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IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT
IN AND FOR XXXXXXXXXXXX COUNTY, FLORIDA

XXXXXXXXXXXXXXXXXXXX XXXXX, :
: Petitioner, : CASE NO. XXXXXXXXXXXXXXXXXXXX XX
: :
: FAMILY DIVISION
vs. :
: :
: :
XXXXXXXXXXXXXXXXXXXX XXXXX, :
: Respondent

MOTION FOR RECONSIDERATION OF THE COURT'S ORDERS DATED
AUGUST 9, 2004 (CORRECTED AUGUST 18, 2004), WHICH FREEZES
RESPONDENT'S ASSETS, AND AUGUST 18, 2004, WHICH ORDERS
TEMPORARY ALIMONY, ATTORNEY'S FEES AND SUIT COSTS

COMES NOW XXXXXXXXXXXXXXXXXXXX XXXXX, Esq., XXXXXXXXXXXXXXXXXXXX in the
above encaptioned action, respectfully moving the Court for

(a) An Order setting a date for a reconsideration hearing concerning a set of Orders entered by the Court dated August 9, 2004 (corrected August 18, 2004), which pertains to the "freezing" of respondent's assets, and August 18, 2004, which pertains to temporary support, attorney's fees and suit costs; and,

(b) An Order staying the court's August 18, 2004 Order pending resolution of this motion for reconsideration.

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PROCEDURAL HISTORY

Petitioner filed a Complaint for Divorce on March 31,
2004. Respondent filed a timely Answer.

Petitioner filed a motion on April 30, 2004 for temporary support (Attached hereto as Appendix A, Ra1 is a copy of Petitioner's Motion for Temporary Support.)

Respondent's attorney moved to withdraw after the filing of petitioner's motion for temporary support, but before the hearing was held. (Attached hereto as Appendix F, Ra190 is a copy of the court's Order dated August 6, 2004 relieving respondent's attorney.)

Three days later on August 9, 2004, the court held a hearing pertaining to petitioner's said motion for temporary support. (Attached hereto as Appendix D, Ra16 is a copy of the transcript dated August 9, 2004 of the said hearing.)

STATEMENT OF FACTS

A. Facts Adduced at the August 9, 2004 Hearing.

1. The parties have been married for over 36 years. [Appendix D, Ra16, at 3:18-22; 69:13-15] Petitioner filed a Complaint for Divorce on March 31, 2004.

2. Petitioner filed a motion on April 30, 2004 for temporary support [Appendix A, Ra1] and made a verbal motion at the August 9, 2004 temporary support hearing to freeze respondent's assets. [Appendix D, Ra16, at 148:13 to 150:2]

3. The verbal motion regarding the freezing of the assets resulted in an Order dated August 9, 2004 [Appendix B, Ra4],

and the motion for temporary support resulted in an Order dated August 18, 2004. [Appendix C, Ra9]

4. Respondent objected at the time that the "freezing of the assets" motion was made that the assets being frozen were non-marital assets. [Appendix D, Ra16, at 149:23 to 150:2]

5. Petitioner earns \$35,000 per year as a legal assistant with a net of \$2,000 per month. [Appendix D, Ra16, at 3:18-25]

6. Respondent is an attorney who for the past one year has operated out of XXXXXXXXXXXXXXXX , Florida, and prior to that has operated in Europe and Asia. [Appendix D, Ra16, at 3:18 to 4:5, 69:16-23 and 70:12-24]

7. Respondent's practice focuses on international debt collection matters, including related litigation strategies and private investigations. [Appendix D, Ra16, at 70:6-11]

8. Mr. XXXXXXXXXXXXXXXX owns interests in various domestic and international companies. His business life is quite complicated. He, *inter alia*, is

(a) The sole shareholder of XXXXXXXXXXXXXXXX XXXXX, P.A., in XXXXXXXXXXXXXXXX , Florida, which has been in existence for the past twenty seven years [Appendix D, Ra16, at 71:2-4];

(b) The vice president of XXXXXXXXXXXXXXXX , in XXXXXXXXXXXXXXXX , Florida, which has been in existence for the past several years [Appendix D, Ra16, at 71:5-11];

(c) An officer of XXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXX, Inc., in XXXXXXXXXXXXXXXX, Florida, which has been in existence for the past one year [Appendix D, Ra16, at 71:12-15];

(d) An officer and director of a company called XXXXXXXXXXXXXXXX in New York, which has been in existence for the past one year [Appendix D, Ra16, at 71:22 to 72:1];

(e) An officer of XXXXXXXXXXXXXXXX in XXXXXXXXXXXXXXXX, Florida, which has been in existence for the past one year [Appendix D, Ra16, at 72:9-13];

(f) The managing director of XXXXXXXXXXXXXXXX, GMBH, in Austria [Appendix D, Ra16, at 72:20-24];

(g) The director of XXXXXXXXXXXXXXXX Limited in the United Kingdom [Appendix D, Ra16, at 74:6-9]; and,

(h) The president of XXXXXXXXXXXXXXXX, in XXXXXXXXXXXXXXXX, Florida, which has been in existence for the past one year [Appendix D, Ra16, at 74:23 to 75:1]

9. Respondent's attorney was relieved by Order dated August 6, 2004 for what his attorney called "irreconcilable differences". [Appendix F, Ra190, Ra190]

10. The August 9th hearing on petitioner's motion for temporary support was held only three days after respondent's attorney was relieved on August 6th.

