IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,854

LARRY W. MALLARD,

Petitioner,

v.

CHARLENE G. MALLARD

Respondent.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
FOR THE SECOND DISTRICT OF FLORIDA

ANSWER BRIEF ON THE MERITS OF RESPONDENT, CHARLENE G. MALLARD

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CERTIFICATE OF TYPE, SIZE, AND STYLE

Counsel for the Respondent/Wife, Charlene G. Mallard, hereby certifies that this Answer Brief on the Merits has been prepared by using 14 point, proportionately spaced type, in Times New Roman font.

INTRODUCTION

The trial court properly awarded permanent periodic alimony to the Wife which included the amount that the Parties saved on a regular basis thus giving rise to the current issue. The issue is simply whether it is appropriate and permissible under Florida law to include an amount for savings since savings had been an historical part of the Parties standard of living during the marriage and the Husband clearly has the ability to pay those amounts, when determining the amount of permanent periodic alimony to be awarded at the conclusion of a long term marriage.

The Parties were able to agree on many things and stipulated to them. However, they were unable to agree on the question of whether the Wife's needs also included a tithe and savings component. Therefore, by agreement of both parties, the issue was tried by the court.

The award was based on competent evidence (not speculation). The award was within the discretion of the trial judge, amply supported by the evidence (the facts are not in dispute), and supported by case law.

The Second District affirmed the award of the trial court but certified the following question to this Court:

> WHEN THE PARTIES TO A DISSOLUTION OF MARRIAGE ACTION HAVE HISTORICALLY DEMONSTRATED THE REGULAR AND CONSISTENT PATTERN TO SAVE MONEY OVER AN EXTENDED

PORTION OF THEIR LONG-TERM MARRIAGE, MAY A TRIAL COURT CONSIDER THIS FACTOR WHEN AWARDING PERMANENT ALIMONY THAT EXCEEDS THE RECIPIENT SPOUSE'S CURRENT NEEDS AND NECESSITIES?

This Court should answer the certified question in the affirmative. The amount of the award to the Wife as permanent alimony is neither arbitrary nor unreasonable and it is supported by fact and law. This is not a novel or complex case, although it is somewhat unusual. The facts are not in dispute and the law is unambiguous and without conflict. The lower court's decision neither relies on speculation or future contingencies nor does it give the Wife the benefit of the family savings twice.

Contrary to the Husband's argument, affirming the lower court's decision will not open a floodgate of new litigation and it will not make it more complicated in arriving at the parties standard of living than it already is in the average long term alimony case. The present case is the only case known to counsel for the Wife since Messina v. Messina, 676 So.2d 483 (Fla. 1st DCA 1996) that has questioned the inclusion of the savings expense in the marital standard of living. The same experts who analyze the parties' standard of living expenses will be well able to include savings in their analysis if such an expense is appropriate.

If the Wife's position is meritorious, as shown by the trial court and the Second District Court of Appeal, then the additional time expended, if any, in calculating this additional living expense is time well spent.

In this brief, the Petitioner, Larry Mallard, will be referred to by name or as "the Husband;" the Respondent, Charlene Mallard, will be referred to by name or as "the Wife." The designation (R:) will indicate as reference to the specific page of the record on appeal; the designation (T:) shall indicate a specific page in the transcript of the final hearing.

At several points throughout the brief, the Wife will refer to the Husband's Initial Brief on the Merits for which the designation (HB:) shall indicate the specific page of the brief.

The appendix consists of: the Husband's financial affidavit dated May 5, 1998; the transcript of the trial court judge's ruling; and the Judiciary Committee Staff Summary in correlation with Florida Statute § 61.08. The designation (A:) will indicate the specific appendix that is referenced.

STATEMENT OF THE CASE AND FACTS

This marriage began in typical fashion on August 15, 1971. (R:1; 8). The Wife, Charlene, had just graduated from college and had begun her teaching career, supporting the family while the Husband, Larry, finished college. (T:69). After graduating the following year, Larry took a job as a manager trainee with NCNB, relocating to Raleigh, North Carolina. (T:70). This was the first of seven moves made for the advancement of the Husband's career during the marriage. (T:70-3; 75-7).

