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## **Charles Frederick Acker v. Barbara Drumm Acker**

THE NEXT CASE ON THE COURT'S DOCKET THIS MORNING IS ACKER VERSUS ACKER.

GOOD MORNING.

CHIEF JUSTICE: YOU MAY PROCEED.

I AM JEROME CALF RICH, AND I -- I AM JEROME KAVULICH, AND I AM HERE ON BEHALF OF CHARLES ACKER. WE ARE HERE AND WHAT THE COURT DOES IN THIS CASE WILL DETERMINE HOW THESE CASES ARE HANDLED FOR YEARS TO COME. WITH THAT IN MIND, WE ARE HERE TODAY ON A CONFLICT CERTIFIED BY THE THIRD DISTRICT IN BANK OPINION.

GIVE US A LITTLE BRITT RECITATION OF THE FACTS.

THE PARTIES WERE DIVORCED IN 1993 AND PURSUANT TO AN AGREEMENT READ INTO THE COURT RECORD, WHEREUPON MR. ACKER RETAINED HIS DELTA AIRLINE PENSION BENEFITS, IN EXCHANGE FOR ALL OF THE OTHER MARITAL ASSETS. IN ADDITION TO THE MARITAL ASSETS GOING TO THE WIFE, HE AGREED TO PAY THE MORTGAGE ON THE MARITAL RESIDENCE, GIVE HER THE MARITAL RESIDENCE FREE AND CLEAR AND TAKE CARE OF DEBTS ASSOCIATED WITH A 401-K PLAN, AND THEN PROVIDE AN OFFSETTING LUMP SUM DISTRIBUTION OF CASH TO EQUALIZE THE DIVISION.

AND ALIMONY. IS THAT CORRECT?

AND THEN HE AGREED TO PAY ALIMONY OF \$3,000 A MONTH. AT THAT TIME HE WAS STILL A PILOT EARNING ABOUT \$180,000 A YEAR, AND THAT WAS THE SOURCE FOR THE ALIMONY. THERE WAS ALSO A PROVISION IN THE AGREEMENT, WHICH STATED THAT WHEN HE REACHED MANDATORY RETIREMENT AGE OF AGE 60, NO LONGER FLYING FOR DELTA, AND WAS LIVING OFF HIS DELTA PENSION PLAN, ALIMONY WOULD BE READDRESSSED, IF ANY. A FEW YEARS LATER --

AGAIN, BECAUSE YOU ARE SAYING THIS IS GOING TO BE APPLICABLE TO ALL OF THE CASES, DO YOU SEE THERE IS SOME SIGNIFICANCE IN THAT PROVISION THAT IT WAS, THAT ALIMONY WAS TOTALLY THE AMOUNT WAS CONTEMPLATED THE AMOUNT WOULD BE ADJUSTED, DEPENDING ON WHAT HAPPENED WHEN HE RETIRED?

YES. THE PURPOSE OF THAT PROVISION IS BASICALLY FOLLOW GOT LAW AT THAT TIME. UPON RETIREMENT, THE PENN CASE HAD COME OUT. YOU HAD SAID THAT MANDATORY RETIRMENT WAS A CHANGE OF CIRCUMSTANCES WHICH THE COURT CAN CONSIDER IN ADJUSTING ALIMONY.

ALL OTHER THINGS BEING EQUAL, RIGHT? THAT IS LOOKING AT IT BACK THEN, IT IS EASY TO CONTEMPLATE THAT, WELL, WHEN HE RETIRES, AT LEAST HIS ANNUAL INCOME IS GOING TO GO DOWN, AND THAT THERE FOR THAT MIGHT WELL BE A GROUNDS FOR ADJUSTING THE ALIMONY.

HOWEVER --

BUT YOU KNOW, BUT LET'S ASSUME THAT, IN THAT DISTRIBUTION, THAT THERE WAS A STOCK AT THE TIME THAT NOBODY THOUGHT VERY MUCH OF, AND LET'S SAY IT WAS 1,000 SHARES OF BOCTEL CORPORATION, AND AT THE TIME NOBODY HAD HEARD OF BECTEL CORPORATION AND THE WIFE SAID THOSE SHARES ARE VALUED AT \$10 APIECE OR SOMETHING, SOME LOW. I AM TRYING TO GIVE A HYPOTHETICAL, AND HE GOT THAT IN THE DISTRIBUTION, BUT NOW, AT THE

TIME THAT THIS RETIREMENT THING COMES IN, THE SHARE IN BECTEL CORPORATION ARE NOW WORTH \$10 MILLION AND HE RECEIVES AN INCOME FROM THOSE SHARES OF SOMETHING LIKE \$100,000 A YEAR. AND NOW THIS PROVISION KICKS IN AND HE RETIRES, AND HE ASKS FOR THE ALIMONY TO BE ADJUSTED, AND THE WIFE SAYS, WELL, YOU ARE RIGHT. YOUR INCOME FROM DELTA HAS GONE DOWN. IS IT DELTA?

DELTA AIR LINES, CORRECT.

BUT MY GOSH, NOW YOU HAVE GOT 1 ARE \$100,000 -- NOW YOU HAVE GOT \$100,000 A YEAR COMING IN FROM THAT STOCK THAT YOU GOT IN THE EXCHANGE, AND WOULDN'T THAT BE A GOOD COUNTERARGUMENT TO REDUCING THEAL MEAN?

-- TO REDUCING THE ALIMONY? JUST TRY MY HYPOTHETICAL FIRST.

I AM WORK ING THROUGH YOUR HYPOTHETICAL, WHICH IS A NONRETIREMENT ASSET, AND IF THE ANTI-DOUBLE DIPPING PROVISIONS OF DIFFENDERFER STILL STAND, THE APPRECIATION ON THAT ASSET IS STILL NOT CONSIDERED BECAUSE HE PAID FOR THAT APPRECIATION, AND THE APPRECIATION OF THAT ASSET WHICH IS NOT INCOME --

SO A COURT WOULD NOT BE TBL TO CONSIDER --

THE APPRECIATION.

-- THE INCOME THAT HE WAS GETTING FROM --.

HOWEVER, BECAUSE THE INCOME FROM THAT STOCK, BECAUSE OBVIOUSLY THE INCOME IS PAID IN THE FORM OF A DIVIDEND, THE ANSWER TO THAT QUESTION WOULD BE YES FOR THAT TYPE OF STOCK, BECAUSE IT IS A NONRETIREMENT TYPE OF ASSET. HOWEVER, LET'S USE THE RETIREMENT ASSETS OF MR. ACKER. THOSE ARE DIFFERENT. I SPENT A LOT OF TIME IN HIGH BRIEF, DISCUSSING THE PUBLIC POLICY HOW RETIREMENT ASSETS, AND RETIREMENT LAWS DEVELOPED FROM FIRST OF ALL, ARISSA, WHERE THE WHOLE INTENT WAS TO PROTECT A FAMILY UNIT FOR RETIREMENT RESPECT, AND TO PROTECT THESE PLANS WITH ANTI-ALIENATION CLAUSES. WE MOVED ON AS DIVORCES BECAME MORE PREVALENT, CASE LAW DEVELOPED BECAUSE IT WAS HAPPENING ONE SPOUSE PARTICIPATING IN A PLAN WAS HIDING BEHIND THESEAL NATION CLAUSES SO AS NOT TO PARTICIPATE IN ALIMONY.

