IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA **CIVIL ACTION**

S. M. F.,
Wife,

vs. **Case No. 00 DR 0000 N**

R. M. F.,
Husband,

FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE

This matter having come before the court at trial on 9/15/2011, 9/21/2011, and 10/20/2011, it is ordered:

1. Jurisdiction The court has jurisdiction of this matter and the parties. The petitioner has been a resident of Florida for more than six months before the date of the filing of the petition.

2. Irretrievably Broken The marriage of the parties is irretrievably broken. Therefore, the marriage of the parties is dissolved.

The parties were married on 5/10/1975 and the wife filed the initial petition on 7/17/2009, so they were married for 34 years. The parties have no minor children.

All temporary orders entered in this matter before this date are now cancelled and of no force or effect, unless specifically incorporated in this judgment. Any agreement between these parties made before this date is not canceled if the parties agreed that it was to be permanent and incorporated in this judgment.

3. Equitable distribution

3.1 Identification of nonmarital and marital assets and liabilities §61.075(7) provides: "The cut-off date for determining assets and liabilities to be identified or classified as marital assets and liabilities is the earliest of the (*sic*) date the parties enter into a valid separation agreement, such other date as may be expressly established by such agreement, or the date of the filing of a petition for dissolution of marriage."

In this case, there is no separation agreement, **so the cut-off date for determining the marital and nonmarital assets and liabilities is the filing date, which is 7/17/2009.**

3.2 . Nonmarital assets and liabilities In making equitable distribution, the court must first identify the nonmarital assets and liabilities of the parties, as required by §61.075(1). The

nonmarital assets and liabilities are as follows:

(A) Vacant lot in Baldwin, Pa. This vacant lot is the husband's nonmarital property, by the agreement of the parties. This lot is worth $900.

(B) W's Saving's Bond A $600 U.S. Savings Bond is the wife's nonmarital property, by the agreement of the parties.

3.3 . Marital assets and liabilities In making equitable distribution of the parties' marital assets and liabilities, §61.075(1) requires the court to begin with the premise that the distribution should be equal unless there is a justification for an unequal distribution based on all relevant factors, including:

3.3.1 .(a) "*The contribution to the marriage by each spouse, including contributions to the care and education of the children and services as homemaker:*"

The wife was the principal homemaker and the husband earned the family's income.

3.3.2 .(b) "*The economic circumstances of the parties:*"

The parties' assets and liabilities on the filing date are listed on Schedule 1 attached. The values given there are at various dates as explained in this judgment. Under (g) below and paragraph 4 below the economic circumstances of the parties are discussed further.

3.3.3 .(c) "*The duration of the marriage:*"

The parties were married on 5/10/1975 and the wife filed the initial petition on 7/17/2009, so they were married for 34 years.

3.3.4 .(d) "*Any interruption of personal careers or educational opportunities of either party:*"

None The wife did not develop a career in which she could earn a significant income. She devoted her marital efforts to raising the parties' children and making a home. Her contributions, like the husband's, were very valuable to the family and the marriage.

She earned a degree during the marriage, but there is no evidence that it enhanced her ability to earn an income or that she has earned an income because of it. The husband worked in a business that he started. The business dealt in title insurance, real estate settlements, and real estate appraisals. That business filed bankruptcy in 2007, two years before the filing date. The company was liquidated by the bankruptcy trustee.

3.3.5 .(e) "*The contribution of one spouse to the personal career or educational opportunity of the other spouse:*"

The wife was the principal homemaker while the husband earned the family's income. Both were successful at those endeavors, although when the real estate markets declined after 2005, the husband's very high income from his business collapsed.

3.3.6 .(f) "*The desirability of retaining any assets, including an interest in a business, corporation, or professional practice, intact and free from any claim or interference by the other party:*"

It is highly desirable to divide up the assets and liabilities so that these parties do not have to deal with each other or make contact with each other.

3.3.7 .(g) "*The contribution of each spouse to the acquisition, enhancement, and production of income or the improvement of, or the incurring of liabilities to, both the marital assets and the nonmarital assets of the parties:*"

Much of the wife's testimony and evidence was devoted to questioning the investment and business decisions the parties made together during the final years of the marriage, even though she participated in some of these decisions, in particular, the decisions to buy the Woodring and Pinetree houses. The wife questioned in particular the decision to borrow $1,000,000 on the husband's signature in order to purchase the Woodring house.

The evidence demonstrates convincingly that the decisions to buy these two houses were decisions the parties made together, including the signature loan of $1,000,000. It also demonstrates that the parties lost money on their investments in these two properties.

Viewing these purchases in hindsight it seems the husband and the wife made bad investments when they bought these houses and financed them with loans that proved to be unsustainable given the decline in parties' income after the loans were taken out, in particular the National City debt of $1,000,000 in 2005, which was a loan that was taken out to finance the purchase of the Woodring house. The parties paid $2,800,000 for Woodring and they obtained a mortgage of $1,800,000 for that purchase, so the $1,000,000 was borrowed to pay the balance of the purchase price for Woodring. The $1,000,000 loan was a signature loan that National City bank made to the husband personally. The wife knew about this loan when it was taken out and she knew why it was taken out. It is a marital liability because it was incurred during the marriage, even if she never knew about it. In May of 2005 the husband was earning "$100,000 a month." In 2005 his business, EFS, had gross income of $74,000,000, its best year ever. Real estate values on Sanibel were soaring. So, to the banker, this was a reasonable loan to make to this borrower.

So, in 2005, with the parties' finances in full flower and with real estate values soaring, purchasing Woodring and borrowing the money to do so seemed like a good investment, even if in hindsight, through the lens of the present recession and the collapse of the real estate market since 2005, this purchase seems like a bad investment. The parties bought the Pinetree house on Sanibel in 2003. The reality is that the husband and the wife were caught up in the bubble in real estate values that swelled from 2000 through 2006. When they bought these houses in 2003 and 2005 each seemed to be a good investment at the time. Real estate values were rising and credit was available.

About a year after this case was filed, on 6/7/2010, the parties sold Woodring for $1,950,000, which was a loss of $850,000. The parties bought the Pinetree house for $850,000 in

2003. That house is now worth $860,000. A gain of $10,000. So, on these two houses the parties lost $840,000. Considering the carrying costs on these properties for taxes, insurance and maintenance they have lost much more. The parties still owe a balance of $822,000 to National City, now PNC bank, on the original $1,000,000 signature loan. The husband has been paying interest only on that obligation since the filing date. That interest is a marital liability. The principal of that loan is also a marital liability.

The wife argues that the loss on these investments and repayment of the PNC signature loan must somehow be borne by the husband alone, but under §61.075 the court must divide all assets and liabilities equally unless there is a factual basis for making an unequal distribution. No factual basis for an unequal distribution is shown. On the cut-off date, 7/17/2009, the assets and liabilities listed
on Schedule 1 attached were all marital, and those are what the court must divide and distribute.

In general, there is no competent, substantial evidence of any fraud, dissipation, wasting or anything improper by the husband or the wife in connection with the Pinetree or Woodring or Redfern houses, the loans obtained to purchase these houses, the operation of EFS, the bankruptcy of EFS, the husband's dealings with the bankruptcy trustee, the husband's ownership and participation in Mena's, and his other business dealings, or the wife's use of funds from the husband's retirement accounts and the Ameritas account after the date of filing.

On the contrary, as for the husband, he was a credible witness and he testified in detail and knowledgeably about his business dealings in EFS, Mena's, Y Waite, Blue Beacon, etc. In 2007, when EFS went bankrupt, all of its dealings were examined by the trustee and the creditors of EFS. The husband was personally sued on legal theories that sought personal liability against him.

