D.A. 2-8-91

IN THE SUPREME COURT OF FLORIDA

DIANE V. BEDELL,

Petitioner,

v.

ROBERT L. BEDELL,

Respondent.

Case No.: 75,894

INITIAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE

On July 28, 1975, the trial court entered a Final Judgment dissolving the marriage of the parties (R. at 14), which incorporated a settlement Agreement previously entered into by the parties on July 15, 1975. (R. at 8-12).

On July 12, 1986, pursuant to § 61.14(1) Florida Statutes (1985), Diane V. Bedell ("Mrs. Bedell" or "the former wife") timely filed a Supplemental Petition for Modification of Alimony. (R. at 22-25). The response of Robert L. Bedell ("the former husband" or "Dr. Bedell") to the supplemental petition was two-fold: He filed an Answer and Counter-Petition for Modification of Final Judgment seeking to terminate his responsibility to his former wife for permanent periodic alimony (R. at 38-41), and he moved the court to strike several paragraphs of the supplemental petition because they were "irrelevant to a cause of action for modification and are improper." (R. at 45-46).

On August 18, 1986, without permitting Mrs. Bedell the opportunity to respond to Dr. Bedell's motion to strike and "without formal hearing," the trial court granted the former husband's motion. (R. at 50). Mrs. Bedell moved for reconsideration of the court's order granting Dr. Bedell's motion to strike (R. at 62-64), and on September 23, 1986, the court held a hearing on the former wife's motion. In keeping with its earlier decision, the court denied Mrs. Bedell's motion. (R. at 78).

Both parties served interrogatories and requests for production of documents upon the other. (R. at 17-20, 21, 71 and 72-74). However, while the former wife fully cooperated by producing her records and documents and answering the former husband's interrogatories (R. at 168-170), Dr. Bedell objected to the discovery served upon him and moved for a protective order excusing him from responding on the ground that "he has sufficient financial

ability to discharge any reasonable fiscal obligation imposed by the Court as alimony. Therefore, the Wife's [discovery] is not reasonably calculated to lead to discoverable and admissible evidence." (R. at 51 and 52). In response, the former wife moved to compel answers to the interrogatories and production of documents and filed a supporting memorandum of law. (R. at 68). After hearing on October 1, 1986, the court denied Mrs. Bedell's motion and granted the former husband's motion for a protective order. (R. at 162 and 165).

On December 11, 1986, a non-jury trial was held before the Honorable Richard S. Fuller. The court heard the testimony of seven witnesses and received into evidence the depositions of three others. In addition, numerous documents setting forth Mrs. Bedell's financial situation were admitted into evidence.

On December 30, 1986, the court rendered a Final Judgment on Petition for Modification. (R. at 308; Appendix, p. 8), which is essentially identical to Dr. Bedell's proposed final judgment. (R. at 287). The Final Judgment denied both petitions for modification (R. at 313) and Mrs. Bedell's Motion for Reimbursement of Payment of Children's College Education. (R. at 314). The trial court denied Mrs. Bedell's petition because it found that she "failed to demonstrate that she has been detrimentally effected by this rise in the cost of living or that such a rise has caused an increase in her need," (R. at 312); that one reason for the requested modification was justified (R. at 312-313); and that she "made no serious effort whatsoever to contribute to her own support" even though she "is fully capable of contributing to her self-support if she chose to do so." (R. at 309). The court, though, gave no reason at all for its denial of Dr. Bedell's petition. Finally, the court

denied Mrs. Bedell's motion for reimbursement because it found "that the Husband's obligation to pay tuition for the year in question was met by his payment to the therapy school . . . ." (R. at 311).

Mrs. Bedell appealed the trial court's judgment to the Third District Court of Appeal. Because of an internal conflict of decisions, the Third District considered the appeal *en banc* pursuant to Rules 9.331(a) and (b), Florida Rules of Appellate Procedure. Mrs. Bedell argued that she was entitled to an increase in alimony as a matter of law under § 61.14, Florida Statutes (1985), due to the stipulated substantial betterment of her former husband's financial circumstances since entry of the final judgment in 1975. Further, Mrs. Bedell contended that the more than 50% decrease in the purchasing power of her $415.00 per month alimony award as a result of inflation, along with other causes, had caused her needs to no longer be met by the original award and entitled her as a matter of law to an increase in alimony.

The district court acknowledged that § 61.14(1), Florida Statutes (1985), permits a spouse who is the recipient of an alimony award in a final judgment of marriage dissolution incorporating a prior settlement agreement to apply to the circuit court for a judgment increasing the amount of alimony when the circumstances or the financial ability of *either* party has changed. It further recognized that the statute invests jurisdiction in the trial court to make orders as equity requires with due regard to the changed circumstances or the financial ability of the parties increasing or confirming the amount of alimony provided for in the agreement or order. But the district court held that the trial court is not required to grant a motion for modification of alimony when a spouse who is the recipient of alimony

is able to demonstrate that the financial condition of the spouse paying the alimony has substantially improved and where the dollar value of her alimony has substantially decreased due to inflation.

The district court expressly held that where the financial needs of the recipient spouse have not substantially increased since the final judgment, the trial court may deny a motion to increase the alimony despite the fact that the paying spouse's income has substantially increased and despite the fact that inflation has cut the recipient spouse's real income in half. The district court held that proof of a rise in the cost of living was not sufficient to justify an increase in alimony for Mrs. Bedell absent a demonstration that she had personally been detrimentally affected by such inflation.

The Third District expressly receded from its decision in *Sherman v. Sherman*, 279 So.2d 887 (Fla. 3d DCA), *cert. dism.*, 282 So.2d 877 (Fla. 1973), in which case the Third District had previously affirmed an increase in periodic alimony for a former wife where the only demonstrated change in circumstances was a substantial increase in the earnings of her former husband.

After denial of her motion to certify conflict of its decision with decisions of the Florida Supreme Court or, alternatively, to certify its decision as passing upon issues of great public importance, Mrs. Bedell sought review in this Court on the basis that the decision of the Third District expressly and directly conflicts with the following decisions of this Court and the Second and Fourth Districts on the same question of law: *McArthur v. McArthur*, 95 So.2d 521 (Fla. 1957); *Lenton v. Lenton*, 370 So.2d 30 (Fla. 2d DCA 1979); *Rogers v. Rogers*, 229 So.2d 618 (Fla. 2d DCA 1969); *Terry v. Terry*, 126 So.2d 890 (Fla. 2d DCA), *cert.*

den., 133 So.2d 321 (Fla. 1961); *England v. England*, 520 So.2d 699 (Fla. 4th DCA 1988); *Weinstein v. Weinstein*, 447 So.2d 309 (Fla. 4th DCA 1984); *Turner v. Turner*, 383 So.2d 700 (Fla. 4th DCA 1980; and *Pope v. Pope*, 342 So.2d 1000 (Fla. 4th DCA 1977). This Court noted probable jurisdiction.

STATEMENT OF THE FACTS

On July 28, 1975, the trial court entered a Final judgment of Dissolution of Marriage dissolving the marriage existing between Mrs. Bedell and Dr. Bedell, and incorporating their settlement Agreement, which, *inter alia,* awarded Mrs. Bedell $415.00 permanent periodic alimony and $500.00 per month child support. (R. at 8).