BUT BEFORE WE GET INTO THAT, HERE WE HAVE GOT, MY CONCERN ABOUT YOUR CASE IS THAT WHY ISN'T IT A FAIR WAY TO LOOK AT THIS, THAT WHAT HAPPENED HERE WAS THAT THE PARTIES MADE AN AGREEMENT. THE AGREEMENT WAS THAT THE ALIMONY. THEY WERE GOING TO HAVE THE EQUITABLE DISTRIBUTION, THEN THE ALIMONY WAS GOING TO BE \$3,000 A MONTH, AND THAT AT A POINT IN TIME OF THE RETIREMENT, THEN WE ARE GOING TO REEXAMINE, I THINK THE WORD WAS REVISIT THE AMOUNT OF THE ALIMONY! AND SO IN EFFECT, WHAT THE AGREEMENT WAS, IS THAT AT THE TIME THAT YOU REACH RETIREMENT, THEN WE ARE GOING TO REEXAMINE THE AMOUNT OF THE ALIMONY AND USE THE SAME CRITERIA THAT WAS USED AT THE TIME THAT WE DETERMINED THAT \$3,000 A MONTH WOULD BE A FAIR, WOULD BE THE EQUITABLE AMOUNT TO BE PAID! THIS IS NOT A POST MODIFICATION. THIS IS A CONTINUATION OF WHAT THE PARTIES AGREED TO AT THE TIME OF THE DISSOLUTION. ISN'T THAT THE WAY, WHAT REALLY HAPPENED HERE?

NO. THIS IS A POST MODIFICATION, BECAUSE WHAT HAS HAPPENED, HAS HAPPENED --

DISREGARD WHAT WAS SAID ABOUT THAT?

NO. ALL OF THAT IS DOING IS JUST SETTING OUT THE CIRCUMSTANCES AS TO WHEN TO ADDRESS THE ALIMONY AGAIN. BECAUSE WHAT HAS HAPPENED IS HE HAS HIS RETIREMENT PLAN. HE HAS

EQUITYBLY DISTRIBUTED THAT ASSET. HE IS LIVING OFF THAT ASSET, AND UNDER THE LAW OF THE DIFFER AND DIFFER, YOU DON'T HAVE A STATUTORY FRAMING.

AT THE TIME WHAT WAS USED AS THE BASIS TO MAKE A DECISION THAT \$3,000 WAS AN EQUITABLE AMOUNT, AT THE TIME OF DISSOLUTION?

IT WAS THE NEEDS OF THE WIFE AT THAT TIME, AND HIS ABILITY TO PAY BECAUSE HE HAD THE ABILITY TO PAY, BECAUSE OF HIS AIRLINE INCOME.

AND TAKING INTO --

INCOME.

TAKING INTO CONSIDERATION WHAT HAD BEEN EQUITYBLY DISTRIBUTED, RIGHT?

IT DID NOT REALLY CONSIDER WHAT WAS EQUITYBLY DISTRIBUTED TO HER, BECAUSE HER ASSETS WERE NOT REALLY CONSIDERED, IN TERMS OF SUPPORTING, MEETING HER NEEDS, BECAUSE SHE, AND THAT IS SHOWN JUST BY VIRTUE OF THE FACT THAT, FROM THE DIVORCE FORWARD, SHE NEVER HAD TO DIP INTO HER ASSETS.

AT LEAST THE STATUTE SAYS THAT YOU WOULD DO IT THAT WAY, CORRECT? THAT IS SUBSECTION 8 THAT SAYS YOU ARE GOING TO MAKE THE DISTRIBUTION, EQUITABLE DISTRIBUTION, AND AFTER THAT, YOU ARE GOING TO MAKE A DETERMINATION AS TO THE AMOUNT OF ALIMONY. THAT IS WHAT THE STATUTE SAYS.

THE STATUTE SAYS. YOU DETERMINE A TIMING TO DETERMINE ALIMONY. DO YOUR ASSET DIVISION FIRST, AND THEN DETERMINE YOUR ALIMONY.

AND I GUESS, GOING BACK TO TWO THINGS ABOUT WHY THIS CASE STILL DOES SEEM SOMEWHAT UNIQUE TO ME, BECAUSE OBVIOUSLY THERE ARE SETTLEMENT AGREEMENTS THAT CAN BE MADE WHERE ALIMONY, YOU GET ALIMONY FOR A PERIOD OF TIME, AND THAT, YOU HAVE AGREED TO IT AND IT IS NOT GOING TO BE MOD FINAL, BUT THIS ONE, PARTICULARLY, SPECIFICALLY CONTEMPLATED THAT, AT RETIREMENT, ALIMONY WOULD BE REVISITED. NOW, UNLESS THE IDEA WAS THAT, ON RETIREMENT, YOU WOULD HAVE NO OTHER SOURCE OF EARNED INCOME, AND THEREFORE THE ALIMONY WOULD BE REDUCED TO ZERO, WHICH IT DOESN'T SAY, IT SEEMS THAT IT IS A REASONABLE INTERPRETATION OF THIS PARTICULAR AGREEMENT THAT, TO LOOK AT THE PARTY'S CIRCUMSTANCES AT THE TIME, AND SEE WHAT, WHETHER SHE WAS WORKING OR NOT AND LOOK AT, JUST START AND ASSESS WHO HAS GOT WHAT KIND OF MONEY TO, WHETHER HE HAS, AGAIN, AS JUSTICE ANSTEAD'S HYPOTHETICAL IS THAT HE HAS MILLIONS OF DOLLARS COMING OUT OF HIS, EITHER ASSET, EARNED OR UNEARNED INCOME, AND SHE HAS A LOT, TOO, AND LOOK AT IT THAT WAY, AND I GUESS I AM HAVING A PROBLEM UNDERSTANDING WHERE THAT IS UNFAIR OR NOT CONTEMPLATED BY THESE PARTY'S AGREEMENTS IN THIS CASE.

WELL, THAT WASN'T WHAT WAS CONTEMPLATED. IT WAS CONTEMPLATED SIMPLY, OKAY, HE HAS HIS PENSION AND THAT IS WHAT HE IS LIVING OFF OF AT THAT POINT IN TIME. THIS IS AN ASSET THAT HE PAID FOR. BUT UNDERSTAND, AND THIS IS ANOTHER MISTAKE THAT THE THIRD DISTRICT MADE, IS, OKAY, WHEN TO DO THAT EXAMINATION, AND ASSUMING IT WANTS TO USE THESE ASSETS OF THE HUSBAND, ALIMONY, AT THAT TIME, IS NEEDS AND ABILITY TO PAY. AND IN MEETING NEEDS, YOU HAVE TO LOOK TO HER ASSETS FIRST. SHE HAD 660,000 DOLLARS OF LIQUID ASSETS, GENERATE AGO RETURN AND WHAT HAVE YOU, AND THAT WASN'T EVEN CONSIDERED. ALL THE COURT --

THAT IS A DIFFERENT ISSUE. WHAT I THOUGHT YOUR POSITION WAS IS THAT, ONCE SOMETHING IS DISTRIBUTED THROUGH EQUITABLE DISTRIBUTION THAT, WHATEVER IS LEFT BY THAT PARTY AND THAT GENERATES A SOURCE OF INCOME, CAN'T BE LOOKED AT IN DETERMINING WHETHER

ALIMONY SHOULD BE PAID. I THOUGHT THAT WAS THE ABSOLUTE POSITION THAT YOU WERE TAKING.

