IN THE SUPREME COURT OF FLORIDA

DIANE V. BEDELL,

Petitioner,

v.

ROBERT L. BEDELL,

Respondent.

Case No.: 75,894

REPLY BRIEF OF PETITIONER

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

By: Terry S. Bienstock, P.A.
James C. Cunningham, Jr.
Philip J. Kantor

and

MARGUERITE H. DAVIS
Florida Bar No. 136563
PAUL R. EZATOFF
Florida Bar No. 300985
Katz, Kutter, Haigler, Alderman,
Davis, Marks and Rutledge, P.A.
Post Office Box 1877
Tallahassee, Florida 32302-1877
(904) 224-9634

ATTORNEYS FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Florida Statutes

Other Authorities

STATEMENT OF THE CASE AND OF THE FACTS

In his Answer Brief, Dr. Bedell ignores the requirement of Rule 9.210(c), Florida Rules of Appellate Procedure, that "the statement of the case and of the facts shall be omitted [from an answer brief] unless there are areas of disagreement, which shall be clearly specified." Although Dr. Bedell's Answer Brief identifies no disagreement with the statement of the case and of the facts asserted in Mrs. Bedell's Initial Brief, it nevertheless includes an entirely new and argumentative statement. Because this new statement is unauthorized, incomplete, and would tend to mislead the Court, a brief response is required so that the parties' arguments may be considered in the proper context.

Dr. Bedell repeatedly asserts that Mrs. Bedell has been unwilling and has refused to contribute to her own self-support since the parties' divorce, but in doing so he omits some important facts. For example, for the two years following the divorce, Mrs. Bedell cared for the parties' children. (T. at 101). During the years 1977-1979, Mrs. Bedell went to New York in order to attempt to gain a degree in art. However, the settlement arranged by Dr. Bedell was, as he recognizes, only enough to meet the monthly payment upon Mrs. Bedell's residence. (Answer Brief at 1). As a result, Mrs. Bedell was only able to earn three credits at Pratt Institute.[1]

From 1980 to 1982, Mrs. Bedell cared for her invalid grandfather. (T. at 108). She took two hiatuses from this responsibility, once to travel to Europe with her sister at her

---

[1] Although Mrs. Bedell and her family financially assisted Dr. Bedell when he attended medical school (T.39-40), he refused to aid Appellant when she sought to improve herself educationally. (T. at 89-09). Had he aided her at that time, it is entirely possible that the necessity for her Petition for Modification would have been avoided.

mother's expense (T. at 108-09), and once in order to have an operation. (T. at 109). In 1982, Mrs. Bedell was employed at Burdines. (T. at 110). In June of 1984, she went to Europe to study calligraphy. (T. at 111-12). Upon her return in October, 1984, she cared for an elderly "aunt." (T. at 113). She obtained a position at a pro shop in a health spa in September, 1985, which lasted until it went out of business in July, 1986. (T. at 113).

The above recitation of facts demonstrates that Mrs. Bedell was not unwilling to work, nor did she refuse to gain employment. She sought to enhance her education and obtain meaningful employment. Furthermore, she spent time caring for ill relatives and recuperating from an operation. When Mrs. Bedell was able to gain employment, it was only at minimum wage positions which required no special training.

Since her divorce in 1975, Mrs. Bedell has survived financially only because of loans from her mother. Dr. Bedell contends that these monies were not loans and that her mother has no serious intention of demanding repayment unless her daughter obtains the money from her former Husband. (Answer Brief at 4-5). The transcript, however, reveals that her mother is realistic about her daughter's ability to repay $65,000.00 when her monthly income is barely in excess of her monthly mortgage payments of $413.00. (T. at 173-74).

Finally, the items in Mrs. Bedell's townhouse which she testified had worn out—kitchen floor, tile, carpet, appliances and furniture—were all original items purchased or installed prior to 1975. The items Mrs. Bedell claims need to be replaced are over fifteen years old and have not been replaced because she cannot afford such items on the inadequate alimony awarded to her fourteen years ago.

SUMMARY OF THE ARGUMENT ON REPLY

Dr. Bedell's Answer Brief misstates Mrs. Bedell's claims of error in the proceeding below. Although Dr. Bedell repeatedly characterizes Mrs. Bedell's claim for an increase in alimony as being based wholly on the substantial betterment of Dr. Bedell's financial condition, this mischaracterizes Mrs. Bedell's position.