The Wife continued to teach on a full time basis even after the first child was born in 1978. (T:70-1). Their second daughter was born in 1982. (T:69). At the time of the final hearing, the older daughter was in college, the younger daughter was a sophomore at Tampa Prep. (T:34).

As was typical in many families, the Parties agreed that the Husband's career was primary, while the Wife took care of the home and family. (T:72). Even though the Wife had the brunt of the household and family responsibilities, she still worked full time for ten years to help support the family. (T:71-6). After the children started school, the Wife worked so that her hours coincided with the childrens' hours. (T:71-6).

As mentioned, moves came regularly, from the first to Raleigh, North Carolina in 1972; to Wilson, North Carolina in 1978; to Greenville, North Carolina in 1981; to Chapel Hill, North Carolina in 1983; to Charlotte, North Carolina in 1985; to Houston,

Texas in 1989; and finally, to Tampa, Florida in 1994. (T:71-6). With each move came a salary increase so that by 1997, the Husband had a salary of over $428,750, excluding bonuses, options, and investments. (T:111). The Wife continued to work outside the home earning $14,000 in addition to raising the children, taking care of the home, and supporting the Husband. (T:8).

The Wife was always supportive of the Husband's career and of the moves, notwithstanding the emotional strain the frequent moving caused. (T:37; 77). Indeed, it was the last move that caused the disintegration of the marriage. (T:44; 79).

While the Parties had a typical marriage, their divorce was not so typical. Neither Party laid blame nor did they cast aspersions on the other. Both were acknowledged as good parents and apparently good spouses. (T:37; 72).

Although the Parties' income increased steadily and dramatically during the twenty-seven year marriage, their lifestyle did not reflect their income level. By agreement, they lived a frugal, if not miserly, life. They bought and drove used cars. (T:82; 102). They did not employ maids or yardmen, the wife took care of those chores. (T:87). They took frugal vacations. (T:101). Neither Party bought jewelry or lavish clothing. (T:87). When dining out, they drank water because the Husband felt that beverages were too expensive. (T:87). During the last eight to ten years of the marriage, when their income was skyrocketing, the Husband placed the Wife on an allowance of

$600 every two weeks for all of the household expenses. (T:84). He later increased this to $1000 every two weeks after they moved to Tampa. (T:86). They did not use credit cards, except in emergencies. (T:92).

The Parties did have two large monthly expenses which they discussed, planned for, and agreed upon early in the marriage - tithing and saving. Both parties testified that the church was important to them and it was an important aspect of their family life. Both felt that tithing was important and it was something they did regularly. (T:57; 74). Their tithe was more than $40,000 per year in recent years. (A:1).

Similarly and more importantly, they agreed early in the marriage to try and save for retirement. Their "conservative" lifestyle was for the specific purpose of being able to save a significant portion of their income every month. They set a target of saving twenty-five percent of their income, and met or exceeded that target during the last six or seven years of their marriage. (T:98-9).

Unfortunately, after twenty-seven years, two children, and seven moves, the marriage collapsed. Fortunately, due to the frugal lifestyle they lived, they ended the marriage with over $3,000,000 in assets and virtually no debt. (R:283-85).

The Parties stipulated to shared parental responsibility, child support, and equitable distribution of the marital assets. (T:49; R:283-300). The Husband also agreed to pay the

Wife's reasonable attorney's fees and accountant's fees, (T:47; R:511-12), the children's schooling expenses, and the daughter's car insurance. (R:288-89).

The Parties agreed to the Wife's needs based on the historical standard of living, excluding savings and tithes, and the Husband agreed to his ability to pay these amounts. (R:280-82). The Parties agreed that the Wife's needs were $5900 per month plus tithes and savings. The Husband's income was over $35,000 per month; with over $16,000 available each and every month for support after paying his own expenses. (R:141-153).

A final hearing was held on May 14, 1998, before the Honorable Vivian C. Maye, on the issue of the Wife's needs, specifically to include savings and tithing.

