

IN THE SUPREME COURT  
STATE OF FLORIDA

no 50A

CASE NO. 71,579

DAVID J. WEISFELD, )  
 )  
Petitioner, )  
 )  
and )  
 )  
PAULINE S. WEISFELD, )  
 )  
Respondent. )  
\_\_\_\_\_

**FILED**

SID J. WHITE

JAN 11 1988

CLERK, SUPREME COURT

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Deputy Clerk

RESPONDENT'S BRIEF ON JURISDICTION

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## INTRODUCTION

The Petitioner, David Weisfeld, will be referred to herein as "Husband", "Petitioner" or "Mr. Weisfeld"s. The Respondent, Pauline Weisfeld will be referred to herein as "Wife", "Respondent", or "Mrs. Weisfeld". The Appendix to Petitioner's Brief on Jurisdiction will be referred to as "App." followed by appropriate page number citations; and the transcript of the trial proceedings will be referred to as "T." followed by appropriate page number citations. All emphasis herein has been supplied by the writer unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

The Respondent generally accepts the Petitioner's statement of the case and facts subject to the following additions and corrections.

In his statement of the case and facts, the Petitioner refers to his recovery of \$150,000.00 for "...his personal injuries". In fact, the monies received by Mr. Weisfeld represented a lump sum payment from Workers' Compensation. The record below demonstrated that these funds were payable \$100,000.00 in a lump sum followed by five annual installments of \$10,000.00 each, and that the initial lump sum amount was invested in various bank certificates in the joint names of the parties (T. 61-63, 65, 89-90). The initial lump sum amount was paid to Mr. Weisfeld approximately two years prior to Mrs. Weisfeld's filing of her Petition for Dissolution of Marriage.

POINT I

THE DECISION BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY DECISION OF ANOTHER DISTRICT COURT OF APPEAL ON THE ISSUE OF WHETHER A WORKERS' COMPENSATION AWARD IS MARITAL PROPERTY SUBJECT TO EQUITABLE DISTRIBUTION IN A DISSOLUTION OF MARRIAGE PROCEEDING

The Petitioner contends that this Court has jurisdiction to review the decision of the District Court of Appeal because it expressly and directly conflicts with the decision of the Fifth District Court of Appeal in Freeman v. Freeman, 468 So.2d 326 (Fla. App. 5 DCA, 1985). The Respondent contends that the decision below is not in conflict with the Freeman decision because the two cases involve distinctly different issues and the rule announced by the Third District Court of Appeal in the instant case is in harmony with the Freeman decision.

In the instant case, the District Court of Appeal determined that a Workers' Compensation award received by Mr. Weisfeld during the marriage of the parties was marital property subject to equitable distribution. In Freeman, supra, the Fifth District Court of Appeal determined that a private disability pension received by the husband as a consequence of injuries received in his

employment was not marital property subject to equitable distribution upon dissolution of the marriage.

In Freeman, supra, the trial court awarded the wife an interest in the husband's private disability pension as an equitable distribution of the assets of the parties. In reversing, the Freeman court noted that the disability pension at issue "...is designed to compensate an employee for lost earnings and injuries (including pain and suffering) sustained on the job." 468 So.2d at 328.

In the instant case, the Third District Court of Appeal determined that Workers' Compensation awards may be considered marital property to the extent that they are intended to compensate for lost wages, lost earning capacity, and medical expenses, all of which may properly be considered as marital assets or marital liabilities. Accordingly, the court contemplated that, on new trial, the trial court would determine the specific purposes of Mr. Weisfeld's award and then determine whether any of those elements were marital property.

Workers' Compensation awards pursuant to Florida's Workers' Compensation Act, Fla. Stat. Sec. 440.01, et seq., are intended to compensate an employee for the loss of his wage earning capacity and medical expenses

due to employment-related injuries without regard to fault, and do not include any compensation for pain and suffering. Pursuant to the opinion rendered below, compensation for pain and suffering would not be marital property subject to equitable distribution regardless of whether the award was for personal injuries from a tortfeasor or was from Workers' Compensation.

