IN THE SUPREME COURT OF FLORIDA

DIANE V. BEDELL,

Petitioner,

v.

ROBERT L. BEDELL

Respondent.

Supreme Court Case No.: 75,894

DCA Case No.: 87-98

APPLICATION FOR DISCRETIONARY REVIEW OF A DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT OF FLORIDA

PETITIONER'S JURISDICTIONAL BRIEF

FRATES BIENSTOCK & SHEEHE
Suite 3160
200 Biscayne Boulevard
Miami, Florida 33131-2367
(305) 358-7447

By: Terry S. Bienstock
James C. Cunningham, Jr.

and

MARGUERITE H. DAVIS
Katz, Kutter, Haigler, Alderman,
Davis, Marks, and Rutledge, P.A.
P.O. Box 1877
Tallahassee, Florida 32302-1877
(904) 224-9634

ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE

Petitioner, Diane V. Bedell, ("Mrs. Bedell") seeks this Court's review of a decision of the District Court of Appeal, Third District, in *Bedell v. Bedell*, 14 F.L.W. 2590 (November 17, 1989). (Appendix, Tab A.) As the petitioner in the trial court, Mrs. Bedell sought modification of permanent periodic alimony awarded her in a 1975 final judgment and sought reimbursement from her former husband of certain college expenses incurred by their son. The trial court denied her petition to modify the amount of permanent periodic alimony and denied her request for reimbursement of certain college expenses. Mrs. Bedell appealed.

Because of a conflict of decisions in the Third District, the Third District decided to consider this appeal *en banc* pursuant to Rule 9.331(a) and (b), Florida Rules of Appellate Procedure. On appeal, Mrs. Bedell challenged the trial court's refusal to increase her alimony. Her primary basis for challenge is that she was entitled to an increase as a matter of law under Section 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, particularly since her needs were not met by the original alimony award and are currently not being met. She also argued that she demonstrated to the trial court that her financial circumstances have substantially changed for the worse since entry of the final judgment due to the ravages of inflation and other causes, and that this, combined with the substantial increase in her former husband's wealth, entitled her as a matter of law to an increase in alimony.

The district court acknowledged that Section 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. However, the Third District recited that, 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, and where such paying spouse's income has substantially increased, then such spouse is entitled to an upward modification in alimony.

The court determined that this exception to the rule announced by it did not apply because Mrs. Bedell had failed to show that the alimony awarded did not meet the needs of the wife based on the standard of living maintained by Mrs. Bedell and her former

husband during their marriage. However, the Third District based this determination on Mrs. Bedell's concession that the "alimony *and* child support awards" combined were sufficient at the time to support Mrs. Bedell and her minor children. The district court also decided that, notwithstanding proof of a rise in the cost of living, Mrs. Bedell had not demonstrated that she had personally been detrimentally affected by the rise in the cost living.

The Third District acknowledged that its decision in *Sherman v. Sherman*, 279 So.2d 887 (Fla. 3rd DCA), *cert. dismissed*, 282 So. 2d 877 (Fla. 1973), directly conflicts with its present decision and it receded from that decision. In *Sherman*, the Third District upheld an increase in periodic alimony for a wife, when the only demonstrated change in circumstances was a substantial increase in the earnings of her former husband.

Mrs. Bedell then asked the Third District to certify conflict of its decision with decisions of the Florida Supreme Court or, alternatively, to certify its decision as passing upon the issues of great public importance. (Appendix, Tab B.) This motion was denied. (Appendix, Tab C.) Review is now sought to the Florida Supreme Court on the basis of conflict of decisions.

STATEMENT OF THE FACTS

The relevant facts are taken from the decision of the Third District as is required by Article V, section 3(b)(3), Florida Constitution, and this Court's decisions, among others, in *Department of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc.*, 498 So.2d 888 (Fla. 1986); *Reaves v. State*, 485 So.2d 829 (Fla. 1986); and *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980).

Mrs. Bedell married her former husband in 1962. During the marriage, the Mrs. Bedell did not work outside the home. Also during the marriage, the Respondent attended medical school and obtained a medical degree. They were divorced in July, 1975, shortly after the husband opened his first medical office. The final judgment of dissolution incorporated a prior settlement agreement. Pursuant to this judgment, Mrs. Bedell, at that time thirty-three years old, received permanent alimony of $415 monthly, custody of their minor children, child support of $250 monthly, Respondent's one-half interest in the townhouse in which Mrs. Bedell resides, and an agreement by Respondent to pay the children's college education. Mrs. Bedell, however, stopped receiving child support in 1977 when she relinquished custody of the children.

On July 12, 1986, Mrs. Bedell filed a petition for modification of her alimony seeking to increase her alimony. Respondent counter-petitioned to terminate Mrs. Bedell's alimony.

