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Supreme Court Case No. 75,894
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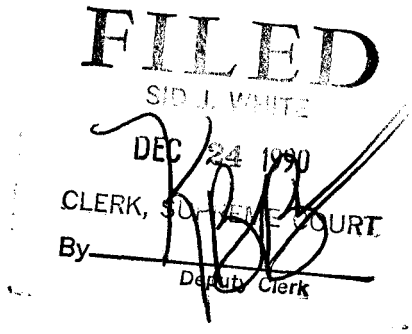
Fla. Bar No. 283975



In the
SUPREME COURT OF FLORIDA

DIANE V. BEDELL,
Petitioner,

vs.

ROBERT L. BEDELL,
Respondent.

ANSWER BRIEF OF RESPONDENT

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INTRODUCTION

The Petitioner, DIANE BEDELL, was the Wife/Petitioner in post-judgmental modification proceedings below and the Appellant in the District Court of Appeal. The Respondent, ROBERT L. BEDELL, was the Husband/Respondent in the trial court and Appellee in the District Court. The parties shall be referred to herein as "the Husband" and "the Wife."

STATEMENT OF THE CASE AND FACTS

This case began at the trial court level in 1986 when the Wife sought modification of the alimony provisions of a 1975 Final Judgment of Dissolution of Marriage which incorporated a "Settlement Agreement" entered into by the parties. The Wife sought an order of the trial court increasing her alimony award from $5,380 per year ($415 per month) to $82,000 per year.

The Husband and Wife were married in 1962 (R. 1) and separated in 1971. (TR. 241). They divorced in 1975 at which time the Wife was engaged to be remarried. (TR. 238). The Final Judgment of Dissolution of Marriage incorporated the parties' "Settlement Agreement" pursuant to which, in pertinent part, the Husband agreed to pay the sum of $500 per month as child support for the parties' two children and the sum of $415 per month - the exact amount as the mortgage payment upon the Wife's residence - as "permanent alimony" until "one month after [the Wife's] remarriage." (R. 226). Thereafter, the Wife broke her engagement, did not remarry and the

Husband has paid the sum of $415 per month as "permanent alimony" to the Wife for the past fifteen years.

The Wife was 33 years old at the time the parties were divorced in 1975. During that year - 1975 - the Wife did not make any effort to seek employment or earn an independent income. (TR. 92).

The following year, 1976, the Wife again made no attempt to seek employment or earn an independent income. She testified that she was occupied that year with caring for the parties' two children, then ages 11 and 13. (TR. 93).

In 1977, however, the Wife decided to move to New York and attend art school. (TR. 93). The custody of the two children, then ages 12 and 14, was voluntarily given by the Wife to the Husband with whom they lived for the remainder of their minority. The Wife thereafter contributed no funds to the Husband towards the support of the children.

The Wife moved to New York and enrolled for three credits (one class) at the Pratt Institute. (TR. 94). Although she did obtain a part time job earning $50 per week, she did not otherwise seek employment (TR. 95). During the years 1977, 1978 and 1979, the Wife neither sought nor obtained work nor did she enroll for classes at the Pratt Institute. She testified that she "audited" classes - attending without actually enrolling - during those years.

The following year, 1980, the Wife summered in Europe. (TR. 100). The trip was a gift from her mother. (TR. 100). Upon her return to the United States, and for two and one-half years

thereafter, during the years 1980, 1981 and 1982, the Wife did not work nor did she attempt to secure employment. (TR. 101).

Finally, in 1982, seven years after the parties' divorced, the Wife secured a full time position. She became employed at a department store but, after only a year, left her position and began working on a part-time basis. (TR. 102). She testified that she was required to leave her full-time position because she suffered from "varicose veins" but admitted that she never saw a doctor concerning her "varicose veins." (TR. 103).

The Wife continued her part-time employment for one year and then ceased that position in order to again travel to Europe. She spent four months traveling in France and England. (TR. 103). When she returned to the United States, in October, 1984, she again did not seek or obtain employment. (TR. 105). Eventually, one year later, she obtained a position at a health spa from which she took a "leave of absence", in November, 1986, in order to again travel to Europe. (TR. 106). Shortly after her return, her position at the health spa was terminated and, at the time of the proceedings at the trial level, had not been employed since. (TR. 105).

Thus, at the time of the hearing in the trial court, the parties had been divorced for eleven years, the Wife was 44 years old and, with the exception of one position which lasted one year, the Wife had made no effort, over the entire eleven year period, to contribute to her own support. The trial court's finding of fact with respect to this situation was:

> ***The Wife was unemployed at the time of the dissolution of marriage and has remained***

> ***unemployed at her own option for virtually the entire eleven years since the dissolution of marriage. In that time the Wife held only one full-time position, which position she maintained for but one and one-half years. The Wife's attempts to secure employment during the eleven years since the dissolution have been minimal at best. The Court finds that in the eleven years following the parties' dissolution of marriage, the Wife has made no serious effort whatsoever to contribute to her own support despite the fact that she was but thirty-three years old at the time and despite the fact that, within one year following the dissolution, she was no longer responsible for the car and rearing of the children and, therefore, had no impediment towards employment or self-support. At the present time the Wife is young, suffers from no physical impairment, speaks English, French and some Spanish and is fully capable of contributing to her self-support if she chose to do so.***

The Wife testified at the trial court level that she was able to survive without working by receiving "loans" from her mother. According to the Wife, her mother provided her with funds throughout her life and, particularly, during her marriage to the Husband. These funds, however, according to the Wife, were not "loans" until after the parties divorced because prior to the divorce such funds were an "investment" in the Wife's "future". (TR. 119).

Neither the Wife nor her mother were able to testify as to the precise amount of these "loans" nor was either able to testify as to a "repayment" plan or date. Verne Oleck, the Wife's mother, testified that she had never kept track of the amount of the "loans" given to her daughter until the modification case commenced. Mrs.