It is significant that he came through the entire process of the bankruptcy and liquidation of EFS with no personal judgments against him. The trustee and his lawyers and accountants were closer to the events than the parties are now, they had better access to records than the parties have now, their job was to scrutinize all of the husband's operations and find anything contrary to law or anything that would benefit the bankrupt estate, and they came up with nothing. The trustee compromised the estate's claim of an improper transfer from EFS to Mena's when EFS loaned money to Mena's in 2006. Bankruptcy trustees, like any interested party in litigation, do not give away anything. When there is a genuine concern about the merits of a claim, they make a deal and compromise the claim. A settlement does not prove any wrong doing, fraud, dissipation, wasting or anything improper. On the contrary, it indicates the adverse party saw merit in the husband's case.

The court finds the husband's accountant, John Thompson, CPA, was a competent, credible witness. The evidence does not support a finding that the husband did anything improper in his businesses or investments.

Since the filing date, as shown on wife's Exhibit 21, the wife received $329,230 from the parties' Ameritas joint brokerage account during 2009 before the filing date, while the husband received $30,607 from this account. The result is that on the filing date this account had a balance of $4,851, which is still the balance. The wife and the husband spent all of the funds they received

before and since the filing date on marital debts and expenses for their support before and during the pendency of this case, so nothing remains to distribute except $4,851 and $5,068 in the wife's 6292 account.

Likewise, the husband liquidated a stock "portfolio," which together with his 401(k) account, that was rolled over to his IRA account after EFS filed bankruptcy, totaled about $1,400,000. The husband as well as the wife spent all of the funds they received before and since the fining date on marital debts and expenses for their support before and during the pendency of this case, so only those amounts remain, that is, $4,851 in the Ameritas account and $5,068 in the wife's 6292 account.

The wife received $280,000 from the husband's IRA account, which sums were rolled over from his EFS 401(k) account. She used all of these funds, the $329,230 from the Ameritas account and the $280,000 from the husband's IRA, to pay marital liabilities, principally related to the Woodring and Pinetree houses, and to pay her own living expenses and some of the husband's living expenses, all of which was a proper use of these marital funds. The husband and the wife were accustomed to spending more than $1,000,000 a year and the reduction in their circumstances has been a difficult adjustment, more for the wife than the husband.

So, nothing remains to distribute except $4,851 and $5,068. *See, e.g., Plichta v. Plichta*, 899 So.2d 1283 (Fla. 2d DCA 2005); *Tucker v Tucker*, 966 So.2d 32 (Fla. 2d DCA 2007); *Austin v. Austin*, 12 So.3d 314 (Fla. 2d DCA 2009). It is an abuse of discretion to award an asset that has been depleted. *Konsoulas v. Konsoulas*, 904 So.2d 440 (Fla. 4th DCA 2005) *citing Knecht v. Knecht*, 629 So.2d 883 (Fla. 3d DCA 1993); *Sheth v. Sheth*, 26 So.3d 653 (Fla. 5th DCA 2009).

3.3.8 .(h) "*The desirability of retaining the marital home as a residence for a dependent child of the marriage or any other party when equitable to do so, it is in the best interest of the child or that party, and it is financially feasible for the parties to maintain the residence until the child is emancipated or until exclusive possession is otherwise terminated by a court of competent jurisdiction. In making this determination, the court shall first determine if it would be in the best interest of the dependent child to remain in the marital home; and, if not, whether other equities would be served by giving any other party exclusive use and possession of the marital home.*"

There is no minor child.

3.3.9 .(i) "*The intentional dissipation, waste, depletion, or destruction of marital assets after the filing of the petition or within 2 years prior to the filing of the petition:*"

As discussed above, there is no competent, substantial and credible evidence that the husband or the wife dissipated, wasted, depleted or destroyed any marital assets or income within 2 years before the filing date or since 2003 or 2005 or after the filing date. There is substantial, competent and credible evidence of business and investment decisions that proved unfortunate and unprofitable but that is the extent of the evidence. Business and investment misfortune is not dissipation, waste, depletion, or destruction. Marriage is for better or worse. There is substantial, competent and credible evidence that the parties, and the wife in particular, had difficulty cutting

down on expenditures, having gone from a lifestyle in 2006 that was dependent on $1,000,000 of disposable income to one in which she has earned income of about $25,000 as of 2010.

The wife's claims that the husband is an alcoholic are not supported by any competent, substantial evidence. Her claims that he dissipated, wasted, depleted or destroyed any marital income or asset is not supported by any competent, substantial evidence. He did not do this. Neither did she.

3.3.10 .(j) "*Any other factors necessary to do equity and justice between the parties*:"

During the trial, the wife asked the court to "impose a constructive trust" but there is no pleading for this relief, no ultimate facts alleged and no pleaded request for this relief, so the court has no authority to impose a constructive trust.

3.4 . **Considering these factors, the court finds that the assets and liabilities of the parties should be divided as provided in Schedule 1 attached.** The items listed in the first column to the left are the marital assets and liabilities of the parties, and the values for each item are listed in the second column from the left. The court identified each item and determined the value of each item from the evidence. The assets and liabilities distributed to the husband are listed in the column entitled "Husband" and those distributed to the wife are listed in the column entitled "Wife."

The parties are ordered to sign any and all documents and otherwise do everything necessary to effect the division ordered in this Final Judgment and Schedule 1. They shall do whatever must be done to divide the property as ordered. If the court must become involved in later hearings to effect the division ordered, attorney's fees and court costs may be assessed against a party responsible for the court's involvement. There is no need for the court to become involved, except as otherwise ordered in this Final Judgment. The parties have the ability to effect the division ordered.

The following comments apply to the equitable distribution:

(A) Mena's Italian Cafe, LLC Mena's, LLC, owns and operates a restaurant in Pittsburgh. The court accepts the testimony of the wife's expert witness, Richard F. Brabender, Esq., that the value of the husband's 60% interest in this business on 6/30/2011 was $301,000. Mr. Thompson, the husband's CPA, agreed with this valuation. The husband believes his 60% interest is worth less, while the wife, seeming to impeach her own expert, believes it is worth more.

Mr. Brabender is a credible witness and a competent expert regarding the valuation of a business such as this one. The court accepts Mr. Brabender's valuation. The court finds 6/30/2011 is the fair date for valuation under the circumstances. So this is the valuation date and the value of the husband's 60% interest in this business. On the cut-off date the 60% of this business owned by the husband was a marital asset. There is no excess cash in Mena's beyond what it needs for its working capital and cash requirements for ordinary operations. All of its assets, including cash, and all of its liabilities were considered by Mr. Brabender in his estimate of the husband's interest in Mena's.

Mena's, LLC, was organized in 2006 and it borrowed $570,000 from EFS in 2006. By the filing date the husband owned 60% of Mena's, LLC. The loan from EFS was the subject of the debt forgiveness and marital tax liability discussed in (E) below. There is no competent, substantial, credible evidence that the husband's dealings with EFS, Mena's, his partner in Mena's, or the EFS bankruptcy trustee were improper.

(B) Blue Beacon Hosting, LLC This entity never made any net taxable income. It was a business venture of the husband that collapsed when the mortgage industry collapsed. It had no value on the filing date or the trial date or any date in between. The marital interest in this is valued at $1 and it is distributed to the wife, as the husband requested.