On June 15, 1998, the Court entered its Final Judgment, approving the stipulations of the Parties and awarding the Wife permanent periodic alimony of $7375 per month, which included $4250 for "needs" and $3125 for "savings." In making that award the court made specific findings of fact, including:

> 8. The Court finds that the standard of living of the parties included savings of 25% of the Husband's income.
>
> 9. The Court has carefully read the memoranda submitted by counsel, and, under the very specific facts of this case, finds that an award of "savings" to the Wife is consistent with Messina v. Messina, 676 So.2d 483 (Fla. 1st DCA 1996) and Section 61.08(1). The Court further believes that the award is necessary in order to do equity and justice between the parties.

> 10. The Court concurs with argument of counsel for the Wife in that the instant case is a greater pattern of savings than in the Messina case. (R:179-182).

The Husband thereupon filed his first appeal in a timely manner. (R:190-2-1).

STANDARD OF REVIEW

According to the Marcoux decision, "Appellate courts must apply a reasonableness test in reviewing discretionary acts of trial courts in making alimony awards." Marcoux v. Marcoux, 464 So.2d 542, 542 (Fla. 1985). The court continued by stating that if competent, substantial evidence exists in the record to substantiate the award, then the result is justified and there is no abuse of discretion. See Marcoux, 464 So.2d at 542-43. In the present case, the alimony award is supported both by case law and by facts. The award is neither arbitrary nor unreasonable. Accordingly the amount of the alimony award is within the discretion of the trial court and must be affirmed by this Court applying the abuse of discretion standard of review.

SUMMARY OF THE ARGUMENT

Florida Statute § 61.001 states that the Chapter "shall be liberally construed and applied." § 61.001(1), Fla. Stat. (1997). The purpose of Chapter 61 is "to (a) preserve the integrity of marriage and to safeguard meaningful family relationships; (b) promote the amicable settlement of disputes that arise between parties to a marriage; and (c) mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage." § 61.001(2), Fla. Stat. (1997).

The stated purpose of Chapter 61, together with the case law and the law as set forth in § 61.08, enables the trial court's inclusion of the savings expense when determining the Parties' marital standard of living to be perfectly aligned with the fundamental principles of alimony law in Florida.

In an effort to clarify any misconceptions, the Wife is not asking this Court to supply her with a "rainy day fund." (HB:9). The Wife is asking this Court to follow and to perpetuate the intent of the alimony statute by including the marital standard of living in the award to the Wife of permanent periodic alimony, thereby preserving the intent of the legislature and the integrity of long standing precedent.

ARGUMENT

A. The Award of Permanent Periodic Alimony is to Be Based on the Needs of the Recipient Spouse and the Ability of the Payor Spouse to Pay.

In Welsh v. Welsh, 35 So.2d 6 (Fla. 1948) the court held that the award of permanent alimony is based upon the "necessities of the wife and the financial ability of the husband to supply the necessity." See Welsh v. Welsh, 35 So.2d 6, 9 (Fla. 1948). However, in 1978, an amendment to the alimony statute set forth numerous factors to consider when determining the amount of an alimony award. § 61.08(2), Fla. Stat. (1978). These factors include: a) The standard of living established during the marriage; b) The duration of the marriage; c) The age and physical and emotional condition of each party; d) The financial resources of each party; e) The accumulation of assets and liabilities of the parties individually and jointly during the marriage; f) If applicable, the time needed by either party for education or training to find appropriate employment; g) The contribution of each party to the marriage including, but not limited to, services rendered in homemaking, child care, education, and career building of the other party. *The court may also consider any other factor necessary to do equity and justice*. § 61.08(2), Fla. Stat. (1978). (Emphasis added.)

The Husband correctly states that the recipient's needs versus the payor's ability is the standard that governs the award of alimony. In the present case, the Wife, as the

recipient spouse, has met her burden by demonstrating her need and has shown that the Husband has the ability to meet her needs without jeopardizing his economic well-being.

In Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), the court reiterated that alimony is to be based upon the needs of the recipient spouse as well as the ability of the payor spouse to pay. See Canakaris v. Canakaris, 382 So.2d 1197, 1201 (Fla. 1980). However, Canakaris went a step further and listed the elements in 1978 Amendment to § 61.08 in its opinion. See id. These elements were utilized by the trial court to aid in making a proper award of alimony. See id. at 1201.