THE POSITION I AM MAINTAINING IS, WITH RETIREMENT ASSETS THAT, IS TRUE, BECAUSE THE INCOME IS AN INTEGRAL PART OF THE RETIREMENT ASSET, BECAUSE A RETIREMENT ASSET HAS TO CONTINUE TO GROW TO MEET THE NEEDS OF THE RETIREE THROUGHOUT THE TIME OF RETIREMENT. WHAT HAPPENS HERE IS THAT THERE IS A PICTURE TAKEN, WHERE YOU HAD THREE YEARS OF FANTASTIC STOCK MARKET GROWTH. WHAT ABOUT AFTERWARDS? BECAUSE WHAT HAPPENS AFTERWARDS, AND WE NOW HAVE THREE YEARS OF DROP IN THE STOCK MARKET, VALUE GOES DOWN. IT IS COMMON KNOWLEDGE 40, 50, 60 PERCENT DROP IN THE STOCK MARKET, BUT THE ASSET HAS TO CONTINUE TO GROW TO MEET THE NEEDS. WHAT IS HAPPENING NOW IS DEPLETING. NOW, WITH THE CASE SITUATION CONCERNING THE STOCK, THAT IS THROWING OFF THE DIVIDENDS BUT HAS GREATLY APPRECIATED, DID IS OUR POSITION UNDER ANTI-DOUBLE DIPPING PROVISIONS OF DIFFER AND DIFFER, PRONOUNCED BY THIS COURT 16 YEARS AGO AND HAS CONTINUED TO BE PRECEDENT, IS THAT, NO, YOU CANNOT CONSIDER THE APPRECIATION FROM THAT STOCK ASSET, BUT HOWEVER SINCE THAT STOCK THROWS OFF INCOME OF \$100,000 A YEAR OF DIVIDENDS, THE DIVIDENDS ARE SEPARATED FROM THAT STOCK, JUST LIKE RENTS ARE SEPARATED FROM A PIECE OF REAL STATE. -- REAL ESTATE.

EXPLAIN TO ME EXACTLY, HE GOT \$400,000-SOME-ODD INEQUITABLE DISTRIBUTION OF HIS PENSION PLAN, CORRECT?

CORRECT.

AND AT THE TIME THAT HE ACTUALLY LEFT DELTA, THERE WAS A \$1 MILLION PLUS THERE WAS A NOT GIVEN TO HIM AS PART OF THE PENSION PLAN IN IS THAT WHAT --

NO. IT WAS PART OF THE INITIAL PENSION PLAN. WHAT HAPPENED WAS HE WAS A PARTICIPANT IN TWO PLANS BECAUSE OF HIS SENIOR STATUS POSITION WITH DELTA, BUT HE WOULD TAKE FROM THE HIGHER, AT THE TIME OF RETIREMENT. THERE WERE TWO PLANS WHERE ONE WAS STACKED UPON THE OTHER. IT WAS NOT THAT BUT THE OTHER WAS THE HIGHER OF THE TWO.

THIS WAS DIFFERENT FROM THE PLAN THAT CONTAINED THE \$400,000 THAT WAS INITIALLY DISTRIBUTED TO HIM AS EQUITABLE DISTRIBUTION.

IT WAS ONE OF TWO PLANS THAT HE HAD. THE 400 VALUE AT THAT TIME. WHAT HAPPENED AT THAT TIME, AT THE TIME OF THE DIVORCE, THE GET DEFINED BENEFIT PLAN, WHICH WAS THE FIXED PLAN, LIKE THE PLAN YOUR HONORS HAVE WHEN YOU RETIRE, YOU JUST GET A BENEFIT AT THE TIME, SHOW A BENEFIT OF \$7800 A MONTH AND THAT WAS WHAT WAS COMPUTED. THERE WAS ALSO ANOTHER PLAN, CALLED THE A/B PLAN, A DEFINED CONTRIBUTION PLAN MANY YEARS OLD. AT THAT TIME IT HAD, IT, YOU KNOW, IT WAS NOT THE MORE VALUABLE OF THE PLANS. IT BECAME THE MORE VALUABLE OF THE PLANS AFTER THE DIVORCE. THROUGH UNFORESEEN CIRCUMSTANCES, BASICALLY THE STOCK MARKET GOING UP IN ITS LITTLE INCREMENTS, AND IT BECAME THE MORE VALUABLE OF THE PLAN. WHEN HE ELECTED EARLY RETIREMENT, HE, YOU KNOW, HE HAD TO ELECT EARLY RETIREMENT AT THAT POINT IN TIME OR HE WOULD LOSE THE A/B PLAN BENEFIT.

UNDER THOSE CIRCUMSTANCES, WHY ISN'T THAT SIMILAR TO THE SCENARIO THAT JUSTICE ANSTEAD POSTED, ACCORDING THE -- POSITED, CONCERNING THE INCREASING VALUE YOUTHFUL THE STOCK? WHY ISN'T THAT SITUATION SIMILAR TO THAT?

BECAUSE THE APPRECIATION GOES ALONG WITH THE ASSET. PRESENT VALUE BUY OUTS ARE BASED UPON AS ULINGSS.

IF WE TAKE THE -- UPON ASSUMPTIONS.

IF WE TAKE THE LOGIC OF -- GO AHEAD.

YOUR PRESENT VALUE BUY OUTS EVER BASED UPON -- BUY OUTS ARE BASED UPON A LONG-TERM FIXED RATE. IF YOU LOOK AT THE A/B PLAN AT THE TIME OF THE DIVORCE, YOU COULD NOT EVEN DETERMINE VALUE BUT IT HAD A PROJECTED VALUE OVER A PERIOD OF TIME. THERE IS TO SAY THAT THE ASSET CAN'T APPRECIATE AFTER THE EXCHANGE, LIKE MRS. ACKER'S ASSETS HAVE APPRECIATED. THEY HAVE ALMOST DOUBLED. NOW, IF THEY ARE GOING TO TAKE THE POSITION THAT THE APPRECIATION CAN BE ATTACHED TO HER ALIMONY, LET'S DO THE REVERSE, IF YOU BEAR WITH ME. IT IS THE SAME THING.

THAT IS NOT WHY THE TRIAL COURT ERRED IN FAILING TO TAKE INTO CONSIDERATION WHETHER HER ASSETS HAD APPRECIATED OR NOT.

I AM TAKING INTO CONSIDERATION WHETHER OR NOT, HE WAS AN US AIR PILOT, AND ACCORDING TO THE NEWS US AIR PILOTS ACCORDING TO THE BANKRUPTCY PROVISIONS, TOOK A 60 -- A BANKRUPTCY PROVISIONS, TOOK A 60 PERCENT REDUCTION IN BENEFITS. IT GOES DOWN, AND NOW DO YOU GET TO DO EQUITABLE DISTRIBUTION ALL OVER AGAIN BY SAYING WE MADE A MISTAKE? YOU CAN'T DO THAT.

I TAKE IT WHEN THESE PARTIES SAID THAT THEY WERE GOING TO REVISIT IT AT THE TIME OF RETIREMENT, THAT THE COURT WOULD REVISIT IT AND EXAMINE, AND IF DEALT, A RATHER THAN PAYING THE OUT THE MILLION DOLLARS HAD GONE INTO BANKRUPTCY AND WAS NOT PAYING ANY INCOME, THEN THAT WOULD BE A MATTER THAT'S RIGHT COURT WOULD TAKE INTO CONSIDERATION AND PROBABLY REDUCE THE AMOUNT.

HOWEVER, WHEN YOU ATTEMPTING TO ATTACH THE APPRECIATION OF AN ASSET AND USE IT AS AN INCOME SOURCE, THE APPRECIATION AND INCOME ARE TWO DIFFERENT CONCEPTS. THE APPRECIATION AFTER ASSET, WHAT YOU ARE DOING IS THAT YOU ARE REDOING EQUITABLE DISTRIBUTION.