(C) Y Waite Solutions, LLC This is not an operating business. It has some income now and then. The husband accounted for the income he has received. It owns a source code that is its only asset. The principal member of this LLC, Mr. Waite, occasionally sells use of this code. This was a venture to develop software for EFS. The value of this company equals the value of this source code. There is no evidence of the value of this source code. There is no evidence of the value of this company so the court has no factual basis for valuing the husband's interest in this LLC. Therefore, the court finds the parties' marital interest in this LLC had no value on the filing date, the trial date or any date in between. The marital interest in this is valued at $1 and it is distributed to the wife, as the husband requested.

(D) Husband's Exhibit 9, a proposed joint tax return for 2009 This tax return was not signed by both parties. It was not filed. The husband asks the court to find some fault with the wife for not signing this joint return. In passing, the court notes that it has no authority to require a party to sign a tax return. By the end of 2009, confidence between the parties had completely broken down and the wife did not sign this proposed joint return. She filed a married, separate return. So did the husband. The result was they paid more in tax, c. $11,000. This additional tax payment was unavoidable because the parties no longer trusted each other, they were separated, this case was pending, and the wife was within her rights to decline signing a joint tax return with the husband. The taxes they paid on both of the single, married returns were marital liabilities. Their payment of these taxes was a proper use of marital funds.

(E) Marital tax liability due to the forgiveness of debt Wife's Exhibit 62 is the letter from the husband's accountant which discusses the marital tax liability generated because of the forgiveness of a commercial debt. The commercial debt was a commercial loan from EFS, Inc., to Mena's, LLC, made in 2006, when Mena's began business. The amount forgiven by the EFS bankruptcy trustee in 2009, $444,244.72, by an agreement between the trustee and Mena's, LLC, generated a marital tax liability. It is a marital tax liability because it was created before the filing date and the marital share of this tax liability attributable to the marriage is 60%, the percentage of the husband's membership of Mena's, LLC. Income or losses of an LLC pass through to the

members of the LLC in the ratio of their ownership. The settlement with the trustee was reached in March 2009, before the filing date. Since a debt was forgiven, the amount of the forgiven debt is taxable income that must be reported.

The tax generated on this marital income is a marital liability. However, due to recent federal legislation, the income realized under the I.R.C. on this forgiveness of a commercial debt, and hence the tax that is owed due to the forgiveness of debt, can be postponed entirely for 5 years and after the 5th year Mena's, LLC, must report this income on its returns 1/5th each year for the next 5 years.

So, this marital tax liability will not have to be paid until years 6 through 10, which means it now has a value that is much less than the estimated tax on a loan forgiveness of $266,546.83 on the filing date or the trial date or any date in between. ($444,244.72 x 60% = $266,546.83). Evidence of the present value of this marital tax liability on the filing date or the trial date or any other date in between is not in evidence.

So, there is no evidence quantifying the present value of this marital tax liability on the filing date, the trial date or any other date. Without some expert testimony of the present value, an appropriate discount rate, an appropriate tax rate, etc., the court has no factual basis to value this marital tax liability, just as the trial court in *Smith v. Smith*, 934 So.2d 636 (Fla. 2d DCA 2006) had no expert testimony with which to find the present value of the husband's pension benefit.

Nevertheless, this marital liability exists. The court assigns a nominal value of ($1.00) to this marital tax liability and distributes it to the husband.

There is no inconsistency between this nominal valuation of this marital liability and Mr. Brabender's consideration of Mena's tax liabilities in his valuation of Mena's. Mr. Brabender used information appropriate for a business appraiser to consider in arriving at his opinion of value. He considered this tax liability in his valuation. The court's task in valuing marital liabilities in equitable distribution is a very different consideration and determination than Mr. Brabender's work and his considerations in arriving at a value of the husband's interest in Mena's. The court must have competent, substantial evidence in the record for the value each marital asset and liability. Here, there is no competent, substantial evidence of the value of this marital tax liability attributable to the husband's share of the forgiveness of a commercial debt. So, it is valued at $1 and it is distributed to the husband.

(F) 2003 or 2005 Jeep This asset was not consistently described in the testimony of the parties. The wife had this marital asset on the filing date. She sold it and used the proceeds to pay her fees and costs, so this asset is not extant on the trial date and the proceeds were properly spent for fees and costs of this litigation.

(G) Mazda 2006 The wife had this marital asset on the filing date and she still has it. It is worth $10,000 and it is distributed to the wife.

(H) 2002 Thunderbird The husband had this marital asset on the filing date and he still has it. It is

worth $6,000 and it is distributed to the husband .

(I) Jaguar automobile The husband has this marital asset on the filing date and he still has it. It is worth $8,000 and it is distributed to the husband.

(J) Florida Gulf Bank escrow This account holds the net proceeds from the sales of the Redfern house and the Woodring house, both of which were sold by the agreement of the parties while this case was pending. The Redfern house was in Pennsylvania. The Woodring house on Sanibel Island, Lee County, Florida. The balance in this escrow account is $425,460 as of 7/29/2011. This is entirely a marital asset.

These escrowed funds shall be held in the escrow account by the attorney or attorneys now maintaining that account, in trust, pursuant to the orders in this Final Judgment. No funds may be withdrawn from this account or otherwise paid from this account without a prior order in this case.

As shown on Schedule 1, attached, the ratio of the distribution of this account to the parties is 13.2% to the husband and 86.7% to the wife. ($369,034/ $425,291 = 86.7%) This is the ratio of the funds that is necessary to achieve equitable distribution.

All distributions from this account, therefore, will be maintained at that ratio unless at the time of any order for a withdrawal from this account the court finds the facts then require a different result in order to achieve equitable distribution and to pay the fees and costs of this litigation. For instance, the court anticipates that pursuant to the reservation over the issue of fees, costs and suit money, the parties may file motions for fees, costs and suit money after the date of this judgment. For instance, the interest on the National City note must be paid until the Pinetree house sells.

The balance of these escrowed funds shall be held pending further orders of the court. **The court reserves jurisdiction** over the issue of equitable distribution and the entire distribution of the parties' assets and liabilities ordered in this Final Judgment and Schedule 1 attached until further order and a final determination and final order of equitable distribution is entered.

Immediately, the attorney or attorneys maintaining this escrow account shall disburse from these escrowed funds $10,000, payable $8,670 to the wife and $1,320 to the husband, within 20 days from the date of this judgment. The parties' use of these funds so paid to them is unrestricted by this judgment or otherwise and they are not required to account for their use of these funds so paid to them.

Immediately, the attorney or attorneys maintaining this escrow account shall disburse from these escrowed funds sufficient money to pay the interest on the National City note, if any is due now, directly to the National City bank and hereafter shall disburse sufficient funds periodically in order to keep the interest payments on that marital liability current and timely paid according to the terms of the note.

Immediately, the attorney or attorneys maintaining this escrow account shall disburse from these escrowed funds an amount equal to the interest on the National City note actually paid

to National City by the husband since 6/30/2011. He shall not be reimbursed for interest payments before that date because he was employed before that date and sums he paid before that date, like sums the wife paid from the retirement funds in her control, were for the benefit of both parties. After 6/30/2011, however, the husband did not have the financial ability to pay the interest on the National City note and also meet his own financial support needs.

(K) Jet ski The wife sold a jet ski while this case was pending. The proceeds were used for support or marital liabilities so nothing remains at trial for distribution.

(L) Vista and Penneco These are entities that are involved with the drilling and production of natural gas. The parties have an interest in these. There is no value for these in evidence. The husband is agreeable to transferring them to the wife. The court gives these a nominal value of $1 to each of these on Schedule 1 and distributes both of these to the wife.