11. As explained in the following paragraphs, by the time of the hearing, and in part as a result of the before

mentioned "irreconcilable differences" with respondent's former attorney, only a portion of respondent's financial records had been compiled in time for the hearing and in time for review by a qualified expert.

12. At the time of the hearing, the parties were not able to have compiled the records pertaining to XXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXX [Appendix D, Ra16, at 71:16-21]; XXXXXXXXXXXXXXXX [Appendix D, Ra16, at 72:2-8]; XXXXXXXXXXXXXXXX Inc. [Appendix D, Ra16, at 72:14-19]; XXXXXXXXXXXXXXXX , GMBH [Appendix D, Ra16, at 72:20 to 74:5]; XXXXXXXXXXXXXXXX Limited [Appendix D, Ra16, at 74:6-22]; and XXXXXXXXXXXXXXXX . [Appendix D, Ra16, at 74:23 to 75:7]

13. Respondent's voluminous financial records are in several countries including the United States of America, United Kingdom and Austria. [Appendix D, Ra16, at 73:23 to 75:19]

14. Respondent objected during the hearing that he simply cannot produce all of that amount of documents within the time provided, but he was absolutely hammered for not producing everything. [Appendix D, Ra16, at 76:11 to 77:17]

15. Respondent only learned from his former legal counsel of the full extent of petitioner's notice to produce

voluminous documents a few weeks before the hearing.
[Appendix D, Ra16, at 77:17-20]

16. Respondent did the best he could in the time allowed, and in that time produced hundreds of pages of documents consisting of three bound volumes. Although those volumes were mentioned during the August 9, 2004 hearing [Appendix D, Ra16, at 73:7-16, 100:16-20 and 105:17-23], petitioner submitted hardly any of those documents into evidence, and apparently had not reviewed the contents of the documents submitted by the hearing.

17. A Certified Public Accountant, Michael M. XXXXXXXXXXXXXXXX, testified on petitioner's behalf, to evaluate respondent's income for the 2003 tax year and to make a determination as to his ability to pay temporary support.
[Appendix D, Ra16, at 24:2-10]

18. Mr. XXXXXXXXXXXXXXXX provided a so-called schedule which included his calculations to reach a determination that from November 2003 through May 2004, respondent deposited in the account of XXXXXXXXXXXXXXXX XXXXX, P.A., a total of \$304,162. [Appendix D, Ra16, at 27:13 to 28:15]²

² The transcript contains a typographical error. At 28:16-17, the transcript says that Respondent XXXXXXXXXXXXXXXX asked the court to accept the document into evidence. It was actually Petitioner's attorney who said that, as evidenced by

19. Respondent objected to the admission of Petitioner's-
1 into evidence because it appeared that Mr. XXXXXXXXXXXXXXXX
had calculated the same monies at least twice [Appendix D,
Ra16, at 28:16 to 29:6], and Mr. XXXXXXXXXXXXXXXX admitted to
not having the bank statements to support his position.
[Appendix D, Ra16, at 28:7-10]

20. Subsequently, respondent again objected to the
\$304,162 figure being used. [Appendix D, Ra16, at 31:8-15]

21. Based upon the documents that he had in his
possession at the time, Mr. XXXXXXXXXXXXXXXX admitted that he
could not determine any of respondent's business or personal
expenses other than his rent, and he could not even state the
amount thereof. [Appendix D, Ra16, at 29:20 to 30:9]

22. Mr. XXXXXXXXXXXXXXXX admitted on cross-examination that
the due date for almost all of the financial documents that
respondent was demanded to produce, such as complex federal
and international tax returns, had not even expired and would
not need to be filed for another several months, or longer.

23. Mr. XXXXXXXXXXXXXXXX admitted that for a corporation
domiciled in the United States, Federal tax returns are
typically due on March 15th of each year and in the State of

Respondent's objection appearing immediately thereafter at
28:18 to 29:2.

Florida they are due on April 1st of every year. [Appendix D, Ra16, at 33:2-23]

24. Mr. XXXXXXXXXXXXXXXX admitted that income tax filing extensions were available that delayed the due date for a federal tax returns to September 15th and for state returns to October 1st [Appendix D, Ra16, at 34:3-16], and further admitted that it is routine for companies to seek extensions of filing dates. [Appendix D, Ra16, at 35:18 to 36:2]

25. Mr. XXXXXXXXXXXXXXXX testified that an individual's federal tax return is due on April 15th of each year with an extension available until August 15th and a second extension available until October 15th. [Appendix D, Ra16, at 34:24 to 35:9]

26. Again, Mr. XXXXXXXXXXXXXXXX testified that it is not by any means unusual for an individual taxpayer to obtain an extension to either August or October as stated above. [Appendix D, Ra16, at 35:18 to 36:2]

27. Mr. XXXXXXXXXXXXXXXX testified that individual taxpayers in the United States who have interests abroad need to also file "something" in connection with a federal 1040 form, but that those papers were yet due because they are not due until after all other tax return documents have been filed. [Appendix D, Ra16, at 36:3 to 37:6]

28. Mr. XXXXXXXXXXXXXXXX admitted that respondent's state and federal tax returns were not yet due at the time of the August 9, 2004 hearing and that the documents pertaining to international interests would not be due until after September 2004. [Appendix D, Ra16, at 34:3-23; 34:24 to 35:17; 36:18 to 39:6]

29. Mr. XXXXXXXXXXXXXXXX testified that it is not proper procedure for a Certified Public Accountant to make determinations of any kind about one's finances for a calendar year until he or she is in possession of all books and records. [Appendix D, Ra16, at 37:24 to 38:10]

30. Again, as set forth above, Mr. XXXXXXXXXXXXXXXX hardly had any of respondent's records in his possession in order to reach the determination that he did. [Appendix D, Ra16, at 24:21 to 25:14, 28:7-10 and 30:18 to 31:7]

31. Mr. XXXXXXXXXXXXXXXX even admitted that he could not, based upon the information before him, testify about the character of the deposits made into respondent's accounts and could not, if required to do so, prepare **any kind** of accounting reports or tax returns.