BUT ARE THE ATTACHING ASSET, THE INCOME STREAM GENERATED BY THE ASSET NOT THE ASSET. THE COURT HASN'T GONE IN AND SAID GIVE HER \$500,000 OF THE MILLION THAT CAME IN LATER. THE COURT IS SIMPLY LOOKING AT THE NEED AND ABILITY TO PAY BOTH PARTIES AND SAID THIS IS WHAT THE INCOME STREAM IS. I AGREE WITH YOU WHOLEHEARTEDLY THAT THE COURT CAN'T LATER COME IN AND SAY, OKAY, YOU HAVE GOT THE MILLION. GIVE HER HALF OF IT, AS THEY DID AT THE INITIAL DIVORCE, FOR A MARITAL ASSET, BUT WHAT IT SEEMS YOU ARE ARGUING IS THE COURT CANNOT EVEN LOOK AT THE INCOME STREAM FROM THE ASSET, AND DETERMINE THE NEED AND ABILITY TO PAY.

OF A --

IS THAT TRUE?

OF A NONRETIREMENT ASSET, THE COURT CAN LOOK AT THE INCOME STREAM, BUT NOT AT THE APPRECIATION. YOU KNOW, WHAT HAPPENS HERE IS THAT THE ASSET HAS APPRECIATE A LOT, AND IN THE SAME TIME, MR. ACKER IS DEPLETING HIS RETIREMENT ASSET, NOT ONLY TO MEET HIS NEEDS BUT TO MEET MRS. ACKER'S NEEDS.

HOW IS HE DEPLETING THE ASSET?

IT IS A RETIREMENT ASSET?

IT IS A RETIREMENT ASSET BECAUSE HE IS RETIRED. HE NO LONGER HAS EARNED INCOME.

HOW HAS HIS ASSET DEPLETED AS OPPOSED TO THE INCOME STREAM GENERATED BY THE ASSET?

THE INCOME STREAM IS PART OF THE ASSET, BECAUSE THAT IS WHAT MAKES THE RETIREMENT ASSET LAST THROUGHOUT THE RETIREMENT PERIOD AND CAN'T REALLY BE SEPARATED. WHEN YOU HAVE A DEFINED BENEFIT, THE ASSET ITSELF, IS NOT ONLY THE BASE ASSET BUT THE GROWTH ON IT, BECAUSE YOU NEED THE GROWTH, TO MEET THE NEEDS OF THE RETIREE, THROUGHOUT THE ENTIRE PERIOD OF RETIREMENT, MUCH LIKE ARISSA SAID MANY, MANY YEARS AGO, THIS PARTICULAR RETIREE, THROUGHOUT HIS ENTIRE RETIREMENT LIFE. THAT IS WHY THE INCOME CANNOT BE SEPARATED.

CHIEF JUSTICE: YOU WANTED TO SAVE SOME TIME FOR REBUTTAL AND THE MARSHAL HAS WARNED US ABOUT. THAT OKAY. SO IT MIGHT BE A GOOD TIME TO PAUSE. THANK YOU VERY MUCH. GOOD MORNING.

GOOD MORNING. NANCY HAAS ON BEHALF OF THE APPELLEE, FORMER WIFE BARBARA DRUMM ACKER.

ARE WE TALKING ABOUT INCOME OR ARE WE TALKING ABOUT DEPLETION OF AN ASET?

WE ARE TALKING ABOUT INCOME. WE ARE NOT TALKING ABOUT DEPLETION OF AN ASSET.

ARE YOU SUGGESTING THAT THE PENSION PLAN, THEN, GENERATES, JUST OF ITSELF, THAT MUCH MONEY INCOME EACH MONTH TO PAY IT, AND HE KEEPS THE PRINCIPLE AMOUNT INTACT?

THAT IS EXACTLY WHAT HAPPENED IN THOSE CASE. IN FACT BOTH OF THOSE THINGS HAPPENED IN THIS CASE. IN THIS CASE, YOU HAD A PENSION THAT, IN 1999, HAD INCREASED IN VALUE BY \$225,000 AND JUST GENERATING \$3,000 OF INCOME PER MONTH, WHICH WAS CERTAINLY SUFFICIENT TO SATISFY THE FORMER WIFE'S ALIMONY OBLIGATION.

BUT THE \$3,000 WAS INCOME OFF OF THE PRINCIPLE?

PURE INCOME. THAT'S RIGHT.

THEY ARE NOT DISTRIBUTING ANY PRINCIPLE OF THAT RETIREMENT ACCOUNT IN ANY PAYMENT.

THAT'S CORRECT. IN ADDITION, MR. ACKER ALSO HAD ADDITIONAL INCOME GENERATING ASSETS AT THAT TIME, AND I THINK THE TRIAL COURT WAS CORRECT IN LOOKING AT THE TOTALITY OF THE CIRCUMSTANCES IN THIS CASE AND THAT WHAT THE LAW -- AND THAT IS WHAT THE LAW OF THIS STATE REQUIRES. IN ADDITION, YOU HAVE ANOTHER UNUSUAL CIRCUMSTANCE IN THIS CASE, AND THAT IS WHAT JUSTICE QUINCE ADDRESSED. YOU HAVE A TIME WHERE, AT THE TIME OF THE DISSOLUTION IN 1993, MR. ACKER HAD A DELTA PENSION VALUED AT \$480,000 FOR PURPOSES OF EQUITABLE DISTRIBUTION AND MRS. ACKER RECEIVED OTHER ASSETS TO BALANCE THAT OUT BUT YOU KNOW WHAT? MR. ACKER WASN'T JUST AGREEING TO EQUITABLE DISTRIBUTION. HE ALSO AGREED TO PAY ALIMONY FOREVER. THIS WAS A LONG-TERM MARRIAGE. THE PARTIES HAD BEEN MARRIED FOR 23 YEARS, SO HE WASN'T GREG TO GIVE HER HALF OF THE ASSETS. HE WAS AGREEING TO GIVE HER SUPPORT.

THIS IS NOT EVEN A CASE TO EVEN TALK ABOUT DOUBLE DIPPING, IF THAT IS A CONCEPT UNDER FLORIDA LAW.

I THINK IT IS IN THESE TERMS, BECAUSE IN THIS CASE YOU ALSO HAVE A SITUATION WHERE, WHEN MR. ACKER ACTUALLY RETIRED, IN 1997, HE TOOK A VOLUNTARY EARLY RETIREMENT, HE ALSO GOT, IN ADDITION TO THE \$487,000, \$1.6 MILLION, WHICH WAS A WINDFALL, WHICH AFTER RETIREMENT HE TOOK UNDER A DIFFERENT PLAN, AND MR. BASTION, AS WELL AS THE PILOT WHO ACTUALLY WROTE THE DELTA PENSION, VERY CLEARLY STATED THAT, AT THE TIME OF THE

DISSOLUTION, MR., MRS. ACKER'S EXPERTS HAD NOT BEEN PROVIDED WITH INFORMATION ABOUT THAT OTHER PLAN.

LET ME ASK YOU THIS, ARE WE DEALING, IS THIS A CASE IN WHICH WE ARE DEALING WITH 67.075 AND.08 OR ARE WE DEALING WITH 61.14?

YOU ARE DEALING WITH BOTH. I THINK 61.14 FOLLOWS 61.08.

IS THIS A MODIFICATION IN TERMS THAT THAT STATUTE CONTEMPLATES, OR IS THIS A, WHAT I WOULD CALL A WRAP UP OF THE ORIGINAL AGREEMENT?