In Freeman, supra, any compensation for pain and suffering was likewise determined to be the separate property of the injured spouse. Thus, there is no conflict between the decision below and the Freeman decision. Since Freeman involved a private disability pension, not a Worker's Compensation award, the issues considered by the two courts are distinct. Accordingly, the decision below does not expressly and directly conflict with Freeman, supra.

While it may be true, as the Petitioner notes in his brief, that the decision below is being cited in other cases involving recovery for personal injuries, the citation of a case is hardly a reason for this court to exercise its discretionary jurisdiction. The decision below does not conflict with Freeman, supra, and the law of this state is not unclear. Accordingly, this Court should refuse to exercise its discretionary jurisdiction.

POINT II

THE DECISION OF THE COURT BELOW DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH ANY DECISION OF THE SUPREME COURT OR ANY OTHER DISTRICT COURT OF APPEAL WITH RESPECT TO THE AWARD OF EXCLUSIVE POSSESSION OF THE MARITAL HOME

The Petitioner contends that the decision below expressly and directly conflicts with the decision in Duncan v. Duncan, 379 So.2d 949 (Fla. 1980). The Respondent asserts that the decision below does not conflict with Duncan, or any other decision of any Florida Appellate Court.

In reversing the award of exclusive possession of the marital home to Mr. Weisfeld, the court below specifically considered the Duncan, supra, decision and noted:

"Although the special purpose requirement is obviously satisfied in the instant case, the award of exclusive possession of the parties' marital home to Mr. Weisfeld is not directly connected to any support obligation."

(App. 13)

In urging conflict, the Petitioner has focused on the requirement that an award of exclusive possession of property must serve a special purpose. However, Mr. Weisfeld has ignored the clear language of Duncan, supra, requiring a direct connection to a support

obligation. As the court below noted, the special purpose requirement must be directly connected with the support obligation, and where, as here, there is no support obligation, there can be no valid award of exclusive possession of joint property.

Mr. Weisfeld's citation to Miller v. Miller, 513 So.2d 199 (Fla. App. 1 DCA, 1987) does not demonstrate any conflict of decisions, since the Miller court simply held that the record did not demonstrate that the exclusive possession awarded to the wife in that case served any special purpose or that the award was either equitable or just. Contrary to Mr. Weisfeld's argument in his brief, the "or" language in Miller, does not create any conflict, since it is essentially the same language employed in Duncan, supra, and by the court below.

The opinion of the court below (App. 13-14) makes it quite clear that the trial court's exclusive possession award to Mr. Weisfeld was reversed because of the demonstrated lack of a support obligation, even though the special purpose was obvious. In so ruling, the court below followed the dictates of Duncan, supra, and did not depart from them, or draw an inflexible rule of law in balancing the rights of both parties to the marital home.

Since the decision below does not expressly and directly conflict with Duncan, supra, or Miller, supra, this Court should refuse to exercise its constitutional discretionary jurisdiction.

## CONCLUSION

The decision below does not expressly and directly conflict with Freeman, supra, because the instant case involved a Workers' Compensation award which is distinct from the private disability pension considered in Freeman. Both Freeman and the decision below reach the same essential conclusion that compensation for pain and suffering is not marital property subject to equitable distribution, and there is no confusion or disharmony in the decisions which rises to the level required to invoke this Court's constitutional discretionary jurisdiction.

The decision below does not in any way conflict with Duncan, supra, or Miller, supra, since the record below demonstrated without question that the award of exclusive possession of the marital home was not directly connected with any support obligation. The opinion rendered by the court below clearly follows the opinion of this Court in Duncan, supra, and thus, it is not possible to determine that the decision below expressly and directly conflicts with Duncan.

For the foregoing reasons and authorities, this Court should refuse to exercise its discretionary

jurisdiction to review the decision of the Third  
District Court of Appeal.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the Respondent's Brief on Jurisdiction has been mailed to Maurice J. Kutner, Esq., of Maurice J. Kutner, P.A. at 28 West Flagler Street, 12th Floor, Roberts Building, Miami, Florida 33130-1801, on this 7 day of January, 1988.

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