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IN THE SUPREME COURT OF THE STATE OF FLORIDA
TALLAHASSEE, FLORIDA

MAURICE S. PIMM,

Appellant,

v.

CAROLYN M. PIMM,

Appellee.

Supreme Court No. 76,885

2nd District No. 89-00021

Florida Bar Nos. 518750
236098

APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE
INITIAL BRIEF OF CROSS-APPELLANT

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TABLE OF CONTENTS

Page(s)

Table of Citations..... ii

Preliminary Statement..... 1

Statement of the Case and Facts..... 2

Summary of the Argument..... 9

Certified Question and Arguments..... 10

ARGUMENT I:

ACCEPTANCE OF POSTJUDGMENT RETIREMENT AS A CHANGE OF CIRCUMSTANCE THAT MAY BE CONSIDERED UPON A PETITION TO MODIFY ALIMONY OR SUPPORT PAYMENTS WOULD BE IN DIRECT CONTRAVENTION OF HIGHLY ENTRENCHED PRINCIPLES OF LAW 11

A. Voluntary Retirement is not an Involuntary Change.

B. Retirement Was, or Should Have Been, Contemplated at the Time of Dissolution.

C. Voluntary Retirement is Not Necessarily Permanent in Nature.

ARGUMENT II:

ACCEPTANCE OF POSTJUDGMENT RETIREMENT AS A CHANGE OF CIRCUMSTANCE THAT MAY BE CONSIDERED IN MODIFYING ALIMONY OR SUPPORT CREATES AN AMBIGUITY IN DISTINGUISHING VOLUNTARY RETIREMENT AND VOLUNTARY DIMINUTION OF INCOME..... 19

ARGUMENT III:

ACCEPTANCE OF POSTJUDGMENT RETIREMENT AS A CHANGE OF CIRCUMSTANCE THAT MAY BE CONSIDERED IN MODIFYING ALIMONY OR SUPPORT DIMINISHES THE IMPORTANCE AND NECESSITY OF PERMANENT PERIODIC ALIMONY..... 24

Conclusion..... 29

Certificate of Service..... 30

TABLE OF CITATIONS

Citations	Pages
Bish v. Bish, 404 So.2d 840 (Fla. 1st DCA 1981).....	11,13,23
Blakistone v. Blakistone, 462 So.2d 883 (Fla. 2d DCA 1985).....	25
Bradley v. Bradley, 347 So.2d 789 (Fla. 3d DCA 1977).....	19,20
Brown v. Brown, 440 So.2d 16, 18 (Fla. 1st DCA 1983).....	12,15,16
Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980).....	24
Chastain v. Chastain, 73 So.2d 66 (Fla. 1954).....	11
Decenzo v. Decenzo, 433 So.2d 1316 (Fla. 3d DCA 1983).....	25
DePoorter v. DePoorter, 509 So.2d 1141 (Fla. 1st DCA 1987).....	11,12
Desilets v. Desilets, 377 So.2d 761 (Fla. 2d DCA 1979).....	19
Faye v. Faye, 131 Misc. 388, 226 N.Y.S. 729 (Sup. Ct. 1928)....	19
Firestone v. Firestone, 263 So.2d 223 (Fla. 1972).....	24
First National Bank in St. Petersburg v. Ford, 283 So.2d 342 (Fla. 1973).....	24
Foster v. Foster, 537 SW2d 833 (Mo. Ct. App. 1976).....	19
Fried v. Fried, 375 So.2d 46 (2d DCA 1979).....	19
Gordon v. Gordon, 204 So.2d 734 (Fla. 3d DCA 1967).....	25

	Page(s)
Holley v. Holley, 380 So.2d 1098 (Fla. 2d DCA 1980).....	25
In Re: Estate of Freeland, 182 So.2d 425 (Fla. 1966).....	24
Jaffee v. Jaffee, 394 So.2d 433 (3d DCA 1981).....	14
Killian v. Lawson, 387 So.2d 960 (Fla. 1980).....	24
Mansfield v. Mansfield, 309 So.2d 629 (3d DCA, 1975).....	13,15,19
Osmond v. Osmond, 280 So.2d 67 (3d DCA 1973).....	16
Pimm v. Pimm, 15 F.L.W. (D) 2613.....	8
Servies v. Servies, 524 So.2d 678 (Fla. 1st DCA 1988).....	11,16, 21,23,29
Tinsley v. Tinsley, 502 So.2d 997 (Fla. 2d DCA 1987).....	12
Waldman v. Waldman, 520 So.2d 87 (Fla. 3d DCA 1987).....	11,23
Ward v. Ward, 502 So.2d 477 (Fla. 3d DCA 1987).....	7,11,17, 20,21,23,29
Wing v. Wing, 429 So.2d 782 (Fla. 3d DCA 1983).....	15
Withers v. Withers, 390 So.2d 453 (Fla. 2d DCA 1980).....	11,16