(M) National City commercial loan, a/k/a PNC note This is a marital liability. The husband took out this loan to finance the purchase of the Woodring house on Sanibel. The loan was taken out on 9/15/2005, which was during the marriage and before the filing date. A liability incurred by either party during the marriage is a marital liability, unless the presumption that it is a marital liability is overcome by a party. This presumption was not overcome in the evidence. The original amount borrowed was $1,000,000 and the loan was made on 9/15/2005. The balance is now $822,000. When the Woodring and Redfern houses sold after the filing date the net proceeds were put in the escrow account identified and valued in (J) above. The husband has been paying the interest on this loan every month, about $2,300 per month, since the filing date.

(N) Pinetree house This is a house on Sanibel that is a marital asset. The wife is living in this house. This house is worth $860,000 as of 9/12/2011, which is the date that the court finds is the fair date under the circumstances to value this house. The mortgage on this house was paid off by agreement after filing. There is a sewer assessment lien against this property of $10,392.

To achieve equitable distribution, the court orders this marital real estate must be sold and the net proceeds applied to reduce the National City marital liability, as provided in (V) below.

So, on Schedule 1 attached, the value of this house is distributed equally to the parties. So is the sewer assessment lien. If that lien is not required to be paid by any contract of sale to a third party for the Pinetree house, then it shall not be paid and title to the buyer shall pass subject to this lien.

(O) 26' SeaRay boat This boat was included in the sale of Woodring so it was sold by the agreement of the parties during the pendency of this case.

(P) $100,000 life insurance policy, Acacia Life The death benefit is $100,000. This policy insures the husband's life and it is owned by him. The case value is $9,000. This is a universal life policy. The annual premium is about $700 and the dividends or earnings of this policy have paid

the annual premium for some years. The husband asked that this be distributed to the wife. This asset is distributed to the wife.

(Q) $900,000 and $500,000 life insurance policies, Acacia Life The death benefit of the first policy was $900,000. This was taken out by the husband when EFS was in business, making his "partner" in that business the beneficiary. After EFS filed bankruptcy, the husband changed the beneficiary to the wife. She paid the premiums for about a year after the filing date. This policy is now lapsed and is no longer enforceable. It has no cash value as of the trial date.

The death benefit on the second policy was $500,000. This policy has also lapsed. It is no longer enforceable and it also has no cash value as of the trial date.

There are no other life insurance polices extant on the trial date. The Acacia policy in (P) is the only existing life insurance policy. There is no credible, competent and substantial evidence that the husband's dealings with any of the insurance policies was in any way improper.

(R) Bank accounts of H & W All of the parties' bank account balances existing on the cut-off date, including but not limited to the "Sharebuilder" account, were spent by the parties to pay their marital liabilities, living expenses for their support and the cost of this litigation since the filing date, with the exception of the Ameritas account, which has a balance of $4,851 and the wife's account 6292 with a balance of $5,068 on the trial date. The Ameritas account is a marital asset and so is the wife's 6292 account. The Ameritas account is distributed to the husband. The wife's account 6292 is distributed to her. The wife's 6292 account contains entirely marital funds, from "refunds" that the wife received that were marital assets.

(S) Husband's IRA account The husband had a 401(k) account with EFS. He rolled that over to an IRA account in 2009, which was $381,000 when that account was opened. By the trial date this IRA had a balance of $111,000. This is the value the court has put on Schedule 1 attached.

The funds withdrawn from this IRA account since it was opened in 2009 were used by the parties for their living expenses, to pay marital liabilities and to pay for this lawsuit, which were proper uses of the funds.

Immediately, the husband's IRA account is hereby divided evenly between the parties. The trustee of this IRA account shall, therefore, with the wife's participation, **immediately** open an IRA account for the wife and distribute to that account one-half of the balance in the husband's IRA account, whatever that might be, on the date of the transfer to the wife's IRA account, asset by asset within the account, one-half of each asset within the husband's IRA account to the wife's IRA account, if that can be done, and if not, then by reducing the assets in his IRA account to cash and then equally dividing the cash by putting one-half of the cash into the wife's account. The wife and the husband shall cooperate with the broker to open her IRA account and otherwise to effect this equal distribution of the husband's IRA account.

(T) IRS debt for 2009 and 2010 due to IRA withdrawals paid to the wife In 2009 and 2010 the

husband paid out $280,465 from the IRA account, paragraph (S) above, leaving a balance of about $100,000 in that account, now $111,000 by the time of trial.

In 2009 the husband paid the wife $160,465 from the IRA for her support and to pay marital liabilities. In 2010 she was paid another $120,000 from the IRA's. The wife's use of the funds for her support and to pay marital liabilities was proper. None of these funds remain in the wife's possession as of the trial date.

The husband's evidence and argument that the wife's use of any of these funds was improper or not for her support or to pay marital liabilities is not persuasive. The parties have experienced a significant decline in their lifestyle from 2006 to the present. The wife's expenditures in 2009 and 2010 may look exorbitant when compared with the present incomes, $2,700 and $6,500 respectively, but they are consistent with their declining lifestyle to its present situation.

As a result of these IRA withdrawals, 40% of the husband's income in 2010 was due to the $120,000 IRA withdrawal paid to the wife in 2010 ($120,000/ 298,283) and 61% of the husband's income in 2009 was due to the $160,465 IRA withdrawal paid to the wife in 2009 (160,465/ 261,607). His tax liability in 2010 was $71,695 plus an additional tax of $12,000 for IRA withdrawals for a total of $83,695, 40% is $33,478. His tax liability in 2009 was $57,621 plus an additional tax of $15,000 for IRA withdrawals for a total of $72,621, 61% is $44,299, rounded $44,300.

Under these circumstances, that the wife received these IRA funds for her support and to pay marital liabilities, some of which benefitted the husband, it is fair to characterize the tax liabilities attributable to the IRA withdrawals paid to the wife for 2009 and 2010 on the husband's separate tax returns as marital liabilities. If she still had any of these funds or if she had used them for some purpose other than her support and marital liabilities, it would be appropriate to put these in her column, but that is not what occurred. She used the money she received from the IRA to support herself and to pay marital liabilities, some of which benefitted the husband.

So, these tax liabilities attributable to the withdrawals from the IRA in 2009 and 2010 are reflected on Schedule 1 attached and these are divided equally between the parties.

So, for the reasons stated, the court orders that the attorney or attorneys maintaining the escrow account shall **immediately** withdraw $77,778 payable to the "U.S. Treasury" from the escrowed funds and this shall be paid to the "U.S. Treasury", c/o the I.R.S., on the husband's account and social security number for his unpaid 2009 and 2010 income taxes, being applied first to 2009 and the balance to 2010, if this is allowable by the I.R.C., and if not then as allowed by law. The balance of those unpaid taxes is the husband's personal responsibility, for income he earned after the filing date that is not attributable to the retirement funds withdrawn and used for the wife's support and marital liabilities.

However, as with any liability or asset, this value of $77,778 will likely change from the value presented at trial and that determined in this judgment, when it comes to paying this liability. The I.R.S. likely changes interest on unpaid taxes and perhaps a penalty in this case. This interest and penalty, if any, attributable to this portion of the husband's unpaid taxes for 2009 and

2010 are part of this liability and must also be paid equally by both parties, from the escrow account.

