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

MAURICE S. PIMM Appellant V. CAROLYN M. PIMM Appellee	APPELLATE CASE NO.: 89-00021 TRIAL COURT CASE NO.: 74-11250 FLA. BAR NO.: 327743 76-885

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from a question certified by the Second District Court of Appeal as an issue of great public importance.

The issue raised in this appeal has been rendered moot as to the parties to this proceeding due to the remarriage of the Wife (A: 28) and the relevant provision of the Final Judgment of Dissolution of Marriage which provides for the termination of the alimony obligation upon her remarriage (R: 4). The issue, however, has been certified by the Second District Court of Appeal to this Court as one of great public importance (A: 25). This Court has jurisdiction to answer the certified question pursuant to Article V, Section 3(b)(4), Florida Constitution; for mootness does not destroy an appellate court's jurisdiction when the question raised is of great public importance. Holly v. Auld, 450 So.2d 217 (Fla. 1984).

The Appellant, Maurice C. Pimm, who was the Petitioner in the trial court, shall be referred to herein as "the Husband". The Appellee, Carolyn M. Pimm, who was the Respondent in the trial court, shall be referred to herein as "the Wife".

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 the Appellant's Initial Brief are indicated by the letter "A" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

On July 21, 1975, a Final Judgment of Dissolution of Marriage was entered by the Circuit Court dissolving the marital bonds between Maurice C. Pimm, the Former Husband/Appellant, and Carolyn M. Pimm, the Former Wife/Appellee. (R: 3-5). The Final Judgment incorporated by reference the parties' Property Settlement Agreement, which contained the following provision:

> "6. Commencing July 4, 1975, Husband shall pay to the Wife as alimony and child support the following payments, to-wit,
>
> (a) Pay direct to the Wife the sum of $275.00 per week, by check or money order only, representing $195.00 as alimony and $80.00 as child support . . .". (R: 7)

The alimony obligation was subsequently increased. By the time of the filing of his modification pleading, the Husband's alimony obligation had increased to $845.00 per month. (R: 1). The Husband filed his Petition to Modify Final Judgment of Dissolution of Marriage on or about March 2, 1988. (R: 1-2). The Husband's Petition alleged that he was anticipating retirement upon attaining age sixty-five (65) years which would result in a substantial change in his financial ability to continue payment of the alimony obligation. (R: 1-2). The Husband, in his Petition, requested the termination of his alimony obligation. (R: 1-2).

On March 22, 1988, the Wife filed her Answer to Husband's Petition to Modify Final Judgment of Dissolution of

Marriage and Counter-Petition. (R: 12-14). In her Counter-Petition, the Wife sought an increase of the permanent periodic alimony obligation. (R: 13).

On August 24, 1988, both the Husband's Petition and the Wife's Counter-Petition were heard by the trial court. (R: 60-146). At the time of this hearing, the Husband had reached the age of sixty-five (65) years (R: 106) and was receiving social security benefits of approximately $797.00 per month. (R: 106). Further testimony revealed the Husband received an additional $438.00 per month in passive income. (R: 107, 109-110). At the time of entry of the Final Judgment, the Husband's income was "[s]lightly over fifty thousand dollars a year." (R: 106).

Testimony was also received by the trial judge as to the employment history of the Husband and the evolution of his position from Owner/President of his own Company at the time of entry of the Final Judgment to becoming a salaried employee of the Firm into which his surveying company was subsumed by purchase acquisition. (R: 133). In addition, since entry of the Final Judgment, the Husband had geographically relocated to the State of Alabama. (R: 114). The Husband held no licenses nor certifications in his profession as a Civil Engineer in Alabama; and, he was not capable of continuing to practice his pre-retirement employment without substantial effort and expense, or, in the alternative, relocating to the State of Florida. (R: 114-116).

Since entry of the Final Judgment, the Wife remained unemployed (R: 72), never sought rehabilitation (R: 72), and voluntarily moved to Tennessee. (R: 69). The Wife never sought employment and fully intended to live off the alimony income of the Husband until his demise. (R: 101). Furthermore, since entry of the Final Judgment of Dissolution of Marriage, the personal financial circumstances of Wife improved significantly such that at the time of the modification hearing the Wife held approximately $84,000.00 in liquid assets. (R: 22-25)(R: 73-74, 76-77). The Wife, by her own admission, since the dissolution of marriage had received: (a) $25,000.00 of inheritance (R: 72, 73); (b) $75,000.00 from the sale of the marital home (R: 70); and, (c) $34-47,000.00 from the sale of a jointly-owned office building. (R: 73). The Wife had $64,351.00 in a TBA Employee Credit Union account (R: 74) and an individual retirement account with a balance in excess of $2,000.00. (R: 77).

