

IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,894
DCA Case No. 87-98
Fla. Bar No. 283975

DIANE V. BEDELL,

Petitioner,

vs.

ROBERT L. BEDELL,

Respondent.

MAY 24 1998
CLERK, SUPREME COURT
By: _____
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RESPONDENT'S JURISDICTIONAL BRIEF

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INTRODUCTION

The Respondent, ROBERT L. BEDELL, was the Appellee in the District Court of Appeal, Third District, and was the Respondent/Husband in a post-dissolution of marriage alimony modification case in the trial court. The Petitioner, DIANE V. BEDELL, was the Appellant in the District Court and the Petitioner/Wife in the trial court. The parties shall be referred to herein as "the Husband" and "the Wife".

STATEMENT OF THE CASE AND FACTS ¹

The Husband and Wife were divorced in 1975 after but nine years of marriage. A Final Judgment incorporating the terms of a Settlement Agreement was entered awarding the then thirty-three year old Wife the custody of the parties' two children, ownership of the parties' home, permanent alimony in the amount of \$415 per month, and child support in the amount of \$500 per month.

Two years after the entry of the Final Judgment, the Wife relinquished the custody of the children to the Husband, who thereafter cared for them and raised them during the remainder of their minority.

Eleven years after the dissolution of marriage, the Wife petitioned for an increase in her permanent alimony award alleging that the cost of living had increased; that her needs had not been met by the original award; and that the Husband's financial condition had improved subsequent to the dissolution of marriage.

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All of the facts set forth hereinafter are as stated in the decision of the District Court of Appeal.

At the time of the final hearing before the trial court, the Wife failed to establish that her need had increased since the original award.² Rather, the Wife took the position, both before the trial court and the District Court of Appeal, that she was entitled to an increase in alimony "as a matter of law" based solely upon the Husband's increased income and the rise in the "cost of living."

The trial court denied the Wife's request for increased alimony upon the grounds that the Wife's needs had not substantially increased after the final judgment was entered and that the Wife had failed to establish that the rise in the cost of living had specifically affected her and her needs. The District Court of Appeal affirmed.

SUMMARY OF THE ARGUMENT

There is no "conflict" between the decision herein and those of the five decisions set forth by the Wife in her "Brief on Jurisdiction."

The instant case merely sets forth certain standards and rules of law which have been the standards and rules for decades:

1. A party seeking an increase in alimony must establish an increase in his or her need for alimony;
2. Need in this context is measured by the standard of living enjoyed during the marriage;

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Further, the Wife conceded, at the trial level, that the original alimony and child support awards were sufficient at the time of the entry of the Final Judgment to enable her to support herself and the children and that she voluntarily agreed to the amount of the original award which was "fair and just" at the time.

3. A rise in the cost of living may establish an increase in need for alimony but in order for same to apply, a specific showing of the impact of the rise in the cost of living upon the individual must be made.

The instant case simply applied these rules. There is no conflict.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT OR WITH ANY DECISION OF THE DISTRICT COURTS OF APPEAL.

A. Overview of the Case and Applicable Law

The key point of the Wife's case is her contention that an alimony award may be increased upon nothing more than a showing of an improvement in the financial circumstances of the payor spouse without reference to increased need on the part of the recipient spouse. Both the trial court and the Third District Court of Appeal disagreed, the latter unanimously, en banc.

The general principles of law applicable to this case and to the determination of whether "conflict" exists between this decision and the decisions of this Court and the various district courts of appeal are:

1. 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.³

2. 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 rule applies - the need for such additional alimony must be demonstrated.

3. "Need" within the context of an alimony award is to be defined in accordance with the standard of living established by the parties during their marriage. When the initial alimony award 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 or additional alimony. The standard never changes with respect to alimony awards - it is always that which was established by the parties during their marriage.⁴

B. Lack of Conflict in Decisions

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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)

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See, e.g., *Johnson v. Johnson*, 386 So.2d 14 (Fla. 5th DCA 1980); *Nicolay v. Nicolay*, 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 from 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 decision of the Third District Court of Appeal in this case - **Bedell v. Bedell**, 14 FLW 2590 (Fla. 3rd DCA, Nov. 17, 1989) - is basic and marks no new ground. This case holds only that:

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 the modification."

The above three principles of law are the sine qua non of the decision herein and represent principles of law that have been enunciated regularly and repeatedly both by this Court and by every district court of appeal in Florida.

The Wife, nevertheless, claims that the decision herein "conflicts" with **McArthur v. McArthur**, 95 So.2d 521 (Fla. 1957); **Lenton v. Lenton**, 370 So.2d 30 (Fla. 4th DCA 1979); **Rogers v. Rogers**, 229 So.2d 618 (Fla. 2nd 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).