One of the bases for Mrs. Bedell's petition for modification is the stipulated improvement in Dr. Bedell's financial condition, and Mrs. Bedell does contend that such improvement should be a sufficient ground for modification under the facts of this case, particularly since the controlling precedent in the Third District during the entirety of the proceeding below was that such an improvement was sufficient, by itself, to support an increase in her alimony under these facts. Contrary to the implication in Dr. Bedell's brief, however, this is not the sole ground for modification.

Mrs. Bedell is also entitled to an upward modification in her alimony because her needs are not met by the original alimony award. Again, Dr. Bedell misstates this claim by asserting that Mrs. Bedell's principal proof of the inadequacy of the award was the expert testimony that inflation has cut the purchasing power of her $415 per month alimony in half since the original award. Mrs. Bedell, however, does not base her claim that the alimony does not meet her needs solely because of the ravages of inflation. The original award is inadequate because it was not adequate originally, it only covers her mortgage payment, it does not allow Mrs. Bedell to meet her basic living expenses (such as food, electricity, clothing, transportation, maintenance), *and* it has not kept pace with inflation. All of these

factors together demonstrate the inadequacy of the alimony, although any one of them is legally sufficient to justify a modification under the circumstances presented here.

By announcing a new rule of law and expressly receding from prior precedent, the decision of the Third District unfairly prevents Mrs. Bedell from presenting the evidence that the Third District now holds should have been presented below. Even if the decision of the Third District is otherwise affirmed, this Court should direct that the cause be remanded for a new trial to allow Mrs. Bedell to present the evidence that the Third District only after-the-fact concluded was lacking.

ARGUMENT

I. THE 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.

In his Answer Brief, Dr. Bedell incompletely and misleadingly restates Mrs. Bedell's argument by asserting that Mrs. Bedell contends that she is entitled to an increase in alimony only because of the stipulated substantial improvement in her ex-husband's financial condition. Mrs. Bedell rather instead asserts that her alimony should be increased because of Dr. Bedell's substantial increase in ability to pay alimony *coupled with her increased need and the inadequacy of the original award*. While Mrs. Bedell does contend that Dr. Bedell's substantial financial improvement is sufficient as a matter of law to require granting the Petition for Modification, she also proved that modification was justified because the original award was insufficient to meet her needs and that her needs have increased due to

inflation and other causes. Considering all of these factors together, the trial court erred in not granting her Petition for Modification. *See Powell v. Powell*, 386 So.2d 1214, 1215, n.4 (Fla. 3d DCA 1980).

When Mrs. Bedell's petition was filed, when the trial was held, and when the final judgment was entered, the law in the Third District was expressed in *Sherman v. Sherman*, 279 So.2d 887 (Fla. 3d DCA 1973). In that case, the court considered the question:

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

Id. at 888. The court expressly recognized the importance of the question and concluded: "We hold that the question presented must be answered in the affirmative upon authority of Fla.Stat. § 61.14(1) . . . ." *Id.* The Third District adhered to this position in later opinions, until the decision below. *E.g.*, *Taplin v. Taplin*, 341 So.2d 1064, 1065 (Fla. 3d DCA 1977("A fundamental prerequisite to modification of alimony payments is a showing of substantial change of circumstances, including financial circumstances, of *one or* both parties."); *Powell v. Powell*, 386 So.2d 1214 (Fla. 3d DCA 1980)(husband argued that his increased ability to pay could not support an order increasing alimony, but court stated that the husband's position "is contrary to Florida law on the subject.") Thus, during the entirety of the proceeding below, Mrs. Bedell was correct to believe that an increase in her former husband's income was all she would have to prove to be entitled to an upward modification of her alimony.

Upon Dr. Bedell's stipulation that he could pay any reasonable alimony ordered by the court, Mrs. Bedell could have submitted the matter for the court's determination in

accordance with *Sherman.* She went one step further, however, and also proved that the original alimony award was inadequate to meet her needs, and that her needs continued to be unmet because of increased basic household maintenance expenses and because of the effects of inflation on the buying power of her meager $415 per month alimony. This additional proof satisfied the clarification of *Sherman* set forth in *Frantz v. Frantz*, 453 So.2d 429, 430 (Fla. 3d DCA 1984), where the court stated that "an increase in the husband's ability would not itself justify an upward modification of alimony *if the wife's needs are already fully met* either by the existing award or otherwise."