Authorities

Sec. 61.14(1), Fla. Stat. (1989).....	11
Sec. 112.044, Fla. Stat. (1989).....	27
Social Security Law and Practice, Sec. 28:4 The Lawyers Co-operative Publishing Company, 1987.....	14

	Page(s)
29 U.S.C., Sec. 1002(24).....	22
42 U.S.C. Sec. 403(f)(3).....	27
26 U.S.C.S. Sec. 411(a)(8)(B).....	22
29 U.S.C.S. Secs. 621-634.....	27

PRELIMINARY STATEMENT

This appeal is based upon the following question certified by the Second District Court of Appeal as one of great public importance:

> IS THE POSTJUDGMENT RETIREMENT OF A SPOUSE WHO IS OBLIGATED TO MAKE SUPPORT OR ALIMONY PAYMENTS PURSUANT TO A JUDGMENT OF DISSOLUTION OF MARRIAGE A CHANGE OF CIRCUMSTANCE THAT MAY BE CONSIDERED TOGETHER WITH OTHER RELEVANT FACTORS AND APPLICABLE LAW UPON A PETITION TO MODIFY SUCH ALIMONY OR SUPPORT PAYMENTS?

Although the issue raised in this appeal will have no effect on the parties to this proceeding, as Mrs. Pimm's permanent periodic alimony has been terminated due to her recent remarriage, the issue is one of tremendous importance, and its resolution will have continuing effect in the State of Florida.

The Appellant, MAURICE C. PIMM, who was the Petitioner in the trial court, shall be referred to herein as the "Husband" or "Mr. Pimm." The Appellee and Cross-Appellant, CAROLYN M. PIMM, who was the Respondent in the trial court, shall be referred to herein as the "Wife" or "Mrs. Pimm."

Citations to the Record on Appeal are indicated by the letter "R" followed by the appropriate page number. Citations to the Appendix on appeal attached to appellant's Initial Brief are indicated by the letter "A" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Appellee does not take issue with most of the Appellant's Initial Brief styled "Statement of the Case." However, in order to present a more balanced rendition of the facts, it is necessary for Appellee to supplement or clarify the Statement of the Facts provided by the Appellant.

The parties, MAURICE C. PIMM and CAROLYN M. PIMM, were divorced on July 21, 1975 after a 29-year marriage. (R-88) During the course of the dissolution of marriage action, the parties entered into a Property Settlement Agreement which was ultimately approved and incorporated into the Final Judgment of Dissolution of Marriage. (R-3-8) Pursuant to the Settlement Agreement and the Final Judgment, the Husband agreed to pay to the Wife permanent periodic alimony of One Hundred Ninety Five Dollars ($195.00) per week, in addition to providing to the Wife payment of the mortgage, insurance and taxes on the marital home until such time as their minor child shall marry, die or reach the age of eighteen (18) years. Further, the Husband and Wife owned as tenants in common the marital home and business property located at 2906 Florida Avenue, Tampa, Florida. (R-8)

In addition, the Husband was ordered to provide health insurance to the Wife and to maintain life insurance policies with the Wife as beneficiary as follows:

Penn Mutual Life Insurance Company, Policy No. 3-386-424, $5,000.00

Penn Mutual Life Insurance Company, Policy No. 4-264-604, $5,000.00

Penn Mutual Life Insurance Company, Policy No. 4-907-280, $5,000.00

Gulf Life Insurance Company, Policy No. 641-012-874, $10,000.00.

Penn Mutual (Group) No. 5467, $5,000.00.

(R-7-8)

Subsequent to the divorce, the parties sold the former marital home as well as the Florida Avenue business property, and received equal distributions of the sale proceeds.

In 1984, the Husband stopped paying the health insurance premiums for his former Wife. (R-125-126) Thereafter, Mrs. Pimm incurred an unanticipated additional expense of $110 per month for her health insurance. (R-125)

Also, subsequent to the divorce, Mr. Pimm stopped paying the premiums on one of the $5,000 Penn Mutual policies and on the Gulf Life Insurance Company policy allowing those policies to lapse, thereby decreasing Mrs. Pimm's life insurance benefits by $15,000. (R-126-127; 129-130)

At the time of the dissolution of marriage in 1975, the Wife was 61 years old. She was unemployed at the time of the divorce and final modification hearing, as has been the case throughout their marriage. (R-98) The highest level of education completed by the Wife was the eleventh grade. (R-98) At no time

during the marriage did the Wife work outside of the marital home, because the Husband did not want to come home to a tired wife. (R-98)