On September 19, 1988, the trial court entered an Order Denying both the Husband's Petition and the Wife's Counter-Petition for Modification. (R: 144). The denial of the petitions was based upon the Court finding:

> " . . . that 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.
>
> An so I don't follow that this is the type of retirement that will warrant the modification. That is the reason.
>
> As far as the counterpetition, I don't think there is sufficient change in

> circumstances which will warrant any increase. So that is it. The only issue, really, is Mr. Pimm's retirement.
>
> Without that there would be no -- absolutely no change at all even considered. His retirement was voluntary, and that is the reason." (A: 85)

A rehearing was held in this cause on November 30, 1988. (R: 147-182). The trial judge affirmed his previous ruling and entered an Order Denying Rehearing (R: 55) reiterating the finding that the Husband's retirement was a voluntary circumstance and further indicated that the basis of his ruling was a finding, as a matter of law, that a retirement at age sixty-five (65) years is a voluntary circumstance. (R: 180) (A: 5-7).

A timely Notice of Appeal was filed by the 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 FLW (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, this Court issued a Briefing Schedule on November 9, 1990. (A: 29).

SUMMARY OF THE ARGUMENT

The Former Husband, Maurice C. Pimm, upon retiring at the age of sixty-five years, petitioned the trial court to terminate his alimony obligation. The trial court denied his petition, finding that the retirement represented a "voluntary" circumstance precluding any modification of the support obligation. The Second District Court of Appeal originally affirmed the trial court's decision; however, upon rehearing, the Second District substituted an Opinion reversing and remanding the issue to the trial court and certified the issue before this Court as one of great public importance.

As stated in the Preliminary Statement, the issue presented has been rendered moot as to the parties; however, the issue is of great public importance and will certainly recur in the future. Therefore, this issue is properly before this Court.

This Court should answer the certified question in the affirmative; for, the Second District Court of Appeal correctly applied the applicable statutory and case law in holding that a trial judge may consider the retirement of a payor spouse contemporaneously with other relevant factors and applicable law in rendering a support modification ruling.

ISSUE ON APPEAL

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 CIRCUMSTANCES THAT MAY BE CONSIDERED TOGETHER WITH OTHER RELEVANT FACTORS AND APPLICABLE LAW UPON A PETITION TO MODIFY SUCH ALIMONY OR SUPPORT PAYMENTS?

The Second District Court of Appeal correctly held that a trial judge may consider the retirement of a payor spouse together with other relevant factors and applicable law in rendering a support modification ruling.

Section 61.14(1), Florida Statutes (1989), vests a trial court with jurisdiction to enter orders, as equity requires, upon a petition for modification of a support obligation based upon a change in financial circumstances of either party to the marriage dissolution. Goldin v. Goldin, 346 So.2d 107, 109 (Fla. 3rd DCA 1977). By enacting this statute, the Legislature expressed the public policy of this State favoring a modification of alimony in accordance with the changed circumstances of the parties. Section 61.14(3), Florida Statutes (1989); Prout v. Prout, 415 So.2d 905 (Fla. 3rd DCA 1982). Indeed, even a complete termination of alimony is both authorized and required under the statute where there has been a sufficiently substantial change in financial circumstances of one or both parties. Goldin, supra at 109; Craig v. Craig, 298 So.2d 189 (Fla. 1st DCA 1974).

The Second District Court of Appeal, in the instant case, recognized established principles of law regarding

modification of support such as a party moving for modification of permanent periodic alimony must show:

> " . . . a substantial change in the circumstances of one or both parties not contemplated at the time of the final judgment of dissolution, and . . . that the moving party is no longer able to pay any amount of alimony, or that the recipient has no need for alimony."

Servies v. Servies, 524 So.2d 678, 680 (Fla. 1st DCA 1988), citing Brown v. Brown, 440 So.2d 16, 18 (Fla. 1st DCA 1983); and, the change in circumstances, in order to support modification, must be sufficient, material, involuntary, and permanent in nature. Servies, supra at 680. Furthermore, whether or not a sufficient change in circumstances occurred in a particular case requires the consideration of the totality of the parties' circumstances. Johnson v. Johnson, 386 So.2d 14, 16 (Fla. 5th DCA 1980). See also Scott v. Scott, 285 So.2d 423 (Fla. 2nd DCA 1973) wherein the Court stated:

> "In considering modification [of alimony] the Court can and should take into consideration all factors and contrast the total circumstances at the time of the original order with all the current circumstances." 285 So.2d at 425 (emphasis supplied).

