) (Pearson, J., dissenting).

108. *See, e.g.*, Colucci v. Colucci, 392 So. 2d 577 (Fla. 3d DCA 1980).

III. SPECIAL EQUITY

Although there remains some inconsistency among the districts on what standards the courts should apply in granting lump sum alimony, *Canakaris* has resoved most of the confusion concerning the proper use of the term *special equity*. Before *Canakaris*, Florida courts had used *special equity* loosely to justify "both (1) a nonalimony property interest, and (2) an award of lump sum alimony."[109] As a nonalimony property interest, the term described "a vested interest in property brought into the marriage or acquired during the marriage because of contribution of services or funds over and above normal marital duties."[110] In this context, special equity allows a spouse to claim a vested interest in property that is held by the other spouse, if he or she has contributed funds or services beyond the usual marital duties and if these funds or services materially contributed to the property's acquisition.[111] The concept developed in case law because Florida's former alimony statute absolutely denied alimony to an adulterous wife.[112] A court might thus grant her the equivalent of her special equity in property despite her adultery. The statutory prohibition against alimony to an adulteress no longer exists. The judicially created term *special equity* still properly describes a vested property interest, but *Canakaris* and *Duncan* insist that alimony is not a vested property interest.[113]

Florida courts have confused the special equity that is a nonalimony property interest with the concept of special equities introduced in *Yandell v. Yandell*[114] in the context of lump sum awards. *Canakaris* noted, however, that the special equities of *Yandell* concern only a case's general equities.[115] Following *Canakaris*, "[t]he term 'special equity' should not be used when considering lump sum alimony; rather, it should be used only when

---

109. Canakaris v. Canakaris, 382 So. 2d 1197, 1200 (Fla. 1980).

110. *Id.*

111. Ball v. Ball, 335 So. 2d 5, 7 (Fla. 1976). The courts have distributed jointly held property equally between the spouses, unless one demonstrated a special equity in the property. A spouse who could show a special equity could receive the entire property unless contradictory evidence indicated that that spouse intended to make a gift of half the property.

112. Heath v. Heath, 103 Fla. 1071, 138 So. 796 (1932).

113. *Canakaris*, 382 So. 2d at 1201; *Duncan*, 379 So. 2d at 952.

114. 39 So. 2d 554, 556-57 (Fla. 1949). Although the exact source of the confusion is indeterminable, the supreme court's discussion of "special equity" in *Heath*'s alimony setting, 103 Fla. 1071, 138 So. 796, certainly contributed to the blending of the term with *Yandell*'s "special equities" in the context of lump sum alimony. *See* note 65 *supra*.

115. 382 So. 2d at 1201.

analyzing a vested property interest of a spouse."[116]

In *Ingram v. Ingram*,[117] decided the same day as *Canakaris* and *Duncan*, the Supreme Court of Florida confirmed the appropriate use of the concept of special equity. In that case, the husband claimed a special equity in the marital home because he had contributed more to the mortgage payments than his wife and had paid for "various repairs and improvements to the home."[118] The wife, however, had purchased the home with a $200 down payment ten months before the couple's marriage, and title remained in her name alone. The trial court refused to grant the husband a special equity. The District Court of Appeal, First District, reversed, holding that the husband's contributions constituted a special equity and remanded the case to the trial court for a determination of the extent of the husband's interest in the home. The supreme court found no special equity as defined by *Canakaris* but stated that the trial judge had discretion to award the husband alimony if necessary "to do equity between the parties."[119]

A. *First District*

The same court that had mistaken special equity for lump sum alimony in *Ingram* correctly applied the *Canakaris* and *Duncan* definition in *Hebert v. Hebert*.[120] In that case, the First District affirmed the trial court's refusal to grant the wife a special equity in the jointly held marital home of more than her contribution from separate funds toward its purchase price. The court noted that although she had contributed originally more than half of the purchase price, her husband later repaid her the excess of her contribution over one-half, so that each would have an equal investment in the house. In *Beugnet v. Beugnet*,[121] on the other hand, the First District affirmed a trial court's award of special equity in a bar business to a wife. There, the wife had worked in her husband's bar business for thirteen years, and the bar license was held in joint names. The First District found that "the record supports the reasonableness and propriety of the trial court's exercise of its discretion in ruling that appellee's contributions established

116. *Id.*
117. 379 So. 2d 955 (Fla. 1980).
118. *Id.* at 956.
119. *Id.*
120. 382 So. 2d 842 (Fla. 1st DCA 1980).
121. 383 So. 2d 1186 (Fla. 1st DCA 1980).