(U) Furniture, etc., tangible personal property In the Pinetree house, the wife now has this property. It was worth $8,000 on the filing date. This Pinetree tangible personal property is distributed to the wife. In the Redfern house, the husband disposed of this property when this house sold. Most of it was given to the parties' adult children with some to the husband's brother, some to charities or discarded and the residue is in the husband's storage unit. The residue in that unit is worth $5,000. The court finds the value of the Redfern tangible personal property was $15,000 on the filing date. This Redfern tangible personal property is distributed to the husband.

(V) Sale of Pinetree, payment of marital liabilities As equitable distribution under §61.075 and pursuant to Rule 1.570(c) & (d), the court orders the Pinetree house sold as soon as possible as provided in this judgment. When and if the house sells, the court will control the disbursement of the net proceeds due seller, just as the court will control the disbursement of the escrow account.

The Pinetree house is described as follows:
(*Description omitted*)

(a) **Sale of Pinetree House ordered, as follows:**

The court orders the parties to sell this marital real estate as soon as possible, as ordered in this Final Judgment. This order of sale is made pursuant to §61.075 and Rule 1.570(c) & (d), to achieve equitable distribution, and not pursuant to any count for partition. Any count for partition is denied.

The parties do not agree that it should be sold or how it should be sold. Therefore, the court orders that it shall be sold and how it will be sold. The court finds that this order, in all of its particulars, is necessary to preserve the value of the property to the greatest extent possible in order to deliver to the parties the greatest amount of net cash proceeds from the sale and reduce marital liabilities, principally the National City marital liability.

The value of "$860,000" for this property on Schedule 1 attached is not the price at which the property must be sold. The market will determine the price. Further, when and if the property sells under this judgment, the "net proceeds" will be the sales price less the seller's expenses and prorations under the contract, less fair rental value to the wife, if any, as explained below, and less an adjustment between the parties for payment of taxes, insurance, maintenance after the date of this judgment and the National City bank principal or interest by either party after 7/1/2011. If the market obtains a higher price or a lower price, that is what the market will obtain. Schedule 1 is only the court's finding of the fair market value of this property as of the appraisal date based on the competent, substantial evidence presented. The market price, however, is what the market will determine and the market price when the house is contracted for sale is the price at which it will sell.

The court hereby reserves jurisdiction over the entire issue of equitable distribution,

so this is not a final order of equitable distribution, and the court reserves jurisdiction to modify and enforce equitable distribution according to law.

Pursuant to §61.075 and Rule 1.570(c) & (d), the court specifically reserves jurisdiction to sell this house by the direct supervision of the court by the means of a special master, such as an attorney or a real estate broker, without the participation of either party in the event that the parties, or either of them, prove recalcitrant and unable to obey the court's orders for each of them with regard to the preparation of the house for sale, its listing and contracting, and every particular that the court orders for the parties.

The court finds that the wife is a reasonable person who is likely to obey the court's orders. The court finds the husband is a reasonable person who is likely to obey the court's orders.

Therefore, the court orders that the wife shall remain in exclusive possession of this property and she shall prepare it for sale immediately. She is ordered to maintain the property and keep it in good order so that it will show well to prospective buyers. Of course, the court does not order that she must reside in the property. She may reside wherever she wishes. With her agreement, the husband may enter the property. In all events, she shall allow the listing broker or any of his or her agents to enter the property at all reasonable hours and upon reasonable request for any purpose related to the listing and sale of the property, including but not limited to showing the property to persons interested in the property.

The court orders the husband to select a real estate broker and to list the property for sale at the broker's opinion of a realistic market price. The court hereby grants to the husband the sole and exclusive authority to determine the listing price after consulting with the broker that he selects.

The court finds that a residence at this price level is likely to take some months to sell after listing, that there is less demand in the market for a residence at this price level because buyers who can afford such a property have little pressure to buy. The court, therefore, orders the parties to work together with the broker for the months necessary to sell the property at a market price under the conditions now prevailing in Lee County, Florida. A residence at a lower price level, a price level more affordable to the average incomes of Lee County, Florida, would take fewer months to sell after listing. This residence is not affordable to a buyer with an average income in Lee County, Florida, so it will take more months to sell. **The court orders the parties to work together and to work with the broker to take the time necessary to sell this property at its market price and to obtain the highest market price reasonable under the circumstances of the market**.

The court finds it is highly unlikely that the parties together could conduct and agree upon the details necessary to list, contract and sell the property, so that a sale is not likely to occur if the court orders the parties to get together and sell the property without the court supervising the listing, contracting and sale as provided in this judgment.

The husband is a sophisticated businessman who is motivated to maximize the sales price and to reduce marital liabilities. The wife is a reasonable person who has taken good care of the Pinetree house and she is capable of continuing to do so.

By motion and notice of hearing, either party may return to court to enforce this order or to raise objections or questions to the actions or decisions of either parties in carrying out this order to sell the property.

The court reserves jurisdiction to modify and enforce this order to sell the house and the entire plan of equitable distribution, as order in this judgment and shown on Schedule 1 attached. So, this is not a final, appealable order of equitable distribution.

The court finds the parties are unable to agree upon the many details that must be worked out between a seller and a listing and selling broker and also between a seller and a buyer in order to contract and close on a contract of sale and purchase, and, therefore, it is necessary for the court to order that one of the parties shall control the negotiations, listing, contracting and closing of a contract of sale and purchase. The court orders that the husband is that party.

The court finds that the parties are unable to agree upon the maintenance and care of the home and showing it to potential buyers and the details of maintaining the house and living in the house, if the wife wishes, until it sells. The court finds the wife is the party who should control the maintenance of the house until it sells.

The court will enter a separate order authorizing the husband to list the Pinetree house. The husband's signature alone to the listing agreement shall be sufficient for listing the property. The husband shall select the broker without the wife's participation. The wife is ordered to cooperate with the broker to effect the sale of the property, if and as requested by the broker.

The court specifically reserves jurisdiction over this real property and the entire plan of equitable distribution, as order in this judgment and shown on Schedule 1 attached. So, this is not a final, appealable order of equitable distribution. Therefore, the court may hereafter amend this Final Judgment in order to list, contract, and transfer the title and ownership, by any order necessary, including but not limited to (1) transferring to this real property to the husband or the wife, and divest the other party of any title, ownership, or interest in the property, if the court finds it is necessary to do this hereafter in order to effect an orderly listing, contract and sale of this property through a broker or to transfer this real property to a third party pursuant to a contract of sale; (2) appointing a special master, such as an attorney or real estate broker, to list, contract and transfer and convey the title to this property to the contract vendee.

The court reserves jurisdiction over the issue of equitable distribution and the entire distribution of the parties' assets and liabilities ordered in this Final Judgment and Schedule 1 attached until further order and a final determination and final order of equitable distribution is entered.

The court specifically reserves jurisdiction to transfer this house to the parties as tenants in common, equally or in some other ratio to achieve equitable distribution, or to one party or the other in order to effect equitable distribution, in the event that a sale does not occur within a reasonable time, as the court determines is a reasonable time, after the reasonable efforts by the parties as ordered in this judgment.

The court orders that the husband alone and without the wife's signature may sign a binding contract to sell this real property, subject, however, to the condition, which shall be

stated in the contract, that the contract of sale signed by the husband is conditional upon either the prompt agreement of the wife or an order of the court approving the contract if the wife does not agree with the contract promptly after it is signed by the husband. **This condition applies to any contract of sale entered into by the husband for the Pinetree house whether this condition is specifically stated in the contract or not. All potential buyers are hereby so notified by this Final Judgment**.

If the wife does not agree promptly to any contract proposed by the husband, then the husband or the wife shall by motion and notice of hearing move for a hearing and an order of the court approving or disapproving any proposed contract of sale.