SUMMARY OF ARGUMENT

The decision of the Third District Court of Appeal expressly and directly conflicts with decisions of this Court and the Second and Fourth Districts on the same question of law. *McArthur v. McArthur*, 95 So.2d 521, 524 (Fla. 1957); *Lenton v. Lenton*, 370 So.2d 30 (Fla. 2d DCA 1979); *Rogers v. Rogers*, 229 So.2d 618 (Fla. 2d DCA 1969); *England v. England*, 520 So.2d 699 (Fla. 4th DCA 1988); and *Weinstein v. Weinstein*, 447 So.2d 309 (Fla. 4th DCA 1984). 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 expressly given Section 61.14(1), Florida Statutes, a different and more restrictive construction than given by this Court or the Second or Fourth Districts. Further,

the Third District's holding that proof of substantial inflation since since the 1975 dissolution is insufficient to demonstrate Mrs. Bedell's need for an increase in her $415 per month alimony is directly contrary to decisions of the Fourth District on this issue. Because a person's right to an increase in alimony should not depend on the district in which the person resides, and because this is an issue of great importance (as the Third District's *en banc* consideration demonstrates), this Court should accept jurisdiction and review the decision below.

ARGUMENT

THE HOLDING OF THE THIRD DISTRICT COURT OF APPEAL THAT MRS. BEDELL WAS NOT ENTITLED TO A MODIFICATION OF ALIMONY AS A MATTER OF LAW EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS IN THIS STATE ON THE SAME QUESTION OF LAW.

Article V, § 3(b)3., Florida Constitution, invests this Court with discretionary jurisdiction to review decisions of district courts of appeal in this state which directly and expressly conflict with prior decisions of this Court and with decisions of other district courts of appeal. The decision of the Third District Court of Appeal, appended hereto, conflicts with such prior decisions and addresses issues of great importance concerning a former spouse's right to increased alimony. For these reasons, this Court should accept jurisdiction of this case.

Mrs. Bedell argued below that she was entitled to an increase in alimony for two principal reasons: (1) because her former husband's financial circumstances had improved as his medical practice developed after dissolution, particularly because her needs were not met by the original alimony and are not currently being met; and (2) assuming such proof

is required, because her financial circumstances have substantially worsened since dissolution due to inflation and other causes.

In support of her contentions, Mrs. Bedell demonstrated to the trial court that her former husband's financial condition had substantially improved since the final judgment awarding her alimony in 1975. She also demonstrated that there has been substantial increase in the cost of living since 1975 due to inflation. Despite this proof, the District Court held that she was not entitled to a modification of her alimony because: (1) as a matter of law, she was not entitled 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; and (2) her proof of an increase in the cost of living since 1975 was insufficient to establish an increase in need.

In reaching its decision, the district court interpreted Section 61.14(1), Florida Statutes (1985), which provides:

> When the parties have entered 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 a judgment 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 or the child or children, decreasing, increasing, or confirming the amount of separate support, maintenance, or alimony provided for in the agreement or order. [Emphasis supplied.]

In its decision below, the Third District explicitly recognized that its holding that an

increase in the former spouse's financial circumstances was insufficient, without proof of a substantial increase in need, to justify an increase in alimony was "not free from doubt," and that such holding only *appeared* to be supported by Florida authority. 14 F.L.W at 2591. In fact, the court found it necessary to *sua sponte* consider the appeal *en banc* because of conflict of decisions in the district on this issue, and it had to specifically recede from a prior contrary holding in rendering its decision.[1] The contrary holding from which the court receded was the law in effect at the time of the original alimony award and at the time that Mrs. Bedell filed her petition for modification, but the court 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.

Although the Third District's *en banc* decision avoided any intra-district conflict, the decision still expressly and directly conflicts with the decisions of this Court and other district courts which have considered the issue. For example, in *McArthur v. McArthur*, 95 So.2d 521, 524 (Fla. 1957), this Court stated that an increase in a former husband's financial condition might, by itself, justify an increase in the former wife's alimony. Likewise, district courts that have examined the issue more closely and more recently have also adhered to that view. In *Lenton v. Lenton*, 370 So.2d 30 (Fla. 2d DCA 1979), the former wife

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[1]*Sherman v. Sherman*, 279 So.2d 887 (Fla. 3d DCA), *cert. dismissed*, 282 So.2d 877 (Fla. 1973). In that case, the Third District considered the question:

> May periodic alimony be increased upon petition for modification when the only change in circumstance shown is a substantial increase in the earnings of the former husband?