Eleven years later, on July 16, 1986, this modification of alimony proceeding was initiated by the Mrs. Bedell for the purpose of seeking an increase in permanent monthly alimony from Dr. Bedell. Mrs. Bedell based her request for modification of alimony on the grounds that the alimony awarded to her was inadequate both at the time of the parties' Agreement and currently, that there has been a favorable and significant change of circumstances in Dr. Bedell's financial condition, that inflation has adversely affected Mrs. Bedell's standard of living, and that her needs had increased since the original judgment.

During the final hearing on the modification petition, the mostly-uncontroverted testimony by Mrs. Bedell revealed the following facts. Mrs. Bedell dropped out of college in order to marry her former husband. (T. at 46). The parties had two sons soon after they were married. (T. at 48). During this period of time, Mrs. Bedell was a housewife and a mother and was not employed during the marriage or at the time of the divorce. (T. at 98).

During their marriage, the former wife and her family assisted Dr. Bedell with his expenses for attending medical school and with other significant family expenses. (T. at 47).

After being separated for a few years, the parties in 1975 entered into an Agreement "settling their respective property and . . . [providing] for support provisions for the Wife and the issue of the marriage." (R. at 8). Dr. Bedell agreed to pay Mrs. Bedell permanent periodic alimony; however, there is no clause in the Agreement requiring Mrs. Bedell to obtain employment to subsidize the alimony award. The former husband also agreed to pay to the Wife $250.00 per month as support for each child. (R. at 8). The alimony award by itself was insufficient to meet Mrs. Bedell's needs in 1975; only with the $500.00 per month child support payment was Mrs. Bedell able to meet her monthly expenses even in 1975. (T. at 40-41). Additionally, Dr. Bedell agreed to be responsible for the costs of the children's college education. (R. at 10). As part of the settlement, Dr. Bedell delivered to Mrs. Bedell the deed to the townhouse (with an existing mortgage) in which she continues to reside. (R. at 9).

The Agreement represented that each party "had independent legal advice by counsel of his or her own selection" and had "made a full disclosure to the other of his or her current financial condition." (R. at 11). However, Mrs. Bedell testified that she had no input into the determination of the alimony amount, that Dr. Bedell made no financial disclosure to her at the time of entering into the Agreement, and that she was unaware of what he was earning or what property he held. (T. at 41-43). Dr. Bedell did not dispute Mrs. Bedell's testimony concerning these items. She stated that she signed the Agreement containing such a financial disclosure representation because she thought it "meant that we

had discussed what I was going to be getting . . . ." (T. at 44). Mrs. Bedell only knew that Dr. Bedell, at the time of the divorce, had opened his first medical office and was in private practice. (T. at 42). Dr. Bedell told his former wife prior to the divorce that he could not afford to pay her more than the $415.00 per month alimony that he was offering and that she should accept that amount. (T. at 88).

Additionally, Mrs. Bedell testified that she did *not* have independent legal advice because the attorney who explained the Agreement to her was a member of the law firm which represented her former husband. (T. at 44). She met with this attorney on one occasion as a result of a "a very strong recommendation" made by Dr. Bedell, and she took his advice because she "trusted him." (T. at 45). There was also testimony that Dr. Bedell threatened Mrs. Bedell in order to accept the settlement. (T. at 46). Her testimony is confirmed by reviewing the transcript of the original final hearing held before Judge Fuller on July 28, 1975, when Mrs. Bedell, in response to Judge Fuller's question of her if she "in fact used counsel," stated she had not. (T. at 4). Moreover, Dr. Bedell stated at the final hearing that:

> We had a lawyer explain — what we did was, we agreed to put into legal terms. Diane went down and had some of the other lawyers review it.

(T. at 6). These "other lawyers" were, in fact, one partner in the firm representing Dr. Bedell. Thus, it is clear that Mrs. Bedell had no legal representation during the original dissolution of marriage proceedings.

Additionally, the townhouse which Mrs. Bedell received in the settlement was worth less than what Dr. Bedell represented at the time of the settlement. In the Agreement, it

is represented that the mortgage upon the realty was in the amount of $36,700.00. (R. at 9). However, Mrs. Bedell later discovered that Dr. Bedell had taken an additional loan out on the equity which he had failed to disclose to her. (T. at 61). The mortgage amount was more than the value of the townhouse she was given. (T. at 61). As a result of Dr. Bedell's nondisclosure, Mrs. Bedell's mortgage payments from 1975 to date have done little more than reduce the principal balance of the mortgage to the level to which she was told it was in 1975. Finally, when the parties' oldest son, David, first attended college at St. Leo College, his father refused to pay, (T. at 244-245), contrary to the Agreement. In order that he could attend the school, his grandmother, Mrs. Bedell's mother, advanced the necessary funds (T. at 164) which amount to over $6,500.00. (T. at 165). As a result, Mrs. Bedell moved for reimbursement of that money. (R. at 380).

While having custody of her two sons, Mrs. Bedell attempted to earn more income by tie-dying fabric which she made into pillows and by modeling on a part-time basis. (T. at 99). Two years after the divorce, Mrs. Bedell moved to New York to study at the Pratt Institute. (T. at 89). Although, Mrs. Bedell only officially took three credits worth of classes at Pratt Institute, she did audit other classes. (T. at 104-105). Mrs. Bedell was unable to register for more classes towards receiving her degree, which she was also unable to obtain, because she could not afford it. (T. at 49). She asked her former husband to assist her in obtaining her degree, but he refused to aid her in any way. (T. at 89-90).

When Mrs. Bedell moved to New York to attend Pratt Institute, Dr. Bedell took custody of the children upon agreement of the parties (T. at 101-102), and thus discontinued paying the $500.00 per month to his former wife for child support. Since the divorce, Mrs.

Bedell has additionally attempted to subsidize the $415.00 monthly alimony payments by doing calligraphy for Air France (T. at 103), and others and by working as a salesperson at Burdines (T. at 110) and at a health spa. (T. at 113). However, these attempts to subsidize her income did not raise her income sufficiently to meet her monthly expenses. Thus, soon after the divorce, Mrs. Bedell's mother began loaning her a substantial amount of money each year in order to survive.

In response to Mrs. Bedell's supplemental petition, Dr. Bedell filed an answer, a counter-petition for modification seeking to terminate his responsibility to pay his former wife alimony and a motion to strike several paragraphs of the supplemental petition with a supporting memorandum of law. The trial court, without a hearing, granted the former husband's motion to strike. Although the court permitted the former wife to argue against the motion to strike on rehearing, the court merely upheld its earlier decision.

Both parties sought extensive discovery, serving upon the other requests to produce and interrogatories. While Mrs. Bedell cooperated fully and responded to the discovery requests, Dr. Bedell moved for and was granted a protective order over Mrs. Bedell's motion to compel. Pursuant to the protective order which Dr. Bedell obtained, he did not produce any financial affidavit.

On December 11, 1986, the Final Hearing was held before the Honorable Richard S. Fuller. The trial court was called upon to determine if either party had established the "fundamental prerequisite" for modification of an alimony agreement or judgment pursuant to § 61.14(1), Florida Statutes, which is "a showing of substantial change of circumstances, including financial circumstances of one or both parties." *Taplin v. Taplin,* 341 So.2d 1064

(Fla. 3d DCA 1977). In order to accomplish this goal, the court heard testimony from Mrs. Bedell, an accountant and an economist retained by her, her mother, an accountant retained by Dr. Bedell and others. The court reviewed pre-trial memoranda and proposed final judgments submitted by both parties.