Q. Can you testify to the amount of deposits that were in [the Lloyd's] bank account based upon the information you'd been provided so far?

A. No, sir.

[Appendix D, Ra16, at 41:15-21]

Q: Based upon the records that you've received so far from counsel, do you think you have enough information to prepare any kind of accounting report for the subject principal of XXXXXXXXXXXXXXXX ?

A: No.

Q: Would you file tax returns based upon what you have so far?

A: I would not file tax returns, no.

[Appendix D, Ra16, at 53:10-17]

32. This case, as shown above, involves international entities. Yet, Mr. XXXXXXXXXXXXXXXX has NO experience with such cases. He, as a Certified Public Accountant, he cannot even as much as convert British Pounds into United States dollars.

[Appendix D, Ra16, at 42:2-20]

33. When cross-examined about such conversions of pounds-to-dollars, and asked specifically, "Do you have any idea?", his response was: "No, sir". [Appendix D, Ra16, at 42:2-20]

34. To boot, he has no idea whether information in European accounting computer programs used by respondent at the time can be automatically converted for him by the United States Quick Books Pro version of the accounting programs.

[Appendix D, Ra16, at 38:18 to 39:6] (Although not put on the record in the trial court, the answer to the question about

the conversion is that the information actually cannot be electronically converted into the U.S. version of the accounting programs. This writer is a Certified Public Accountant with over 30 years experience and is qualified to make that determination.)

35. Mr. XXXXXXXXXXXXXXXX is not certified in the use of those complex accounting programs and he had never taken as much as one course regarding those programs [Appendix D, Ra16, at 51:12-21], whereas he has received full training using other programs. [Appendix D, Ra16, at 51:22 to 52:10]

36. Petitioner demanded a budget of \$15,000 for accounting services, yet Mr. XXXXXXXXXXXXXXXX never had seen that budget, had no information about it and provided no testimony regarding same. [Appendix D, Ra16, at 54:24 to 55:4]

37. Petitioner's counsel, while testifying about the budget she wanted to set for the case, testified that she wanted to hire an accountant not experienced in international accounting, and that the parties would just have to pay him to educate himself if he needed such knowledge.

Q: Do you think we need that accountant who doesn't know anything about the UK and Austria?

A: Yes, sir.

Q: You do. So do you think we should pay him to educate him about matters of international scope?

A: Yes, sir.

[Appendix D, Ra16, at 139:7-12]

38. One of the most interesting issues raised during the hearing in question was that, as just stated, petitioner's attorney testified that an accountant was not required for this case who was experienced in international transactions and pounds-to-dollars issues. Mr. XXXXXXXXXXXXXXXX felt different, however. He admitted that a conversion of British Pounds to U.S. dollars was necessary in order to make financial determinations. [Appendix D, Ra16, at 43:1-12]

B. The Court's Ruling.

39. Attached hereto as Appendix B [Ra4] is a copy of the court's August 9, 2004 Order freezing respondent's assets held by HSBC and Merrill Lynch.

40. Attached hereto as Appendix C [Ra9] is a copy of the court's August 18, 2004 Order granting petitioner temporary support in the amount of \$2,500 per month along with past, current and prospective attorney's fees and suit costs in the amount of \$30,000.

41. The court awarded petitioner's counsel \$20,000 in temporary attorney's fees [Appendix D, Ra16, at 154:19 to 155:9] and \$10,000 for accounting fees. [Appendix D, Ra16, at 155:10-15]

C. Facts Requiring Reconsideration.

42. There are various reasons that reconsideration is necessary at this time.

43. Petitioner's represented monthly living expenses, and the court's temporary support award of \$5,160, is overstated. [A copy of petitioner's financial disclosures is reproduced at Appendix G, Ra197.]

44. The said overstatement concerns the fact that the court has Ordered respondent to pay certain items, such as health insurance premiums, to petitioner that respondent is already paying separately. This has allowed petitioner to double-dip. Petitioner's Financial Disclosures provides that her figure of \$5,160 per month in living expenses includes a need for \$442.12 for respondent's health insurance and \$282.00 for a car lease. Respondent pays these items separately.

45. Also, if the court were to add petitioner's expenses from top to bottom, there is \$1,713.55 in mathematical errors. That further decreases petitioner's monthly expenses. [A copy

of petitioner's financial disclosures is reproduced at Appendix G, Ra197.]

46. Another reason that reconsideration is warranted is that respondent is making progress in collecting his financial information that was not presented during the August 9, 2004 hearing.