Reviewing the relevant language of Section 61.14(1), Florida Statutes, (which has not changed), the court answered the question in the affirmative.

petitioned for modification of alimony because of a substantial change in her former husband's financial condition. The trial court denied the requested modification because it found that the former wife's financial needs had not changed since the dissolution. The Second District reversed, holding that an increase in the former wife's financial needs was not a prerequisite to modification. The court concluded that "[a] change in circumstances of only one of the parties is sufficient to justify a modification of alimony," *id.* at 31, and ordered an increase in alimony based on the former husband's improved financial circumstances. An earlier decision of the Second District is in accord with the statement of law expressed in *Lenton*. *See Rogers v. Rogers*, 229 So.2d 618 (Fla. 2d DCA 1969).

The Fourth District Court of Appeal has also held that a party seeking modification of alimony need only show a substantial change in the paying party's financial ability to pay *or* a substantial change in need of the receiving party. *England v. England*, 520 So.2d 699 (Fla. 4th DCA 1988). In that case, the court reversed a trial court denial of modification, reiterating the rule that "to succeed in a motion to increase an alimony award, it is only necessary to prove *either* an increase in need *or* the ability to pay." *Id.* at 701 (emphasis in original). While the court found that *both* elements were present in that case, thus mandating an increase in alimony, its holding that the statute only requires *either* element for a modification to be justified was repeated and unambiguous.

Assuming that both elements are required, the Third District's holding in this case that proof of an increase in the cost of living is insufficient to establish an increase in need also conflicts with the decisions of other district courts of appeal on that issue. For instance, in *England v. England, supra,* the Fourth District took judicial notice of the effect of inflation

on a 1967 alimony award, even though no actuarial evidence had been presented. Based on its consideration of inflation's general effect on buying power, the court ruled that, even without a showing of specific instances of increased need, the trial court should have found a significant change of circumstances justifying an increase in alimony based *solely* on the impact of inflation on the original alimony award and the ex-husband's increased income. 520 So.2d at 702.

Similarly, in *Weinstein v. Weinstein*, 447 So.2d 309 (Fla. 4th DCA 1984), the Fourth District reversed the trial court and ruled that an increase in the former husband's income coupled with a change in the former wife's financial condition due only to the impact of inflation justified a modification of alimony. In reaching its decision, the court relied on only 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. On the basis of these findings, the Fourth District ruled that modification was required.

In this case, Mrs. Bedell presented expert testimony that the cost of living had risen over 100% in the fourteen years since the original award of alimony, thus presenting even more evidence than the Fourth District required in *England, supra,* for proof of increased need due to inflation. Even accepting such evidence of the effect of inflation on Mrs. Bedell's alimony payments, and accepting the stipulated increase in her former husband's

income, the Third District below ruled that modification was not justified. That ruling is expressly and directly contrary to the decisions of the Fourth District in *England* and *Weinstein, supra.*

If Mrs. Bedell had filed her modification petition in the Second or Fourth Districts (for example, if she had filed in Broward instead of Dade County), the above-cited precedent would suggest that her modification petition would have been granted. However, It is grossly unjust that Mrs. Bedell's statutory right to modification of alimony (and, accordingly, her right to maintain a decent standard of living in the face of inflationary pressures) should depend on where she files her petition for modification. Further, the Third District's *en banc* reversal of its previous position on these issues, with the resulting conflict with the decisions of at least two other districts, demonstrates the confusion existing on this important issue of law. So that Mrs. Bedell may have a final decision on this matter of her very livelihood, and so that others do not suffer with the uncertainty of their rights to modification of alimony awards which have not kept pace with cost of living even while their former spouses enjoy unprecedented bounty, this Court should accept jurisdiction.

CONCLUSION

This Court should accept jurisdiction of this case because the decision of the Third District expressly and directly conflicts with decisions of the this Court and of the Second and Fourth Districts on the same issue of law. Also, the conflicting district court decisions impact an important area of the law--the right to modification of alimony in response to changing circumstances--in which there must be continuity and consistency. For these reasons, this Court should exercise its discretion and review the decision below.

Respectfully submitted,

FRATES BIENSTOCK & SHEEHE
Southeast Financial Center
Suite 3160
200 S. Biscayne Boulevard
Miami, Florida 33131
(305) 358-7447

BY: TERRY S. BIENSTOCK
JAMES C. CUNNINGHAM, JR.

Fla. Bar No. 237017

and

MARGUERITE H. DAVIS
Katz, Kutter, Haigler, Alderman,
Davis, Marks and Rutledge, P.A.
P.O. Box 1877
Tallahassee, Florida 32302-1877
(904) 224-9634
Fla. Bar Number 136563
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing was mailed to **CYNTHIA L. GREENE**, Greene & Greene, P.A., New World Tower, Suite 601, 100 North Biscayne Boulevard, Miami, Florida, 33132, on this 27th day of April, 1990.

MARGUERITE H. DAVIS

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DIANE V. BEDELL,

Petitioner, **Supreme Court Case No.:**

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ROBERT L. BEDELL

Respondent.

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APPENDIX TO PETITIONER'S BRIEF ON JURISDICTION