Further, the court stated that permanent periodic alimony is to provide for the needs and necessities of life to the former spouse as established during the course of the parties' marriage. See Canakaris, 382 So.2d at 1201. In the instant case, during the course of the Parties' marriage, a decision was made to save twenty-five percent of their income. The Parties were able to meet this financial goal by abstaining from certain other luxuries, such as new clothes, luxurious vacations, new cars, jewelry, maids, and yardmen,[1] all of which would have been taken into consideration in the Parties' marital standard of living had they so indulged. However, the Husband contends that the same money that could have well provided for a very luxurious standard of living should be ignored. To follow that logic would enable a court to pick and choose, at its whim, what

[1] T:72, 77, 82, 84, 86, 87, 101, 102.

is worthy of being deemed an expense that should be calculated into the parties standard of living and which ones should be ignored. This would create judicial chaos.

The Husband looks to Rosen v. Rosen, 696 So.2d 697 (Fla. 1997) which states that "alimony is to provide the current necessary support." See Rosen v. Rosen, 696 So.2d 697, 703 (Fla. 1997). In Rosen, the court had to decide an issue entirely different from the one presented to this Court. The Rosen issue was whether an award of permanent alimony was even the correct finding. See Rosen, 696 So.2d at 697. Ms. Rosen argued that since the court had considered her employability at the time of the final judgment, it could not be reassessed in a later modification proceeding. See Rosen, 696 So.2d at 702. The court rejected this argument on the basis that employability is variable and may change due to outside forces. See id.

The Wife recognizes that it is an unusual circumstance where habitual savings can be classified as an expense and encompassed as part of the marital standard of living. However, the customary behavior of the Parties of saving substantial sums of money on a monthly basis transformed what is often viewed as a luxury into a way of life. The present case can be distinguished from Rosen in that the standard of living developed during the marriage in the present case was not something that was variable and is not something that could presently change as a result of outside forces. Further, if either

Party can later demonstrate a substantial change in circumstances, then either Party would be entitled to file for a modification.

The Parties agreed between themselves to "save twenty-five percent of the annual income" and they were able to accomplish that goal. (T:98, 99). At the time of the dissolution of the Parties' marriage, twenty-five percent of their annual income factored out to be approximately $75,000.[2] Saving $75,000 per year is not something that just happens, it was made to happen through the Parties joint efforts and commitment to their goals.

The Husband contends that the Wife is "complaining" about the calculation of her reasonable needs. (HB:11). This is not the case, as the Wife is simply asking this Court to include in her award what she is entitled to receive. At the time the Wife entered into the partial stipulation, both Parties realized that it did not account for the entire marital standard of living. This notion was corroborated by counsel for the Husband's statement on the record that the Parties had resolved most of the issues by stipulation *"save the issue of Messina alimony which the Wife seeks."* (A:2). (Emphasis added.) Without the inclusion of the entire marital standard of living, the well-settled law is not being followed. Certainly the Wife is not complaining by suggesting that the law be followed.

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[2] $3125 (the amount awarded to the Wife) x 2 = $6250 savings per month; $6250 x 12 = $75,000 annual savings.

The Husband contends that the stipulation "already included a nearly twenty percent adjustment upward from her historical standard of living." (HB:11). The Husband freely entered into the stipulation knowing that the Wife was not agreeing to the savings expense issue, as pointed out by Husband's counsel.

The Husband goes on to cite Diffenderfer v. Diffenderfer, 491 So.2d 265 (Fla. 1986) as an attempt to incorrectly merge the issues of alimony and equitable distribution. In Diffenderfer, the court had two certified questions to decide. See Diffenderfer v. Diffenderfer, 491 So.2d 265, 265 (Fla. 1986). The present case concerns only the second of the two questions, "whether a husband's retirement benefits, which were both vested and matured, could be considered as both a marital asset subject to distribution and as a source of payment for permanent periodic alimony." See id. The court held that such retirement benefits could be considered either as a marital asset subject to equitable distribution or as a source of payment for permanent periodic alimony but not both. See Diffenderfer, 491 So.2d at 267. The Diffenderfer court had to decide whether one account was to be treated as an asset or as a source of payment. See id. at 265.