47. Attached hereto as Appendix I, Ra210, is an Affidavit from respondent's Accountant, Deborah M. XXXXXXXXXXXXXXXX, enumerating what she and respondent have been accomplishing. There are ten exhibits that go along with that Affidavit:

- Exhibit A: Résumé of XXXXXXXXXXXXXXXX ... Appendix I, Ra216
- Exhibit B: 8-6-04 Letter from Mrs. XXXX App. I, Ra218
- Exhibit C: XXXXXXXXXXXXXXXX Trust Balance ... Appendix I, Ra219
- Exhibit D: XXXXXXXXXXXXXXXX Trust Balance Appendix I, Ra220
- Exhibit E: Respondent's 2003 1040 Form Appendix I, Ra221
- Exhibit F: Petitioner's 2003 1040 Form Appendix I, Ra230
- Exhibit G: XXXXXXXXXXXXXXXX, P.A., Balance ... Appendix I, Ra238
- Exhibit G3: XXXXXXXXXXXXXXXX PA Profit & Loss App. I, Ra261
- Exhibit H: Festivals of XXXXXXXX Balance Appendix I, Ra262
- Exhibit I: Comerci Corp. Balance Sheet Appendix I, Ra263
- Exhibit J: XXXXXXXXXXXXXXXX Corp. Appendix I, Ra264
- Exhibit G: XXXXXXXXXXXXXXXX, P.A., Balance ... Appendix I, Ra238

48. Ms. XXXXXXXXXXXXXXXX certifies in her Affidavit that she and respondent have just recently completed petitioner and respondent's 2003 USA Form 1040's, organized the 2003 accounts for XXXXXXXXXXXXXXXX XXXXX, P.A., and are constructing trial balances for XXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXX, Inc., XXXXXXXXXXXXXXXX and XXXXXXXXXXXXXXXX. [Appendix I, Ra210 at Paragraphs 5-7]

49. In addition to this, respondent has made plans to visit Austria and the United Kingdom in late October 2004 to have his tax and other necessary financial documents completed for XXXXXXXXXXXXXXXX, GMBH, which is an Austrian corporation and XXXXXXXXXXXXXXXX Limited, which is an England and Wales corporation.

50. The only finalized numbers as of the date of this writing that can be provided to the court as to respondent's finances are that XXXXXXXXXXXXXXXX XXXXX, P.A., incurred a loss of \$18,824 for the period from January 1, 2003 to December 31, 2003. It has a negative net worth of \$58,508 on the accrual basis of accounting. [Appendix I, Ra210 at Paragraph No. 10]

51. Ms. XXXXXXXXXXXXXXXX certifies that respondent's 2003 1040 tax return shows an Adjusted Gross Income of \$64,000, but only \$18,000 or such is a recurring income amount for 2004. The 2003 accounts of XXXXXXXXXXXXXXXX XXXXX, P.A., show a salary

to respondent of the same \$18,000 annual salary and a Net Operating Loss for 2003 of \$18,864. after said respondent salary. [Appendix I, Ra210 at Paragraph Nos. 9-10]

52. Ms. XXXXXXXXXXXXXXX also certifies that she had not seen any indication thus far that respondent has anywhere near \$30,000 in disposable assets to make compliance with the court's August 18, 2004 Order possible. [Appendix I, Ra210 at Paragraph Nos. 8 and 12]

53. Finally, the court's August 9, 2004 Order freezes respondent's assets that constitute non-martial assets in that they were inherited from respondent's mother. Those assets have never been commingled with martial assets. This issue also requires reconsideration.

D. Appeal.

54. Respondent filed a timely Notice of Appeal as to both the August 9 and 18, 2004 Orders. [Appendix G, Ra193]

LEGAL ARGUMENT

POINT I

FLORIDA COURTS HAVE THE INHERENT AUTHORITY TO RECONSIDER THEIR ORDERS

Florida courts have the "inherent authority to reconsider and, if deemed appropriate, alter or retract any of its nonfinal rulings prior to entry of the final judgment or order

terminating an action". Silvestrone v. Edell, 721 So.2d 1173, 1175 (Fla. 1998). See also Mason v. E. Speer & Associates, Inc., 846 So.2d 529, 536, *rehearing denied*, 857 So.2d 196 (Fla. App. 4 Dist. 2003); May Investments, Inc. v. Lisa, S.A., 814 So.2d 471, 472 (Fla. App. 3 Dist. 2002).

POINT II

**THE COURT ABUSED ITS DISCRETION BECAUSE
ABSOLUTELY NO SHOWING HAS BEEN MADE THAT
RESPONDENT POSSESSES \$30,000 TO PAY**

The court is required under Florida Statute §61.08(2)(d) to take respondent's inability to pay into consideration. Sokol v. Sokol, 441 So.2d 682, 684 (Fla. App. 2 Dist. 1983) ("in determining the proper amount of ... alimony, the trial court must consider the []husband's ability to pay ...").

Although entering an Order requiring payment of what respondent cannot afford to pay may not offend the law, attempting to enforce the Order would violate respondent's due process rights guaranteed under the Fourteenth Amendment to the United States Constitution. Martyak v. Martyak, 873 So.2d 405 (Fla. App. 4th Dist. 2004).

[H]aving Martyak taken into custody as a result of his contempt was erroneous in light of the trial court's failure to make separate affirmative findings that he has the ability to pay the purge amount, and the basis for such ability. In light of this error we reverse the order of the trial

court and instruct that upon remand further proceedings take place that are consistent with this opinion.