her special equity and joint ownership of the bar."[122]

B. *Second District*

The wife in *Holley v. Holley*,[123] however, was not successful in establishing a special equity in her husband's law practice. In *Holley*, both husband and wife were attorneys in their fifties and had been married for only six years. The wife assisted her husband in an unsuccessful judicial campaign, worked for a short time as his secretary, and assisted him in his authorship of a book. She argued that she had a special equity in his practice for these reasons and because she had allowed her husband to practice in a commercial building she had owned before the marriage. The District Court of Appeal, Second District, however, was not convinced that the wife had contributed substantially to her husband's practice. She had retained ownership of the building and the husband had paid all the mortgage payments and other expenses during his occupancy. The court was unpersuaded that "the services provided by the wife were 'made over and above the performance of normal marital duties.' "[124]

Similarly, in *Hoch v. Hoch*,[125] the Second District, held improper a trial court's award to the wife of a special equity of $7,000 more than her half-interest in the parties' homes. In *Hoch*, the wife's contribution was connected with the marital relationship, although her earnings during the marriage had paid for the property while her husband's earnings had contributed to the family's support.[126] The court noted that *Ball v. Ball*[127] had held that a spouse could create a special equity by an unrebutted showing that he or she had supplied all the consideration for the property from a source clearly unconnected with the marital relationship. In *Smith*

---

122. *Id.* at 1188.

123. 380 So. 2d 1098 (Fla. 2d DCA 1980).

124. *Id.* at 1100 (quoting Duncan v. Duncan, 379 So. 2d at 956). The court agreed with the trial judge's conclusion that the wife's expenses in resuming her law practice after four years would be no more than the husband's expenses of relocating his home and his office, and that therefore she was not entitled to alimony. *Id.*

125. 380 So. 2d 499 (Fla. 2d DCA 1980). The *Hoch* court relied on the *Duncan* holding that a special equity does not arise when a couple acquires property with funds that one spouse earned during marriage while the other performed normal marital or household duties. *Id.* at 500.

126. The court somewhat softened its holding on special equity by remanding the case to the trial judge to allocate the marital assets fairly, implying that lump sum alimony might be appropriate since the wife had purchased the couple's first home with independent funds. 380 So. 2d at 500.

127. 335 So. 2d 5 (Fla. 1976).

v. Smith,[128] the Second District concluded that the husband had failed to make such an unrebutted showing to justify a special equity in property held as tenants by the entirety. In that case, the husband was an attorney earning $61,500 a year, with net assets of approximately $2,000,000. His wife, a former stewardess, was a housewife and mother to the couple's three children. The husband contended that he had used inherited money to purchase three parcels of real estate. The wife argued that they had purchased the property for the family's use and that the $250,000 inherited from a friend of the family had been meant for the couple jointly.[129] They did not contest that they had taken title to the property in joint names. The court concluded that "[t]he refusal of the trial court to find a special equity in the husband . . . thereby leaving the parties as joint owners of the three parcels of property is supported by the facts established in this case . . . ."[130]

Although the trial court improperly used the term *special equity* to award a spouse marital property in *McCall v. McCall*,[131] the Second District upheld the award as lump sum alimony. Since the trial court could have properly granted the wife the marital home, the Second District let the award stand "as an appropriate lump sum alimony award although erroneously designated as a 'special equity.' "[132]

C. *Third District*

The District Court of Appeal, Third District, has distinguished special equity from lump sum alimony with the same care and consistency as the First and Second Districts. For example, in *Bullard v. Bullard*,[133] the Third District held that a wife had no special equity in the marital home, furniture, and cemetery lots owned by the couple, merely because her financial contributions exceeded her husband's. The parties purchased these properties with their earnings during the marriage. The Third District ruled, however, that the wife had a trust in some real property that her aunt intended to convey only to her. Her husband had agreed to secure the deeds from the wife's aunt and to put the deeds in his

128. 382 So. 2d 1242 (Fla. 2d DCA 1980).

129. The wife testified that the donor had informed both parties that she would mail them a copy of her will and that the money was for them both. *Id.* at 1244.

130. *Id.* at 1245.

131. 386 So. 2d 275 (Fla. 2d DCA 1980).

132. *Id.* at 276.