Turning to the first of these decisions - **McArthur v. McArthur** - the Wife alleges that this Court therein held that "an increase in a former husband's financial condition might, by itself, justify an increase in the former wife's alimony." (Petitioner's Brief, page 7). No such holding can be gleaned from **McArthur**, which specifically relies upon and makes reference to changes in the wife'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 in themselves 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)

Turning to the second case cited by the Wife herein as "conflicting" with the instant case - **Lenton v. Lenton** - 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 amount far below her actual needs and far below the standard of living enjoyed by the parties during their marriage. The 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).

The instant case is completely in accord with *Lenton* because the holding of the District Court herein, citing *Lenton* as authority, states:

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 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. (Id. at 2592)

Although it is true, as the Wife advises this Court, that the *Lenton* decision also notes, in dicta, that "a change in circumstances of only one of the parties is sufficient to justify a modification of alimony", two of the three citations of authority relied upon for this statement were *Meltzer v. Meltzer*, 356 So.2d 1263 (Fla. 3rd DCA 1978) and *Sherman v. Sherman*, 279 So.2d 887 (Fla. 3rd DCA 1973).⁵ *Meltzer* and *Sherman* involved, in pertinent part, modification of child support which is a totally different

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The third decision relied upon in *Lenton* was *Rogers v. Rogers*, 229 So.2d 618 (Fla. 2nd DCA 1969) which is discussed hereinafter.

standard than alimony modification. The District Court of Appeal herein noted this difference in standards:

[A]n increase in the paying spouse's ability to pay would not in itself justify an upward modification of alimony if the recipient spouse's needs are already fully met by the existing award or otherwise. This rule, however, is to be distinguished from the related rule recognized in other Florida cases that a substantial increase in the paying spouse's financial circumstances is, in itself, a sufficient legal basis under Section 61.16(1), Florida Statutes (1985) to justify an increase in the amount of child support. (Id. at 2591-92)

Turning to the third of the cases claimed by the Wife herein to "conflict" with the decision in the instant case - *Rogers v. Rogers* - it is clear that the Wife is misreading this decision in her search for "conflict".

Although the *Rogers* court held that a modification may be granted "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", the opinion makes it clear that what the court meant was that the *paying spouse* could request a *decrease* in the event his financial circumstances changed just as much as the recipient spouse could request an increase if her needs changed. The *Rogers* court never meant what the Wife herein suggests - that an increase in the paying spouse's ability alone may justify an increase in alimony without a corresponding showing of increased need.

A reading of the *Rogers* opinion establishes the foregoing because the court makes specific reference to the fact that “a substantial diminution of the former husband’s ability to pay, or a ‘drying up of the financial reservoir’, may be just as much of a ‘changed circumstance’ as would be a material change in her necessities of life.”

The fourth of the cases claimed by the Wife to establish “conflict” - *England v. England* - is identical with the foregoing. The court’s reference to a change in the payor’s ability is with respect to the ability of 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, emphasis supplied).

With respect to the fifth case cited by the Wife herein - *Weinstein v. Weinstein* - although the Wife claims that the District Court therein relied upon certain “findings” to reach its decision, the findings recited by the Wife are those of the trial court, not the appellate court. The actual holding of the District Court in *Weinstein* was:

[W]hen a husband’s income has markedly improved while a wife’s circumstances have worsened because of the impact of inflation, it is error not to grant the wife a modification of alimony. (Id. at 311).

This holding is totally in line with the opinion of the District Court herein, which stated:

[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 affected the party seeking the modification. (Id. at 2593)

As the foregoing makes clear, there is no conflict between the decision herein and any of the decisions cited by the Wife. This Court should, accordingly, deny the Wife's request for discretionary review of the District Court's decision in this case.

CONCLUSION

Almost thirty years ago this Court determined that a "conflict" between decisions with respect to this Court's jurisdiction means decisions that are "wholly irreconcilable". *Williams v. Duggan*, 153 So.2d 726 (Fla. 1963). No such showing has been made herein rather, the Wife has merely presented this Court with attenuated interpretations of a series of decisions. This Court should deny jurisdiction in this case.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a copy of the foregoing has been served by mail upon counsel for the Wife: Frates, Bienstock & Sheehe, Suite 3160, 200 Biscayne Boulevard, Miami, Florida, 33131, and Marguerite H. Davis, Katz, Kutter, Haigler, Alderman, Davis, Marks and Rutledge, P.A., P.O. Box 1877, Tallahassee, Florida, 32302-1877, this 22nd day of May, 1990.


CYNTHIA L. GREENE