Oleck testified that she had no serious intention of demanding repayment unless the Wife was successful in obtaining the money from her former husband through the modification proceedings. Mrs. Oleck told the trial court that if the Husband were required to "repay" the "loans" and not the Wife, *then* Mrs. Oleck would want "full repayment". (TR. 165-166).

The trial court found, with respect to the issue of whether the funds provided to the Wife by her mother were support or were "loans", as follows:

> ***[T]he Wife's mother testified that it was "understood" between herself and her daughter that the funds advanced for her daughter's support since the time of her daughter's divorce would be repaid "someday." Neither the Wife nor her mother maintained any records with respect to the total amount provided nor was there any discussion between the Wife and her mother as to the amount to be repaid, or the manner of repayment. Until this action was commenced by the Wife, neither the Wife nor her mother knew the total amount of the alleged "loans". Further, the Wife's mother testified at the final hearing that it was not her intention to require the Wife to repay "all" of the loans but, rather, just "some." The Wife's mother was unsure of which portion was to be repaid and which was not. Under these facts, the Court finds that the monies provided to the Wife by her mother since the dissolution are not and were not "loans" but, rather, represented support provided to the Wife by her mother voluntarily, which support continues presently.***

The Wife's main contention at the trial court level was that she required increased alimony because the "cost of living" had

increased since the time that she was divorced. She called a professor of economics as a witness who testified about the rise in the cost of living generally in the United States. (TR. 33-39). The Wife's *entire* testimony regarding this "cost of living" increase was the following:

> ***Wife's counsel: Has the 415 dollars a month that you have been receiving from Doctor Bedell plus whatever you have received in earnings through your employment been sufficient for you to live on?***
>
> ***The Wife: No.***
>
> ***Wife's counsel: Why not?***
>
> ***The Wife: Well, the cost of living has gone up. It was never really that much to begin with. I've borrowed from my mother and things just seem to keep escalating and becoming more costly all the time and 415 is not enough.*** *(TR. 41).*
>
> * * *
>
> ***Wife's counsel: Mrs. Bedell, have your needs increased since the time of the original divorce in 1975?***
>
> ***The Wife: Yes, my needs have increased.***
>
> ***Wife's counsel: Please explain to the court how they have increased.***
>
> ***The Wife: Well, the cost of living has gone up. My earning power has not gone up.*** (TR. 75).

The trial court made two findings of fact with respect to the "cost of living" issue, specifically:

> ***This Court finds that a rise in the cost of***

> ***living may be a basis for a modification of alimony provided, however, that a showing is made that the increase in the cost of living has specifically effected the party seeking the modification. Here, although the Wife presented testimony as to the general rise in the cost of living, she made no showing and presented no evidence that she, herself, has been detrimentally effected by this rise in the cost of living or that such a rise has caused an increase in her needs. The Wife presented no testimony or evidence relating to the nature and amount of her necessary required expenditures currently. She introduced no financial records supporting the amount of her claimed expenses and did not testify as to specific items of increase.***
>
> * * *
>
> ***[A]lthough, as aforesaid, the cost of living has increased during these years, the Wife made no showing whatsoever that the rise has in any way impacted upon her or effected her. Inasmuch as the . . . Wife's income and expenditures are now and have been for the last five years, nearly equal, the Wife failed to demonstrate a "need" for additional alimony.***

In support of her request for an increase in alimony from $5380 per year to $82,000 per year, the Wife filed a "Financial Affidavit" in order to establish her "need" for such an amount which included the following:

> ***Q: Under [item] P, you have repairs and maintenance, house appliance repairs, carpeting and drapes, $525 [per month]?***
>
> ***A: Yes.***
>
> ***Q: Could you explain to the court how you came up with that number?***

A: [On household repairs] it would be the chattahoochee drive, about $250.

Q: What is wrong with the driveway?

A: Well most of the neighbors have that improvement. It would just look nice. It is not really a necessary repair. It would enhance appearance. (TR. 58-59).

* * *

Q: Please continue.

A: The third thing is television which I don't have a television and I have not had one for several years . . .

Q: What is the replacement price of the TV that you got?

A: I saw a nice one in the store that was $709 which was very nice.

Q: $709?

A: I added a VCR, which would be nicer, for $479. (TR. 61).

* * *

Q: What is the next item you have?

A: From Sun Chevrolet.

Q: That's for replacement for a car?

A: Yes.

Q: You said the car is several years old and needs replacement?

A: Yes.

Q: What is the estimate you got for replacement of the car and what kind of car?

A: Well, to replace the car I have with the same car it would be about $13,000. (TR. 62).

* * *

Q: Vacation, you have $125 [per month]. How did you come up with that?

A: $125 is just based on the sort of number that would be -

Q: $1,500 once a year vacation type of thing?

A: Yes. (TR. 73).

* * *

Q: College tuition $260 [per month]. What is that for?

A: That is possibly to enable me to get a degree, to be more self-supportive and more self-sufficient and be able to earn a better wage, better salary.

Q: Did you find out how much it would cost for you to complete your degree?

A: Yes.

Q: Who did you contact? What did you find out?

A: Well, the University of Miami and FIU, this is - it comes to - I've put down $10,000, which is an arbitrary figure really.

* * *

> ***Q: Business expense, you have $168 [per month]. What is that for?***
>
> ***A: That would be for - I do calligraphy. I get calls every so often to do diplomas, to do proclamations for schools of different kinds. I have studied calligraphy for quite a number of years and I would like to set up a small business if that - it would be possible and those would be expenses connected with the cost of getting the equipment that I would need and advertising and setting up the form.*** (TR. 75).

