IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

THOMAS MITCHELL POTTER IV,
HUSBAND,

Appellant/Cross-Appellee,

DCA Case No. 1D20-0603
L.T. Case No. 2018-DR-002827

vs.

MALEE POTTER, WIFE, AND
TCB VETERINARY SERVICES, INC.,
D/B/A ALLIED VETERINARY
EMERGENCY HOSPITAL, A
FLORIDA FOR PROFIT CORPORATION,

Appellee/Cross-Appellant.
_____/

CROSS REPLY BRIEF OF APPELLEE/CROSS-APPELLANT, MALEE POTTER

Appeal from a Final Order of the Circuit Court

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ARGUMENT

The success and prosperity Mr. Potter enjoys today would not have been possible without Ms. Potter's joint efforts and support. While fully explained in the Initial Cross-Appellate brief, it bears repeating that the Potters had no significant assets when they married in 2000. When Mr. Potter went back to school, Ms. Potter supported him, not just emotionally, but also physically and financially, working full time, taking care of their three children and the marital home, and paying for Mr. Potter's education with her teaching salary. Ms. Potter moved multiple times for Mr. Potter's career, necessarily sacrificing her own teaching career in the process. And when Mr. Potter finally settled in Tallahassee, Ms. Potter worked for Mr. Potter for many years *without pay*, managing the office and helping to build their business, all the while continuing to take primary responsibility for maintaining their home and raising their children.

Now, after nearly 18 years of marriage and on the heels of the parties' divorce—a divorce due in large part to Mr. Potter's repeated and ongoing infidelities, spending lavishly on other women during their marriage *as the trial court found*—Mr. Potter invites this Court to award the fruits of the Potters' joint labors all but to himself. This Court must decline that invitation.

I. THE TRIAL JUDGE FAILED TO ADDRESS THE PRESUMPTION IN FAVOR OF PERMANENT PERIODIC ALIMONY IN THIS LONG-TERM MARRIAGE.

The trial court correctly found *as a matter of law*, that the Potters had a long-

term marriage of over 17 years according to section 61.08(4), Florida Statutes. It also made the requisite findings to support Ms. Potter's needs and maintenance requirements and Mr. Potter's ability to pay alimony as required by section 61.08(2). But the trial court then failed to address the presumption in favor of permanent alimony under section 61.08(8) and the applicable case law, erroneously awarding an inadequate durational amount instead. That was error. *See Rhoden v. Rhoden*, 295 So. 3d 864, 867 (Fla. 1st DCA 2020) (reversing when the court awarded durational alimony following a long term marriage without addressing the presumption favoring permanent alimony or explaining "how or why the presumption had been overcome" and when "the findings the court did make were insufficient to rebut the presumption in favor of permanent alimony").

Mr. Potter's full faith and credit argument—claiming the court failed to give full faith and credit to the Alabama *divorce* [CAB[1] 11]—is off point. The full faith and credit clause applies equally to the Potters' Alabama *marriage.* The trial court rightly recognized the Potters' first marriage (regardless of where it occurred) of over nine years combined with the second marriage of over eight years, with only a brief separation in-between (regardless of where the first divorce occurred), constitutes a long-term marriage under *Florida* law.

Section 61.08(4), Florida Statutes, defines a long-term marriage as "a

[1] "CAB" refers to the Cross Answer Brief.

marriage having a duration of 17 years or greater." This Court has held that when a couple has been married more than one time to each other, and the separation between marriages is brief, the court may combine the lengths of the marriages for determining an equitable settlement. *See Thomas v. Thomas*, 571 So. 2d 499, 502 (Fla. 1st DCA 1990); *see also Cox v. Cox*., 659 So. 2d 1051, 1054 n. 5 (Fla. 1995) (although overruling *Thomas* on other grounds, the Florida Supreme Court cited *Thomas* approvingly for the proposition that previous marriages between the same parties should be combined for purposes of determining alimony). The 2010 amendments to section 61.08 did not overturn this bedrock principle.