The Second District Court of Appeal, in their Opinion on Motion for Rehearing entered October 12, 1990 (A: 20-25), recognized and properly applied these established principles of law in reversing and remanding the instant case to the

trial court for consideration of the effect of the Husband's retirement at age sixty-five (65) on his alimony obligation.

The central issue involved in the instant case is whether a "voluntary" retirement at age 65 years is a factor which may be considered in an alimony or support modification proceeding. The trial judge, according to the Opinion rendered by the Second District, construed Ward v. Ward, 502 So.2d 477 (Fla. 3rd DCA 1987), as requiring him

> ". . . to rule as a matter of law that a spouse's act of voluntary retirement at any age, if not mandated by the spouse's employer or by other circumstances such as ill health, is not a change of circumstances that may be considered in determining whether an obligation of the retiring spouse to pay alimony or support should be modified." (A: 21)

The trial judge, nevertheless, realized the harshness of his ruling -- which he felt obligated to make under existing case law -- by stating:

> " . . . I think I should take another look at the law because it does seem that if the law is as I ruled, that it's a harsh result. (R: 157).
>
> * * *
>
> . . . But I can agree with that argument, that if a person is expected to draw social security at age 65, the government expects that he or she should retire. (R: 157).
>
> And as a result of that the income situation is drastically reduced, shouldn't there be a reduction in the alimony -- that's logic . . . (R:157).
>
> * * *
>
> . . . All right. I agree with the equitable argument, but the legal argument, I think, must prevail. There may be some circumstances that would make the equities

> a little bit different, but on the face of it it appears Mr. Pimm has a hardship; it wouldn't be equitable to make him make the payments.
>
> But as I said before, I don't know any case on point that would authorize me to do that . . .". (R: 176, 177).

There can be no doubt that the trial judge based the denial of modification solely on the premise that the Husband's retirement at age 65 years was a voluntary act prohibiting modification.

The Second District Court of Appeal, however, in concluding that the trial judge erred in declining to consider the Husband's retirement, states:

> " . . . the apparent bright line rule announced in Ward and Servies [v. Servies, 524 So.2d 678 (Fla. 1st DCA 1988] rejecting any consideration of "voluntary" retirement as a change of circumstances sufficient to support a modification of alimony or support payments is too severe. It is undoubtedly the use of the term "voluntary" retirement that leads to the rule announced in Ward and Servies." (A: 21) (emphasis supplied).

The cases of Ward and Servies are readily distinguished from the present case. In the instant case, the Husband had reached the age of sixty-five years before he made the decision to retire. In Ward and Servies, the former husbands, as payor spouses, both simply decided to "quit working", not retire, prior to their reaching the age of sixty-five years. In Ward, the Husband was 63 years of age; and, he did not "retire", he

> "[p]lainly and simply [was] tired of working . . . and was desirous of spending his time hunting, fishing, and puttering in his yard". 502 So.2d at 748.

Similar facts in Servies mandated the proper application of the Ward holding. In Servies, the husband, who testified he could have continued working until age 62 or 65, decided to "retire" at age 60 years "so that he could complete an independent research project". 524 So.2d at 678. In the present case, the Husband had reached a "normal" and recognized retirement age of sixty-five years. See e.g., 42 U.S.C. 416 (l)(1)(A) ("Social Security Act").

A failure to distinguish Ward and Servies from the instant case will create substantial dilemmas and conflicts. For instance, application of the literal holdings of Ward and Servies will require the divorced payor spouse to continue to work past age 65 years, if his health permits, to meet his support obligation; whereas, a married spouse will be permitted to retire and the parties will be expected to adapt their lifestyle to their reduced income. This proposition was squarely addressed by the Superior Court of Pennsylvania in Commonwealth ex. rel. Burns v. Burns, 331 A.2d 768 (Pa. Super. 1974) as follows:

> "If there is evidence indicating that a man planned his retirement . . . then we are of the strong opinion that even if he and his wife were living together -- there could be no complaint on the part of the wife that her income would be reduced. Certainly this being so, an estranged wife would have no greater claim on such a husband." 331 A.2d at 771.

The issue was further addressed by the Second District Court of Appeal in the instant case:

> " . . . . If the parties had remained married, they more than likely, as other retired people often do, would have expected to live on reduced income when the supporting spouse reached retirement age . . .". (A: 24).