In addition to the Wife's claimed "need" for a new car, a new Sony TV and VCR, a fully paid for annual vacation, a fully paid for college education and a fully capitalized "business of her own", other items on her "Financial Affidavit" were the cost of completely replacing her kitchen - dishwasher, trash compactor and washer/dryer - because the appliances were "old" (TR. 60); the cost of installing a security system in her home (TR. 56); the cost of replacing the carpet in her home as well as the draperies and tile in the kitchen and bathroom (TR. 63-65); and the cost of "repaying" her mother the sum of $65,000 which purportedly represented "loans" made to the Wife by her mother since the parties' divorce. (TR. 72).

Ultimately, the trial court determined that the Wife had failed to establish a sufficient change in circumstances to warrant or justify a modification of alimony and denied the Wife's petition.

The Wife sought review in the District Court of Appeal, Third District, arguing, in principle part, two points. First, that she was entitled, *as a matter of law*, to a modification simply by virtue of the Husband's stipulation that his income had increased in the eleven years following the parties' divorce and that she was not required to

establish or demonstrate any increase in her needs but, rather, was entitled to an increase in her alimony upon nothing more than an increase in the Husband's earnings. And, second, that the trial court erred in permitting the Husband to introduce evidence of the Wife's total failure and refusal to take any action to contribute to her own support because, according to the Wife, a permanent alimony recipient has no obligation to obtain employment or to attempt to contribute to his or her own support.

The District Court ultimately decided the case en banc and, in affirming the trial court, held:

1. "Where the financial needs of the recipient spouse, as established by the standard of living maintained during the marriage, have not substantially increased since the final judgment, the trial court is justified in denying a motion to modify upward the alimony award, even though there has been a substantial increase in the financial circumstances of the paying spouse."

2. "An increase in the paying spouse's ability to pay would not itself justify an upward modification of alimony if the recipient spouse's needs are already fully met by the existing award or otherwise."

3. "[A] rise in the cost of living may be a basis for modification of alimony provided, however, that a showing is made that the increase in the cost of living has specifically affected the party seeking modification."

The Wife sought review before this Court and continues to argue, as she did at the District Court level, that a former spouse is entitled, as a matter of law, to an increase in alimony upon nothing

more than a showing that the income of the paying spouse has increased.

SUMMARY OF THE ARGUMENT

If the Wife's contention herein is correct - if an alimony recipient is entitled as a "matter of law" to increased alimony each and every time the paying spouse's income increases, even if the recipient's need has not increased, then there will no longer be any such thing as a "divorce." Instead, former spouses will continue to be required to share their increased income with their ex-spouses without limitation, for all time.

The Wife's position, however, is incorrect and it is incorrect for the very simple reason that all alimony awards are and must be based upon need. A modification is simply a request for additional alimony and, therefore, a modification must also be based upon either increased need or continuing need unmet by the original award.

The Wife, in asserting her position, misreads §61.14, Florida Statutes, and claims that alimony may be increased either upon a change in circumstances or upon increased ability of the payor. In fact, however, the statute is clear in its meaning:

1. If the circumstances of the recipient change, due to circumstances beyond the recipient's control, such that the recipient's need increases, an upward modification of alimony is permissible; or,

2. If the circumstances of the recipient change such that the recipient's need is decreased, a downward modification of alimony is permissible; or,

3. If the financial ability to the payor decreases, a downward modification of alimony is permissible; or,

4. If the financial abillity of the payor increases and the need of the recipient was initially unmet or has itself increased, an upward modification of alimony is permissible.

The Wife also seeks to have this Court retry this case and conclude that the trial court's findings of fact, which were affirmed by the District Court of Appeal, en banc, were "erroneous". This Court cannot do so. There is substantial evidence in this record from which the trial court properly concluded that the Wife failed to establish a change in her needs; failed to establish that the increase in the "cost of living" had effected her and failed to establish that she (as opposed to her mother) was owed any money as "reimbursement" for certain college expenses incurred by the parties' oldest child.

ARGUMENT

I.

THE THIRD DISTRICT COURT OF APPEAL DID NOT ERR IN HOLDING THAT A WIFE MUST PROVE AN INCREASE IN HER NEED AND NOT JUST AN INCREASE IN HER FORMER SPOUSE'S INCOME BEFORE AN UPWARD MODIFICATION OF ALIMONY MAY BE GRANTED.

A. AN UPWARD MODIFICATION OF ALIMONY CANNOT BE BASED SOLELY UPON AN INCREASE IN THE PAYOR'S ABILITY TO PAY ABSENT EITHER INCREASED NEED ON THE PART OF THE RECIPIENT OR CONTINUING NEED UNMET BY THE ORIGINAL ALIMONY AWARD.

The Wife's first point herein is that an alimony recipient is entitled as a matter of law to increased alimony each and every time the paying spouse's income increases, even if the recipient's need has not increased. Simply stated, under the Wife's view of the law there is no such thing as a divorce - former spouses must continue to share their increased income with their ex-spouse without limitation, for all time.

The Wife derives her concept of the law from the language of §61.14, Florida Statutes, which reads, in pertinent part:

> ***When the parties have entered into, or hereafter enter into, an agreement for payments for, or instead of, support, maintenance, or alimony . . . or when a party is required by court order to make any payments, and the circumstances or the financial ability of either party has changed . . ., either party may apply to the circuit court . . . for an order decreasing or increasing the amount of support, maintenance, or alimony . . .***(Emphasis supplied.)

According to the Wife, the "plain meaning" of the foregoing language - the Wife emphasizes the portion reading "and the circumstances or the financial ability of either party has changed" - is that a change in circumstances "of only one of the parties is sufficient to support a modification of alimony."

To the contrary, however, the "plain meaning", when the statute is read in its entirety so as to include not just the language emphasized by the Wife but, further, that the court may enter an order "decreasing or increasing" the amount provided, is that the paying spouse may request a decrease in the event his financial circumstances have changed just as much as the recipient may request an increase if her needs have changed.