At the time of the divorce, the Husband was employed as a civil engineer with Pimm-Wood Engineering Co. The Husband was president of the company, which was primarily involved in the surveying of real property. (R-132) He was licensed in the State of Florida as a civil engineer and land surveyor. Before he stopped working, and moved to Alabama, the Husband's salary was $733 per week, or approximately $38,116 per year. (R-132; 106)

At the time of his divorce, the Husband knew that he would retire, but simply had not decided when he would stop work. (R-124-125) On June 24, 1988, Mr. Pimm had reached the age of 65 and decided it was time to retire. His desire to retire was entirely voluntary. (R-132) He was not forced to retire by the company, by ill health or for any other reason. In fact, the Husband admitted that his health was good. (R-112) His decision was simply to retire based upon reaching his 65th year of age. (R-1-11; 132; 112)

Four months <u>before</u> his 65th birthday, Mr. Pimm filed his Petition for Modification of the Final Judgment based upon his anticipated retirement. (R-1-11) By the time of the final hearing on modification, not only had the Husband "retired," but he had also remarried and moved to Birmingham, Alabama. (R-105; 110; 114) Coincidentally, or perhaps not, Mr. Pimm's

retirement, remarriage and move to Alabama all took place within months of each other, each event having a prospective effect on the Husband's income.

Mr. Pimm retired voluntarily, knowing he could work if he so chose; he moved to Alabama voluntarily, knowing that his civil engineering license would not be recognized in Alabama; and he also remarried, voluntarily, knowing of his prior legal obligations to his former Wife. (R-114)

On March 22, 1988, Mrs. Pimm filed an Answer and Counter-petition, seeking an increase in her alimony due to the unanticipated additional expense of her health insurance the Husband had stopped paying, and due to the general increased cost of her basic needs over the 13 year period subsequent to her Final Judgment. (R-12-14)

The Husband's postretirement income included Social Security benefits in the amount of $822 per month, $250 per month in investment interest and $198 per month in payments on a five-year stock redemption plan. (R-106) His financial affidavit showed net assets of $99,675.92, which included a one-third interest in a Piper aircraft purchased after the divorce. (R-18)

Although he and his new wife had not formalized an arrangement for his financial contribution to their joint living expenses, Mr. Pimm admitted that his new wife's $2,000 per month salary helped contribute, and thus reduce, his expenses. (R-112; 117-118; 123)

On the other hand, Mrs. Pimm had not remarried at the time of the final hearing, but had moved to Tennessee to be nearer to her children. Although she was receiving $408.46 a month in interest income, she continued to rely upon the $195 a week in the permanent alimony payments imposed upon her former husband by his 13-year-old agreement and Final Judgment of Dissolution of Marriage. (R-139-140) She showed net assets of $74,214.38. (R-22-25)

This matter came for final hearing before the Honorable Ralph Steinberg on August 24, 1988.

The Court announced its decision to deny the Husband's Petition along with certain findings of fact, including:

> "...before Mr. Pimm decided to retire, he should have considered that obligation. I agree he has a right to retire. He also has an obligation. And so I don't follow that this is the type of retirement that will warrant the modification. That is the reason.

(R-144)

The Court explained further:

> "Without that, there would be no -- absolutely no change at all even considered. His retirement was voluntary, and that is the reason."

(R-144)

Based on his findings of fact, including those heretofore described, the trial judge ruled that the Husband had not met his burden of establishing a substantial and material change in circumstances such as would warrant a modification of the Final

Judgment of Dissolution of Marriage. The Court denied both the Petition and Counterpetition for Modification. (R-144) The Order Denying the Petitioner/Former Husband's Petition for Modification of Alimony and Denying the Respondent/Former Wife's Counterpetition for Modification of Alimony was entered on September 19, 1988.

The Husband filed a Motion for Rehearing alleging as error the court's misinterpretation of the law, in particular, the case of Ward v. Ward, 502 So.2d 477 (Fla. 3d DCA 1987), and its failure to consider the totality of the circumstances. (R-51-54)

The Husband's Motion for Rehearing came on for hearing on November 30, 1988. The trial judge thereupon re-examined the law presented on these issues and found, once again, that there must be an involuntary change in circumstances to warrant a modification of the Final Judgment of Dissolution of Marriage. (R-179-180)

Further, the Court found that the Husband had not satisfied his burden of proving a substantial change in circumstances and denied the Husband's Motion for Rehearing. (R-178-180, 55)

A timely Notice of Appeal was filed by ther Husband. (R-56-57) An Opinion was entered by the Second District Court of Appeal on April 18, 1990 (A-8-13) which affirmed the trial court's denial of the Husband's petition to modify the alimony obligation. (A-11)

A timely Motion for Rehearing and Clarification and Motion for Rehearing En Banc was filed in the appellate court by the

Husband. (A-14-18) In an Order entered October 12, 1990, the appellate court granted the motion for rehearing, denied the rehearing en banc, and withdrew the opinion issued April 18, 1990. (A-19) The substituted opinion of Pimm v. Pimm appears at 15 F.L.W. (D) 2613. (A-20-25) In this substituted opinion, the Second District Court of Appeal certified the issue presented as a question of great public importance. (A-25)

The Husband/Appellant timely filed a Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court (A-26); and on November 5, 1990, Wife/Appellee served her Cross-Notice to Invoke Discretionary Jurisdiction of the Florida Supreme Court.