NO. THIS WAS A MODIFICATION CASE THAT FELL UNDER 61.14 AND PURSUANT TO 61.14, THE TRIAL COURT PROPERLY CONSIDERED THE FACTORS SET FORTH IN 61.08-D-2 AND ALSO 61.08-2-G, AND 61.08-2-D IS VERY CLEAR THAT, UPON CONSIDERING AWARDS OF ALIMONY, THE FINANCIAL RESOURCES OF EACH PARTY, THE NONMARITAL AND MARITAL ASSETS AND LIABILITIES DISTRIBUTED TO EACH SHALL BE CONSIDERED. I THINK THOSE ARE VERY CLEARLY UNDER THE EXISTING CASE LAW, THE FACTORS THAT NEED TO BE TAKEN INTO CONSIDERATION. I MEAN, IN PIM, THIS COURT VERY CLEARLY SET FORTH THAT, IN ORDER TO ESTABLISH A MIDFOX -- A MODIFICATION, WE NEED TO ESTABLISH A CHANGE EVER CIRCUMSTANCES THAT DOESN'T EXIST AT THE TIME OF THE DISSOLUTION AND COULD NOT BE ANTICIPATED. IN THE MARITAL AGREEMENT THE PARTIES SAID THAT THEY WOULD REVISIT THE ALIMONY REALLY WAS AN ANTICIPATED CIRCUMSTANCE. THEY KNEW, AT THE TIME THAT THEY ENTERED INTO THAT AGREEMENT IN 1993, THAT MR. ACKER WOULD HAVE TO RETIRE FROM FLYING AN AS A PILOT AT -- FROM FLYING AS A PILOT AT AGE 60.

I THOUGHT, AND IN HEARING JUSTICE WELLS'S QUESTION, THAT THE FACT THAT THIS STRUCTURE OF THIS AGREEMENT CONTEMPLATED THIS EVENT AND CONTEMPLATED REVISITING, WOULD MAKE YOUR BURDEN, IN TERMS OF WHAT YOU HAVE TO SHOW, MUCH SIMPLER THAN IN A CASE WHERE THE SETTLEMENT AGREEMENT HAD NOT, HAD SAID THIS IS THE AMOUNT OF ALIMONY, AND HAD NOT REFERENCED THE RETIREMENT EVENT. ARE YOU DISAGREEING WITH THAT? DO YOU THINK IT IS THE SAME? DO YOU STILL HAVE THE SAME HEAVY BURDEN, OR IS IT DIFFERENT IN THIS CASE?

I THINK IN REALITY, AT THE TRIAL COURT LEVEL, WHETHER THERE IS A PROVISION IN A MARITAL SETTLEMENT AGREEMENT THAT PROVIDES FOR REVISITING OR NOT, ANYONE CAN LATER FILE A PETITION FOR MODIFICATION, IF THEY FEEL THAT THERE HAS BEEN A SUBSTANTIAL CHANGE OF CIRCUMSTANCES. THE LAW CLEARLY PROVIDES FOR THAT.

MY PROBLEM IS THAT, WHERE, IF THIS IS TREATED AS A COMPLETION OF THE SETTLEMENT AGREEMENT WHICH, AND THIS COMPLETION WAS CONTEMPLATED UNDER THE ORIGINAL 61.075 DISSOLUTION, THEN THAT IS, SEEMS TO ME DOES NOT BROADLY AFFECT ALL CASES IN WHICH YOU WOULD THEN COME IN AND MAKE A DETERMINATION AS TO 61.14. IT LOOSE TO ME LIKE IT IS A MUCH NARROWER CIRCUMSTANCE.

I AGREE. THIS IS A MUCH MORE NARROW CIRCUMSTANCE IN THIS CASE, AND BECAUSE OF ALL OF THE OTHER FACTORS IN THIS CASE, IT IS ALSO VERY DIFFERENT.

CAN I ASK YOU ON THESE OTHER FACTORS AND YOUR POSITION ON THIS, IF THE, YOU KNOW, I UNDERSTAND THE CONCEPT OF SEPARATING WHAT, THAT ASSETS IN A RETIREMENT ACCOUNT CAN BE GENERATING INCOME, BUT THEY ARE IN THAT ACCOUNT. THEY ARE NOT BEING DRAWN DOWN UNTIL YOU ARE RETIRED. BUT IN TERMS OF THE, LET'S JUST SAY THAT IN THIS SITUATION, THAT YOU HAVE GOT THE WIFE, AND THE WIFE IS 10, 15 YEARS YOUNGER THAN THE HUSBAND, AND, BUT SHE HAS GOTTEN THESE ASSETS, AND HER ASSETS HAVE ACTUALLY, BECAUSE OF THE NATURE OF WHAT THEY WERE, ACTUALLY TRIPLED OR QAUT RUN HE WOULD, BUT SHE -- OR QUADRUPLED, BUT SHE HAS NOT TAKEN ANYTHING OUT OF THOSE ASSETS. ARE YOU SAYING

THAT THE JUDGE, IN THAT CIRCUMSTANCE, CANNOT, LOOKING AT NEED AND ABILITY TO PAY, IS PRECLUDED FROM LOOKING AT THE, WHAT THE WIFE HAS IN TERMS OF HER ASSETS?

NO. I AM NOT. AND I THINK THAT THE PIM CASE IS CLEAR ABOUT THAT. THE PIM CASE SAYS THAT WE CAN LOOK AT THE ASSETS AND THE INCOME THAT IS BEING GENERATED, TO THE RECEIVING SPOUSE. HOWEVER, WHAT IS GOOD FOR THE GOOSE IS GOOD FOR THE GANDER. IF YOU CAN LOOK AT THE INCOME GENERATED FROM THE ASSETS THAT ARE RECEIVED, YOU ALSO NEED TO LOOK AT THE ASSETS THAT ARE RECEIVED BY THE PAY OR -- BY THE PAYOR SPOUSE, AND IN THIS CASE YOU HAVE SOMETHING COMPLETELY DIFFERENT, YOU HAVE SOMEONE WHO WAS 51 YEARS OLD AT THE TIME OF THE MODIFICATION IN ILL HEALTH AND HER ASSETS HAD ONLY GENERATED INCOME OF \$3900 PER YEAR AND INCOME OF \$9,000 PER YEAR. SO YOU --

SO YOU WOULDN'T CONTEMPLATE ON SOMEBODY SITTING ON A SITUATION WITH TWO DIFFERENT HOUSES. ONE HOUSE HAD APPRECIATED TO \$5 MILLION AND SHE WAS LIVING IN ONE, AND THAT A JUDGE LOOKING AT THIS SITUATION IS NOT PRECLUDED FROM LOOKING AT THAT.

ABSOLUTELY NOT AND THAT IS THE BEAUTY AFTER COURT SITTING IN EQUITY AND 61.08 CLEARLY PROVIDES FOR THAT, THAT THERE IS THAT FLEXIBILITY BUILT INTO THE STATUTE. IF THIS HAD BEEN A DIFFERENT CIRCUMSTANCE, WHERE YOU DIDN'T HAVE THE KIND IN INCOME GENERATED FROM THAT SITUATION, INCOME GENERATED FROM MR. ACKER TO PAY THAT ALIMONY, IT MIGHT NOT BE THE SAME SITUATION.

AT THAT POINT IN TIME, SHE BEGINS TO DRAW FROM HER RETIREMENT, SHE IS GOING TO HAVE A MUCH GREAT HER INCOME STREAM HERSELF.

SHE MIGHT HAVE A GREATER INCOME STREAM IN THE FUTURE, BUT YOU KNOW WHAT? THEN YOU HAVE TO GO BACK AND REVISIT IT AGAIN AND THAT IS WHAT THE MODIFICATION STATUTES PROVIDE FOR. ONCE YOU GO IN FOR MODIFICATION DOESN'T MEAN THAT YOU CAN NEVER GO IN AGAIN. IF SOMETHING IN THE FUTURE HAPPENS --

BUT YOU WOULD AGREE THAT, AT THE TIME THAT SHE BEGINS TO HAVE THE RIGHT, WITHOUT A PENALTY, TO DRAW FROM HER RETIREMENT, HER OWN RETIREMENT, THAT THEN THERE COULD BE A 61.14 MODIFICATION.