As a result of the protective order obtained by Dr. Bedell, most of the hearing dealt with Mrs. Bedell's financial situation. Her financial affidavit and income tax returns reveal that she receives as monthly income $415.00 from alimony and $87.00 from calligraphy and other art-related jobs, totalling $6,020.00 per year. Such a minimal yearly income is very near the poverty level as defined by the Department of Commerce. (T. at 22). However, Dr. Bedell's accountant, Carl Margeneau, testified that with the loans from her mother Mrs. Bedell had a total "income" of approximately $18,500.00 per year for the years 1981 through 1986 (T. at 199-200), and in its Final Judgment the court accepted this conclusory testimony. (R. at 312). Mr. Margeneau further testified that in 1981, for instance, Mrs. Bedell's tax returns, bank statements and other financial records show that she received $4,980.00 from alimony, $850.00 from unidentified sources (presumably art-related jobs) and $14,591.00 in contributions from her mother[1] (T. at 227), equalling $20,421.00 in "income." Thus, Mr. Margeneau's analysis reveals that his definition of "income" is broader than the legal

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[1] Clearly, this is not "income." In fact, the testimony from Mrs. Bedell, Mrs. Oleck (Mrs. Bedell's mother), and Carl Margeneau concerned "contributions" received by Mrs. Bedell from her mother. Both Mrs. Bedell and Mrs. Oleck calculated that Mrs. Oleck *loaned* approximately $65,000.00 to her daughter from 1977 to present, an average of about $6,500.00 per year. (T. at 50 and 159). However, Mr. Margeneau, after analyzing both Mrs. Bedell's records and records voluntarily produced by Mrs. Oleck, determined that Mrs. Oleck has loaned Appellant "closer to a little bit over 9 thousand dollars a year for a six year period." (T. at 216-217).

definition, which is "the return in money from one's business, labor, or capital invested; gains, profits or private revenue." *Black's Law Dictionary* 906 (4th ed. 1968). The definition which Mr. Margeneau appears to be utilizing in his analysis is simply money coming into Mrs. Bedell's bank account from any source, including loans.

Mrs. Bedell quite frankly testified that she is actually currently spending "about $20,000.00" per year. (T. at 52). This amount for actual annual expenditure was confirmed by Dr. Bedell's accountant, who testified that Mrs. Bedell's average annual expenditure for the years 1981 through 1986 was $19,392.00. (T. at 199). Further, Mr. Margeneau stated that in order to provide Mrs. Bedell with "the same standard of living as presently indicated in the records" which he reviewed, she would need an annual gross income equalling between $23,000.00 and $25,000.00. (T. at 203).

Mrs. Bedell testified at length concerning the reasons for the disparity between the amount of money she is currently spending and the amount listed on her financial affidavit. She first explained that she does not spend the $55,000.00 listed in her financial affidavit because she simply does not have that kind of money (T. at 52). The amount in the financial affidavit largely represents her anticipated needs. (T. at 52). Specifically, Mrs. Bedell testified that the expenditures amounting to $35,000.00 ($55,000.00 as listed in the financial affidavit minus $20,000.00 actually expended) include monthly amounts of $119.00 for medical insurance coverage (T. at 55), additional money for drugs and medications (T. at 57), for electricity to be able to use her dryer and air conditioner on a more frequent basis (T. at 60), for exterminator service (T. at 62), for food and grocery items (T. at 75),

cleaning supplies and laundry (T. at 75), hygienic supplies (T. at 76), clothing and shoes (T. at 76) and entertainment and vacation. (T. at 77).

Furthermore, Mrs. Bedell testified that she included several one-time, substantial items including $525.00 for home repairs and maintenance. (T. at 62). She calculated that amount by obtaining estimates for various items, including painting and plumbing to remedy leaks (T. at 65), security for the home for which there presently is none (T. at 67), a new dishwasher, trash compactor and dryer to replace those appliances which were purchased with the home more than fifteen years ago (T. at 68 and 69), new carpeting to replace the original (T. 71-72), drapes in order to replace bedspreads and sheets which presently hang in her windows as shades (T. at 72-73), tile to replace the original tile in her kitchen (T. at 73) and to recover her sofa which was also present when the house was purchased. (T. at 73-74). As stated, most of these items are necessary to replace items which were originally in the house when Dr. Bedell purchased it more than fifteen years ago. (T. at 66). Mrs. Bedell calculated the $525.00 monthly figure by adding all estimates obtained for these items,[2] which equalled $20,000.00, and calculating the monthly pay-back figure for such a loan. (T. at 74). Mr. Margeneau confirmed that the pay-back figure for a $20,000.00 loan at 12% over 48 months would equal about $525.00. (T. at 220-221). The final major items listed in her financial affidavit include a replacement for her 1982 car, which equals $13,000.00 (T. at 70-71) or $330.00 per month for 4 years (R. at 372), for a television which

[2] Appellant testified as to each item and estimate during the final hearing. These estimates were also received into evidence by the Court as Exhibit Number 4. (T. at 64). Although the Clerk of the Circuit Court has represented that it could not locate any Exhibits marked and filed, these estimates were not disputed or objected to by Appellee during the final hearing.

she has done without for several years, and for a video cassette recorder, which she has never had. (T. at 69). (These amounts are included in the $20,000.00 estimate listed previously). Additionally, Mrs. Bedell has listed in her financial affidavit $260.00 per month for college tuition in order to obtain her degree (T. at 82) and $168.00 per month for business expenses in order to obtain the proper equipment to start her own small business. (T. at 83). The monthly expenditure for college tuition and business expenses are similar to those for repairs and maintenance, in that they are short-term items in order for Mrs. Bedell to repay loans over five and four years. (R. at 374). The final expense is $60,000.00 to pay back her mother for the substantial loans made by her to Mrs. Bedell for her support. Considering these additional expenses, which did not exist at the time of dissolution, Mrs. Bedell's annual need over three to four years amounts to approximately $55,000.00 (T. at 17; Appendix B. at 4).

Professor Ledford, an economist from the University of Miami, testified by deposition concerning the impact of inflation and the consumer price index upon Mrs. Bedell's standard of living. First, Professor Ledford testified that based upon the consumer price index, inflation has averaged 6.67% per year from 1975 to 1986 (T. at 33-34), and that total inflation during that same period has been over 100%. (T. at 38-39). Professor Ledford additionally calculated and reported that the current cost to purchase goods and services valued at $415.00 in 1975 dollars equals $844.42. (T. at 33). Mrs. Bedell testified that inflation has personally hurt her financially. (T. at 85). This testimony was undisputed. Thus, it is clear that inflation has had an adverse effect on Mrs. Bedell, allowing her to

purchase less goods and services with her alimony since her income has remained static while prices have more than doubled.

Finally, the former wife's accountant, Robert A. Stone, testified regarding several matters. First, Mr. Stone testified that based upon the projected annual expenditures as stated in Mrs. Bedell's financial affidavit, she would require $21,391.00 annually in order to pay related income taxes. (T. at 17). Thus, he determined that an increase in alimony to $75,600 per year would be necessary to pay all of her expenses. (T. at 17; Appendix B at 1). Additionally, Mr. Stone testified that based upon Professor Ledford's determination that one would need $844.00 in net disposable dollars to purchase the same goods and services purchased with $415.00 in 1975, one would need to increase the $844.00 by approximately 25% for related tax effect. Thus, in order to spend $844.00 per month, one must have approximately $1,200.00 per month in gross income. (T. at 22).