It is important to note that *Frantz* only requires an inquiry into whether Mrs. Bedell's needs are being *met*; it does not allow the court to inquire whether her needs have *increased* since the original award. As discussed more fully in Petitioner's Initial Brief, the evidence adduced below revealed that Mrs. Bedell's needs are not being fully met; it defies even common sense to suggest that $415 per month could meet Mrs. Bedell's basic needs of housing, food, and transportation, since the money does nothing but pay her mortgage payment. (Initial Brief at 26-35). Witnesses on Mrs. Bedell's behalf testified "that she is not presently able to meet her living conditions." (Testimony of Laura Oleck, T. at 177; Peter Oleck, T. at 140; Larry Oleck, T. at 156; and Verne Oleck; T. at 162).

In this case, not only did Mrs. Bedell have no input into the determination of the alimony amount (T. at 41-42), she also had no knowledge of Dr. Bedell's financial circumstances when the agreement was made, since he made *no* financial disclosures to her. (T. at 42-43). Although Dr. Bedell notes that Mrs. Bedell conceded that the alimony *and* child support award *combined* were sufficient at the time of the dissolution (Answer Brief

at 21; T. at 32-33), he fails to acknowledge the obvious corollary, that the alimony by itself was *not* sufficient, as it was only "the exact amount of the mortgage payment upon the Wife's residence." (Answer Brief at 1). However, as Mrs. Bedell testified, that amount does not permit Mrs. Bedell to pay the homeowners' association fee, her electric bill, telephone bill, nor does it provide her with sufficient income to do required maintenance or to even purchase food. The $415 per month could not be adequate to replace the original fifteen-year-old appliances in her home, to purchase drapes to replace the bedspreads hanging in her windows, to allow full use of her air conditioner and dryer, to replace her 1982 automobile, or to purchase proper amounts of groceries. Thus, in order to properly do equity in this matter, the alimony award which resulted from Dr. Bedell's claim that he could not afford to pay more (T. at 88), that was not supported by financial disclosure of any kind, and which was clearly insufficient at the time of dissolution, must be modified so as to meet Mrs. Bedell's needs.

By proving the obvious—that $415 per month alone is not sufficient to meet Mrs. Bedell's needs for food, clothing, shelter, and transportation—Mrs. Bedell demonstrated that her "needs [were not] already fully met either by the existing award or otherwise." *Frantz, supra* at 430. Further, Mrs. Bedell corroborated the testimony concerning the inadequacy of her alimony by presenting the expert testimony of Professor Ledford that 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 this inflation has personally

hurt her financially. (T. at 85). 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.

The court in *Wolfe v. Wolfe,* 424 So.2d 32, 35 (Fla. 4th DCA 1982), recognized that proof of the adverse effects of inflation alone is enough to justify an increase in alimony:

> 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.

Similarly, considering facts almost identical to those presented here, the Fourth District in *Plevy v. Plevy*, 517 So.2d 128, 129 (Fla. 4th DCA 1987), reversed a trial court order reducing alimony and held that it was an abuse of discretion for the trial court to refuse to award an increase in alimony to the recipient wife:

> . . . 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. Finally, in *England v. England*, 520 So.2d 699 (Fla. 4th DCA 1988), 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. 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) directly contrary to these precedents.

Dr. Bedell must not take issue with the decisions of the Fourth District regarding inflation as a ground for modification since he did not rebut or even address any of those cases in his answer brief. Instead of attempting to distinguish these Florida authorities, Dr. Bedell provided this Court with brief excerpts of a 1967 Alabama decision[2] and three aged Illinois appellate decisions[3] which he contends are contrary to the established Florida precedent cited above. Of course, those decisions are not pertinent since the Fourth District decisions already address the issue of the quantum of proof necessary to demonstrate the obvious adverse effects of inflation, and Mrs. Bedell supplied more than the necessary evidence. Even if the Alabama and Illinois decisions were pertinent, however, they only hold that a petitioner for modification of alimony must offer actual proof of the adverse effects of inflation. Mrs. Bedell offered such proof, and so the foreign decisions cited by Dr. Bedell do not support the judgment entered below.

---

[2] *Block v. Block*, 201 So.2d 51 (Ala. 1967).

[3] *Shive v. Shive*, 373 N.E.2d 557 (Ill. Ct. App. 1978); *Nordstrom v. Nordstrom*, 343 N.E.2d 640 (Ill. Ct. App. 1977); and *Goldberg v. Goldberg*, 332 N.E.2d 710 (Ill. Ct. App. 1976).