The present case is easily distinguished from Diffenderfer. In the present case, the Parties stipulated to the distribution of the savings/retirement account as part of the equitable distribution. The Wife is not asking to continue to tap into this same account for the payment of the savings award. To follow the Husband's logic would be to make

alimony and equitable distribution two mutually exclusive remedies available to a spouse. This logic allows a spouse to either be entitled to alimony or equitable distribution but not both. Obviously this is not the correct application of the law.

B. A Former Spouse Does Not Have the Right to the Other Spouse's Future Increased Income.

There is well-settled law dealing with a former spouse's right to the other spouse's future income. The Husband cites several cases which, while they state correct rules of law, are unable to be analogized with the present issue.

In Cummings v. Cummings, 330 So.2d 134 (Fla. 1976), the court decided that the "recitation of marriage vows neither diminishes the [wife's] capacity for self-support nor does it give her a vested right in her husband's earnings for the remainder of her life." See Cummings v. Cummings, 330 So.2d 134, 136 (Fla. 1976). The court was referring to an equitable distribution of the parties marital and nonmarital debts. See id. This statement is correct from an equitable distribution standpoint, however, it is not correct from an alimony perspective. Any spouse that is ever awarded alimony, in any form, will technically have a "future interest" in the payor spouse's future income and future employability. If the payor spouse is no longer employed and is not able to provide an income sufficient to meet the recipient spouse's needs, the recipient spouse's interests will certainly be affected, thus granting the payee spouse a "future interest" in the payor spouse's income as to whether the payor spouse will be able to meet the alimony

obligation. No matter what amount of alimony the Wife receives in the present case, she has a future interest in whether the Husband earns sufficient income to secure his obligation.

The Husband cites Boyett v. Boyett, 703 So.2d 451 (Fla. 1997) which applies the definition of marital asset to retirement assets. See Boyett v. Boyett, 703 So.2d 451, 452 (Fla. 1997). The court stated that the "valuation of a vested retirement plan is not to include any contributions made after the original judgment of dissolution." See Boyett, 703 So.2d at 452. The Wife fully agrees with the Husband's contention that if a pension plan is considered a marital asset at the time of the dissolution of marriage it will be equitably distributed based on its value at the time of dissolution and that any payments or accrual from the time of the dissolution forward will be classified as nonmarital. However, in the present case, it is important to reiterate two points: one, equitable distribution and alimony are separate and distinct issues, not mutually exclusive concepts, and second, equitable distribution is not an issue in front of this Court.

Further, the Husband contends that there was a pattern of wealth accumulation in the pension plan in Boyett just as the Parties had a pattern of savings in the present case. (HB:13-4). The only similarity between Boyett and the present case is that there was an equitable distribution. The savings pattern of the parties in Boyett was not even remotely similar to the patterns in the present case. The Husband states that the Boyett decision

"effectively settles the issue of savings alimony," (HB:13) when in reality, Boyett does not even address the correct issue.

The Husband goes on to cite Barner v. Barner, 716 So.2d 795 (Fla. 4th DCA 1998), Hughes v. Hughes, 438 So.2d 146 (Fla. 3d DCA 1983), and Severs v. Severs, 426 So.2d 992 (Fla. 5th DCA 1983), however, these cases offer no guidance to the issue of including a savings expense in the marital standard of living.

The Barner court, though it undoubtedly states the correct law, is of no help to the present case. In Barner, the court held that a "husband's future earning ability was not an 'asset' for purposes of equitable distribution." See Barner v. Barner, 716 So.2d 795, 796 (Fla. 4th DCA 1998). The court reasoned that the husband's future earnings had not accrued during the marriage and, therefore, the wife had no claim to it from an equitable distribution standpoint. See Barner, 716 So.2d at 797. The Wife in the present case agrees with the holding. The Wife is not asking for this Court to classify the Husband's future income as an asset and she is not attempting to re-open the issue of equitable distribution.

The Hughes and Severs courts stand for the proposition that an educational degree (according to Hughes) is not property subject to distribution as lump sum alimony and the wife (according to Severs) is not entitled to claim a vested interest in an educational degree. See Hughes v. Hughes, 428 So.2d 146, 150 (Fla. 3d DCA 1983); See Severs v.

Severs, 426 So. 2d 992, 994 (Fla. 5th DCA 1983). Not only is the Wife in the present case not attempting to stake a claim in the Husband's educational degree, she is also not asking that this Court award her lump sum alimony.