THERE MIGHT VERY WELL BE, BUT THERE IS A CASE THAT ADDRESSES THAT. I BELIEVE IT IS THE McCOWSKI CASE, WHERE THE COURT HAD ANTICIPATED THE WIFE'S FINANCIAL CIRCUMSTANCES AT AGE 62, WHEN SHE WAS ABLE TO DRAW DOWN FROM HER PENSION, AND THE APPELLATE COURT REVERSING, YOU KNOW, SAYING WE CAN'T ANTICIPATE ANYTHING. WE DON'T KNOW WHAT HER HEALTH IS GOING TO BE LIKE WHEN SHE CAN DRAW DOWN ON THAT PENSION. WE DON'T KNOW WHAT HER OTHER FINANCIAL CIRCUMSTANCES ARE GOING TO BE, SO AT THIS TIME I DON'T THINK THAT YOU CAN PROJECT AS TO WHEN MRS. ACKER CAN DRAW DOWN ON RETIREMENT FUNDS THAT ARE PROVIDED TO HER. I THINK IT IS PREMATURE.

BUT IT IS SOMETHING THAT, AGAIN, IS MOD FINAL, IF, FOR EITHER WAY.

ABSOLUTE -- THAT IS MODIFYABLE EITHER WAY.

ABSOLUTELY. I THINK THE STATUTE CLEARLY PROVIDES FOR THAT AND WHEN THE STATUTE WAS AMENDED IN 1998, I THINK IT DID TAKE DIFENDERFER TO A DIFFERENT STAGE, AND I THINK IT HAS TO DO WITH THE ABILITY TO PAY ALIMONY.

ARE WE IN THAT CASE ACTUALLY CONTEMPLATING THAT CIRCUMSTANCE OR NOT? I MEAN, IN OTHER WORDS, THAT THE DOUBLE DIPPING ISSUE IS, CAN YOU, AFTER THE ASSETS HAVE BEEN DISTRIBUTED, YOU THEN LOOK AT WHAT IS BEING GENERATED.

I ABSOLUTELY DO. I THINK THE SECOND DISTRICT AND THE FIFTH DISTRICT HAVE TAKEN VERY HARD-LINE POSITIONS ON DIFENDERFER. THE LANGUAGE SAYS, LESS THE OUR OBSERVATIONS HERE -- LEFT OUR OBSERVATIONS HERE BE -- LEST OUR OBSERVATIONS HERE BE MISUNDERSTOOD, WE WANT TO AVOID ESTABLISHING INFLEXIBLE RULES THAT MAKE EQUITY BETWEEN THE PARTIES DIFCONSULT TO ACHIEVE IF NOT I AM -- DIFFICULT TO ACHIEVE IF NOT IMPOSSIBLE. AND YOU KNOW WHAT, THAT IS TAKEN FROM THE HAMLET CASE IN 1981 AND THE PIM CASE IN 1982. THIS IS WHERE THE LEGISLATURE IS GOING AND I THINK WE CAN CLEARLY SAY THAT, IN DETERMINING WHETHER A MODIFICATION IS MANDATED, WE CAN LOOK TO ALL OF THE ASSETS AVAILABLE, AND I LEAVE THAT THE THIRD DISTRICT WAS IT ABSOLUTELY CORRECT AND THE JUDGE WAS ABSOLUTELY CORRECT IN SAYING THAT MR. ACKER, BASED ON THE TOTALITY OF THE CIRCUMSTANCES IN THIS CASE, HAS THE ABILITY TO CONTINUE TO PAY THAT PERIODIC ALIMONY, AND ADD DRESZ -- AND ADDRESSING MR. KAVULICH'S ISSUE ABOUT THE PENSION, THIS IS AN ISSUE THAT THE PUBLIC POLICY WOULD BE TO EVERY WIFE ENTITLED TO AWARD OF EXTENDED REHABILITATIVE ALIMONY OR PERSONNANT ALIMONY, WHAT THIS SAYS IS THAT AT THE TIME YOU GO TO TRIAL, YOU CAN NEVER GIVE UP YOUR HUSBAND'S HALF INTEREST IN HIS PENSION, BECAUSE YOU KNOW WHAT? WHEN HE RETIRES, HE IS GOING TO SAY HE NO LONGER HAS THE ABILITY TO PAY PERMANENT ALIMONY AND YOU ARE OPENING THE FLOODGATES FOR LITIGATION IN THAT CASE, BECAUSE UNDER THAT SITUATION, NO PAYEE SPOUSE WOULD BE ABLE TO GIVE UP HER HALF OF THAT PENSION.

HOW WOULD YOU TREAT IT IF THE RETIREMENT ACCOUNT IS DIVIDED EQUALLY, NOT ASSUMING IT IS ONE-SIDED LIKE WE ARE DEALING WITH HERE BUT EQUALLY. DOES THAT ALTER THE ANALYSIS?

IT DOES ALTER THE ANALYSIS, BECAUSE YOU KNOW WHAT? IF MRS. ACKER WAS RECEIVING HALF OF THE PENSION AND SHE WAS IN FACT RECEIVING A INCOME STREAM, THAN THAT WOULD HAVE BEEN ONE OF THE FACTORS THAT THE TRIAL COURT WAS ALLOWED TO CONSIDER. IF SHE HAD BEEN RECEIVING ANOTHER \$2,000 INCOME PER MONTH OR WHATEVER IT IS AND MR. ACKER'S INCOME WAS REDUCED BY NOT RECEIVING THAT PORTION OF THE INCOME STREAM, THEN YOU MIGHT VERY WELL HAVE TO CONSIDER THAT, BUT AGAIN IT IS THE TOTALITY OF THE CIRCUMSTANCES. YOU HAVE TO LOOK AT THE AGE OF THE WIFE. YOU HAVE TO LOOK AT THE LENGTH OF THE MARRIAGE, HER PHYSICAL CONDITION, BUT YES, THAT MIGHT VERY WELL HAVE AFFECTED THE OUTCOME, BUT THAT IS NOT THE CASE BECAUSE SHE DOESN'T HAVE THAT INCOME STREAM.

I UNDERSTAND THAT BUT WE ARE LOOKING AT THE RULES OF LAW, SO ALL OF THESE DIFFERENT FACTORS THAT COME IN, SO IF YOU HAVE A SITUATION WHERE IT IS DIVIDED EQUALLY AND THE HUSBAND, CERTAINLY BECAUSE OF BEING A PILOT HAS A REDUCED WORK EXPECTANCY THAT HAS THAT INCOME COMING IN, AND THE WIFE IS CERTAINLY NOT IN THE POSITION TO RETIRE YET BECAUSE A YOUNGER POSITION, SO THEREFORE INCOME IS NOT COMING FROM RETIREMENT, THAT THE WIFE IS ENTITLED TO DRAW ON THE RETIREMENT PORTION, EVEN THOUGH IT IS PART PRINCIPLE, BECAUSE THESE RETIREMENT ACCOUNTS AREN'T DESIGNED THAT THEY ARE GOING TO LEAVE \$1 MILLION AT THE END. THEY ARE PAYING PART PRINCIPLE AS THEY GO ALONG.

HE WAS LUCKY.

MOST OF THEM ARE DESIGNED THAT WAY SO YOU CAN PAY OUT THE ACCOUNT OVER A PERIOD OF TIME, THAT THE OTHER SPOUSE CAN DRAW FROM THAT AS WELL, AND EVEN THOUGH IT HAS ALREADY BEEN DIVIDED AND SHE HAS ALREADY RECEIVED HALF OF IT.