If such a motion is filed by the husband or the wife, then upon notice of hearing on the motion, the court will hear the parties' argument, objections, and evidence for or against the contract and the court shall approve or disapprove any contract.

Therefore, the court reserves jurisdiction to approve or disapprove any proposed contract for the sale of this property. The court will expedite any such motion on its calendar so that a potential contract may be performed or declined promptly.

The court, if requested by motion and notice of hearing, will supervise the listing and sale of the home, if necessary, in later hearings, upon motion by either party to address any issue, and the court may award fees and costs against any party not cooperating and facilitating the sale, pursuant to Rule 1.570(c) & (d). The court will also adjust the distribution of the net proceeds from the 50/50 distribution depicted on Schedule 1 to a more equitable distribution if either party should cause the wasting of this or any other marital asset or the incurring of any unnecessary expense, including attorney's fees and any other expense, before this real estate is sold by delaying and not facilitating and cooperating in the sale of this property or for any other reason that is equitable under the circumstances.

The court reserves to determine whether the wife's exclusive use and possession granted in this judgment has a fair rental value for which the husband is entitled to credit upon a sale of the house or division of the escrowed funds retained in escrow by this judgment. Therefore, when the parties or the court divides the net proceeds of sale or the escrowed funds, the court will consider any evidence and argument regarding fair rental value to a spouse in exclusive possession of marital property pursuant to this judgment. The court does not now prejudge the issue, either the law of this issue or the facts. Fair rental value may or may not be an issue. This question was not raised by the parties and evidence regarding fair rental value is not before the court. The court is, nevertheless, aware of this question and the court hereby reserves jurisdiction to determine if fair rental value should or should not be charged to the wife. The court has not been briefed on the law of this question by counsel.

Likewise, the court also reserves jurisdiction to determine if either party has paid more than his or her share of the taxes, insurance, and maintenance of the property after the date of this judgment. The interest on the National City loan after 6/30/2011 is also an expense that the court will allocate from the net sales proceeds or from the escrowed funds.

For these items before this judgment, and on the National City interest before 6/30/2011,

the court has considered the amounts paid by each party in making the orders and findings in this judgment.

The court finds that the husband became involuntarily unemployed in the month of June 2011 and that he is making a good faith effort to be find a new job. The court's findings regarding his current income are in paragraph 4. The husband has paid and maintained the interest due on the National City marital liability, for the benefit of both parties, before 6/30/2011. After that date, the escrowed funds shall be used to service the interest due on that date, as provided above.

When the parties divide the net proceeds or the escrowed funds that the court orders must be maintained in escrow, to the extent that either party paid more than one-half of the ordinary and reasonable expenses for the taxes, insurance, and maintenance payments due on the property since the date of this judgment, and with regard to the interest on the National City marital debt since 6/30/2011, such party shall be entitled to be reimbursed from the net proceeds or escrowed funds before they are divided between the parties.

The court reserves jurisdiction to sort out and determine the claims of either party to having paid for more than half of such expenses or for any marital liability or expense of the property and to settle the payment and reimbursement from the net proceeds or escrowed funds before the net proceeds or escrowed funds are divided between the parties by an order of the court or the agreement of the parties.

4. Alimony The wife has made a claim for alimony. The court has considered the factors in §61.08(1) - (9)(2011), as follows:

(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 or 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. The court may consider the adultery of either spouse and the circumstances thereof in determining the amount of alimony, if any, to be awarded. 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*.

Regarding adultery, this factor does not apply because, even if there is competent, substantial evidence of adultery, there is no competent, substantial evidence that some quantifiable amount of marital income or assets were depleted or spent on adulterous relationships. *See, e.g., Baxter v. Baxter*, 720 So.2d 624 (Fla. 5th DCA 1998).

(2) *In determining whether to award alimony or maintenance, the court shall first make a specific factual determination as to whether either party has an actual need for alimony or maintenance and whether either party has the ability to pay alimony or maintenance.*

The court finds that the wife has an actual need for alimony and the husband has the ability to pay alimony, considering the factors below and all of the statutory factors.

If the court finds that a party has a need for alimony or maintenance and that the other party has the ability to pay alimony or maintenance, then in determining the proper type and amount of alimony or maintenance under subsections (5)-(8), the court shall consider all relevant factors, including, but not limited to:

(a) *The standard of living established during the marriage*.

The parties had a very high standard of living until the downturn in the U.S. economy that began late in 2005. In 2005 Express Financial Services, Inc, the business that provided the family income, had gross income of $74,000,000. For 2006 EFS reported a net operating loss of $4,600,000 on gross income of about $45,000,000. In 2007 EFS filed bankruptcy.

The husband started the company in Pittsburgh in 1995. It provided title insurance, settlement services and real estate appraisals to finance companies. The business grew until it had branch offices in Pennsylvania, Maryland, New Jersey, Virginia and Florida. That company was the husband's principal business enterprise, from which the parties received their income. It provided title services to the mortgage industry, an industry that declined greatly beginning late in 2005.

The tax returns for 2006, 2007, and 2008 show the decline in the parties' fortunes. In 2006 the husband reported W-2 income of $1,041,633 and the parties' adjusted gross income was $1,118,032. In 2007 his W-2 income was $814,308 and their adjusted gross income was $867,622. In 2008 his W-2 income was $16,932 and the parties' adjusted gross income was $119,717.

During the marriage, the wife testified that she would call the "CFO" of EFS from time to time and tell him how much money she wanted to pay the household bills and other marital expenses. There was no limit to what she could ask for. Of course, in 2007 after EFS filed bankruptcy, this practice stopped.

Nevertheless, the parties continued the practice of having the wife pay marital expenses and her support. In 2009 the wife was given $329,230 from the parties' Ameritas account. The husband withdrew $30,607 from that account. In 2009 the wife was paid $160,465 by the husband from his IRA account for her use for her support and to pay marital liabilities, including expense items for his support. Her use of these funds was proper. In 2010 she was paid another $120,000 from the IRA's for these purposes and, again, her use of these funds was proper. None of these funds from the Ameritas account or the IRA remain in the wife's possession as of the trial date. They were all spent on her living expenses and mortgage payments, taxes, insurance, etc., on houses owned by the parties. So, none of these funds are extant for equitable distribution, but the use of the funds is an indication of the level of spending to which the parties were accustomed.

The husband's business interests and his income and the parties' investments in houses on Sanibel greatly declined in value after mid 2006. His business interests and income were directly related to real estate markets and mortgages and mortgage refinancing.

As the second district said in *Jones v. Jones*, 28 So.3d 229 (Fla. 2d DCA 2010):

> "... [T]he Joneses, as a single family unit, lived a modest, middle-class lifestyle. No matter what judgment a trial judge fashions in this case, the two family units created by the divorce cannot maintain the same lifestyle. Like many Floridians in these difficult economic times, the Joneses almost cannot afford to divorce."

While the facts here are somewhat different from that in *Jones* in that these parties had a very high, upper class lifestyle, their decline from that very high standard to a very low standard is the same. The marital lifestyle existing before 2007 or 2008 cannot now be maintained.