SUMMARY OF THE ARGUMENT

Alimony is a basic living expense, like food, shelter, or clothing, that must be considered before a payor spouse chooses to reduce his income.

If that payor spouse can afford to pay his basic living expenses, then he is free to stop working, quit his job, or retire at any such time he so chooses.

By accepting "postjudgment retirement" as a change of circumstance to support modification of alimony or support, this Court will encourage early "voluntary retirement" to attempt a shifting of the associated financial reduction to the recipient spouse.

The Pimms represent what might be considered a "typical" couple who would be confronted by this issue. If this Court answers affirmatively the certified question on appeal, payor spouses like Mr. Pimm could "retire" upon their desire and ask their recipient spouses to reduce their basic necessities by accepting the financial reduction associated with the payor's retirement. This result is unfair, confusing and a violation of many well-established principles of law.

CERTIFIED QUESTIONS AND ARGUMENTS

ARGUMENT I

ACCEPTANCE OF POSTJUDGMENT RETIREMENT AS A CHANGE OF CIRCUMSTANCE THAT MAY BE CONSIDERED UPON A PETITION TO MODIFY ALIMONY OR SUPPORT PAYMENTS WOULD BE IN DIRECT CONTRAVENTION OF HIGHLY ENTRENCHED PRINCIPLES OF LAW

ARGUMENT II

ACCEPTANCE OF POSTJUDGMENT RETIREMENT AS A CHANGE OF CIRCUMSTANCE THAT MAY BE CONSIDERED IN MODIFYING ALIMONY OR SUPPORT CREATES AN AMBIGUITY IN DISTINGUISHING VOLUNTARY RETIREMENT AND VOLUNTARY DIMINUTION OF INCOME.

ARGUMENT III

ACCEPTANCE OF POSTJUDGMENT RETIREMENT AS A CHANGE OF CIRCUMSTANCE THAT MAY BE CONSIDERED IN MODIFYING ALIMONY OR SUPPORT DIMINISHES THE IMPORTANCE AND NECESSITY OF PERMANENT PERIODIC ALIMONY.

ARGUMENT

I.

ACCEPTANCE OF POSTJUDGMENT RETIREMENT AS A CHANGE OF CIRCUMSTANCE THAT MAY BE CONSIDERED UPON A PETITION TO MODIFY ALIMONY OR SUPPORT PAYMENTS WOULD BE IN DIRECT CONTRAVENTION OF HIGHLY ENTRENCHED PRINCIPLES OF LAW.

The long-standing, fundamental prerequisites to modification of alimony, recognized now for over a half century in the State of Florida, require that the moving party show:

1. A substantial change in circumstances..., Chastain v. Chastain, 73 So.2d 66 (Fla. 1954); Sec. 61.14(1), Florida Statutes (1989);

2. ...not contemplated at the time of final judgment of dissolution, Withers v. Withers, 390 So.2d 453 (Fla. 2d DCA 1980); and

3. ...that is sufficient, material, involuntary and permanent in nature. Bish v. Bish, 404 So.2d 840 (Fla. 1st DCA 1981); Ward v. Ward, 502 So.2d 477 (Fla. 3d DCA 1987); Waldman v. Waldman, 520 So.2d 87 (Fla. 3d DCA 1987); DePoorter v. DePoorter, 509 So.2d 1141 (Fla. 1st DCA 1987); Servies v. Servies, 524 So.2d 678 (Fla. 1st DCA 1988).

Furthermore, if one wishes to terminate his obligation of permanent, periodic alimony in a modification proceeding, as did Mr. Pimm, he must show a substantial change in circumstances with all of the above characteristics, and show, in addition,

"...that the moving party is no longer able to pay any amount of alimony, or that the recipient has no need for alimony." Brown v. Brown, 440 So.2d 16, 18 (Fla. 1st DCA 1983).

Of course, when one is attempting to modify an agreement of the parties, the burden of proving these prerequisites is "heavier," since the alimony provision, and every other provision of the agreement, will be interpreted in accordance with contract principles." Tinsley v. Tinsley, 502 So.2d 997 (Fla. 2d DCA 1987); DePoorter v. DePoorter, supra.