As described above and in the Initial Brief on Cross-Appeal, Mr. Potter would not be where he is today without Ms. Potter's support. The financial success the Potters achieved was accomplished during the Potters' nearly 18-year marriage and is 100 percent attributable to the Potters' *joint* efforts. Yet Mr. Potter would have this Court ignore the first eight years of the parties' marriage, ignore all the years during which Ms. Potter worked to put him through school and raised his children, and ignore binding case law from this Court.

The trial court's durational alimony award leaves Ms. Potter with a temporary and relatively small monthly income ($8,916, $2,916 of which is imputed) which will expire when the durational period terminates. And it leaves Mr. Potter with an over $66,000 per month income after deducting alimony, which,

as Mr. Potter himself testified, will only continue to increase over time.

Case after Florida case supports that, under these circumstances, the alimony the trial court awarded is inequitable and inadequate, and that the court committed reversible error by failing to recognize the presumption in favor of permanent alimony. *See, e.g.*, *Rhoden*, 295 So. 3d at 867; *Broemer v. Broemer*, 109 So. 3d 284, 290 (Fla. 1st DCA 2013); *Zeigler v. Zeigler,* 635 So. 2d 50, 54 (Fla. 1st DCA 1994); *Frerking v. Stacy*, 266 So. 3d 273, 275 (Fla. 5th DCA 2019); *Motie v. Motie*, 132 So. 3d 1210, 1213 (Fla. 5th DCA 2014); *Fortune v. Fortune,* 61 So. 3d 441, 446 (Fla. 2d DCA 2011); *Alcantara v. Alcantara,* 15 So. 3d 844, 845-46 (Fla. 3d DCA 2009); *see also Knoff v. Knoff*, 751 So. 2d 167, 168 (Fla. 2d DCA 2000) (holding "the great disparity in the Husband's income and the prospective income of the Wife warrants permanent alimony. Given the duration of the marriage, the lifestyle enjoyed during the marriage, the Wife's agreement to forego her career for a significant period of time in order to care for the children, the needs of the Wife, and the disparity in the parties' income, we conclude that the trial court abused its discretion in not awarding the Wife permanent alimony") (citations omitted).

Accordingly, this Court should reverse and remand for the trial court to decide the appropriate amount of permanent alimony here.

II. THE ALIMONY AWARD IS INADEQUATE BECAUSE IT DID NOT TAKE THE PARTIES' STANDARDS OF LIVING INTO CONSIDERATION

The trial court also erred by considering only Ms. Potter's post-separation

lifestyle and not her standard of living established during the marriage in calculating alimony. *See, e.g.*, *Juchnowicz v. Juchnowicz*, 157 So. 3d 497, 500 (Fla. 2d DCA 2015) (finding error when the trial court based the Wife's need on the postseparation lifestyle and not the standard of living enjoyed during the marriage). The purpose of awarding permanent alimony is to enable the moving spouse to maintain the lifestyle enjoyed during the marriage. *See Knoff*, 751 So. 2d at 168. Furthermore, "permanent periodic alimony is appropriate where one spouse has foregone a career to become a homemaker and to care for the children for a significant period of time" (*See id*. at 169), as Ms. Potter did here.

The record here shows that in 2018 when the Petition for dissolution was filed, Mr. Potter's income was $875,000 per year (nearly $73,000 per month), and continually increasing each year [*e.g*., R 124, 1239], and Ms. Potter's income was just $400 per month [R 40, 1081]. The parties stipulated Ms. Potter could potentially earn $35,000 per year as a teacher [R 123], although the stipulation was pre-COVID-19, and her teaching license had long expired. [R 1073-74]

Nonetheless, adding Ms. Potter's potential $35,000 annual income ($2,916 per month) to the $6,000 per month durational alimony leaves Ms. Potter with a hypothetical projected income of just $8,916 per month. Meanwhile, Mr. Potter's actual monthly income (after subtracting the $6,000 durational alimony award) would exceed $66,000. That is grossly inequitable.