In order to fully describe the degree to which the Wife's argument herein is contrary to all established legal principles pertaining to alimony awards (i.e., that an alimony recipient may receive an increase not based upon her need but, rather, solely upon the income of the payor), it is necessary to first review certain general principles applicable to both initial alimony cases and alimony modification cases.

To begin, all alimony awards must be based upon need. There can be no such thing as an alimony award without a need therefor or an alimony award which exceeds the established need of the recipient. An illustrative statement of this rule appears in ***Turner v. Turner***, 383 So.2d 700 (Fla. 4th DCA 1980):

> ***[T]rue alimony is based upon the needs of one party and the concomitant ability of the other to pay. Absent either factor (not necessarily both) alimony is inappropriate.*** (Id. at 702).

Second, a modification for the purpose of increasing an alimony award is simply a request for the award of additional alimony. Whatever amount may be awarded, it is still alimony and the same rules apply - the need for such additional alimony must be demonstrated.

Lastly, "need" within the context of alimony is to be defined in accordance with the standard of living established by the parties during their marriage. When the initial award of alimony is made, at the time of the parties' divorce, the standard for determining need is the standard of living established during the marriage and that standard continues to apply to all subsequent requests for increased alimony. The standard never changes - it is always that which was established by the parties during the marriage.[1]

Turning to modification cases specifically, a review of the applicable case law establishes that there are only two factual situations which can arise in which an increase in alimony (an upward modification) would be proper:

1. The needs of the spouse receiving alimony were not met by the initial alimony award made at the time of the dissolution of marriage and continue to be unmet. This situation customarily arises where the spouse receiving alimony had a need for alimony, at

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See, e.g., ***Johnson v. Johnson***, 386 So.2d 14 (Fla. 5th DCA 1980); ***Nicholay v. Nicholay***, 387 So.2d 500 (Fla. 2nd DCA 1980); ***O'Neal v. O'Neal***, 410 So.2d 1369 (Fla. 5th DCA 1982). This, of course, is quite different fro the rule applied in modification of child support cases. Children should be and are entitled to share in the future success of their parents irrespective of the standard of living of the parents at the time of divorce. Unlike a child, however, a spouse's right to share in the other spouse's success ends upon the termination of the marriage, as that is when the "marital partnership" ends.

the time of divorce, in an amount greater than the payor-spouse could then provide. Upon an increase in the payor-spouse's financial ability and, of course, the continued existence of the unmet need, the spouse receiving alimony would be entitled to an increase in the amount of the original award to an amount designed to meet the need established by the standard of living during the marriage.[2]

2. The original alimony award met the needs of the recipient-spouse as established by the standard of living during the marriage but, due to a change in circumstances beyond the control of the recipient-spouse, the amount originally awarded no longer meets those needs. This situation customarily arises where an increase in the cost of living causes an amount which was once sufficient to become insufficient to meet the needs of the recipient, or where the alimony recipient has suffered a loss of employment or an illness or some other significant change has occurred resulting in a loss of income or other such inability to meet his or her needs. In this type of case, an increase in the ability of the payor-spouse will justify an increase in the alimony award so as to re-establish the amount as sufficient to meet the needs of the recipient.

The key points with respect to the foregoing are:

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An example of this type of case is ***Lenton v. Lenton***, 370 So.2d 30 (Fla. 2nd DCA 1979), where the court expressly stated that the wife's needs had not been met by the original alimony award and, therefore, upon a showing of the husband's increased ability to pay, a modification in the amount of alimony awarded to the wife was proper. It is significant to note that the Lenton decision points out that the wife's standard of living upon her alimony award was greatly decreased from that enjoyed during the marriage. Therefore, there can be no question but that the wife in Lenton did establish a need for additional alimony in order to maintain her prior standard of living even if the decision itself does not expressly so state.

First, "need" is defined in accordance with the standard of living established by the parties during their marriage. This is true irrespective of whether the case is one in which need was originally unmet or one in which need was originally met but, due to changes in circumstances, is no longer met by the original award.

Second, in either of the two types of cases, the spouse seeking the increase must establish his or her need. It is not sufficient for the spouse seeking a modification to simply demonstrate an increased ability on the part of the payor without also showing either that his or her need was originally unmet and remains unmet or that his or her need is now unmet by the original award because of circumstances outside of his or her control.

All of the decisions of the Third District Court of Appeal are now consistent with the foregoing principles of law following the rendition of the court's opinion herein in which the Third District receded from ***Sherman v. Sherman***, 279 So.2d 887 (Fla. 3rd DCA), *cert. dism.*, 282 So.2d 877 (Fla. 1973), the single aberrant case in the Third District.

In ***Sherman***, *supra.*, the Third District, in 1973, had answered the following question in the affirmative:

> ***May periodic alimony be increased upon petition for modification when the only change of circumstances shown is a substantial increase in the earnings of the former husband?*** (Id. at 888)

Seven years later, in ***Powell v. Powell***, 386 So.2d 1214 (Fla. 3rd DCA 1980), the Third District held to the contrary, noting, in a footnote:

> ***Of course, an increase in the husband's ability***

> ***would not itself justify an upward modification of alimony if the wife's needs are already fully met either by the existing award or otherwise.*** (Id. at 1216).

Three years after Powell, the Third District rendered its decision in ***Frantz v. Frantz***, 453 So.2d 429 (Fla. 3rd DCA 1983), and quoted the above language from ***Powell*** as the basis for affirming the trial court's denial of a requested modification.

Then, in 1985, the Third District rendered its decision in ***Bess v. Bess***, 471 So.2d 1342 (Fla. 3rd DCA 1985), and held:

> ***While the record shows that Mrs. Bess proved her ex-husband's ability to pay additional alimony, we find that there is competent substantial evidence to support a finding that she did not demonstrate her need for increased payments.*** (Id. at 1343).