A. Voluntary Retirement is Not an Involuntary Change.

Mr. Pimm attempted to terminate his permanent periodic alimony obligations to his Wife by bringing a modification action based upon his decision to voluntarily retire upon reaching age 65. The impetus for the question certified by the Second District Court of Appeal was that court's reversal of the trial court's decision to deny Mr. Pimm's modification action upon his petition to terminate his alimony since his voluntary retirement fell outside of the long established definition of substantial change of circumstances upon which a modification could be based.

Acceptance of voluntary retirement as a form of "postjudgment retirement" which "may" be considered upon a petition to modify alimony will cause a "substantial change" in the long established principles heretofore relied upon.

Simply put, a change which occurs voluntarily conflicts directly with the test established by the First District Court of Appeal, that is, the change must be "involuntary." If one retires by choice at any age, whether at age 59-1/2, age 62, age 65 or age 70, the change is not one which is "involuntary." Bish v. Bish, 404 So.2d 840 (Fla. 1st DCA 1981).

Mr. Pimm was the first to admit that his health was good, that he could work full time or part time if he so desired, but that he decided to retire simply upon reaching the age of 65. (R-112; 123-124)

B. Retirement Was, or Should Have Been, Contemplated at the Time of Dissolution.

Mr. Pimm was like many other employed persons. At the time of his Marital Settlement Agreement, he knew he would retire some day, but simply was not sure when that even would occur. (R-124-125) And yet, Mr. Pimm agreed in his Marital Settlement Agreement to provide permanent periodic alimony to Mrs. Pimm until either party's death or upon the remarriage of Mrs. Pimm. (R-3-8) Although he had every opportunity to do so, Mr. Pimm did not add a provision for reconsideration of his support upon his retirement - whenever that occurred. See, Mansfield v. Mansfield, 309 So.2d 629 (3d DCA, 1975), where the parties included a provision for modification upon the Husband's retirement.

Assuming one would retire before death, isn't retirement an act inherently contemplated by any employed person? Moreover, retirement should have been contemplated upon entering into a specific agreement where alimony could be paid until one's death. Accordingly, since retirement is a change contemplated at all times, including the time of the Final Judgment of Dissolution, then it is not a change which would be sufficient to modify alimony.

The Third District Court of Appeal expressed the rationale behind this doctrine, saying:

> "If the likelihood of a particular occurrence was one of the factors which the court or parties considered in initially fixing the award in question, it would be grossly unfair subsequently to change the result simply because the anticipated event comes to pass."

Jaffee v. Jaffee, 394 So.2d 433 (3d DCA 1981).

C. Voluntary Retirement is Not Necessarily Permanent in Nature.

Mr. Pimm admitted that even though he was 65 years old, he could work if he so desired. (R-112; 123-124) In fact, he could have worked under the supervision of a licensed surveyor or licensed engineer in the State of Alabama. (R-123-124) Moreoever, at the time of the final hearing on the Husband's Petition to Terminate Alimony, Mr. Pimm was able to earn approximately $8,800 and still receive his full social security benefits. Social Security Law and Practice, Sec. 28:4. If Mr. Pimm had decided to work part time, would he still be looked

upon as having retired? If the Husband returned to work at some point after receiving a reduction or termination of alimony, then Mrs. Pimm has the burden of reinstating her alimony and establishing the foundations for a modification in a subsequent proceeding. Brown v. Brown, supra; see, Wing v. Wing, 429 So.2d 782 (Fla. 3d DCA 1983). When a change has come about by choice and can easily be rescinded, its permanency is questionable.

This is the exact chain of events before the Third District Court of Appeal in Mansfield v. Mansfield, 309 So.2d 629 (3d DCA 1975). In that case, the husband retired, received a modification of his wife's alimony and then took additional employment earning $10,000. Seeing this, the wife moved to modify upward her support. The court granted her motion, stating:

> "In our view, this fact alone shows that the appellant had a greater earning capacity than that indicated at the time of retirement."

And, furthermore:

> "While the increase in earnings above that anticipated at the time of the entry of the order of modification after the husband retired may be temporary, it does indicate a change of circumstances to the extent that it shows the former husband had the ability to earn if he so desired."

Mansfield, p. 630.

Ability to pay, however, is the sine qua non of a modification of alimony. Even if voluntary retirement at age

65, or 60, or 59-1/2 was considered "involuntary," "foreseeable" and "permanent in nature," and, therefore, considered as a substantial change in circumstances, the payor spouse must continue to pay his alimony obligation if he retains the ability to do so and the recipient maintains her continued need for the alimony. Brown v. Brown, 440 So.2d 16, (Fla. 1st DCA 1983); Servies, supra; Osmond v. Osmond, 280 So.2d 67 (3d DCA 1973); Withers v. Withers, 390 So.2d 453 (2nd DCA). For example, in Osmond, the Third District Court of Appeal considered the husband's forced retirement due to his dwindling health as a substantial change. However, the court looked beyond this substantial change and found that he still retained his ability to pay his support, and that his wife continued to rely upon that support.