In reversing the inadequate alimony award in *Juchnowicz*, the court noted the excessive income disparity when, after paying alimony, the wife would be left with just $4,800 per month income and the husband would still have $21,761 in income per month after deducting alimony.

Here, of course, the Potters' income disparity is much greater.

The $6,000 durational amount the court awarded also is not commensurate with the standard of living established by the parties during the marriage or with the husband's ability to pay. *See Juchnowicz*, 157 So. 3d at 500. In *Juchnowicz*, the court reversed an inadequate alimony award noting that the parties had enjoyed a lifestyle during the marriage which included a vacation home in Costa Rica and several expensive vehicles and homes. *Id.* While the husband continued to afford that lifestyle post-separation, the court-awarded alimony precluded the wife from doing so. *See id.* This "great disparity" warranted reversing the alimony award. *Id.*

Likewise here, among other things, the Potters owned multiple expensive vehicles for which they paid cash, a 130+ acre vacation property where they also kept numerous recreational vehicles, and they also took several expensive trips to other places each year. [R 123-24, 1079, 1094, 1114-15]

It is not seriously disputed that the parties' affluent lifestyle was created during the more than 17 years the parties were married due in large part to Ms. Potter's efforts. As the trial court expressly found, Ms. Potter "sacrificed herself"

and her career during the marriage to help Mr. Potter build his now extremely successful business. [R 125] This Court should not permit Mr. Potter to keep the fruits of the parties' joint labors all but to himself.

Mr. Potter's reliance on Ms. Potter's testimony that she spends just $6,000 to $8,000 per month [CAB 12] does not take into account that those amounts reflect just what she spent to "keep her head above water" [R 1159] after Mr. Potter denied her all access to the couple's joint resources. [R 1116] That amount did not account for the standard of living established during the marriage—not nice trips, not vacation homes, not recreational vehicles, or any other luxuries.

Those amounts instead reflected her post-separation lifestyle and her attempt to just make do. As Ms. Potter testified, among many other things, after the parties separated and Mr. Potter transferred all their joint bank accounts to just himself, she could not even afford gasoline, so she began driving a small car her parents gave her instead of the much larger vehicle the couple purchased during the marriage. Ms. Potter also transferred her cellular telephone to her parent's account because she could not afford it on her own, and she cancelled her cable television just to save money. [R 1157-60]

Meanwhile, based on the 2017 numbers used at trial, Mr. Potter was earning $59,166.67 per month, spending $38,566.83 each month to maintain his lavish lifestyle, and still had $20,599.84 left over at the end of each month. [R 72, 76]

The trial court committed reversible error by calculating need based on Ms. Potter's comparatively meager postseparation lifestyle rather than the comfortable standard of living established during the marriage. Accordingly, this Court must find that $6,000 per month durational award is grossly inadequate based on the parties' disparate incomes and the style of living established during the marriage. It should reverse and remand for the trial court to determine an equitable and adequate permanent alimony award.

III. THE TRIAL COURT APPLIED A 15 PERCENT MARKETABILITY DISCOUNT FOR REASONS NOT SUPPORTED BY THE RECORD.

The trial court rightly rejected the expert's opinion that a marketability discount was appropriate for the reasons that "you can't take that to cash right away" or because TCB is "specific to this geographic location." As argued in the Initial Brief on Cross-Appeal, if that were true, marketability discounts would apply to all businesses. No business can be liquidated "right away." And Mr. Luger gave no reason for summarily concluding that only a "limited group" would desire an extremely lucrative veterinary hospital in Tallahassee, as the Potters did here.

However, the trial court's own reason for applying the marketability discount to TCB—because "it is essentially a personal services company"—also is not supported by competent substantial evidence. Like the expert, the trial court provided no evidentiary support or other basis for summarily concluding that "personal services" businesses are less marketable than other types of commercial

businesses. None exists in the record, the testimony, or any case law.