Finally, in ***Waldman v. Waldman***, 520 So.2d 87 (Fla. 3rd DCA 1987), although the Third District made no direct statement with respect to the impermissibility of a modification upon a showing of nothing more than an increased ability to pay, the court nevertheless held that despite evidence of a "doubling" of the husband's salary, the wife was not entitled to increased alimony.

As the foregoing establishes, the law in the Third District is very clear and very consistent and the Third District, in receding from ***Sherman***, the one aberrant case in the district, obviously paid heed to Judge Barkdull's 1973 dissent in ***Sherman*** which the Third District adopted in the instant case:

> ***Following the majority's opinion to a logical conclusion, a former wife receiving periodic alimony could hold her former husband to an increase in alimony upon increased earnings***

> ***at any time during the remainder of his life. I don't think the courts should condone such action. Many of the authorities cited in the majority opinion , which approved an increase in alimony , had an additional element other than the mere increase in earning capacity of the former husband, to wit: a change in circumstances to the detriment of the former wife. And authorities that permit an increase in periodic alimony solely because of the increase in earning capacity of the former husband I would either not follow because they were rendered prior to the modern concepts of divorce law . . . or, if rendered in recent years, I would respectfully decline to follow as not being the proper course that the law should follow at this time.*** (Id. at 889)

Despite the fact that the law in the Third District is clear and consistent and has been since 1980, the Wife herein suggests that the Third District's decisions are "different and more restrictive" than decisions of this Court or of the Second and Fourth District Courts, citing ***McArthur v. McArthur***, 95 So.2d 521 (Fla. 1957); ***Lenton v. Lenton***, 370 So.2d 30 (Fla. 2nd DCA 1979) and ***England v. England***, 520 So.2d 699 (Fla. 4th DCA 1988). The Wife, however, is wrong.

In ***McArthur v. McArthur***, *supra.*, this Court specifically relied upon and made reference to changes in the alimony recipient's circumstances and conditions:

> ***It seems to us that the changes in circumstances in the financial condition of Mr. McArthur and Mrs. McArthur's condition of health and inability to work constitute sufficient cause to justify an increase in the amount of alimony which she should receive.***
>
> ***The further change in Mr. McArthur's financial***

> ***condition as reflected by the amended petition for rehearing might perhaps justify even a greater increase in the sums which she should receive.*** (Id. at 524)

In view of the foregoing, it is clear that Mrs. McArthur met the second of the two standards for modification of alimony, specifically: the original alimony award met her needs but, due to a change in circumstances beyond her control, the amount originally awarded no longer met her needs.

In ***Lenton v. Lenton***, *supra.*, one finds that, again, the decision to modify the wife's alimony was based upon the wife's need.

In ***Lenton***, the husband had filed, at the time of the initial divorce action, a fraudulent financial affidavit and, based upon that financial affidavit, the wife had accepted an alimony award far below her actual needs and far below the standard of living of the parties during the marriage. The Second District Court held:

> ***Here, the wife agreed to accept a decrease in her standard of living at the time of dissolution because the husband apparently did not have the means to support her in the same style she had enjoyed during the marriage. However, she should not be held to this agreement when the projection of limited means is not accurate.*** (Id. at 31).

As the foregoing makes clear, Mrs. Lenton met the first of the two standards of modification, specifically: the needs of the spouse receiving alimony were not met by the initial alimony award made at the time of the dissolution and continued to be unmet.

Thus, reviewing only ***Lenton*** and ***McArthur***, it is impossible to conclude that the decision of the District Court herein is

"different and more restrictive" where the Third District's decision in this case states:

> ***[I]n a petition for modification [seeking increased alimony] the recipient's need [as established by the standard of living maintained during the marriage] is the sine qua non of the determination; unless and until it is established that there has been a substantial increase in need, [the paying spouse's] ability to pay must not be considered. Once that need is established, the question is whether or not [the paying spouse] has the ability to meet that increased need, in whole or in part. To hold otherwise improperly grants the alimony recipient a continuing interest in the former spouse's good fortune.***
>
> * * *
>
> ***There is one exception to the rule that a substantial post-divorce increase in the needs of the recipient spouse is a prerequisite to obtaining an upward modification in alimony, and that a substantial increase in the paying spouse's ability to pay alimony cannot, in itself, justify an upward modification in alimony. This exception obtains in the relatively rare case where the recipient spouse's needs, as established by the standard of living maintained during the marriage,were not, and could not be, initially met by the original final judgment of marriage dissolution due to the then-existing financial inability of the paying spouse to meet those needs, which needs continue to remain unmet at the time modification is sought.***

As is evident from the foregoing, the decision of the Third District herein addresses both of the standards for alimony modification illustrated by the ***McArthur*** and ***Lenton*** decisions.

In ***England v. England***, 520 So.2d 699 (Fla. 4th DCA 1988), the last of the cases cited by the Wife, the court's reference to a change in the payor's ability to pay was with respect to the ability to the payor to seek a decrease. The ***England*** decision makes this quite clear:

> ***Modification may be granted based upon a substantial change in the ability to pay of the party required to pay support or by a substantial change in the needs and ability to meet those needs of the party receiving alimony. Of course, alimony should not be increased absent a demonstration of need for increased support and the other spouse's ability to respond to that need.*** (Id. at 700)

Here, the Wife contends that the modification statute is "clear" and the words, "and the circumstances or the financial ability of either party has changed" is to be read as meaning that an alimony recipient may receive an increase in alimony upon *either* a change in his or her circumstances *or* upon a change in the financial ability of the payor without any change in the circumstances of the recipient. The reality, however, is that the Wife's reading of this statute is what is "different" from the body of the case law in this state. The case law establishes that the language of the statute means:

1. If the circumstances of the recipient change, due to circumstances beyond the recipient's control, such that the recipient's need increases, an upward modification of alimony is permissible; or,

2. If the circumstances of the recipient change such that the recipient's need is decreased, a downward modification of alimony is permissible; or,

3. If the financial ability of the payor decreases, a downward modification of alimony is permissible; or,

4. If the financial ability of the payor increases and the need of the recipient was initially unmet, an upward modification of alimony is permissible.