Despite the supportive decisions of the Fourth District, Mrs. Bedell does not ask this Court to hold that inflation is a sufficient reason, by itself, to allow an increase in alimony. But Mrs. Bedell does submit that proof of substantial inflation, coupled with proof that such inflation has adversely affected her, coupled with proof of needs which remain unmet because of the inadequacy of her alimony, coupled with proof that Mrs. Bedell has had to incur substantial debts to meet expenses, coupled with the stipulated improvement of Dr. Bedell's financial condition (showing that inflation has not adversely affected him), all compel the conclusion that an upward modification of alimony is justified. In refusing to modify Mrs. Bedell's alimony, the trial court erred.

Mrs. Bedell's major source of "income" which has allowed her to meet expenses has been loans from her mother which have equaled approximately $14,000 per year (T. at 227). As a matter of law, the trial court erred in determining that these loans were "income", since they were not "the return of money from one's business, labor, or capital invested gains, profits or private revenue." *Black's Law Dictionary* 906 (4th ed. 1968). At most, these payments are gifts which should not legally diminish Dr. Bedell's continuing alimony obligations. This is particularly true since Mrs. Bedell's mother is not legally obligated to contribute to her daughter's support, *see Perla v. Perla*, 58 So.2d 689 (Fla. 1952), and she may cease her assistance at any time without Mrs. Bedell's consent. Alimony, though, is "based on the common law *obligation* of the *husband* to support his wife." *Jacobs v. Jacobs*, 50 So.2d 169, 173 (Fla. 1951).

As noted above, the law in the Third District at the time of the parties settlement and during the proceedings below was that "periodic alimony [may] be increased upon

petition for modification when the only change of circumstance shown is a substantial increase in the earnings of the former husband . . . ." *Sherman v. Sherman*, 279 So.2d 887, 888 (Fla. 3d DCA 1973). Although the Third District expressly overruled *Sherman* in its decision below, it did not allow Mrs. Bedell to present evidence in accordance with the new rule which it announced for the first time in that decision. Thus, although Mrs. Bedell presented evidence which would have been sufficient to entitle her to an increase in alimony under the then-existing standard, the Third District created a new standard which could not have been anticipated by Mrs. Bedell and then judged her proof against it. Mrs. Bedell has never had the opportunity to submit evidence under this new standard, and so she has been deprived of due process by the retroactive application of the new standard to her case. Just as a statute should not ordinarily be given a retroactive application,[4] and retroactive application which creates new obligations in connection with completed transactions is invalid,[5] so, too, should the Third District's new construction of Section 61.14 not be given retroactive effect so as to deprive Mrs. Bedell of the right to present evidence under the new standard. This is especially true since the *Sherman* decision expressed the law in effect when Mrs. Bedell and Dr. Bedell entered into their settlement agreement, and it thus became a part of that agreement, *Florida Beverage Corporation v. Division of Alcoholic Beverages and Tobacco*, 503 So.2d 396 (Fla. 1st DCA 1987), and since the provisions of such an agreement are binding on the parties in determining the right to modification of alimony.

---

[4] *See, e.g., Avila South Condominium Association, Inc. v. Kappa Corporation*, 347 So.2d 599 (Fla. 1977).

[5] *See, e.g., McCord v. Smith*, 43 So.2d 704 (Fla. 1950).

See Ochs v. Ochs, 540 So.2d 190 (Fla. 1st DCA 1989). Therefore, even if the decision of the Third District is affirmed, the Third District should be directed to remand the case to the trial court so that Mrs. Bedell may present additional evidence to meet the newly-enunciated standard.

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

Mrs. Bedell reasserts her argument concerning this issue on appeal as found in her Initial Brief at pages 35-37.

CONCLUSION

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,

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

By: Terry S. Bienstock, P.A.
James C. Cunningham, Jr.
Philip J. Kantor

and

MARGUERITE H. DAVIS
Florida Bar No. 136563
PAUL R. EZATOFF
Florida Bar No. 300985
Katz, Kutter, Haigler, Alderman,
Davis, Marks and Rutledge, P.A.
Post Office Box 1877
Tallahassee, Florida 32302-1877
(904) 224-9634

ATTORNEYS FOR PETITIONER

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 10th day of January, 1991.

Marguerite H. Davis

MARGUERITE H. DAVIS