Id. at 407.

At no time during the August 9th hearing was evidence provided that respondent is in possession of \$30,000 to make him able to pay the court's award embodied in its August 18, 2004 Order. [Appendix C, Ra9]

In fact, respondent's expert witness, an accountant, Deborah M. XXXXXXXXXXXXXXXX, has provided the court an Affidavit that respondent's XXXXXXXXXXXXXXXX XXXXX, P.A., incurred a loss of \$18,824 for the period from January 1, 2003 to December 31, 2003 and that it has a negative net worth of \$58,508 on the accrual basis of accounting. [Appendix I, Ra210 at Paragraph No. 10]

Ms. XXXXXXXXXXXXXXXX certifies in her Affidavit that respondent's 2003 1040 tax return shows an Adjusted Gross Income of \$64,000, but only \$18,000 or such is a recurring income amount for 2004. The 2003 accounts of XXXXXXXXXXXXXXXX XXXXX, P.A., show a salary to respondent of the same \$18,000 annual salary and a Net Operating Loss for 2003 of \$18,864. after said respondent salary. [Appendix I, Ra210 at Paragraph Nos. 9-10]

Finally, Ms. XXXXXXXXXXXXXXXX certifies in her Affidavit that she had not seen any indication thus far that respondent has anywhere near \$30,000 in disposable assets to make compliance with the court's August 18, 2004 Order possible.

[Appendix I, Ra210 at Paragraph Nos. 8 and 12]

Respondent is hereby respectfully putting the court and the parties on notice that he does not, and never did pending this case, have the ability to meet the financial obligations set forth in the court's August 18, 2004 Order.

Accordingly, compliance cannot, and apparently will not, be made with that Order for reasons outside of respondent's abilities. The Court is asked to reconsider and modify the Order accordingly.

POINT III

THE COURT'S AWARD OF \$2,500 PER MONTH IN TEMPORARY SUPPORT NEEDS REVISION IN THAT THE FIGURE IS DERIVED FROM A MATHEMATICAL MISCALCULATION

The court's August 18, 2004 Order [Appendix C, Ra9] inadvertently allows for double dipping. Paragraph 5 of the Order provides that respondent must continue paying \$442.12 per month to petitioner for his medical coverage, whereas payment for that coverage is already encompassed in petitioner's demand for \$5,160 per month in alimony.

Petitioner's Financial Disclosures [Appendix H, Ra196] lists the medical coverage as being part of that figure.

Also, petitioner's demand for \$5,160 per month includes \$282.00 for a car lease. [Appendix H, Ra196] Respondent already pays that item separately.

Finally, if the court were to add petitioner's expenses from top to bottom, there is \$1,713.55 in mathematical errors. The court should reconsider and modify petitioner's award pursuant to Florida Statute §61.08(2)(a) requiring the court to take the parties' standard of living into consideration. The award is inconsistent with the parties standard of living and makes an award to petitioner in an amount inconsistent with her current monthly needs.

POINT IV

THE COURT'S ORDER FREEZING RESPONDENT'S HSBC AND MERILL LYNCH ACCOUNTS IS AN ABUSE OF DISCRETION BECAUSE IT HAS NOT BEEN SHOWN THAT THE ACCOUNTS ARE MARITAL ASSETS

Respondent's HSBC and Merill Lynch accounts are non-marital assets in that they were obtained by inheritance from the death of respondent's mother in 2002. The court has frozen those assets, however, presumably to preserve them for equitable distribution.

Equitable distribution is governed by Florida Statute § 61.075, which clearly sets forth what constitutes a marital asset. This statute clearly states that assets obtained via noninterspousal bequest or devise **DO NOT** constitute marital assets.

(a) "Marital assets and liabilities" include:

1. Assets acquired and liabilities incurred during the marriage, individually by either spouse or jointly by them;

* * * *

(b) "Nonmarital assets and liabilities" include:

* * * *

2. Assets acquired separately by either party by noninterspousal gift, bequest, devise, or descent, and assets acquired in exchange for such assets;

3. All income derived from nonmarital assets during the marriage unless the income was treated, used, or relied upon by the parties as a marital asset;

* * * *

Florida Statute § 61.075(3)(a) and (b) *et seq.*

No showing of commingling of marital with non-marital assets was made during the hearing. In fact, it was not until

the very end of the hearing that the freezing of assets was even mentioned via petitioner's oral motion. [Appendix D, Ra16, at 148:13 to 150:2]

A. Respondent was Denied Due Process.

Although verbal motions are not prohibited under the Rules, due process of law under the United States Constitution requires that a party have fair notice of the issues to be presented and a fair opportunity to be heard and to present evidence.

[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.

Little v. Streater, 452 U.S. 1, 5-6 (1981), quoting Boddie vs. Connecticut, 401 U.S. 371, 377 (1971).

Respondent was afforded no notice to come to court prepared to prove this asset to be non-martial in nature. Furthermore, petitioner waited until all testimony was completed and the hearing was concluding to make her motion to freeze the assets.

The court should reconsider the matter and hear respondent's defenses at this time.

B. An Injunction Was Inappropriate Even Aside from the Non-Martial Nature of the Assets.

Florida Statute 61.11 provides that, "When either party is about to remove himself or herself or his or her property out of the state, or fraudulently convey or conceal it, the court may award a ne exeat or injunction against the party or the property and make such orders as will secure alimony or support to the party who should receive it." Id. See also P.T.S. Trading Corp. v. Habie, 673 So.2d 498 (Fla. App. 4 Dist. 1996), *citing* Gooding vs. Gooding, 602 So.2d 615 (Fla. App. 4 Dist. 1992).