Mr. Stone also testified that based upon Department of Commerce statistical information of 1984, the poverty level for a single individual is between $5,400.00 and $5,500.00 per year. (T. at 22). Thus, without earning the small amount she does from art-related jobs, Mrs. Bedell's alimony income would place her below that poverty level. Even with that extra income, Mrs. Bedell is barely above the poverty level. Without contributions from her mother, Mrs. Bedell could not have survived at even the modest standard of living she presently maintains.

SUMMARY OF ARGUMENT

Section 61.14(1), Florida Statutes (1985), provides that a spouse may seek modification of alimony when the circumstances or the financial ability of either party changes. In order to determine if such a significant change in circumstances has occurred, the parties' previous and present standards of living and their previous and present earning capacities should be considered. Mrs. Bedell sought modification of her alimony pursuant to § 61.14 based on the stipulated substantial betterment of her former husband's financial circumstances since dissolution in 1975, particularly since her needs were not met by the original alimony award and are currently not being met. Adhering to the dictates of § 61.14(1), Mrs. Bedell is entitled as a matter of law to an increase in alimony on the basis of improvement in her former husband's financial circumstances, without proof of an increase in her need.

In ruling that Mrs. Bedell was not entitled to a modification of alimony due to her former husband's substantial increase in income since dissolution, the Third District has given § 61.14(1) a different and more restrictive construction than given it by this Court or the Second or Fourth Districts. Section 61.14(1) expressly provides that a spouse may seek modification of alimony based upon a change in the circumstances or financial ability of *either* spouse. Nevertheless, while acknowledging the dictates of this statute, the Third District held that the trial court is not required to grant a motion for modification of alimony when a spouse who is the recipient of alimony is able to demonstrate that the financial condition of the spouse paying the alimony has substantially improved and where the dollar value of her alimony has substantially decreased due to inflation.

Furthermore, assuming such proof is required, Mrs. Bedell demonstrated that her needs were not met by the original alimony award and are not currently being met, and she showed that her financial circumstances have substantially worsened due to the ravages of inflation and other causes. The Third District's holding that proof of substantial inflation since the 1975 dissolution is insufficient to demonstrate Mrs. Bedell's need for an increase in her $415.00 per month alimony is directly contrary to decisions of the Fourth District on this issue. *Weinstein v. Weinstein*, 447 So.2d 309 (Fla. 4th DCA 1984); *Pope v. Pope*, 342 So.2d 1000 (Fla. 4th DCA 1977). Further, the court's consideration of money *loaned* to Mrs. Bedell's by her mother as "income" to be considered in determining Mrs. Bedell's financial condition and need is erroneous as a matter of law.

Mrs. Bedell demonstrated to the court that Dr. Bedell failed to make any financial disclosure to her, that the attorney who explained the Agreement to her was a member of the same law firm as Dr. Bedell's attorney, that the realty she received in the Agreement was more encumbered than Dr. Bedell disclosed, and that Dr. Bedell claimed he could not afford to pay more than the $415.00 per month as alimony that he offered. Thus, based upon the foregoing, Mrs. Bedell was able to show that the alimony was inadequate at the time of entry into the Agreement, that her needs have substantially increased, and that Dr. Bedell's financial circumstances have changed for the better. Therefore, as a matter of law, the court should have granted Mrs. Bedell's petition for modification.

This Third District's restrictive interpretation is directly contrary to the express language contained in § 61.14(1), as well as the decisions of this Court and the Second and Fourth Districts. The Third District has impermissibly departed from the cardinal rule

of statutory construction that a statute must be construed so as to give effect to the intention of the legislature as expressed by the words in the statute. *City of Tampa v. Thatcher Glass Corp.*, 445 So.2d 578 (Fla. 1984). Although § 61.14 unambiguously declares the legislative intent that a spouse may seek modification of alimony based upon a change in the circumstances or financial ability of *either* of the parties, the Third District has nevertheless impermissibly invaded the province of the legislature and deviated from the plain meaning of the statute by placing additional burdens not dictated by this section upon a spouse seeking a modification of alimony.

Finally, pursuant to the parties' Agreement, the court should have required Dr. Bedell to reimburse Mrs. Bedell for her mother's payment of the parties' oldest son's college expenses. It is not contested that Dr. Bedell did not pay his son's first year college expenses, as was required by the Agreement, nor that Mrs. Bedell's mother paid them. Therefore, it was error to deny Mrs. Bedell's motion for reimbursement. Thus, the trial court's ruling is erroneous, as a matter of law and fact, and should be reversed.

The Third District's decision should be quashed with directions that the case be remanded to the trial court for determination of the amount of increase in alimony which should be awarded to Mrs. Bedell and for entry of judgement in favor of Mrs. Bedell for reimbursement of the son's college expenses.

ARGUMENT

I. THE TRIAL COURT AND THIRD DISTRICT ERRED IN HOLDING THAT MRS. BEDELL IS NOT ENTITLED TO A MODIFICATION OF ALIMONY EVEN THOUGH HER HUSBAND'S FINANCIAL CONDITION HAS SUBSTANTIALLY IMPROVED, HER NEEDS WERE NOT MET BY THE ORIGINAL ALIMONY AWARD, AND HER FINANCIAL CONDITION HAS SIGNIFICANTLY WORSENED AS A RESULT OF INFLATION AND OTHER CAUSES.

Alimony such as originally awarded to Mrs. Bedell is used to provide the necessities of life to a former spouse as was established by the marriage of the parties. *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980). Once awarded, alimony is subject to modification upon a change of circumstances. *Id.* The starting point for modifying the award of alimony in this case is § 61.14(1), Florida Statutes (1985), which was in effect at the time Mrs. Bedell filed her petition. That section provides:

> 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 of the circuit in which the parties, or either of them, resided at the date of the execution of the agreement or reside at the date of the application, or in which the agreement was executed or in which the order was rendered, for an order decreasing or increasing the amount of support, maintenance, or alimony, and the court has jurisdiction to make orders as equity requires, with due regard to the changed circumstances or the financial ability of the parties . . . , decreasing, increasing, or confirming the amount of separate support, maintenance, or alimony provided in the agreement or order. [Emphasis added.]

As indicated by the statute's plain language, the legislature has unambiguously declared its intent that a change in circumstances of *only one of the parties* is sufficient to support a modification of alimony in Florida.

Mrs. Bedell petitioned the circuit court for an order increasing her 1975 alimony award for two principal reasons: (1) because her former husband's financial circumstances have improved as his medical practice developed after dissolution, particularly since her needs were not met by the original award and continue to be unmet; and (2) her financial condition has worsened since the original award because inflation has reduced the buying power of her alimony by more than 50%, while her normal living expenses have at the same time substantially increased. Either of these grounds is sufficient as a matter of law to require an increase in the alimony paid to Mrs. Bedell.