B. THE WIFE FAILED TO DEMONSTRATE A SUBSTANTIAL ADVERSE CHANGE IN HER FINANCIAL CIRCUMSTANCES SO AS TO JUSTIFY AN INCREASE IN ALIMONY.

Applying all of the principles herein discussed to the instant case, it is clear that the trial court did not err in denying the Wife's request for a modification of alimony and the District Court did not err in affirming, en banc, the trial court's decision.

First, by the Wife's own testimony it was established that this was not a case where the Wife's needs were originally unmet at the time of the dissolution of marriage. To the contrary, the Wife testified that her needs were met by the combined awards of alimony and child support which she received pursuant to the parties' divorce settlement. The Wife admitted:

> **Wife's counsel:** ***Was the 415 dollars a month [alimony] that you were given pursuant to the property settlement agreement in 1975, was that sufficient to live on at that time?***
>
> **The Wife:** ***Since I was also getting five hundred dollars for child support and my children were living with me, it was sufficient at that time.*** (TR. 32-33).

Thus, the Wife admitted that the amounts being paid to her and received by her pursuant to the original awards of alimony and child support were sufficient when entered. What made the amounts "insufficient", by her own admission, was the elimination of the amounts being paid as child support following her voluntary decision to relinquish the custody of the parties' children to the Husband.

Next, this was not a case where the Wife established that factors or circumstances outside of her control caused a previously sufficient amount of alimony to become insufficient to meet her needs as established by the standard of living of the parties during the marriage. The Wife failed to meet this burden of proof in the following ways:

First, the Wife did not demonstrate that the increased "cost of living" had impacted directly upon her in any way. She did not present any evidence or testimony as to the nature and extent of her expenses in 1975 (the time of the dissolution of marriage), nor did she present any evidence comparing her present expenditures to those of 1975. The only testimony which the Wife presented was as to the general increase in the "cost of living" nationally and her own opinion that "things cost more."

Second, the Wife failed to demonstrate that she required increased alimony to meet her needs due to a change in circumstances outside of her control. Beyond the fact that the Wife's "needs", if any, were originally the result of her voluntary relinquishment of the custody of the children to the Husband and concomitant loss of child support, the evidence further established that the Wife herself was responsible for her own financial position

due to her refusal to seek employment despite her capacity to do so. Rather than attempting, in any fashion whatsoever, to develop her capacity for self-support, the Wife, who was 33 years of age at the time of the parties' divorce, spent the eleven years between the dissolution of marriage and the modification hearing auditing art classes in New York, traveling to Europe and living of "loans" from her mother.

Third, the Wife herein was seeking a modification of alimony to a standard of living far in excess of that enjoyed by the parties during their marriage.

According to the testimony at trial and according to that set forth in the Wife's arguments to the Third District Court, the standard of living of the parties at the time of the dissolution of their marriage was that the Husband was in medical school throughout the marriage, had just opened his first office at the time of the divorce, advised the Wife that he could not afford to pay more than $415 per month, and the parties owned a townhouse with equity equal to the amount of the mortgages. (Initial Brief of Appellant, District Court, at 2-8).

The foregoing notwithstanding, at the time of the modification hearing the Wife was seeking an award of alimony equal to the sum of $82,000 per year (a requested increase of some 507%) to provide her with, for example, a new car to replace her four year old vehicle, a new television set with VCR, new furnishings and fixtures for her home, a four year college education, an annual vacation, and a full capitalized "business of her own."

Lastly, and perhaps of greatest importance, the trial court's denial of the requested modification and the District Court's affirmance of that decision was proper because the Wife failed to demonstrate that she had a need for increased alimony.

What the evidence established was the the Wife's income and expenditures had remained the same for at least five years prior to the requested modification. What the Wife claimed to be her "need" was, in fact, nothing more than a statement of what she would do if she were "given" the sum of $82,000 per year, including replacing her driveway because "it would look nice"; purchasing a television and a VCR, "which would be nicer [than just a TV by itself]"; replacing her but four year old car with a new model; spending an annual vacation in Europe; attending college and starting her own business. Such items are not "needs"; they are "wants" or maybe "wishes" but "wants" and "wishes" do not justify modification of alimony.

The Wife, in this proceeding, asserts that she established that the "cost of living" had increased and, therefore, again "as a matter of law", she was entitled to an upward modification of her alimony.

There is no question but that the Wife presented testimony that the "cost of living" had increased since 1975. What the Wife did not do, however, was present any evidence or testimony - other than her simple statement that "things cost more" - that this rise in the "cost of living"had specifically effected her. The law is manifestly clear that such is not enough.

In ***Greene v. Greene***, 372 So.2d 189 (Fla. 3rd DCA 1979), the District Court held:

> ***[T]he loss in the purchasing power of the dollar is a factor to be considered in modifying an award of alimony; however, in our opinion, it is only one factor to be considered and, by itself, is insufficient to justify an increase in alimony.*** (Id. at 190).

In ***Powell v. Powell***, 386 So.2d 1214 (Fla. 3rd DCA 1980), the Third District undertook to clarify the ***Greene*** decision and opined that ***Greene*** cannot be read to hold that a rise in the "cost of living" can never be considered as the basis for an upward modification, but, rather, that a rise in the "cost of living" is an appropriate basis for an increase where it is shown that it has particularly effected a party:

> ***In Greene, the alimony award was erroneously modified in the trial court solely on the basis of a national increase in the cost of living without evidence that it had any adverse impact upon the wife's actual situation. Thus, there was a total absence of the required showing that there had been a substantial change in the circumstances of a party, as opposed to an abstract and therefore essentially irrelevant change in the economy as a whole.*** (Id. at 1215).