"A preliminary injunction is an extraordinary remedy which should be granted only if the party seeking the injunction establishes the following criteria: (1) the likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) substantial likelihood of success on the merits; and (4) consideration of the public interest." Dragomirecky v. Town of Ponce Inlet, 2004 WL 2071202, *1 (Fla. App. 5 Dist. 2004). "A trial court's denial of a preliminary injunction comes to the appellate court with a presumption of correctness, and is reversible only upon a showing of a clear abuse of discretion." Id.

The moving party must prove a "common ownership" over the assets and "that a lifting of the injunction would expose those assets to conversion or dissipation". Vargas v. Vargas, 771 So.2d 594, 595-96 (Fla. App. 3 Dist. 2000).

Petitioner failed to meet her burden pertaining to common ownership over assets inherited from respondent's mother, and the trial court outright failed to make findings of fact or conclusions of law of any kind on this issue.

In Vargas, the court upheld the freezing of assets, but only when both elements of "freezing" had been met and based upon detailed findings of fact from the trial court. "In its order granting the temporary injunction, the trial court made clear, definite, and unequivocal factual findings sufficient to support each of the elements necessary to justify the entry of the temporary injunction." Id. at 596.

In Vargas, the moving party proved a probability that the money would be moved out of the jurisdiction. There was no such showing in the case at bar.

The court is also referred to P.T.S. Trading Corp. v. Habie, 673 So.2d 498 (Fla. App. 4 Dist. 1996). There, the enjoined party admitted during his deposition "he unsuccessfully attempted to evade [a court] order by back-dating [a] fax to [a] bank that was holding [his] company's

funds in an attempt to move money out of [the] country." Id. at 500. Circumstances such as those presented in P.T.S. are not presented here.

The court is referred back to Florida Statute 61.11. Under that statute a court may only freeze a party's assets when it is proven that "either party is about to remove himself or herself or his or her property out of the state, or fraudulently convey or conceal it ... " Id. No such showing was made in this case.

Finally, petitioner has failed to show a lack of an adequate remedy at law. Assuming *arguendo* that petitioner is entitled to some of those assets as equitable distribution, there would be adequate remedies at law if respondent dissipated the assets. Petitioner could secure a judgment in the matrimonial case and could then attach on the corporations, perhaps liquidate the corporations, she is already in possession of the marital home and the like.

The fact that the petitioner in Weinstein v. Aisenberg, 758 So.2d 705 (Fla. App. 4 Dist. 2000), could obtain a money judgment was deemed to be an adequate remedy at law, and for that reason, an injunction was denied. "The appellee has an adequate remedy at law, i.e., money damages." Id. at 706. "The order granting the temporary injunction must be reversed

because the complaint failed to show lack of an adequate remedy at law justifying issuance of an injunction." Id. at 707. See also Williams v. Boyer ex rel. Boyer, 734 So.2d 1206 (Fla. App. 4 Dist. 1999)(same).

Accordingly, an adequate remedy at law is available to petitioner. It was simply inappropriate under the evidence provided for the court to freeze respondent's assets. The August 9, 2004 Order should be rescinded.

POINT V

AN AWARD OF \$30,000 IN PROSPECTIVE FEES VIOLATES PUBLIC POLICY AND DOES LITTLE MORE THAN ENCOURAGE LITIGATION

Respondent does not dispute that a fair reading of Florida Statute 61.16(1) allows for prospective fee and costs awards, but there is not much law in the State of Florida about such prospective awards. We have basically two cases to rely upon: Abraham v. Abraham, 700 So. 2d 421 (Fla. App. 3 Dist. 1997), and Schubot v. Schubot, 523 So. 2d 661 (Fla. App. 4 Dist. 1988).

The District Court of Appeals disapproved a prospective fee award in Abraham. It did so, however, in a one paragraph opinion under circumstances where the trial court also Ordered child support without applying the guidelines and awarded the

wife temporary support in the amount of 87% of the husband's worth. Id. at 422. The case is not very helpful.

In Schubot, the Court allowed an award of prospective attorney's fees in light of the wife's evidence that additional attorney time was required and that the husband had a net worth exceeding 30 million and had an ability to pay the award. Id. at 661-62.

In this case, however, there is no showing that respondent has thirty million dollars, or even thirty thousand dollars for that matter. Caselaws from other jurisdictions have been mustered to assist in resolving this issue.

Respondent respectfully contends that an award of \$30,000 for fees and costs violates public policy. Having an extraordinarily large amount of money for litigation will do nothing more than encourage the parties to thumb their noses at one another. State Farm Fire and Casualty Co. v. Higgins, 788 So. 2d 992, 1006 (Fla. App. 4 Dist. 2001) (settlement is Florida public policy); Allstate Ins. Co. v. Chaple, 774 So. 2d 742, 744 (Fla. App. 3 Dist. 2000) (same); Kilpatrick v. Ogden Entertainment, Inc., 745 So. 2d 492, 494 (Fla. App. 1 Dist. 1999) (same).