Interestingly, Mr. Pimm's Petition to Terminate Alimony was void of any allegation that he was unable to pay his alimony obligation, or that Mrs. Pimm no longer needed his support. (R-1-11)

Appellant would argue that any working person's retirement at age 65 satisfies the tests of "involuntary" and "permanent" by pronouncing that age as the age of "normal retirement." He disregards the tremendous numbers of people who have no choice but to continue working past the age they consider as "normal retirement" if they do not have investment income, social security payments or savings sufficient to

provide the necessities of life. Instead, Appellant believes that reaching the "normal age of retirement" is a substantial change that should culminate in shifting the associated financial reduction to the recipient spouse.

Query: Can an employed recipient spouse decide he or she has reached 65 years or some other retirement age or guidepost, retire, and then require the payor spouse to accommodate this change by increasing his or her support?

No one is denying Mr. Pimm's, or anyone else's, right to retire at any such time as he or she determines. However, as long as he has the ability to satisfy his obligations to the recipient spouse, one's decision to retire should not be accepted as a change of circumstances to modify that support. As aptly set forth in Ward v. Ward, the husband is ..."not entitled to have his former wife defray the cost of his retirement through a reduction of his long-standing obligations to her. Ward v. Ward, supra, at 478.

Postjudgment retirement of a voluntary nature is not involuntary, is or should be contemplated and may not be permanent, and, thus, does not pass the long-standing tests for a substantial change of circumstances sufficient for modification.

As succinctly set forth in Ward:

> ..."[t]he obligation to support a former wife of a long term marriage does not diminish in the later years of life. Only when the ability to carry out that

> obligation is lessened by circumstances beyond the control of the party required to pay support will such party be entitled to have the amount of the obligation reduced."

Ward v Ward, supra, at 478.

II.

ACCEPTANCE OF POSTJUDGMENT RETIREMENT AS A CHANGE OF CIRCUMSTANCE THAT MAY BE CONSIDERED IN MODIFYING ALIMONY OR SUPPORT CREATES AN AMBIGUITY IN DISTINGUISHING VOLUNTARY RETIREMENT AND VOLUNTARY DIMINUTION OF INCOME.

How does one determine whether "postjudgment retirement" is retirement and not "quitting work"? How does one distinguish between a voluntary retirement from employment and a voluntary diminution of one's income? Voluntary diminuition occurs where the husband has the current ability to earn money and yet chooses or refuses not to use his ability in that manner. As set forth succinctly by Judge Danahy of the Second District Court of Appeal:

> Where a former husband has an ability to earn if he so desires, the trial judge may impute an income to the husband according to what he could earn by the use of his best efforts to gain employment equal to his capacities, and on that basis enter an award of alimony as if the husband were in fact earning the income so imputed."

Desilets v. Desilets, 377 So.2d 761 (Fla. 2nd DCA 1979); Fried v. Fried, 375 So.2d 46 (DCA 1979); Bradley v. Bradley, 347 So.2d 789 (Fla. 3d DCA 1977); Mansfield v. Mansfield, 309 So.2d 629 (Fla. 3d DCA 1975); Foster v. Foster, 537 SW2d 833 (Mo. Ct. App. 1976); Faye v. Faye, 131 Misc. 388, 226 N.Y.S. 729 (Sup. Ct. 1928).

He goes on to state that:

> "In such a situation, an award of alimony entirely exhausting the husband's actual income may be a proper exercise of the trial judge's discretion."

Bradley v. Bradley, supra.

But how does one distinguish voluntary diminution such that income should be imputed when the ability to earn exists and voluntary retirement where the ability to earn still exists?

In Ward, supra, the Second District Court of Appeal wrestled with this very issue. In that case, the husband, at age 63, decided to voluntarily retire. His retirement was not motivated by ill health or not mandated by his employer or any other circumstance. As is set forth in the opinion,

> "Plainly and simply, he was, by his own admission, tired of working, would not work even if a job were available, and was desirous of spending his time hunting, fishing, and puttering in his yard."

Ward, supra, at 478.

As the court later found, "but for his precipitous decision to retire - Mr. Ward was fully capable of earning his pre-retirement income." The court interpreted Mr. Ward's retirement as voluntary diminution, citing the Desilets case and others as set forth above.

Interestingly, although Mr. Ward was 63 at the time he filed his petition for modification, the opinion mentions that the hearing on his petition took place more than a year later. Accordingly, Mr. Ward was 64 or, possibly, 65 at the time of the Final Hearing on his petition to modify based upon his voluntary retirement.