So, under the facts of this case, the wife's need for alimony cannot be determined by making "marital lifestyle" a "'super factor' trumping all other factors in awarding alimony." *Jaffy v. Jaffy*, 965 So.2d 825 at 828 (Fla. 4th DCA 2007) *citing Nichols v. Nichols*, 907 So.2d 620 at 623 (Fla. 4th DCA 2005). To paraphrase the opinion in *Jaffy*, "when a high standard of living has been possible only [by a very high standard of living that is no longer possible] awarding permanent alimony fixed at that standard could have a pernicious effect. Doing so rewards extravagance and encourages lifetime profligacy while discouraging correction, legitimizes waste, and perverts the basic purpose of alimony - providing assistance for those who are unable to support themselves. Fixing alimony at a profligate standard of living is to turn alimony into a lottery." *Id.* at 827, 828. As the court said in *Jaffy*, alimony is based on a *"need*" test, not a "*desire* or *want* test." *Id.* at 828.

The comments by Justice Farmer in *Hillier v. Iglesias*, 901 So.2d 947 beginning at 949 (Fla. 4th DCA 2005) are instructive on the question of marital lifestyle and its importance as a factor in determining a spouse's need for financial support:

> "I note that the statute [§61.08] directs the court to consider all relevant factors but does not specify any listed factor as always relevant. I also note that the statute does not make any of these factors more important than another. Nor does the statute stipulate that any particular factor is always dispositive.
>
> This listing of "relevant economic factors was added to the statute in 1978 and was obviously part of the statute at the time *Canakaris* was decided in 1980. In amending the statute the legislature did not adopt a statutory standard for determining when to award alimony. In short, the legislature did not intend to overturn the line of cases (cited in the majority opinion) holding that the purpose of alimony is to provide the necessities of life to a needy former spouse. It is clear that the statute does not modify the foundation facts for all alimony awards, namely need and ability.
>
> From the actual text employed in these statutory factors, I think it is clear that the standard-of-living factor is obviously not applicable in every case. For example, in a marriage of modest assets and income with only one spouse having income, it would be absurd to think the paying spouse could maintain two households at the same standard of living after the dissolution. Dividing a standard of living on a $50,000 annual income into two new households does not result in the two halves each remaining at the $50,000 level. Clearly the standard-of-living factor must be intended to apply only when "equity would make it so.

> If the standard-of-living is not a super-or omnipresent-factor in setting the amount of alimony, it must have only a case specific, and more limited purpose. I think its intended use was to avoid having alimony set at bare subsistence levels when the standard of living during marriage was significantly better and the payor has the ability to pay more than minimum wage, so to speak. The middle class professional, as well as the wealthy plutocrat, who exposes the spouse to a standard during marriage beyond the mere necessaries of life should be required to do better than mere subsistence with alimony. The purpose of the standard-of-living factor, therefore, is not to equalize the post marital lifestyle. Instead it is intended to avoid allowing the payor who makes enough to get away with mere subsistence.
>
> Beyond that concept I do not believe the standard-of-living factor has much, if anything at all, to do with setting the amount of alimony in many cases. I do not think it is even relevant to do equity where both former spouses have annual earnings in the upper 10% of all incomes in this country. And I certainly do not agree, as the former wife argues here, that it is an imperative requirement in maintaining alimony long after the recipient has attained the income level she enjoys. *Cf. Kahn v. Kahn*, 78 So.2d 367, 368 (Fla.1955) ("We do not construe the marriage status, once achieved, as conferring on the former wife of a ship-wrecked marriage the right to live a life of veritable ease with no effort and little incentive on her part to apply such talent as she may possess to making her own way.").

The record demonstrates that this is a case in which it is now impossible to approximate the marital lifestyle, so the lifestyle cannot trump the other factors and especially not a finding of actual need.

Under the standard in §61.30 and the case law there is no competent, substantial evidence that would justify imputing income to the husband or the wife. The husband is not voluntarily unemployed or underemployed. The wife is not voluntarily underemployed.

(b) *The duration of the marriage*.

The parties were married on 5/10/1975 and the wife filed the initial petition on 7/17/2009, so they were married for 34 years and this is a long term marriage.

(c) *The age and the physical and emotional condition of each party*.

The wife is now 56 years old. She smokes but appears is in good health, physically, emotionally, and mentally. She is working to the best of her ability at her present job.

The husband is now 60 years old. He has a history of epilepsy and heart surgery. He is emotionally, mentally, and physically able to work.

(d) *The financial resources of each party, including the nonmarital and the marital assets and liabilities distributed to each*.

The assets and liabilities distributed to each party are reflected on Schedule 1 attached, subject to the order to sell the Pinetree house and the court's reservation of jurisdiction over the entire issue of equitable distribution.

(e) *The 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*.

The wife works for a local florist for 32 to 38 hours per week, say 35 hours a week. She is paid $16 an hour or $2,425 gross per month. She has no benefits with this job. Now she has health insurance provided by the husband through a COBRA policy derived from his prior employer's group policy. The premium for this coverage is $320 per month. The wife will be responsible to pay this premium after this judgment is final. The husband has been paying it before this date. She is 56 years old. The wife has little work history. At this job she is working to the best of her ability. There is no competent, substantial evidence that justifies imputing a higher income to the wife. She is not voluntarily underemployed.

The husband stopped working for EFS in October 2007. The practice of withdrawing funds from EFS to fund the family budget stopped in September 2007. After that date, the family lived by liquidating assets, a stock "portfolio" and the husband's 401(k), both of which had a combined value of about $1,400,000 in the fall of 2007. The husband's use of any marital funds or income by him after separation was proper, just as the wife's use of any funds coming into her possession after separation was proper. These assets were not wasted by the husband or the wife or spent for nonmarital purposes. There is nothing of them left to distribute, except as reflected on Schedule 1 attached. *See, e.g., Plichta v. Plichta*, 899 So.2d 1283 (Fla. 2d DCA 2005); *Tucker v Tucker*, 966 So.2d 32 (Fla. 2d DCA 2007); *Austin v. Austin*, 12 So.3d 314 (Fla. 2d DCA 2009). It is an abuse of discretion to award an asset that has been depleted. *Konsoulas v. Konsoulas*, 904 So.2d 440 (Fla. 4th DCA 2005) *citing Knecht v. Knecht*, 629 So.2d 883 (Fla. 3d DCA 1993); *Sheth v. Sheth*, 26 So.3d 653 (Fla. 5th DCA 2009).

In June 2009 the husband started working for a company that provided title insurance and settlement services to the real estate market, or, in general, the same business as EFS, "United Lender Services." His initial annual salary was $75,000.

In June of 2011 he was laid off by that company. His annual salary at that time was $100,000. He is now collecting unemployment compensation. He was an "advisor" to that business and his job was "to bring in business." He did not have any operational responsibilities. He is subject to a noncompete agreement, which somewhat limits his opportunities in the same field, which is the field he has worked in since 1995.

Since June 2011 the husband has been looking for work by contacting his former business associates in real estate, title insurance, and financing businesses. He has also conducted Internet searches and he has worked with a "head hunter" that the husband regards as an "expert" in this field. The husband has talked to him "numerous times."

There is no competent, substantial evidence that justifies imputing any income to the husband. He is not voluntarily unemployed since he was laid off in June 2011.

The husband is now paid unemployment compensation of $2,483 per month and an average of $4,049 per month in cash distributions from Mena's, LLC. However, the actual cash distributions from Mena's are not regular and they fluctuate. He owns a 60% interest in that LLC, which owns a restaurant in Pittsburgh. He has no operational responsibilities in this restaurant. It is operated by the 40% member.

He also receives an average of $286 a month from "Vista" and "Penneco Drilling," which are natural gas drilling entities in which the parties have an interest. As requested by the husband, the court distributes the parties' interests in these entities to the wife, so the husband's gross monthly income is $6,500.

The court makes no finding regarding how long the husband may receive unemployment compensation benefits. However, the court does find that these benefits will not be paid for an unlimited number of months.