Thus, ***Powell*** stands for the proposition that a party must prove that a rise in the "cost of living" has specifically effected that party. It is insufficient, according to ***Powell***, for a party seeking an increase in alimony to merely appear before the trial court and plead that the "cost of living" has increased. As ***Powell*** holds, a contrary ruling would be the equivalent of a "requirement of a virtually automatic adjustment in each existing alimony and support judgment, based solely on monthly changes in the consumer price index."

Following ***Powell***, the decisional law of the state has mentioned the "cost of living" factor relative to modification of alimony awards only insofar as the party seeking a modification was able to show that the "cost of living" had a specific impact upon the party. Although it is clear that mere recitation of the words, "the cost of living has gone up", as here, is not sufficient "evidence" upon which an increase in alimony may be granted, no Florida case has addressed the issue of what type of evidence is necessary. The Husband submits, therefore, that guidance may be obtained from the decisional law of our sister states.

In ***Block v. Block***, 201 So.2d 51 (Ala. 1967), the wife sought an increase in alimony and was awarded the requested increase. The Supreme Court of Alabama described the facts of the case as follows:

> ***The ex-wife was the only witness to testify. She testified that she was thirty-five years of age, in good health and not employed; that appellant is sixty-three years of age and that he sole and only ground for seeking modification of the alimony payments is that the cost of living has increased. She testified that her rent, groceries, clothing, automobile and entertainment expenses had increased since 1960, but she produced no records showing an increase in grocery expenses, clothing expenses, utility bills or automobile expenses. The amount of increases which she did testify to were guesses or approximations.***
> (Id. at 52).

Upon these facts, the Alabama court concluded that the lower court had erred in increasing the wife's alimony, finding themselves,

"not convinced that the finding of the lower court was supported by the evidence."

In the decisional law of the state of Illinois, much effort has been made to describe and explain the type of showing required to substantiate an increase in alimony based upon a rise in the "cost of living."

In ***Goldberg v. Goldberg***, 332 N.E.2d 710 (Ill. App.Ct. 1976), an order of modification was reversed because:

> ***We do not believe that inflation in itself is sufficient to establish a material change in circumstances. A material change in circumstances is not shown by merely having the court take judicial notice of inflation, but instead by evidence clearly indicating that the applicant's needs have increased since the original award.*** (Id. at 713).

Similarly, in ***Nordstrom v. Nordstrom,*** 343 N.E.2d 640 (Ill. Ct.App. 1977), the court found insufficient evidence to justify a modification of child support on the basis of a rise in the "cost of living" because, although the wife had produced an itemized list of expenses for child support, she did not offer any evidence in support of the itemized expenses and was unable to say how much the cost of supporting the children had increased.

These two decisions ultimately led to the decision in ***Shive v. Shive***, 373 N.E.2d 557 (Ill. Ct. App. 1978). In ***Shive***, the wife received an increase in alimony based upon the trial court's finding that the cost of living had increased. The husband appealed, arguing that the ***Goldberg*** and ***Nordstrom*** decisions stood for the proposition that a finding of increased need cannot be based solely

upon inflation. The appellate court first reviewed the evidence, finding:

> ***Mrs. Shive then testified that her living expenses had increased substantially since the 1969 decree and offered into evidence an exhibit itemizing projected necessary living expenses in the amount of $1969 per month. Mrs. Shive testified that many of her living costs had doubled since 1969, while others had increased over 50%.*** (Id. at 560).

The court found that this type of evidence and testimony was persuasive and explained the difference between the holding in ***Shive*** and the holdings in ***Goldberg*** and ***Nordstrom***:

> ***Mrs. Shive did not simply rely upon a general statement that her living expense had increased due to inflation, but produced an itemized list of living expenses and explained these expenses in her testimony.***
>
> * * *
>
> ***The principle concern of the Goldberg and Nordstrom courts was not that inflation be excluded as evidence of increased need, but that a petitioner desiring an increase in alimony or child support be required to provide a specific accounting of increased expenses and not be granted an increase solely on the basis of a general statement that inflation has increased.*** (Id. at 563)

What is demonstrated by the foregoing is that although a rise in the "cost of living" can be a factor in a modification case, evidence must be introduced to establish that the alleged increase in the "cost of living" has had a specific, demonstrable, impact upon the party seeking the modification. That evidence should, minimally,

consist of records showing the purported increased expenditures as in ***Block***; or an itemized list of expenses and testimony as to the increased cost of the items listed as in ***Shive***; or an accounting of the alleged increased expenses as also in ***Shive***.

Turning to the facts of this case, the record is clear that the Wife did none of the above. She presented no testimony or evidence whatsoever regarding her expenditures or need as of 1975. She introduced no financial records either as to her expenditures in 1975 or as to her expenditures at the time of the final hearing on her modification petition. The only financial documentation placed into evidence by the Wife was her "Financial Affidavit" which, by her own admission, did not represent her actual expenditures but, rather, was a "Christmas wish list" of what she would spend if she was given $82,000 per year in alimony. The Wife's entire case for modification consisted of her expert's testimony regarding the "cost of living" nationally and her own testimony that "things cost more." This was not enough. The Wife was required to, but did not, explain what "things" cost "more" and what "things" have "gone up".

Lastly, the Wife also complains that the trial court and district court of appeal both erred in finding that the support provided to the Wife by her mother over an eleven year period was not a "loan."