133. 380 So. 2d 1090 (Fla. 3d DCA 1980).

wife's name alone. He breached that agreement by having the deeds executed in both names. He also broke his subsequent promises to tranfer title to his wife. Although that property was also jointly held, the trial court should have awarded it to the wife because of "[t]he additional showing . . . that Mr. Bullard agreed to act on behalf of his wife in transferring the title solely to her, and that he breached promises, made both before and after the aunt's conveyance, to effect that transfer."[134]

D. *Fourth District*

Employing the same reasoning as the Third District, in *Holbrook v. Holbrook*[135] the District Court of Appeal, Fourth District, denied the wife a special equity in real properties owned jointly by the couple because, although the wife was the primary source of the purchase money, her money was connected with the marital relationship. In that case, the wife's earnings were larger than her husband's, and the couple had made most of the acquisitions with her income. During the marriage, she managed the couple's finances. None of these facts, however, were sufficient to dissociate her contributions from the marriage. The wife in *Bird v. Bird*,[136] however, did contribute services sufficient to justify a special equity in her husband's taxi business.[137] The Fourth District affirmed the trial court's award of the wife's special equity in the business to the husband and its award of the husband's interest in three pieces of property to the wife. Emphasizing that a court has broad discretion to achieve equitable distribution, the Fourth District held that although the trial court had erroneously called the award to the wife a "special equity," the award was appropriate as lump sum alimony.[138]

---

134. *Id.* at 1092. Since the wife clearly did not intend to give half the property to the husband, the court could have found that she had a special equity in the property. *See Duncan*, 379 So. 2d at 952; *Ball*, 335 So. 2d at 7.

135. 383 So. 2d 981 (Fla. 4th DCA 1980).

136. 385 So. 2d 1090 (Fla. 4th DCA 1980).

137. The court noted that the wife had spent a "considerable time working in the business." *Id.* at 1091.

138. The court concluded that under the circumstances of the case, the wife deserved the lump sum award. The husband had harassed her, threatened her with a gun, shot at her, and broken into her house. *Id.* at 1092. These factors sound more like the "special equities" of *Yandell* than like the "justification" of *Canakaris*. The court should have pointed out that the lump sum award was merely equitable compensation to the wife, since the trial court had awarded her special equity in the taxi business to her husband.

E. *Fifth District*

Following the same guidelines, the District Court of Appeal, Fifth District, held in *Connor v. Connor*[139] that a wife who had supported her mentally ill husband was not entitled to a special equity in the marital home. According to the court, "[t]he illness and misfortune of a spouse should not create a special equity for the healthy spouse in jointly-owned property."[140]

IV. CONCLUSION

The *Canakaris* decision made significant progress toward clarifying the distinction between lump sum alimony and special equity. The opinion failed, however, to clarify how different kinds of periodic alimony affect the general rule that the recipient spouse's subsequent remarriage terminates permanent periodic alimony. In *Frye v. Frye*,[141] for example, the District Court of Appeal, Second District, demonstrated its confusion about whether rehabilitative alimony terminates on remarriage. The court pointed out that both permanent and rehabilitative alimony can be periodic. It interpreted *Canakaris* as having specified only that permanent alimony terminates on remarriage and held that rehabilitative alimony "should not necessarily be terminated upon remarriage,"[142] since the purpose of rehabilitation does not disappear upon the recipient's remarriage. Then, in October 1980, the supreme court dispelled whatever doubts may have existed about the nature of lump sum alimony as a right vesting on final judgment and not terminating on remarriage. The issue in that case, *Claughton v. Claughton*,[143] was whether lump sum alimony payments to a wife might continue after her remarriage. The supreme court stated that remarriage would not prevent the use of lump sum alimony "to provide the wife with an equitable share of the assets of the parties accumulated during their marriage, as distinguished from her need for support."[144] The court emphasized that the trial judge must follow the standards of *Canakaris* and *Brown*, and that the award must "be based on [the wife's] equitable share of the assets resulting from her marital contribution rather than her need for

139. 386 So. 2d 595 (Fla. 5th DCA 1980).
140. *Id.* at 597.
141. 385 So. 2d 1383 (Fla. 2d DCA 1980).
142. *Id.* at 1389.
143. 393 So. 2d 1061 (Fla. 1980).
144. *Id.* at 1062.

support."[145]