(f) *The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education, and career building of the other party*.

The wife was the principal homemaker and the husband earned the family's income.

(g) *The responsibilities each party will have with regard to any minor children they have in common*.

None.

(h) *The tax treatment and consequences to both parties of any alimony award, including the designation of all or a portion of the payment as a nontaxable, nondeductible payment*.

Considered.

(i) *All sources of income available to either party, including income available to either party through investments of any asset held by that party*.

The wife's earned income is $2,425 gross per month. The assets and liabilities distributed to her are those reflected on Schedule 1 attached. After she begins receiving the Penneco and Vista income, $285 per month, her income will be $2,710, rounded, $2,700 gross per month.

The husband is now paid unemployment compensation of $2,483 per month and an average of $4,049 per month in cash distributions from Mena's, LLC. However, the actual cash distributions from Mena's are not regular and they fluctuate. He owns a 60% interest in that LLC, which owns a restaurant in Pittsburgh. He has no operational responsibilities in this restaurant. It is operated by the 40% member. He also receives an average of $286 a month from "Vista" and "Penneco Drilling," which are natural gas drilling entities in which the parties have an interest. As requested by the husband, the court distributes the parties' interests in these entities to the wife, so the husband's gross monthly income is $6,500.

(j) *Any other factor necessary to do equity and justice between the parties*.

Considered. The husband's payment of estimated taxes since the filing date were a proper use of marital income and assets because these payments reduced additional liabilities for interest and penalties to the I.R.S.

(3) *To the extent necessary to protect an award of alimony, the court may order any party who is ordered to pay alimony to purchase or maintain a life insurance policy or a bond, or to otherwise secure such alimony award with any other assets which may be suitable for that purpose*.

The only life insurance available in this case is the policy on the husband's life that is distributed to the wife on Schedule 1 attached, as the husband requested. Regarding any request of the wife for new policies, there is no evidence that the husband is now insurable, the cost of a new policy, or that he has the ability to pay the premium. Regarding policies that lapsed in recent years, there is no evidence that any of these policies may be revived. The lapsing of any policy was not improper or due to any neglect by the wife or the husband.

(4) *For purposes of determining alimony, there is a rebuttable presumption that a short-term marriage is a marriage having a duration of less than 7 years, a moderate-term marriage is a marriage having a duration of greater than 7 years but less than 17 years, and long-term marriage is a marriage having a duration of 17 years or greater. 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.*

This is a long-term marriage.

(5) *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.*

The wife did not request bridge-the-gap alimony.

(6)(a) *Rehabilitative alimony may be awarded to assist a party in establishing the capacity for self-support ...*

The wife did not request rehabilitative alimony and there is no evidence of a rehabilitative plan.

(7) *Durational alimony may be awarded when permanent periodic alimony is inappropriate.*

The wife did not request durational alimony.

(8) *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 (2), following a marriage of moderate duration if such an award is appropriate based upon clear and convincing evidence after consideration of the factors set forth in subsection (2), or following a marriage of short duration if there are written findings of exceptional circumstances. In awarding permanent alimony, the court shall include a finding that no other form of alimony is fair and reasonable under the circumstances of the parties. An award of permanent alimony terminates upon the death of either party or upon the remarriage of the party receiving alimony. An award may be modified or terminated based upon a substantial change in circumstances or upon the existence of a supportive relationship in accordance with s. 61.14.

This is a marriage of long duration. An award of permanent alimony to the wife is equitable upon consideration of the factors.

The court finds the wife's actual monthly financial need for her support is $3,000, based on the competent, substantial evidence at the trial.

The court finds the husband's actual monthly financial need for his support is $3,000, based on the competent, substantial evidence at the trial.

As shown on Exhibit A attached, the wife can meet her actual financial needs by the payment of $1,500 from the husband to the wife each month, and the husband can meet his actual financial needs after the payment of $1,500 to the wife each month.

(9) *The award of alimony may not leave the payor with significantly less net income than the net income of the recipient unless there are written findings of exceptional circumstances*.

4.1 After considering the factors, **the court grants the wife's claim for permanent, periodic alimony**. **The court finds that the wife needs $1,500 per month for financial support from the husband and that the husband has the ability to pay this amount and still meet his own financial needs**. The court has considered all of the factors in §61.08 in deciding upon an alimony award.

Therefore, the husband is ordered to pay to the wife permanent periodic alimony of $1,500 per month.

This amount of permanent periodic alimony is payable beginning 7/1/2011. The husband was unemployed in June 2011. Beginning 7/1/2011 his income is $6,500 per month, as found above. Therefore, the permanent alimony of $1,500 is payable beginning 7/1/2011 in the amount of $1,500 per month. This order for permanent alimony supersedes and cancels any temporary alimony order. However, any amounts of temporary alimony paid by the husband after 6/30/2011 shall be credited to his permanent alimony obligation.

If there is any arrearage or overage in the permanent alimony after crediting the husband for temporary alimony paid after 6/30/2011, the court will address the issue any arrearage or overage upon motion and notice of hearing by either party, both the determination of the amount and how it will be paid. So, the court reserves jurisdiction for later hearings to determine whether there is an overage or an arrearage and, if so, how it will be paid.

4.2 Temporary alimony Temporary alimony was ordered in the amount of $2,000 a month on the first of the month. This order is now cancelled.

4.3 First Payment Due Date **The first monthly payment of permanent periodic alimony is due 7/1/2011 and on a like day of each month thereafter**.

4.4 Income Deduction Order A separate Income Deduction Order shall issue directing the payor's current employer and any future employer of the payor to deduct the alimony due under this order from any income due to the payor and forward it the depository, the "Florida Support Disbursement Unit", as required by law as amended from time to time hereafter. The form of the income deduction order shall be prepared by the payee or the payee's counsel and sent to the undersigned judge for signing and filing. Serving the IDO on any employer is the responsibility of the payee. The payor must also give a copy of the IDO to his employer

4.5 **Place of Payment Alimony shall be paid by check or money order payable to and sent to the "Florida Support Disbursement Unit", P.O. Box 8500, Tallahassee, FL 32314-8500. The payor must write on each check (1) *this case number* and also the words (2) "*Lee County case*", plus any fees or costs required by law from time to time for this payment through the depository, which shall be paid by the husband with each payment.**

4.6 Addresses and Social Security numbers Within 30 days of this order both parties are ordered to write to the "State Case Registry", P.O. Box 8500, Tallahassee, FL 32314-8500 and advise that agency of this Case Number in Lee County, Florida, and their current names, addresses, social security numbers, telephone numbers, driver's license numbers, and their employer's name, address, and telephone number, as these presently exist and as they change in the future. A copy of any letter with that information sent to the "State Case Registry" must also be delivered or mailed to the Clerk of the Court, Lee County, Florida, 1700 Monroe Street, Fort Myers, FL 33901.

5. Attorney's Fees, Costs, and Suit Money The court reserves jurisdiction over the issue of attorney's fees, costs, and suit money, both entitlement and amount, for further hearings. Any further hearing on these issues must be preceded by a motion by either party asking for fees, costs or suit money, and a notice of hearing on the motion.

6. Restoration of former name The wife is hereby restored to her former name: S. G.

7. Reservation of Jurisdiction The court reserves jurisdiction of this action to enforce this final judgment and for all purposes specifically reserved.

Done and ordered in Fort Myers, Lee County, Florida, this _____

R. Thomas Corbin, Circuit Judge

Copies provided to:
, Esq., and , Esq.