It is fundamental that this Court cannot, as requested by the Wife, reweigh the evidence and retry this case. In ***Jones v. Jones***, 338 So.2d 60 (Fla. 3rd DCA 1976), the appellant therein attempted precisely that which the Wife herein is attempting - to have the

appellate court re-decide the factual and evidentiary portions of the case:

> ***The plaintiff in a stockholder's derivative action appeals a final judgment for the defendants. The basic finding of the trial court was that the plaintiff had, after a full trial, failed to show a misapplication of corporate funds. On this appeal, plaintiff argues that he did, in fact, prove a misapplication of corporate funds. The record contains evidence which, if believed by the trial judge, amply supports the court's findings. Under such circumstances, it is not the function of an appellate court to retry the case.*** (Id. at 60).

Here, the Wife complains that the trial court, in finding that the support money received by the Wife from her mother over eleven years was not a "loan", "ignored" certain testimony, misunderstood the Wife's mother's intentions, and failed to apply a standard of "life experience" as opposed to standards of lending used by banks.

The reality, however, is that the trial court was absolutely correct in finding that the funds received by the Wife from her mother were not "loans" where the evidence established that neither the Wife nor her mother knew the precise amounts of the "loans" and neither was able to tell the trial court about any kind of repayment plan or date.

II.

THE TRIAL COURT DID NOT ERR IN DENYING THE WIFE'S MOTION FOR "REIMBURSEMENT" OF COLLEGE EXPENSES AND THE DISTRICT COURT DID NOT ERR IN AFFIRMING THE TRIAL COURT'S DECISION.

During the course of the proceedings at the trial level, the Wife filed a motion which she entitled as one for "reimbursement" of college expenses paid on behalf of one of the parties' children.

The facts surrounding the issue of these college expenses were that one of the parties' children had experienced difficulties in high school, had been expelled, had been determined to have been suffering from psychological and substance abuse problems and, therefore, had been enrolled by the Husband in a special "therapy school." The Husband paid a year's tuition in the amount of $18,000 for the child's enrollment in the "therapy school."

The Wife, however, did not believe that the child required therapy in a residential setting, believing instead, according to the Husband, that a "year in Europe" to "find himself" was all that was necessary. The child, with the encouragement of the Wife, left the school upon attaining his majority and moved in with his mother. (TR. 235).

Thereafter, the Wife's mother - not the Wife - took it upon herself to enroll the child at St. Leo's college, over the objection of the Husband who, based upon the opinion of the psychologists at the "therapy school", attempted to insist that the child complete his treatment. (TR. 239).

Notwithstanding the Husband's protestations, the Wife's mother enrolled the child in the college of her choice and paid the tuition expense for one semester. The child completed the semester paid for by the Wife's mother and, thereafter, all of his subsequent college expenses were paid for by the Husband.

The trial court denied the Wife request - made during the proceedings some seven years after the incident - to be "reimbursed" for the one semester of tuition paid by her mother. The trial court found:

> **As part of these proceedings the Wife also filed a "Motion for Reimbursement of Children's College Education", claiming that the Husband owed her certain sums expended on tuition for one of the parties' children during his first year of college. The evidence showed, however, that the Wife did not pay the child's tuition but, rather, her mother did. The evidence also showed that at the time in question the Husband had enrolled the child, who had a history of drug abuse and had been expelled from his high school, in a therapy school and had paid the sum of $18,000 for a full year's tuition. At the Wife's suggestion, the child withdrew from the school when he attained majority and enrolled at St. Leo's College. The Husband's tuition payment at the therapy school was not refunded despite the fact that the child did not complete the year for which tuition had been paid. The Court finds that the Husband's obligation to pay tuition for the year in question was met by his payment to the therapy school and that the parties' agreement cannot be read so as to require the Husband to pay successive schools within the same period of time, particularly where, as here, full payment was made and the child elected not to avail himself of same. The Court further notes that**

> **the Husband fully met his obligation to pay tuition in all subsequent years.**

The District Court, en banc, affirmed this finding of the trial court, holding:

> **The wife also claims error in the denial of her request for reimbursement of one year of college expense for the parties' oldest son; we conclude that no error is presented by this ruling. First, the husband, in fact, paid $18,000 for one year's tuition for the son in a therapy school after the son graduated from high school. Thereafter, the son withdrew from this school after attaining his majority and enrolled in a college, all without the husband's consent; the husband's tuition payment to the therapy school was thereafter never refunded . . . Second, the wife's mother, not the wife, paid for the son's tuition at the second school. Under these circumstances, the wife clearly was not entitled to be "reimbursed" for an expenditure which she did not make.**

As before, the Wife impermissibly asks this Court to reweigh the evidence before the trial court and retry this issue. This Court cannot do so.

Further, the issue which the Wife does not address is how she expects to be "reimbursed" for monies she did not pay, an issue that both the trial court and the district court of appeal found to be significant.

It was undisputed that the Wife never paid the child's college tuition. The tuition expense was paid by her mother. The Wife's mother enrolled the child at St. Leo's College and the Wife's mother paid all the attendant expenses. There was, therefore, nothing for which to "reimburse" the Wife.

The motion seeking "reimbursement" was filed by and on behalf of the Wife. The Wife's mother never attempted to intervene in the proceedings and never attempted to seek standing as a party. Thus, the Wife's mother was not before the trial court. The trial court could not, therefore, order "reimbursement" even if the trial could had been inclined to do so.

CONCLUSION

Upon the argument and authority contained herein, the Husband respectfully submits that the decision of the District Court of Appeal, Third District, rendered en banc, is correct and should be affirmed by this Court.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing Answer Brief of Respondent was served by mail this 21st day of December, 1990 upon Marguerite H. Davis, Katz, Kutter, Haigler, Alderman, Davis, Marks and Rutledge, P.A., P.O. Box 1877, Tallahassee, Florida, 32302 and upon Frates, Beinstock & Sheehe, Suite 3160, 200 Biscayne Boulevard, Miami, Florida, 33131.

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