RIGHT, AND YOU KNOW WHAT? THAT IS THE FACTOR THAT PIM TAKES INTO ACCOUNT AND RIGHTFULLY SO, AND I THINK THAT THIS IS JUST EVOLUTION OF THAT THINKING. THE BOUGHT OMING LINE IS IT WOULD DEPEND UPON THE CIRCUMSTANCES, IF SHE IS ONLY RECEIVING A LIMITED AMOUNT OF MONEY AND MR. ACKER HAD OTHER SOURCES TO DRAW ON TO PAY THE

ALIMONY AS WELL, THEN HE MIGHT NOT BE AN ENTITLED TO REDUCTION IN THAT CASE, EITHER. AGAIN I THINK THE COURT PROPERLY DIRECTED THE TOTALITY OF THE CIRCUMSTANCES, BUT I THINK TO PROTECT AN ASSET, WHEN YOU HAVE MADE AN AGREEMENT TO PAY PERMANENT PERIODIC ALIMONY THAT, THAT IS THE AGREEMENT AND THAT IS THE LAW.

WHAT WAS THE, I NOTICE THAT THE FAMILY LAW SECTION FILED AMICUS BRIEF BELOW BUT DIDN'T FILE ONE HERE. WHAT WAS THE POSITION OF THE BRIEF IN THE, BEFORE THE THIRD DISTRICT?

THEY CONCURRED WITH THE APPELLEE'S POSITION, WITH MRS. ACKER'S POSITION THAT NOT ONLY THE INCOME BUT THE PENSION, ITSELF, COULD BE LOOKED UPON AS A A SOURCE FOR THE PAYMENT OF ALIMONY UNDER 61.08-2-D AND G.

CAN YOU ADD DECEMBER YOUR POSITION ON -- CAN YOU ADDRESS YOUR POSITION ON DIFFENDERFER, BECAUSE MANY COURTS OF APPEAL HAVE DETERMINED DIFFENDERFER, SAYING WE HOLD THAT YOU CAN EITHER CONSIDER THEM AS A MARITAL ASSET OR AS INCOME BUT NOT BOTH.

PENSION ASSETS AND BENEFITS ARE NO DIFFERENT THAN ANY OTHER ASSET.

MY QUESTION IS DOES DIFFENDERFER HOLD, DO WE HAVE TO RECEDE IN THIS CASE FROM DIFFENDERER, TO CREATE YOUR POSITION?

I THINK YOU HAVE TO TAKE THE NEXT STEP AND THAT IS WHERE THE CASES ARE GOING. WHEN HAMLET SAID THAT IN 1991, IT TALKED ABOUT WE CAN GIVE ALIMONY TO BALANCE EQUITABLE DISTRIBUTION, THAT WAS THE NEXT STEP, AND WHEN WE TALKED ABOUT IN PIM, YOU SAID, WELL, WE SHOULD BE ABLE TO CONSIDER RETIREMENT AS A BASIS --

THAT IS NOT THE INTERPRETATION THAT BAIN GAVE OUT OF THE FIFTH.

I UNDERSTAND.

BAIN VERY EXPRESSLY SAYS THAT YOU CANNOT USE THEM BOTH.

I THINK THE STATUTE THAT WAS AMENDED STATES THAT A PENSION BENEFIT, LIKE ANY OTHER ASSET, NEEDS TO BE CONSIDERED IN THE ABILITY TO PAVEMENT.

YOUR POSITION IS THAT BAIN MISCONSTRUED DIFFENDERFER?

YES, AND I THINK A LOT OF THOSE CASES MISCONSTRUED DIFFENDERFER. I UNDERSTAND AT THE TIME OF DISSOLUTION DON'T DIVIDE THAT HALF TO PAY SUPPORT, BUT THIS IS A POST DISSOLUTION MODIFICATION, AFTER THE INITIAL AWARD, AND I THINK IT THAT IN THAT WAY, POST DISSOLUTION CASES, MODIFICATION CASES ARE DIFFERENT, AND I THINK 61.14, WHICH FOLLOWS FROM 61.08 IN PROVIDING THE BASIS FOR MODIFICATION, 61.14 SAYS WE HAVE TO DO EQUITY. WE HAVE TO LOOK AT ALL OF THE FACTORS AND DO EQUITY.

WOULD YOU AGREE, THEN, THAT UNDER DIFFENDERFER, THAT AT THE TIME OF THE INITIAL DISSOLUTION, THAT A COURT CANNOT USE A PENSION PLAN AS BOTH AN ASSET TO BE DISTRIBUTED AND THEN AS AN INCOME STREAM?

I WOULD AGREE THAT ANY ASSET, BECAUSE MY POSITION IS THAT YOU CAN SEPARATE OUT PENSION AS -- THAT YOU CAN'T SEPARATE OUT PENSION ASSETS ANYMORE, THAT THE EQUITABLE DISTRIBUTION OF LAW IS THAT THE PENSION HAS TO BE TREATED LIKE ANY OTHER PIECE OF PROPERTY. LIKE A RENTAL PROPERTY. IF A RENTAL PROPERTY ARE GENERATING RENTS THAT ASSIST IN THE SUPPORT OF THE HUSBAND, THEN THEY CAN BE CONSIDERED FOR ALIMONY. I

DON'T THINK THAT AT THE TIME THE ASSETS, ACTUALLY 61.075 SAYS THAT WE HAVE TO DO EQUITABLE DISTRIBUTION FIRST AND THEN WE HAVE TO LOOK AT THE ALIMONY, BUT IN THE HAMLET CASE, THIS COURT CLEARLY STATED THAT WE CAN DO EQUITABLE DISTRIBUTION AND ALIMONY AND THEN LOOK AT THE DISTRIBUTION AND BASAL MONEY UPON AN IN EQUAL DISTRIBUTION OF ASSETS.

I AM MISSING THE ANALOGY BETWEEN A PENSION AND A RENTAL PROPERTY, BECAUSE A PENSION EATS ITSELF UP. I MEAN THERE, IS A TIME WHEN IT IS DESIGNED TO ALL BE GONE. WITH RENTAL PROPERTY, THE PROPERTY IS ALWAYS THERE, AND IT IS INCOME THAT IS PURE INCOME, NO PRINCIPLE GOING AT THE TIME, SO I AM HAVING DIFFICULTY UNDERSTANDING HOW THOSE TWO ARE IDENTICAL.

IN THIS CASE, THOUGH, IT WASN'T LIKE THAT, BECAUSE IN THIS CASE WHAT YOU HAD WAS AN ANNUITY THAT WAS DISTRIBUTED AND A SEPARATE LUMP SUM CASH PAYMENT OF \$1.6 MILLION.

THIS IS SOMETHING DIFFERENT THEN, THAN THE CONCEPT WE HAVE BEEN TALKING ABOUT DOUBLE DIPPING ON A PENSION PLAN. IF THIS IS DIFFERENT, WE NEED TO KNOW IT IS DIFFERENT.

I THINK IT IS BOTH, BECAUSE OUR POSITION ON THE PENSION IS THAT IF IT GENERATES A STREAM OF INCOME THAT THE HUSBAND IS DRAWING ON TO SUPPORT HIMSELF, THEN HE NEEDS TO CONTINUE PAYING HIS ALIMONY AS LONG AS HE HAS THE ABILITY AND HE IS NOT LIVING OUT ON THE STREET BECAUSE HE IS RECEIVING SO LITTLE MONEY THAT HE CAN'T DO BOTH.

WHAT YOU ARE SAYING, AS I UNDERSTAND, THE ARGUMENT THAT YOU ARE MAKING HERE AND FROM THE BRIEF, IS THAT YOU DON'T LOOK AT THE TYPE OF ASSET THAT IS GENERATING THE INCOME. BECAUSE WHAT 61.80-G SAYS IS ALL SOURCES OF INCOME AVAILABLE TO EITHER PARTY.

THAT'S CORRECT. THAT IS ABSOLUTELY CORRECT.