A. STANDING ALONE, DR. BEDELL'S STIPULATED IMPROVEMENT IN FINANCIAL CIRCUMSTANCES IS SUFFICIENT TO JUSTIFY AN INCREASE IN ALIMONY AS A MATTER OF LAW

In its Final Judgment, the trial court recognized that Dr. Bedell "has stipulated to the ability to pay any reasonable award, if any, entered by this Court." (R. at 308). Based on Dr. Bedell's stipulation, the court prohibited Mrs. Bedell from making any inquiry into her former husband's present or past financial situation.[3] By virtue of his stipulated ability to

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[3] During the October 1, 1986, hearing concerning Mrs. Bedell's motion to compel and Dr. Bedell's motion for protective order, the following discussion occurred.:

> MS. GREEN [sic]: Your Honor, we stipulated that we have the financial ability to discharge any reasonable physical [sic] obligation imposed by the court as alimony.
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> * * *
>
> MR. BIENSTOCK: We don't have to prove change in circumstances of his financial ability.
>
> MS. GREEN: Of course not.
>
> THE COURT: Now it is on record.

pay any reasonable award, Dr. Bedell "admitted the allegation of the petition for modification that his ability to pay had materially changed for the better." *Powell v. Powell*, 386 So.2d 1214, 1215, n.4 (Fla. 3d DCA 1980). However, despite the stipulated improvement in Dr. Bedell's financial condition since the divorce and the commencement of his medical practice, the trial court refused to award an increase in alimony, and the Third District affirmed.

The district court expressly held that where the financial needs of the recipient spouse have not substantially increased since the final judgment, the trial court may not award an increase in alimony based solely on the fact that the paying spouse's income has substantially increased. The Third District carved out a single exception to this rule and held that an increase in alimony based upon the improved financial circumstances of the paying spouse may be appropriate *only* where the needs of the recipient spouse were not and could not be met by the final judgment of dissolution because of the then-existing inability of the paying spouse to meet her needs, which needs have continued to be unmet.

The district court determined that this exception did not apply in this case because Mrs. Bedell had failed to show that the alimony awarded did not meet her needs based on the standard of living maintained by Mrs. Bedell and her former husband during their marriage. However, the Third District based its determination that the original alimony award was sufficient solely on Mrs. Bedell's concession that the "alimony *and child support awards*" combined were sufficient in 1975 to meet Mrs. Bedell's needs; as there was no

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(R. at 159-160).

supporting evidence, the court erred in determining that the alimony alone was sufficient in 1975 to support Mrs. Bedell in the manner established by the parties during their marriage, as should be evident by the fact that such award barely covered her mortgage payment. The district court also held that Mrs. Bedell's proof of a 100% rise in the cost of living since 1975 was not sufficient to demonstrate that she had been personally detrimentally affected such inflation or that her needs had increased as a result.

The Third District acknowledged that its decision in *Sherman v. Sherman*, 279 So.2d 887 (Fla. 3d DCA), *cert. dism.*, 282 So.2d 877 (Fla. 1973), directly conflicted with its present decision and it receded from that decision. In *Sherman*, the Third District had affirmed an increase in periodic alimony for a wife based only a substantial increase in the earnings of her former husband. Although the decision in *Sherman* was the controlling law at the time Mrs. Bedell petitioned for an increase in alimony, the Third District nevertheless retroactively applied its new construction of the law and deprived Mrs. Bedell of a modification of alimony to which she would have previously been entitled.

In rendering its decision in this case, the Third District has given § 61.14(1), Florida Statutes, a different and more restrictive construction than given it by this Court or the Second or Fourth Districts. This Court in *McArthur v. McArthur*, 95 So.2d 521 (Fla. 1957), stated that an increase in a former husband's financial condition might, by itself, justify an increase in the former wife's alimony. In that case, the former wife had petitioned for an increase in alimony alleging, *inter alia*, that the former husband's income and assets had

greatly increased.[4] While the former wife in that case sought an increase based upon a change in the circumstances of both parties, this Court specifically stated that the former wife could have filed a "petition for increase in alimony on the basis of the change in [the former husband's] financial condition. . . ." *Id.* at 524.

The Second and Fourth Districts have rendered opinions in accord with the decision in *McArthur.* In *Lenton v. Lenton*, 370 So.2d 30 (Fla. 2d DCA 1979), *cert. den.,* 381 So.2d 767 (Fla. 1980), the Second District reiterated the rule that a change in circumstances of only one of the parties is sufficient to justify a modification of alimony. The former wife had petitioned for modification of her alimony because of a substantial improvement in her former husband's financial condition. The trial court denied the former wife's request to modify based on the fact that the former wife's financial needs had not changed since the dissolution. The Second District reversed the lower court and held that a change in the former wife's financial needs was not a prerequisite to modification. The court then ordered an increase in alimony based upon the former husband's changed financial condition.[5]

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[4] The statutory basis for the former wife's petition for modification of alimony in *McArthur* was § 61.15, Florida Statutes (1955). Section 61.15 is a predecessor of § 61.14, Florida Statutes (1985), and contains substantially the same relevant language.

[5] The *Lenton* decision followed two earlier cases from the same district. In *Rogers v. Rogers*, 229 So.2d 618 (Fla. 2d DCA 1969), the court construed § 61.14 and held that a substantial change in one party's circumstances may as a matter of law warrant modification of alimony, adding that this rule applies "whether the changed circumstances are brought about by a substantial change in earnings of the man paying *or* a substantial change in the necessities of life of the woman receiving, *or* both." *Id.* at 620. Similarly, in *Terry v. Terry*, 126 So.2d 890 (Fla. 2d DCA), *cert. den.*, 133 So.2d 321 (Fla. 1961), the court recognized that alimony was subject to modification in the event there was a substantial change in the circumstances of the parties, *or either of them*, and it affirmed the award of an increase in the former wife's alimony based solely on a change in the former husband's ability to pay.

The *Lenton* decision was recently reaffirmed by the Second District. In *Schlesinger v. Emmons*, ___ So.2d ___, 15 FLW D2236 (September, 7, 1990), the court approved an increase in alimony for a former wife based on the former husband's increased ability to pay. The court reiterated the holding of *Lenton* that "a dramatic postdissolution improvement in husband's financial condition was sufficient in itself to support an increase in alimony where the needs of the spouse receiving alimony were not initially met." *Id.* at D2337. While not disagreeing with the result in *Bedell*, the court criticized the Third District's narrow and inflexible application of the requirement that the receiving spouse's increased need must always be established before considering the paying spouse's improved financial circumstances. "[W]e are not as certain as the *Bedell* court seems to be that this exception is the only exception that should be recognized . . . ; we cannot be certain that we would not recognize other exceptions to the rule based upon what equity may require according to the particular facts of each individual case." *Id.*

The Fourth District has also held that modification may be granted based upon a substantial change in the ability to pay *or* a substantial change in the needs and ability to meet those needs. In *England v. England*, 520 So.2d 699 (Fla. 4th DCA 1988), the court reversed the lower court's denial of modification, holding that the evidence demonstrated both a substantial increase in the former husband's ability to pay and in the former wife's needs. However, the court reiterated the rule that "to succeed in a motion to increase an alimony award, it is only necessary for a petitioner to prove *either* an increase in need *or* the ability to pay." *Id.* at 701 (emphasis in original).

In the present case, the Third District ruled that an increase in the former husband's financial circumstances, without a showing of a substantial increase in the needs of the former wife, was insufficient to justify an increase in alimony. However, the court explicitly recognized that its holding was "not free from doubt," and that such holding only *appeared* to be supported by Florida authority. *Bedell v. Bedell*, 561 So.2d at 1182.