The open-ended language on alimony in *Canakaris* is not the opinion's only deficiency. The case also failed to clarify whether Florida is still a record title state for the purpose of distributing marital assets or whether it has, by judicial fiat, adopted the concept of equitable distribution. The equitable language of *Canakaris* and the cases following it strongly support the latter conclusion. Yet the law requires more clarification. Nowhere does *Canakaris* specify what property is available for distribution; nowhere does it set forth what standards a trial court should employ to assure equitable distribution. Because the Supreme Court of Florida has frequently changed its treatment of property distribution in recent years, the district courts of appeal have not wholeheartedly accepted the supreme court's apparent departure in *Canakaris* from a pure record title system. The Florida Statutes provide little guidance: Section 61.08 mentions only alimony, not property distribution, and it does not provide any objective guidelines for determining the allocation of marital property. The courts, stepping into this legislative void, are consequently using a form of alimony (lump sum) as a substitute for legislation specifically concerned with property distribution.[146] When courts employ alimony for several different purposes, confusion and inconsistencies are inevitable. Court-awarded lump sum alimony as a substitute for legislation is simply not an acceptable permanent solution for Florida. Florida needs a statute concerned specifically with the distribution of marital property to lend consistency to marriage dissolution law at the trial court level.

The trend in common law property states has been toward the equitable distribution of property.[147] Some states have achieved this distribution by judicial fiat;[148] others have passed property distribution statutes that require supplementation by trial courts.[149] The Florida legislature should follow the precedents of Illinois, New York, Colorado, or Maine, by adopting a form of the Uniform Marriage and Divorce Act.[150] The Act defines marital property and enumerates factors to guide courts in equitably dis-

145. *Id.*

146. 385 So. 2d at 1389.

147. I. BAXTER, *supra* note 7, at 99.

148. *Id.* at 98.

149. *See* Wilson v. Wilson, 270 S.C. 216, 241 S.E. 2d 566 (1978); Painter v. Painter, 65 N.J. 196, 320 A.2d 484 (1974).

150. 9A UNIFORM LAWS ANN. Section 307 of the Act concerns property distribution.

tributing marital property. A property distribution statute, such as that in Illinois,[151] allows courts to retain the discretion necessary for case-by-case decisions, yet provides guidelines to assist courts in determining what is equitable.[152] The statute serves to protect a

151. ILL. ANN. STAT. ch. 40 § 503 (Smith-Hurd 1980), provides:

(a) For purposes of this Act, 'marital property' means all property acquired by either spouse subsequent to the marriage, except the following, which is known as 'non-marital property':

(1) property acquired by gift, bequest, devise or descent;

(2) property acquired in exchange for property acquired before the marriage or in exchange for property acquired by gift, bequest, devise or descent;

(3) property acquired by a spouse after a judgment of legal separation;

(4) property excluded by valid agreement of the parties;

(5) the increase in value of property acquired before the marriage; and

(6) property acquired before the marriage.

(b) All property acquired by either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of marriage is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of co-ownership such as joint tenancy, tenancy in common, tenancy by the entirety, or community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (a) of this Section.

(c) In a proceeding for dissolution of marriage or declaration of invalidity of marriage, or in a proceeding for disposition of property following dissolution of marriage by a court which lacked jurisdiction to dispose of the property, the court shall assign each spouse's non-marital property to that spouse. It also shall divide the marital property without regard to marital misconduct in just proportions considering all relevant factors, including:

(1) the contribution or dissipation of each party in the acquisition, preservation or depreciation or appreciation in value, of the marital and non-marital property, including the contribution of a spouse as a homemaker or to the family unit;

(2) the value of the property set apart to each spouse;

(3) the duration of the marriage;

(4) the relevant economic circumstances of each spouse when the division of property is to become effective, including the desirability of awarding the family home, or the right to live therein for reasonable periods, to the spouse having custody of the children;

(5) any obligations and rights arising from a prior marriage of either party;

(6) any antenuptial agreement of the parties;

(7) the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties;

(8) the custodial provisions for any children;

(9) whether the apportionment is in lieu of or in addition to maintenance; and

(10) the reasonable opportunity of each spouse for future acquisition of capital assets and income.

(d) The court may protect and promote the best interests of the children by setting aside a portion of the jointly or separately held estates of the parties in a separate fund or trust for the support, maintenance, education, and general welfare of any minor, dependent, or incompetent child of the parties.

152. *See* Kujawinski v. Kujawinski, 71 Ill. 2d 563, 376 N.E.2d 1382 (1978).

dependent spouse by considering the homemaker's contributions to the marriage. Property distribution need not be a function of alimony; rather, alimony may merge with the concept of equitable property distribution.[153]

Although *Canakaris* brought Florida closer to the tenets of the majority of common law jurisdictions in the United States,[154] the legislature must act so that the Florida courts' distribution of property upon divorce will reflect a consistency that is truly equitable.

153. *Id.*
154. I. BAXTER, *supra* note 7, at 98.