Second, if it is held that, as a matter of law, a supporting spouse cannot rely on the reduced income at "normal" retirement age as a factor that may be considered in proving a change in circumstances, the supporting spouse is put in the untenable position of being unable to retire at any age. Under the Ward and Servies holdings, when (or at what age) will a supporting spouse be permitted to "voluntarily" retire and be granted a corresponding decrease in his or her support obligation? To not answer in the affirmative the issue as certified by the Second District would extend the working life of every payor spouse in the State of Florida beyond the "normal" retirement age of ordinary, non-divorced citizens with dependents. It is not and cannot be the law of the State of Florida that a person may be compelled to work into perpetuity, in a state of virtual "indentured servitude", to meet a support obligation based upon previous earnings.

Third, without clarification from this Court, case law sets separate standards for retirement decisions for self-employed payor spouses versus non-self-employed payor spouses. The self-employed payor spouse, such as the Husband in the

instant case, will be deemed to have voluntarily retired at age 65 years; whereas, when his corporate counterpart must retire at age 65 years, this represents an involuntarily retirement. See, Sheeder v. Sheeder, 15 FLW (D) 2677 (Case No. 89-1522, filed October 30, 1990) wherein the payor husband was involuntarily terminated from his position at the University of Miami and the appellate court reversed with instructions to "enter an order which reduces the alimony award accordingly." 15 FLW at 2677. See also Landry v. Landry, 436 So.2d 353 (Fla. 1st DCA 1983).

The Appellant recognizes a trial court may impute income to a person who has no income or has earnings less than are available to him based upon a showing that the party has the capability to earn more by the use of best efforts. See e.g., Desilets v. Desilets, 377 So. 2d 761 (Fla. 2nd DCA 1979); Bradley v. Bradley, 347 So.2d 789 (Fla. 3rd DCA 1977). The Florida Courts have also properly extended this doctrine to apply to situations where the payor spouse leaves work under the guise of an "early retirement"; for, the mere application of the word "retirement" to describe leaving employment does not clothe the willful reduction in income with some aura of propriety. See e.g., Ward, supra at 478; Servies, supra. However, imputing income to a payor spouse who reaches a normal retirement age is wholly inappropriate. As the Second District Court of Appeal in the instant case states:

> "We cannot conclude, however, that a "voluntary" retirement under normal circumstances or at normal or expected retirement age should be equated with such a voluntary diminution of income." (A: 23)

The imputing of income standard should not be "triggered" or applied unless there is some conduct by the payor spouse indicating deliberate behavior designed to avoid or diminish a support obligation.

A trial court, therefore, should be permitted to consider the circumstances and motivations of a retirement at an evidentiary hearing. At hearing, the trial judge could consider whether the retirement was made in "good faith" at a "normal" age or prompted by a desire to evade or diminish the support obligation. The trial court could further consider whether the retirement was contemplated at the time of entry of the Final Judgment. See e.g., Littleton v. Littleton, 555 So.2d 924, 926 (Fla. 1st DCA 1990) (footnote 6) (". . . [b]ecause the former husband's retirement is not a conclusively established fact, he will not be precluded from seeking a reduction of the alimony award in the future should he find that he is unable to continue making the [support] payments").

Answering the certified question posited by the Second District Court of Appeal in the affirmative would simply permit a trial judge to consider the retirement of a payor spouse as one of several factors in a support modification proceeding. This ruling would be in accord with the "totality of the circumstances" considerations enumerated in prior case

law, Johnson, supra at 16; Scott, supra at 425, and the liberal construing and application of the equitable considerations of statutory law. See, e.g., Sections 61.001 and 61.011, Florida Statutes (1989). Furthermore, such a holding would not interfere with any other established principles of law regarding modification of support obligations. Such a ruling would recognize that the bona fide retirement of a supporting spouse warrants an examination by the trial court to determine if there has been a substantial change in circumstances to justify a modification of his or her support obligation. Additionally, the payee spouse is protected; for, inquiry can be made regarding the motivation and circumstances surrounding the payor spouse's retirement. There must, however, be some presumption that a payor spouse can retire in the normal course of his or her working life when he or she reaches the normal, federally-recognized retirement age of 65 years; and, this retirement should be a factor to be considered with other applicable law in a post-judgment support modification proceeding.

CONCLUSION

This Court should affirm the substituted decision of the Second District Court of Appeal filed October 12, 1990. Additionally, the issue as certified by the Second District should be answered in the affirmative; thereby, permitting the retirement of a payor spouse to be considered contemporaneously with other relevant factors and applicable law in a post-judgment support modification proceeding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Appellant's Initial Brief was furnished by U.S. Mail to Nancy Hutcheson Harris, Esquire, Attorney for Appellee at Maney, Damsker & Arledge, P.A., 606 East Madison Street, P.O. Box 172009, Tampa, Florida 33672-0009 this 4th day of December, 1990.

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