Appellant characterizes Mr. Ward's retirement at age 63 as merely "quitting work," (Appellant's Brief, p. 10), but that at age 65 "quitting work" becomes "voluntary retirement" which then becomes an "involuntary" substantial change of circumstances!

The Second District Court of Appeal initially affirmed the trial court's decision denying Mr. Pimm's Petition for Modification, interpreting the trial judge's reliance upon Ward as a correct interpretation of existing law. However, in response to the Motion for Rehearing filed by Appellant, the Second District Court of Appeal reversed itself, substituting an opinion specifically rejecting the Ward and Servies court's view that voluntary retirement was not a substantial change of circumstance to support a modification of alimony.

Once again, the ultimate decision rests upon one's ability to provide the support. Retirement is available at any age, as long as one is able to satisfy his or her obligations. However, if one no longer has the ability to satisfy his obligations, including that of support, then, and only then, should modification of alimony be considered.

There are no age guidelines or other bright lines which characterize one's decision to stop work as retirement. Chronologic age now bears minimal relationship to one's physical or mental fortitude. "Postjudgment retirement" could occur at any age.

Perhaps the earliest age associated with the term "retirement" is that of 59-1/2, the "early retirement" age of many pension and profit sharing plans.

But then, according to Section 29, United States Code, Section 1002(24), the term "normal retirement age" means the earlier of:

> A. The time a plan participant attains normal retirement age under the plan, or
>
> B. The latter of:
>
> (i) The time a plan participant attains age 65, or
>
> (ii) The 5th anniversary of the time a plan participant commenced participation in the plan.

The Internal Revenue Service has also adopted this somewhat nebulous definition. 26 U.S.C.S. Sec. 411(a)(8)(B)

If this Court agrees with Appellant's position that retirement at a "normal retirement age" is involuntary, then some direction must be given to determine which age, or which standard, should be looked upon as the correct interpretation of "normal retirement age," or perhaps the courts could develop a new definition of "normal retirement age." Of course, the Court doesn't necessarily need to define a particular age or a particular standard to decide when stopping work is "retirement," but could allow each individual to characterize his termination of employment as "retirement." Confusion reigns.

The open-ended term "postjudgment retirement," or even "normal retirement," provides no direction whatsoever to the judiciary or to individuals in determining whether they are candidates to modify their alimony or, perhaps, whether they are vulnerable to a reduction in their support. Accepting this event as a circumstance for modification opens the door to confusion, culminating in endless litigation, causing unanticipated financial stress on individuals whose "nest egg" was the source of their financial independence from other relatives and the State - instead of a source of financial independence for the legal community.

The long-established, dependable prerequisites for modification already provide recourse for the individual who is unable to satisfy his support obligations at age 65, or any other age, when that inability is "sufficient, material, involuntary and permanent in nature." Servies, supra, citing Waldman v. Waldman, 520 So.2d 87 (Fla. 3d DCA 1987); Ward v. Ward, 502 So.2d 477 (Fla. 3d DCA 1987); and Bish v. Bish, 404 So.2d 840 (Fla. 1st DCA 1981). Accordingly, one can retire at any time of his choosing as long as he is able to satisfy his financial obligations, including his obligation of support.

III.

ACCEPTANCE OF POSTJUDGMENT RETIREMENT AS A CHANGE OF CIRCUMSTANCE THAT MAY BE CONSIDERED IN MODIFYING ALIMONY OR SUPPORT DIMINISHES THE IMPORTANCE AND NECESSITY OF PERMANENT PERIODIC ALIMONY.

> "The purpose of alimony is to prevent a dependent party from becoming a public charge or an object of charity."

Killian v. Lawson, 387 So.2d 960 (Fla. 1980).

> "Permanent periodic alimony is used to provide the needs and the necessities of life to a former spouse as they have been established by the marriage of the parties."

Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980).

> "A spouse's ability to pay may be determined not only from net income, but also net worth, past earnings, and the value of the parties' capital assets."

Canakaris, supra, citing Firestone v. Firestone, 263 So.2d 223 (Fla. 1972).

> "As a general rule, permanent periodic alimony is terminated upon the death of either spouse or the remarriage of the receiving spouse."

Canakaris, supra, citing First National Bank in St. Petersburg v. Ford, 283 So.2d 342 (Fla. 1973); In Re: Estate of Freeland, 182 So.2d 425 (Fla. 1966).

Permanent alimony is distinguished from rehabilitative alimony in that the principal purpose of rehabilitative alimony is to establish the capacity for self-support of the receiving spouse. Canakaris, supra, p. 1202. Permanent alimony is

awarded when the recipient is not expected to provide for her needs and necessities as established by the marriage.