If the Husband is relying on Hughes based upon the idea that the monetary measures of an award cannot be speculative (Hughes, 438 So.2d at 150) then that argument must fail as well. The amount the Parties saved was the result of a conscious and mutual decision to set aside twenty-five percent of their income for savings. There was no speculation or subjectivity involved as to how much the Parties would save, the ground rules were set by the Parties.

The Husband again tries to reconcile an issue that proves unhelpful through the use of Wood v. Wood, 528 So.2d 508 (Fla. 2d DCA 1988), Irwin v. Irwin, 539 So.2d 1177 (Fla. 5th DCA 1989), Gordon v. Gordon, 335 So.2d 321 (Fla. 4th DCA 1976), reh'g denied, 344 So.2d 324 (1977), and Hamilton v. Hamilton, 552 So.2d 929 (Fla. 1st DCA 1989).

The Wood case does not provide the essential facts that would enable a constructive comparison. In Wood, the court stated that an award of alimony is to be based on the needs of the payee spouse and the ability of the payor spouse to pay. See Wood v. Wood, 528 So.2d 508, 509 (Fla. 2d DCA 1988). The husband in that case was the sole owner and employee of his own business. See id. In the course of the husband's

testimony, he stated that he expected his income to be $100,000 for the next few years. See id. Instead of analyzing the actual needs of the wife, the court ordered that fifty percent of the husband's gross monthly income was to be paid to the wife. See id. Basically, the court never considered the wife's need for support, the husband's ability to pay, or the parties' standard of living.

The facts of the Wood case do not coincide with the facts of the present case where the present Wife's needs, excluding the amount for the savings expense, were calculated and were stipulated to be $5910 per month. Again, the Parties set their goal at saving twenty-five percent of their annual income during their marriage. The $3125 award for the savings component was not arbitrarily reached without assessing the needs and ability of the Parties, as was the situation in the Wood case.

The Irwin court addressed the elements to be considered in a modification of alimony case, as well as the order in which to consider the elements. The court held that an increase in the payor spouse's ability to pay does not qualify the payee spouse for an automatic increase in the amount of alimony. See Irwin v. Irwin, 539 So.2d 1177, 1178 (Fla. 5th DCA 1989). The court determined that the needs of the payee spouse must be examined first and only when an increase in payee's needs are recognized will the ability of the payor spouse to pay be analyzed. See Irwin, 539 So.2d at 1178.

Irwin does not apply in the present case because this is not a case for modification, the Wife's needs have been established, the Husband's ability to pay has been demonstrated, and the Wife is not asking for the $3125 to increase automatically with the Husband's future salary increases and/or his receipt of future bonuses.

The Gordon court stated that because the husband has an over abundant ability to pay, it does not mean that the wife is entitled to that full amount. See Gordon v. Gordon, 335 So.2d 321, 322 (Fla. 4th DCA 1976). In other words, if the husband showed an ability to pay $5000 each month, the wife would not automatically be entitled to $5000. The wife has the burden of demonstrating her need and only upon the wife's successful demonstration of such will the husband's ability to pay even be considered. See Irwin, 539 So.2d at 1178.

The Wife in the present case does not contest this point of law. The Wife's whole point is that the savings *expense* should be included as part of her standard of living which is one of several determinants of a recipient spouse's need according to § 61.08(2). § 61.08, Fla. Stat. (1997). The Wife is only asking for the amount that is commensurate with her need - not the amount commensurate with the Husband's ability to pay.

The Husband refers to Hamilton v. Hamilton, 552 So.2d 929 (Fla. 1st DCA 1989) which repeats that a spouse has no interest in the property acquired by the other spouse after dissolution. See Hamilton v. Hamilton, 552 So.2d 929, 93l (Fla. 1st DCA 1989).

The husband in Hamilton argued, and the court agreed, that to award the wife a percentage of the husband's future raises and an additional percentage of his future bonuses, violates the principles of alimony law. See Hamilton, 552 So.2d at 93l. The Wife in the present case agrees.

The Wife is not asking this Court to award her any portion of a post-dissolution asset. The Wife is asking for the inclusion of the savings expense in her marital standard of living; not the distribution of a non-marital asset.