A case on-point is Neidlinger v. Neidlinger, 52 S.W. 3d 513 (Ky. 2001). There, the Kentucky Supreme Court approved an

award of prospective attorney's fees, but with a limitation that not too much be awarded because it will violate public policy by being counterproductive. "In awarding prospective attorney's fees, the trial court should consider the possibility that the case might be settled or that the parties might reconcile before the awarded fee is actually earned."

Id. at 521.

Neidlinger recognizes that as a matter of human nature, when party has \$30,000 cash in their arsenal, 100% of it solely for fees and costs, who will want to settle? Will the attorney holding that money diligently pursue settlement, or will he or she delay until all of the resources have been depleted?

An award of \$30,000 in prospective fees is simply inappropriate. The court should reconsider and modify this ruling.

POINT VI

THE \$30,000 PROSPECTIVE AWARD FOR FEES AND COSTS WAS AN ABUSE OF DISCRETION BECAUSE THE AWARD WAS UNREASONABLE AND BECAUSE NEITHER OF THE TWO EXPERT WITNESSES, AN ACCOUNTANT AND AN ATTORNEY, STATED WHAT THE MONEY WOULD BE USED FOR

Awards of attorney's fees and costs of suit are governed by Florida Statute § 61.16(1) which provides that,

The court may from time to time, after considering the financial resources of both parties, order a party to pay a **reasonable** amount for attorney's fees, suit money, and the cost to the other party of maintaining or defending any proceeding under this chapter, including enforcement and modification proceedings and appeals ... An application for attorney's fees, suit money, or costs, whether temporary or otherwise, shall not require corroborating expert testimony in order to support an award under this chapter ... In all cases, the court may order that the amount be paid directly to the attorney, who may enforce the order in that attorney's name.

Id. (Emp. Supp.)

The clear meaning of this statute is that fees and costs may be awarded if they are reasonable, and that an expert is not required to testify as to the reasonableness of the award.

Surely \$30,000 in a lump sum exceeds the bounds of reasonableness, especially where \$15,000 of it is for alleged prospective accounting expenses under circumstances where all of the records have not been produced yet. Without having all of the records, how can such a determination be made as to what services will be needed?

Although the statute clearly says that expert testimony is not required in order to sustain an award of fees or costs, petitioner did present such an accounting expert. That expert testified that he had no idea where a figure of \$15,000 came

from [Appendix D at 54:24 to 55:4], and he made no indication whatsoever that the award was necessary.

Petitioner's attorney testified as to need for the \$30,000 in prospective costs and fees. She said nothing more than that if allowed to, she would put a tremendous amount of time into the case and run the parties a large legal bill.

Q: My name is Deanna Shifrin. I have been practicing family law for 18 years.

It is my opinion that in order to complete this case, I will need to have at least \$15,000 in costs, most which will be for accounting fees in order to determine Mr. XXXXXXXXXXXXXXXX 's income and assets. And I will need, I estimate, 61 hours in attorney hours to complete the case. I do not foresee the case settling.

[Appendix D at 132:6-15]

Ms. Shifrin provided no testimony about what she would do in those 61 hours, why she needed so much time or how she made that calculation. She also states that she does not foresee the case settling. With \$30,000 in her account, and a implied declaration by the trial court to go ahead and "dig in", does this court, with all due respect, really see a possibility of settlement either?

A party should not be able to just pick an number of attorney hours out of thin air and say, "This is how long it will take to complete this case". Requiring the moving party

to do this would be in accord with existing law that the burden of proof rests with the moving party to prove the reasonableness of the fee request. Safford v. Safford, 656 So. 2d 485, 486 (Fla. App. 2 Dist. 1994).

The court is asked to set a precedent construing Florida Statute § 61.16(1) as requiring that a party requesting a prospective award for fees or costs be able to explain exactly what the money will be used for.

POINT VII

THE COURT ABUSED ITS DISCRETION BY GRANTING AN AWARD OF \$15,000 IN FEES TO AN ACCOUNTANT WHO IS ADMITTEDLY UNQUALIFIED AND INEXPERIENCED WITH INTERNATIONAL TAXATION AND FINANCIAL ISSUES

Petitioner's expert witness is admittedly unqualified to handle this matter. This action involves various domestic and international businesses throughout the United States and parts of Europe. [Appendix D at 71:2 to 75:1] This action will require review of tax returns and asset records of foreign countries [Appendix D at 73:23 to 75:19], complex conversions of monies from **various** different countries into U.S. dollars and will require in-depth knowledge of international taxation issues.

Petitioner's accounting expert, Mr. XXXXXXXXXXXXXXXX, admits to having **absolutely no** experience in **any** of these areas. When cross-examined about conversions of European pounds into United States dollars, and asked specifically, "Do you have any idea?", his response was: "No, sir". [Appendix D at 42:2-20]

Mr. XXXXXXXXXXXXXXXX also has no idea how to operate the accounting programs used in Europe by respondent at the time can be automatically converted for him by the United States version of the accounting programs. [Appendix D at 38:18 to 39:6] In, fact those European programs cannot be converted into United States format. It all must be done manually, and Mr. XXXXXXXXXXXXXXXX admits to lacking the qualifications to do it himself.

The most disturbing aspect of this motion is the position taken by petitioner's attorney during the August 9, 2004 hearing about Mr. XXXXXXXXXXXXXXXX 's qualifications. It was her testimony that if Mr. XXXXXXXXXXXXXXXX does not know how to do these things, respondent should be required to pay Mr. XXXXXXXXXXXXXXXX to educate himself.