The alimony referred to in the certified question would be, in most instances, one of long-standing support, or permanent periodic alimony. Mrs. Pimm is perhaps typical of a recipient of permanent periodic alimony. Mrs. Pimm was 61 years old when her Husband turned 65 and retired. (R-99) Mr. and Mrs. Pimm enjoyed a traditional marriage in which the Wife was not employed, but provided substantial contributions through her homemaking and the raising of their children. (R-98) Although Mrs. Pimm received some $400 monthly in investment interest, she relied upon every alimony payment for her day-to-day necessities. (R-139-140) Although she had carefully conserved the assets she received pursuant to an equitable distribution of their marital assets, she would not be required to deplete those assets to maintain her standard of living. Decenzo v. Decenzo, 433 So.2d 1316 (Fla. 3d DCA 1983); Holley v. Holley, 380 So.2d 1098 (Fla. 2d DCA 1980); Gordon v. Gordon, 204 So.2d 734 (Fla. 3d DCA 1967); Blakistone v. Blakistone, 462 So.2d 883 (Fla. 2d DCA 1985).

When Mr. Pimm decided to retire, he asked the Court to reduce his alimony so that his former Wife could accommodate his right of passage. Acceptance of "postjudgment retirement" as a substantial change of circumstance to modify alimony shifts the financial burden of retirement, if any, to a spouse who depends upon every dollar of that alimony for her bare necessities.

Had that recipient spouse remained married to the payor spouse, the decision of when one is able to retire would have been mutual. They would have been able to determine whether their financial obligations could still be met without receiving the full-time salary. If, for instance, they determined that they could not pay their monthly bills and still retire, then, assuming they wanted to continue their basic necessities of life, and assuming the continued ability to work, retirement would not occur at that time. Instead, the couple would decide to continue working, continue saving, so that one day they could retire and maintain their independence. However, it would be unusual for a couple to willingly stop working if they could not afford their basic living expenses.

They may, on the other hand, decide to retire, but reduce luxury expenses, or unnecessary expenses. In that event, they would voluntarily share in thereduced lifestyle. This is unlike the Pimm case, where Mrs. Pimm would bear an involuntary one-sided burden.

By way of their Marital Settlement Agreement, Mrs. Pimm's basic living expenses, as per the alimony she receives, are basic living expenses assumed by Mr. Pimm in the form and to the extent of his monthly alimony obligation.

Why should the Court support Mr. Pimm's unilateral and voluntary change as a way to avoid or reduce his financial obligation to Mrs. Pimm?

By shifting the burden of retirement onto the recipient spouse, the court will, in effect, create a form of reverse discrimination upon a federally-protected age group, that is, recipients like Mrs. Pimm, who fall within the ages of 40 to 65 years old. The State of Florida has followed the federal government in enacting legislation recognizing that age alone should not be a factor in hiring or firing decisions, and specifically protects those individuals within the ages of 40 and 65. 29 U.S.C.S. Secs. 621-634. Most recipient spouses would fall within this age-protected class. Likewise, society has recognized that age 65 can no longer be looked upon as an age where an individual is no longer capable of working. The Florida Age Discrimination Employment Act has been enacted to promote employment of older persons, based on ability and not age, and to prohibit arbitrary age discrimination in employment Fla. Stat., Sec. 112.044. Social security recognizes that individuals at age 62, 65 and older are able to, may need to, and may desire to work, and receive income, while still benefiting from their social security benefits. 42 U.S.C. Sec. 403(f)(3).

Does quitting work at age 65 become "postjudgment retirement"? Does quitting work at age 65 become an involuntary act? The Appellant would support this position. The federal government, the Social Security Administration and other federal and state authorities have moved away from such bright line

age-related distinctions. However, without such bright lines, the courts are unable to determine when "retirement" occurs versus "voluntary diminution," causing unnecessary litigation and expense to both the court system as well as to the petitioners and respondents of such modification actions.

CONCLUSION

This Court should reverse the substituted decision of the Second District Court of Appeal filed October 12, 1990. The issue as certified by the Second District should be answered in the negative, thereby affirming the Ward and Servies courts' interpretations of established principles of law in the State of Florida.

Respectfully submitted,

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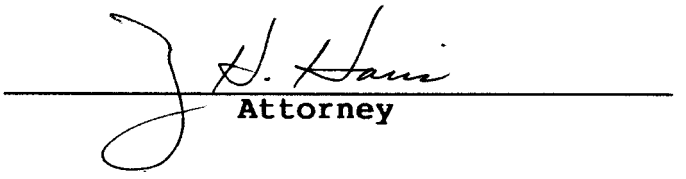
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee and Initial Brief of Cross-Appellant has been furnished, by U. S. Mail, to SUSANA D. GONZALEZ, ESQUIRE and RICHARD A. WEIS, ESQUIRE, Attorneys for Appellant, 1505 South Howard Avenue, Tampa, Florida 33606, this 14th day of January, 1991.



Attorney