Mrs. Bedell's uncontroverted testimony revealed that she had no input into the determination of the amount of alimony that she would receive. (T. at 41-42). At the time of entering into the Agreement, Dr. Bedell was definite in offering $415.00 as permanent periodic alimony and that that amount was just and fair, and he told Mrs. Bedell that he could not afford to pay more. (T. at 88). Mrs. Bedell additionally testified, without any rebuttal, that Dr. Bedell made no financial disclosure to her at the time of entering into the agreement, that she was unaware of what he was earning or what property he held. (T. at 42-43). Mrs. Bedell's uncontroverted testimony was that she did not have independent legal advice because the attorney who represented her was a member of the law firm which represented Dr. Bedell. (T. at 44). This lack of independent legal advice made it impossible for Mrs. Bedell to challenge the terms of the final judgment at the time it was entered.

Mrs. Bedell testified that without the $500.00 per month she was receiving as child support, the $415.00 monthly alimony was not sufficient to meet her needs even in 1975, particularly since she was not employed during the marriage or at the time of the divorce. (T. at 40-41). The alimony only covered her mortgage payment and no more. (T. at 40). She further testified that the alimony "was never really that much to begin with." (T. at 49).

This testimony was corroborated by Mrs. Oleck, Mrs. Bedell's mother, who stated that as early as 1977, Mrs. Bedell "didn't have enough to manage." (T. at 168). This evidence shows that Mrs. Bedell's needs were not met by the original alimony award, further justifying an upward modification in alimony based on her former husband's substantial improvement in financial circumstances. As a matter of law, evidence that the original alimony award barely covered the unemployed former wife's mortgage payment should be sufficient to demonstrate that her needs were not met by such award. The failure of the award to meet her needs, coupled with her former husband's improved circumstances, compels reversal of the district court decision and an upward modification of alimony. *McArthur v. McArthur*; *Lenton v. Lenton*; *Schlesinger v. Emmons*; *England v. England*; *supra.*

By receding from *Sherman* and narrowly reconstruing § 61.14(1), the Third District has impermissibly departed from the plain meaning of this statute. This restrictive interpretation adopted by the Third District is directly adverse to the express language contained in § 61.14(1), as well as the decisions of this Court and the Second and Fourth Districts. The cardinal rule of statutory construction is that a statute must be construed so as to determine and give effect to the intention of the legislature as expressed in the statute. *City of Tampa v. Thatcher Glass Corp.*, 445 So.2d 578 (Fla. 1984). And where the words of a statute are clear and unambiguous, it is not appropriate for the courts to displace the expressed intent. *Citizens v. Public Service Comm'n*, 435 So.2d 784 (Fla. 1985). The legislature has unambiguously declared its intent that a spouse may seek modification of alimony based upon a change in the circumstances or financial ability of *either* of the parties. In rendering its decision, the Third District departs from the plain meaning of Section

61.14(1) and places additional burdens not required under this statute upon a spouse seeking a modification of alimony. Thus, the Third District has impermissibly invaded the province of the legislature. "It is neither the function nor prerogative of the Courts to speculate on constructions more or less reasonable, when the language itself conveys an unequivocal meaning." *Heredia v. Allstate Ins. Co.*, 358 So.2d 1353, 1355 (Fla. 1978).

If the legislature had intended that § 61.14 require a substantial increase in the recipient spouse's needs before modification be allowed, it could easily have said so. The relevant language of § 61.14 has remained intact for a number of years and the legislature has had the opportunity to revisit its provisions and amend the language if it had so chosen. The legislature is assumed to know the meaning of the words and to have expressed its intent by the use of the words found in the statutes. *S.R.G. Corp. v. Department of Revenue*, 365 So.2d 687 (Fla. 1978). Thus, since the legislature has chosen not to alter the requirements for a modification of alimony, the Third District may not invade legislative jurisdiction and judicially redraft the provisions of § 61.14 as it has attempted to do.

B. ASSUMING THE SUBSTANTIAL CHANGE IN DR. BEDELL'S FINANCIAL CONDITION IS INSUFFICIENT BY ITSELF TO SUPPORT A MODIFICATION OF ALIMONY, MRS. BEDELL DEMONSTRATED A SUBSTANTIAL ADVERSE CHANGE IN HER FINANCIAL CIRCUMSTANCES SO AS TO REQUIRE AN INCREASE IN ALIMONY

Since the parties' dissolution of their marriage in 1975, Mrs. Bedell's needs have greatly increased because of the inexorable rise in the cost of living and the normal deterioration of major household items. As revealed in Mrs. Bedell's testimony and her financial affidavit, major appliances, such as a dishwasher, trash compactor and dryer, currently need to be replaced because the original items are now over fifteen years old. (T.

at 68 and 69; R. at 371 and 372). Additionally, Mrs. Bedell testified that she does not use her dryer and air conditioner because she cannot afford the high electric bills (T. at 60); that she needs more money for food and grocery items (T. at 75); and that she needs additional money for clothing and shoes. (T. 76). Thus, such testimony certainly demonstrates that Mrs. Bedell's needs have significantly increased since 1975. Moreover, unlike her costs, Mrs. Bedell's income to meet her needs has not increased, but instead has decreased in real terms due to the effects of inflation. As a result, Mrs. Bedell is entitled to an increase in her alimony.

In its final judgment, the trial court recognized "that a rise in the cost of living is a sufficient basis for a modification of alimony," but stated that the party requesting said modification must also demonstrate "that the increase in the cost of living has specifically affected" her. (R. at 312). The trial court, in applying its holding to the case at bar, stated that Mrs. Bedell

> 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.

(R. at 312). These findings are erroneous as a matter of law and are contrary to the undisputed evidence.

Mrs. Bedell testified directly that her standard of living has drastically diminished since the divorce, and she specifically attributed that decrease to the effects of inflation and the inadequacy of the alimony being paid by the Dr. Bedell. (T. at 85-86).[6] Additionally,

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[6] At the final hearing, the following discussion was had:
Q. [MR. BIENSTOCK]: Has your standard of living changed over the past eleven years?

her family confirmed that Mrs. Bedell is living, at most, very modestly. (T. at 140; 155-156; 162; and 177-178). Without her mother's loans, Mrs. Bedell's monthly income of $502.00 is barely sufficient to cover her monthly mortgage payment of $416.00 and maintenance fee of $80.22. (R. at 371). As Professor Ledford testified, by 1986 inflation had caused prices to increase by over 100% since 1975; as of December, 1986, it took at least $844.00 to purchase goods costing $415.00 in 1975. (T. at 33). Undoubtedly, the real value of Mrs. Bedell's alimony has decreased even further since 1986. The decrease in Mrs. Bedell's standard of living, coupled with the more than 50% reduction in the buying power of her 1975 alimony award, demonstrates a sufficient change in her financial circumstances to justify an increase in alimony.

Considering similar facts, the court in *Wolfe v. Wolfe,* 424 So.2d 32, 35 (Fla. 4th DCA 1982), stated:

> As her unrebutted testimony shows, inflation has had an adverse effect on her cost of living. Under *Powell v. Powell,* 386 So.2d 1214 (Fla. 3d DCA 1980), this specific demonstration of a resulting increase in appellant's financial needs due to the ravages of inflation is enough of a change of circumstances to warrant modification.

Furthermore, this Court in *Powell* concluded that based on "the material increase in the wife's needs *alone*," the trial court's order increasing the former wife's alimony "must be sustained." 386 So.2d 1215-16 (emphasis added).