These conclusory observations are not "competent substantial evidence" as Mr. Potter claims [CAB 16] because no reasoning or evidentiary support was provided to substantiate them.

The trial court thus abused its discretion in arbitrarily applying the marketability discount because no basis or legal authority was provided to support the broad assertions that a marketability discount is appropriate for "personal services businesses," for the inability to "take cash right away," or for any particular "geographical location" in which a business may be located. *See USAA Cas. Ins. Co. v. Prime Care Chiropractic Enters, P.A.*, 93 So. 3d 345, 347 (Fla. 2d DCA 2012) (holding the trial court abused its discretion by awarding a multiplier when the expert had summarily concluded that "the market required a multiplier" but he "did not provide the court with any evidence to support his broad assertion" and thus "no competent, substantial evidence" supported applying a multiplier).

The trial court did not reach the right result for the wrong reason, as Mr. Potter claims. [CAB 16-17] It reached the wrong result. This Court should reverse.

IV. THE DATA USED FOR VALUATING TCB WAS OUTDATED.

This Court should hold that the business valuation, which was based on outdated 2017 tax returns, is inadequate. Mr. Luger based his report on the outdated 2017 numbers solely because those returns had been reconciled and he

found them "useful." That was error. A business valuation should not be based on some random past date simply because it is convenient for the valuator.

"The cut-off date for determining assets and liabilities to be identified or classified as marital assets and liabilities is the earliest of the 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." § 61.075(7), Fla. Stat.; *see also Nicewonder v. Nicewonder*, 602 So. 2d 1354, 1357 (Fla. 1st DCA 1992) (rejecting the valuation based on year-end 1988 data when that was not the date of filing, not the date of the final hearing, and not the date on which a valid settlement agreement had been entered); *Willman v. Willman*, 944 So. 2d 1151, 1151 (Fla. 1st DCA 2006) ("In the absence of a valid separation agreement, a married couple's assets remain 'marital' until the date dissolution papers are filed.").

The Potters had no valid separation agreement here, and the Petition was not filed until the end of September 2018. Thus, as of the final hearing on August 28, 2019, the valuation date was nearly two years old. The record evidence showed TCB's value and cash assets had greatly increased each year, including after the 2017 year-end valuation date. That increase in value continued to be attributable to Ms. Potter's efforts, as she continued to work at TCB for little or no pay after December 31, 2017, and she continued to take primary responsibility for the

parties' home and child care after filing the Petition—despite that Mr. Potter had completely cut her off from their joint financial resources.

Ms. Potter does not seek to exclude Mr. Luger's testimony or question his methodology post-trial, as Mr. Potter claims. [CAB 19-20] She questions instead, as she did at trial multiple times, why he based the business valuation on outdated numbers when current values were available. The trial court is required to rely on a valuation date that is just and equitable, or at least legally cognizable, not a date that is merely convenient. *See Nicewonder*, 602 So. 2d at 1357; *Willman*, 944 So. 2d at 1151; *see also Leonardis v. Leonardis*, 30 So. 3d 568, 571 (Fla. 4th DCA 2010) (holding the trial court abused its discretion by using the filing date for valuation when the property value had changed significantly by the time of trial).

This Court should reverse and remand for the trial court to determine TCB's business valuation either as of the date of filing or as of the final hearing date.

CONCLUSION

This Court should reverse the durational alimony award and remand, instructing the trial court to award Ms. Potter permanent periodic alimony in an amount commensurate with the standard of living established during the marriage. This Court should also instruct the trial court on remand to value TCB as of the date of filing or as of the trial date, without applying any marketability discount. In all other respects, the final judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of August 2020 a true and correct copy of the foregoing has been electronically uploaded to the First District Court of Appeal's ePortal and was furnished by E-Mail to all parties listed below.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the font used in this brief is the Times New Roman 14-point font and that the brief complies with the font requirements of Rule 9.210(a)(2).

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