AND THAT YOU LOOK AT ALL SOURCES OF INCOME AVAILABLE TO EITHER PARTY, AFTER THERE HAS BEEN IN HE CANABLE SDRIB -- INEQUITABLE DISTRIBUTION. IS THAT BECAUSE ARE SAY SOMETHING.

YES, AND IF YOU HAVE A PENSION PLAN GENERATING \$11,000 A MONTH.

BUT WHAT IS HAPPENING IS YOU ARE NOT JUST REPRESENTING INCOME. YOU ARE CONSUMING IT AT THE SAME TIME. THAT IS WHERE WE ARE GOING. IT IS NOT JUST INCOME. YOU KEEP MAKING THAT STATEMENT BUT IT IS NOT.

IN THIS CASE IT WAS BOTH, BECAUSE HE HAD AN ANNUITY AND HE ALSO HAD THE LUMP SUM, BUT YES, I AGREE WITH YOU IN THAT CASE THAT IT WOULD BE EXACTLY SIMILAR.

BUT IN HIS RETIREMENT, NORMAL PEOPLE THAT DON'T HAVE THE ADDITIONAL AMOUNTS THAT OBTAINED HERE, IT THAT YOU ARE GOING TO LOOK AT BOTH PARTIES, WHAT THEIR NEEDS ARE. BOTH PARTIES.

ABSOLUTELY.

SO THAT IF THE, AT RETIREMENT, THE ASSET, THE PENSION PLAN IS THE SOLE SOURCE OF A HUSBAND OR A WIFE'S INCOME, AND THEY NEED THAT TO LIVE ON, WE ARE HOPING NO COURT IS GOING TO SAY, WELL, THAT, WE ARE GOING TO IGNORE. THAT YOU SHOULD GO OUT AND --

ABSOLUTELY.

GET ANOTHER JOB.

YES. THAT IS ABSOLUTELY WHAT THE CASE LAW AND ALL OF THE STATUTES CONTEMPLATE. IF MR. ACKER WERE ONLY RECEIVING SOCIAL SECURITY INCOME, CERTAINLY THERE WOULD HAVE BEEN A MODIFICATION, BUT AGAIN IN THIS CASE, BASED UPON A TOTALITY OF THE CIRCUMSTANCES, WHERE YOU HAVE AN ASSET THAT IS REDUCING, A STREAM OF INCOME, AND YOU ALSO HAVE OTHER ASSETS THAT COULD HAVE BEEN DRAWN UPON TO PAY THE ALIMONY, THERE WAS NO BASIS FOR MODIFICATION.

CHIEF JUSTICE: WE ARE GOING TO HAVE TO END ON THAT NOTE. THANK YOU VERY MUCH. HOW MUCH TIME FOR REBUTTAL? OKAY.

OKAY. JUST TO READDRESS MY RECOLLECTION OF THE A.M. I CAN -- -- OF THE AMICUS BRIEF, I BELIEVE THE FAMILY LAW SECTION ARGUED HALFWAY NOT AS JUSTICE LEWIS SAID, REGARDING THE WHOLE \$11,000, THEY ARGUED THAT THE INCOME ON IT WOULD BE SUBJECT TO BEING AN ALIMONY SOURCE NOT THE ENTIRE AMOUNT. ADDRESSING --

WHAT DID, OKAY, JUST GOING BACK TO WHAT THE JUDGE DID IN THIS CASE, WHAT DID THE JUDGE, YOU KNOW, NOW WE, OF COURSE THIS IS HIS CASE SPECIFIC, BUT AS YOU SAY IT HAS GREATER IMPLICATIONS, DID THE JUDGE ERRONEOUSLY CONSIDER TOO MUCH? DID THEY CONSIDER WHAT WAS GOING TO BE NECESSARY FOR THIS PERSON TO LIVE ON EVERY YEAR, OR --

I DON'T THINK, THE JUDGE JUST TOOK THE POSITION HE IS BETTER OFF, CONTINUE PAYING THE ALIMONY, WITHOUT ADDRESSING THE DEFENDER'S PROVISIONS AND WITHOUT ADDRESSING THE FACT THAT SHE HAD \$600,000 WORTH OF ASSETS AVAILABLE FOR HER SUPPORT. ALIMONY IS AN ENTITLEMENT. IT IS NOT A PROPERTY RIGHT AND YOU HAVE TO MEET THE REQUIREMENTS, BECAUSE --

YOU WOULD HAVE TO AGREE THAT ONE OF THE REQUIREMENTS IS THIS SECTION G, WHICH SAYS ALL SOURCES OF INCOME AVAILABLE TO EITHER PARTY.

EITHER PARTY. BOTH PARTIES. BUT YOU HAVE TO MEET HER NEEDS FIRST. I MEAN, YOU DON'T SAY SINCE HE HAS MORE INCOME YOU DON'T HAVE TO CONSIDER HER INCOME. REMEMBER HE IS NOT EARNING INCOME. IS HE DEPLETING AN ASSET, TO MEET HIS NEEDS, AND HER NEEDS.

GO AHEAD.

I THOUGHT THAT THE, IF, IN THE CASE, FOR EXAMPLE, ALL HE HAD WAS THIS AND SHE HAD \$5 MILLION OF ASSETS, I UNDERSTOOD THAT MS. HAAS WAS SAYING THAT, YES, OF COURSE THE COURT SHOULD BE CONSIDERING THAT IN DETERMINING WHETHER HE SHOULD PAY MORSE ALIMONY. ARE YOU -- SHOULD PAY MORE OR LESS ALIMONY. IT SEEMS LIKE YOU ARE SAYING THE SAME THING, JUST AS TO HOW IT APPLIED IN THIS CASE AS TO WHETHER THE JUDGE ABUSED HIS DISCRETION IN DOING THAT. I DON'T THINK WE ARE GOING TO BE LOOKING AT, GOING BACK AND LOOKING AT THE SPECIFICS OF WHETHER THERE WAS SOME ERROR IN NOT, IN THE WAY THAT THIS DECISION WAS MADE, OTHER THAN THE LEGAL PRINCIPLE OF WHETHER YOU COULD LOOK AT HIS PENSION PLAN INCOME AS A SOURCE OF, FOR THE MODIFICATION. IN OTHER WORDS, DO YOU AGREE THAT YOU STILL SHOULD LOOK AT BOTH PARTY'S OTHER ASSETS, WHEN YOU ARE LOOKING AT THE MODIFICATION QUESTION?

THAT IS CORRECT. YOU LOOK AT THE ASSET FLOW BUT YOU CAN'T LOOK AT THEM BOTH TOGETHER. YOU HAVE TO LOOK AT HER ASSETS FIRST, TO MEET HER NEEDS, AND THEN IF THEY ARE INSUFFICIENT, THEN YOU GO TO HIS INCOME GENERATED BY HIS DEFENDER'S EQUITABLE DISTRIBUTION ASSETS, NOT RETIREMENT, BUT STILL WHEN IT COMES TO RETIREMENT PLANS, THE INCOME IS AN INTEGRAL PART OF IT, BECAUSE IT IS NEEDED TO MAINTAIN THAT BENEFIT THROUGHOUT THE LIFE EXPECTANCY, VERSUS THE RENTAL PROPERTY SCENARIO, WHERE THE INCOME IS SEPARATE. THE 100 SHARES OF THIS FANTASTIC STOCK THAT THROWS OFF \$100,000 OF

DIVIDENDS, THOSE DIVIDENDS CAN BE SEPARATED. THAT IS THE DIFFERENCE.

CHIEF JUSTICE: THANK YOU VERY MUCH. THANK YOU BOTH, VERY MUCH. THE COURT IS GOING TO TAKE ITS MORNING RECESS AND WILL BE IN RECESS UNTIL A QUARTER OF THE HOUR.

MARSHAL: PLEASE STAND.