Q: Do you think we need that accountant who doesn't know anything about the UK and Austria?

A: Yes, sir.

Q: You do. So do you think we should pay him to educate him about matters of international scope?

A: Yes, sir.

[Appendix D at 139:7-12]

After a diligent attempt, a caselaw from the State of Florida could not be mustered pertaining to an award of fees for an inexperienced or unqualified expert. There are cases from other jurisdictions that provide us guidance, however.

In Brunner v. Brunner, 370 S.E. 2d 614 (S.C. App. 1988) (a copy of which is reproduced at Appendix J, Pa265), the Court of Appeals of South Carolina affirmed a trial court determination that the wife was not entitled to an award of fees for an unqualified expert witness. The expert witness in

that case was an attorney who provided testimony regarding bankruptcy issues that were outside of his scope of expertise.

No abuse of discretion is apparent here, especially since the family court found the witness unqualified to offer an expert opinion on bankruptcy litigation, a finding Mrs. Brunner does not challenge by proper exception, and since attorney fees incurred in protecting in the bankruptcy court an award of attorney fees made by the family court are unrecoverable as costs in the family court.

Id. at 63.

Likewise, in the case at bar, international taxation and financial issues are outside of Mr. XXXXXXXXXXXXXXXX 's expertise.

POINT VIII

THE TEMPORARY SUPPORT ORDER IS PREMATURE IN THAT EVEN PETITIONER'S EXPERT ADMITTED THAT HE WAS NOT IN POSSESSION OF ANYWHERE NEAR THE AMOUNT OF DOCUMENTS AND INFORMATION REQUIRED TO MAKE A FAIR DETERMINATION REGARDING RESPONDENT'S FIANANCES

Petitioner's expert witness, Mr. XXXXXXXXXXXXXXXX , admitted that he lacked sufficient information at the time of the August 9, 2004 hearing to provide a fair determination as to respondent's assets and ability to pay the \$30,000 award.

Q. Can you testify to the amount of deposits that were in [the Lloyd's] bank account based upon the information you'd been provided so far?

A. No, sir.

[Appendix D at 41:15-21]

Q: Based upon the records that you've received so far from counsel, do you think you have enough information to prepare **any kind** of accounting report for the subject principle of XXXXXXXXXXXXXXXX ?

A: No.

Q: Would you file tax returns based upon what you have so far?

A: I would not file tax returns, no.

[Appendix D at 53:10-17 (Emp. Supp.)]

Moreover, there was testimony during the case that at the time of the hearing petitioner was not in possession of the records pertaining to XXXXXXXXXXXXXXXX XXXXXXXXXXXXXXXX [Appendix D at 71:16-21]; Commercy [Appendix D at 72:2-8]; XXXXXXXXXXXXXXXX [Appendix D at 72:14-19]; XXXXXXXXXXXXXXXX , GMBH [Appendix D at 72:20 to 74:5]; XXXXXXXXXXXXXXXX [Appendix D at 74:6-22]; and XXXXXXXXXXXXXXXX , Inc. [Appendix D at 74:23 to 75:7] Respondents voluminous financial records are all over the United States and Austria. [Appendix D at 73:23 to 75:19]

Mr. XXXXXXXXXXXXXXXX 's determination was, therefore, premature. Almost all of these company's of respondents are

less than a year old and have not made a profit as of yet.

[Appendix D at 72:2 to 75:7]

Mr. XXXXXXXXXXXXXXXX also testified about the long list of documents that he needs to reach a fair determination about respondent's assets and ability to pay an award of \$30,000. He does not have any of these documents.

Q: Can you please tell the Court what the essential documents are to determine what Mr. XXXXXXXXXXXXXXXX 's ability to pay alimony and attorney's fees is.

A: The essential documents would be his corporate tax return for 2003, if it has not been prepared, 1099's, evidence of payments, evidence of deposit, all checks, all cash disbursements, cash receipt ledgers and account receivable ledgers. Deposit slips for his PA for 2002, 2003, 2004. Bank statements, canceled checks for his PA account form June 4 from the SunTrust bank. Checkbook registers from is PA from Wachovia bank account ending in 3275 for 2002, 2003, and 2004 to date and for SunTrust bank account ending in 8391 for 2004.

[Appendix D, 25:1-15]

CONCLUSION

The August 18, 2004 Order requiring respondent to pay \$30,000 in prospective fees and costs was premature in that, *inter alia*, no showing was made that respondent had the ability to pay that amount of money, an award that large will

only discourage settlement and \$15,000 of it to an unqualified expert was an abuse of discretion.

It was also an abuse of discretion to freeze some of respondent's assets in the August 9, 2004 Order in that there is no evidence that those are marital assets. There was no evidence of common ownership shown.

XXXXXXXXXXXXXXXXXXXX XXXXXX
XXXXXXXXXXXXXXXXXXXX

Dated: September 30, 2004

CERTIFICATION OF SERVICE

This is to certify that on October 4, 2004, I served a copy of this Notice of Appeal upon petitioner's attorney, XXXXXXXXXXXXXXXXXXXX, Esq., of the Law Offices of XXXXXXXXXXXXXXXXXXXX, XXXXXXXX, Florida 33130.

I hereby certify that the foregoing is true and correct to the best of my knowledge, information and belief.

XXXXXXXXXXXXXXXXXXXX XXXXXX