A. [MRS. BEDELL]: Yes.
Q. How has it changed?
A. Well, it's -- I would say probably it's gone down.
Q. Why do you say that?
A. Because I'm able to afford less because of the rising, you know, costs. (T. at 85).

Under almost identical facts, the Fourth District has held that it was an abuse of discretion for the trial court to refuse to award an increase in alimony to the recipient wife. In reversing a trial court order reducing alimony, the court in *Plevy v. Plevy*, 517 So.2d 128 (Fla. 4th DCA 1987) stated:

> . . . we determine that permanent periodic alimony should have been increased rather than decreased. The husband, a doctor, has experienced a substantial increase in earnings. The wife, on the other hand, has faced continually increasing expenses and her health has made it difficult for her to improve her economic situation. We believe the standard articulated in *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980), mandates a finding that failure to give the wife an increase in the amount of permanent periodic alimony was an abuse of discretion.

Id. at 129.

In *England v. England*, *supra*, the Fourth District specifically recognized that an improvement in the paying spouse's financial circumstances, coupled with an increase in the recipient's needs as a result of nothing more than inflation, compelled an upward modification in alimony without specific proof of increased need.

> While there was no actuarial evidence presented below, we can take judicial notice of the fact that the value of $75 today is far less that what it was in 1967. *On that basis alone*, coupled with [the former husband's] increased income, it would seem that the court should have found a significant change of circumstances even without a showing of specific instances of [the former wife's] increased needs.

520 So.2d at 702 (emphasis added). Here, there was actuarial testimony and there was specific proof of the former wife's increased need, thus making the trial court's decision (and the district court's affirmance) even less supportable as a matter of law.

Similarly, in *Weinstein v. Weinstein*, 447 So.2d 309 (Fla. 4th DCA 1984), the Fourth District reversed the trial court's denial of modification and held that when a former husband's income has markedly improved while the former wife's circumstances have worsened because of inflation, it is error not to grant the former wife a modification of alimony. In reaching this decision, the court relied only upon the following specific findings:

> 1. The Respondent/Former Husband's income and assets have increased significantly since the final dissolution of marriage.
>
> 2. The Petitioner/Former Wife's circumstances have changed since the final dissolution of marriage only to the extent of normal inflation and increased costs of living.

Id. at 311. Solely considering those factors, the court ruled that modification was required. *See also*, *Turner v. Turner*, 383 So.2d 700, 702 (Fla. 4th DCA 1980) ("It is now rather firmly established that a change in the circumstances of either party may require modification of alimony."); *Pope v. Pope*, 342 So.2d 1000 (Fla. 4th DCA 1977) (the court held an increase in alimony was supported by the fact former husband's income has increased coupled with change in the former wife's financial condition due to inflation.)

The burden which the trial and district courts placed on Mrs. Bedell to demonstrate increased need goes well beyond that contemplated by the statute, well beyond that required by any other court which has considered similar circumstances, and well beyond the bounds of common sense. It is indisputable (and undisputed) that the buying power of Mrs. Bedell's alimony has been significantly reduced in the fifteen years since it was originally awarded, and it is not unreasonable to believe that the aged appliances and household items need replacing after all of these years of use. Upon making such a showing, Mrs. Bedell met any

reasonable burden of showing increased need and the burden should have shifted to Dr. Bedell to show that the need was not genuine.

The trial court appears to base its conclusion of lack of need on its finding that Mrs. Bedell spends approximately $19,000.00 per year, and that she has an annual income of approximately $18,500.00 (R. at 311 and 312). However, the finding by the court that Mrs. Bedell has an annual income of $18,500.00 is only one of numerous factual findings in the Final Judgment which are erroneous as a matter of law.[7] Mr. Margeneau, Dr. Bedell's accountant, testified that in 1981 Mrs. Bedell's tax returns, bank statements and other financial records showed that she received as "income" $4,980.00 from alimony and $850.00 from unidentified sources (presumably, art-related) (T. at 227), which is consistent with her financial affidavit. (R. at 367). Thus, it is apparent that the trial court considered the voluntary contributions or loans received by Mrs. Bedell from her mother, Mrs. Oleck, as income to Mrs. Bedell.

Additionally, the trial court concluded without support that "the monies provided to the Wife by her mother since dissolution were not 'loans' . . . ." (R. at 310). It based this conclusion on the facts that neither Mrs. Bedell nor Mrs. Oleck "maintained any records" nor did they have any discussions concerning "amount to be repaid, or the manner of repayment." (R. at 310). Finally, the court stated that "the Wife's mother testified at the hearing that it was not her intention to require the Wife to repay 'all' of the 'loans' but, rather just 'some.'" (R. at 310).

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[7] The Final Judgment entered by the trial court is virtually identical, except for the findings on the former-Husband's petition to terminate alimony, to Dr. Bedell's proposed final judgment. (R. at 287).

It appears that, in reaching its conclusions that the monies which the parties intended to be loans were not actually loans, the court completely ignored the undisputed testimony of Mrs. Bedell and her mother that the monies were loans, as well as the corroborating testimony of Mrs. Bedell's brothers, Larry and Peter Oleck, and her sister, Laura Oleck. They each testified that they too borrowed money from their mother and intend to pay her back when they are able. Both Peter and Laura Oleck testified that they, like their sister, have yet to repay their mother for money she loaned to them. (T. at 142 and 179). Further, Laura Oleck testified that she too had not maintained records concerning the amount to be repaid. (T. at 180). Thus, the court received corroborating evidence that the family practice was for Mrs. Oleck to loan money to her children when they needed it, and that they in turn would pay her back when they were able. Dr. Bedell presented no evidence to rebut that practice.

Finally, it seems that the court misquoted Mrs. Oleck concerning her intentions regarding the repayment of the loans by Mrs. Bedell. During direction examination, the following discussion was held:

> Q. [MR. BIENSTOCK]: Do you know whether or not Diane intends to repay you?
>
> A. [MRS. OLECK]: I hope she intends to repay me. *She does intend to repay me when she has the funds available.*
>
> Q: What was your agreement with Diane concerning repayment of those loans?
>
> A: That when she had some money, she would help pay it back.
>
> Q: Why has it not been paid back?

A: Because she has not had any money.

(T. at 161) (emphasis added). The court must have reached its conclusion that Mrs. Oleck does not intend to require Mrs. Bedell to repay "all of the loans" from the following excerpt from the cross-examination of Mrs. Oleck:

Q. [MS. GREENE]: Well, tell me then how is Diane going to know how much to pay you back?

A. [MRS. OLECK]: She will pay what she can.

Q: If she can only pay five, that's what she will pay?

A: Apparently, yes.

Q: If she can pay 75 thousand -

A: No.

* * *

Q: But since you really have no idea what the total is, it's okay?
Whatever she wants to pay is okay?

A: Whatever she can and she does, yes, I'd appreciate getting it back.

(T. at 169). The above two excerpts do not demonstrate Mrs. Oleck's intentions, but they do show that she is realistic about her daughter's ability to repay the loans. Finally, the court attempted to apply standards which a bank or other lending institution would follow to a loan made between family members. Life experience would seem to support the fact that such loans are not as formalized as a bank loan. Thus, based upon the undisputed evidence, the court could only properly have determined that the monies provided to Mrs. Bedell by her mother are indeed "loans" which Mrs. Bedell is obligated to repay.

There are other unsupported factual inaccuracies in the final judgment concerning Mrs. Bedell's financial condition which are erroneous as a matter of law. For example, the court found that "the Wife was able to maintain a standard of living which has included travel to Europe . . . and the purchase of clothing, a vehicle and major appliances." (R. at 310). However, the court recognized that trips to Europe were paid for by her mother (R. at 310), and nowhere does the record on appeal reveal that Mrs. Bedell purchased clothing and major appliances. If she did purchase clothing, which we must assume that she has since the divorce in 1975, it was with the money loaned to her by her mother. Similarly, Mrs. Bedell's mother paid for her car purchased in 1982. (T. at 50).

The record does not show that Mrs. Bedell has a substantial income which excuses Dr. Bedell from meeting his obligation to provide alimony; rather, the record only shows that Mrs. Bedell has a generous mother who, without any obligation to do so, has provided money to Mrs. Bedell so that she will not be forced to live below the poverty level on her meager alimony. What the decisions of the trial and district courts suggest is that only if Mrs. Bedell's mother lets Mrs. Bedell drop into poverty will Dr. Bedell have any obligation to increase his alimony payments. The law cannot intend that a wealthy man like Dr. Bedell can avoid his legal obligations because of the caring and generosity of his former wife's loving mother.

The decisions of the trial and district courts are unduly harsh and inflexible, and do not take the numerous equitable factors into account which compel an upward adjustment in Mrs. Bedell's alimony. This is a case of a high-school-educated woman who was divorced by her husband after having his children and helping put him through medical school; a case

where the unsophisticated wife trusted her physician husband to be fair in their marital settlement and naively took the advice of her husband's lawyers in agreeing to the settlement; a case where the unemployed and unskilled wife's needs could not possibly have been met in 1975 by the meager $415.00 per month alimony which barely covered her mortgage payment on the townhouse whose value was misrepresented to her by her husband; a case where inflation has cut the value of Mrs. Bedell's alimony in half in the intervening years, while at the same time major expenses for life's necessities have accrued; and a case where the former wife must rely on the benevolence of her mother despite her former husband's admitted ability to pay any reasonable modification of alimony. This is precisely the situation which this Court declared should not occur, that is, one "spouse automatically [passing] from prosperity to misfortune . . . ." *Canakaris v. Canakaris,* 382 So.2d 1197, 1204 (Fla. 1980). Equity dictates that the injustice which has occurred be remedied, and the remedy will involve nothing more than requiring her former husband to meet his voluntarily-assumed obligation to pay sufficient alimony to his former wife to allow her to live above the poverty level without borrowing money from her mother.

For all of the foregoing reasons, an upward modification of alimony is required in order to increase Mrs. Bedell's income so to equal her increased needs. Thus, this Court should quash the district court decision with directions that the cause be remanded to the trial court's to determine the appropriate amount of increased alimony.

II. THE LOWER COURT ERRED IN DENYING MRS. BEDELL'S MOTION FOR REIMBURSEMENT OF COLLEGE EXPENSES

Pursuant to the parties' Agreement, and as part of the proceedings below, Mrs. Bedell moved the court for reimbursement for payment of the first year of the parties'

oldest son, David's college tuition. (R. at 480). The Agreement provides that "Husband agrees to pay for the cost of the eduction even though incurred after the children attain the age of 18." (R. at 10). It was agreed upon by the parties during the final hearing that David was expelled from this high school prior to graduation (T. at 241), that he, at the insistence of his father, attended a therapy school (T. at 241), that Dr. Bedell paid for the therapy school (T. at 242), and that David left the school in order to attend St. Leo College prior to completing the requirements of that school. (T. 242). Dr. Bedell thus argued that based upon the facts that he paid for the therapy school, that David did not complete the requirements of the school, and that Dr. Bedell paid the remainder of David's college education, he was relieved from paying for his first year tuition and expenses at St. Leo College. (T. at 289). Dr. Bedell's obstinance is not a proper ground to ignore the Agreement and penalize the parties' son.

It appears the court was persuaded by Dr. Bedell's argument because it denied Mrs. Bedell's motion. (R. at 314). However, the court again made several prejudicial statements unsupported by the Record on Appeal. First, the court stated that David "had a history of drug abuse and had been expelled from his high school . . . ." (R. at 311). However, there is no evidence of such a problem. To the contrary, David testified that he "got kicked out [of high school] for having a girl in my room" (T. at 253), and for no other reason. Second, the court stated that David left the therapy school and enrolled in St. Leo College at Mrs. Bedell's suggestion. (R. at 311). Again, there is absolutely no support in the Record for that finding.

There is no argument that the Agreement in fact requires Dr. Bedell to pay for his children's college education, that he did not pay for David's freshman year at St. Leo College (T. at 244-245) and that Mrs. Oleck paid the $6,560.20 necessary for David to attend St. Leo. (T. at 244). Dr. Bedell stated that he did pay for the remainder of David's college education. (T. at 244). During cross-examination concerning this issue, Dr. Bedell admitted that had David completed the requirements of the therapy school and then had gone on to college, *he would have paid David's full college education.* (T. at 249-250). Further, he stated that, as a result, *he really did not lose any money by David not completing the therapy school.* (T. at 250).

Finally, during David's freshman year, Dr. Bedell stated that David "did better. He maintained a C-plus average . . . ." (T. at 244). Actually, David stated that he did even better than his father said; "I did very good. I made Dean's list." (T. at 257). Thus, once David proved himself to his father, Dr. Bedell "relented . . . [and] resume[d] paying for the school . . . ." (T. at 244).

Therefore, in accordance with the Agreement, and considering the facts that Dr. Bedell paid all other college expenses and that Dr. Bedell admittedly lost no money because of David's early withdrawal from the therapy school and entry into college, Dr. Bedell should have been required to pay all expenses for David's freshman year of college.

CONCLUSION

This Court should continue the recognized standard for granting a modification of alimony: that the petitioning party only needs to show a change in the ability to pay of the party paying support *or* a substantial change in needs of the party receiving alimony. *See Powell, supra; England, supra.* The Third District's erroneous conclusion that the petitioning party needs to show both an increased ability to pay ***and*** an increase in needs should be rejected.

The undisputed facts of this case show that Mrs. Bedell's needs are not currently met by her $415.00 per month alimony and have in fact increased since dissolution, that inflation has adversely affected Mrs. Bedell personally, that her needs have increased as a result of the effects of inflation and other causes over the last 15 years, and that Dr. Bedell has the ability to pay any reasonable alimony. Therefore, even if the restrictive standard enunciated below is applied, Mrs. Bedell proved her entitlement to an increase in alimony.

Further, it is clear that Dr. Bedell has not met his obligation under the parties' Settlement Agreement to pay for his son's college education, and so the holding of the district court that reimbursement of Mrs. Bedell's payment of those expenses should be reversed.

This Court should quash the decision of the Third District with directions that the cause be remanded to the trial court for the determination of the amount of increase in alimony to be awarded to Mrs. Bedell and for entry of a judgment requiring Dr. Bedell to reimburse Mrs. Bedell for payment of the their oldest son's first year college education expenses.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof was furnished by regular U.S. mail to: **CYNTHIA L. GREENE**, Greene & Greene, P.A., 100 North Biscayne Boulevard, Suite 1100, Miami, Florida, 33132, this 26th day of November, 1990.

Marguerite H. Davis

MARGUERITE H. DAVIS