As stated above, the Wife is not asking for the $3125 monthly expense to automatically increase with the Husband's future increases in salary or with his receipt of future bonuses. The Wife is only asking for the amount equal to her need according to the standard of living established during the marriage.

While the Wife neither has a claim or an interest in the Husband's post-dissolution assets nor in his increases in salary or future bonuses, she does maintain an interest in the Husband's income. Her interest lies in the fact that the Husband stay employed in order to continue having the *ability* to meet her *needs*.

Finally, the Husband contends that by the inclusion of the savings expense in the Wife's standard of living, the lower court has "transformed what is supposed to be a remedial tool to provide for the needs of the dependent spouse into a system of ongoing financial interdependence." (HB:17). The award of permanent periodic alimony is not

a "remedial tool." Permanent periodic alimony is an ongoing, continuing obligation that flows from the payor to the recipient until such time as one of several contingencies occur, such as remarriage, death, or modification. Additionally, permanent periodic alimony is to provide for the recipient's needs and is to maintain the recipient spouse in the standard of living the parties developed throughout their long term marriage.

The Husband also argues that the Parties only realized their savings goal "during the last years of the marriage." (HB:footnote 5). What the Husband fails to emphasize is that the realization of the goal was due to the years of lifestyle adjustments and the consistent patterns of behavior that continuously occurred during the marriage.

The Husband suggests that the lower court's heavy reliance on Messina v. Messina, 676 So.2d 483 (Fla. 1st DCA 1996) somehow weakens the Wife's position. (HB:18). However, that suggestion could not be more inaccurate. Messina provides this Court with the only decision that is actually both legally and factually on point.

The court in Messina dealt with almost the identical factual circumstances as the present case. In both cases, there were long term marriages, the wife was supportive of the husband's career, there were children born of the marriage, the parties moved numerous times for the benefit of the husband's career, the parties adopted a standard of living that included contributing money into a savings/retirement account on a monthly basis, and the husband continues to have the ability to pay this savings expense which

would maintain the marital standard of living. See Messina, 676 So.2d at 484-85. The one factual difference between the cases is that the parties in Messina lived a lavish lifestyle while the Parties in the present case lived a rather miserly existence. See Messina, 676 So.2d at 484. On these facts, the Messina court held that it was "not an abuse of discretion to consider the amount of money saved by the parties for retirement when calculating the reasonable amount necessary for the wife to maintain herself in the lifestyle established during the marriage." See Messina, 676 So.2d at 483.

The court further held that the money saved by the parties for security does not constitute a prospective award of alimony based on speculative future needs. See Messina v. Messina, 676 So.2d 483, 483 (Fla. 1st DCA 1996). The court's reasoning was that the amount saved by the parties was an amount created by them *during* the marriage. See Messina, 676 So.2d at 486. In other words, the parties mutually agreed on the amount they would save each month. See id.

These facts are perfectly aligned with the facts in the present case. The Parties decided that they would save twenty-five percent of their annual income. To enable themselves to realize their goal, the Parties made the savings expense a priority, just as they would any other monthly expense, such as their mortgage payment or their car payment. In order to have money to put into their savings, the Parties did not have maids or yardmen, they did not take luxurious vacations, they did not buy jewelry or expensive

clothing. Instead of these indulgences, the Parties put their money toward their savings expense. However, *had* the Parties indulged themselves and employed domestic help, taken luxurious vacations, and purchased expensive things, those facts would have been considered in the standard of living and the Wife's alimony would reflect such a standard. It was well stated in the opinion of the Second District Court of Appeal that had the evidence shown that the Wife had purchased a new vehicle every two years, that would have been considered when figuring the amount of alimony to be paid. Mallard v. Mallard, 24 Fla. L. Weekly D1560, 1561 (Fla. 2d DCA July 9, 1999). However, the court would have no way of knowing nor would it bother to inquire whether every two years the Wife actually went out and bought a car. See id. The manner in which the Wife would choose to spend her money would be her own business. In other words, the expense should be accounted for in the alimony calculation because that money was set aside each month from the portion of the income the Parties were allowed to spend. How the money was actually spent during the marriage or how the Wife spends it post-dissolution is not the court's concern.

The Husband argues that this argument is impractical because had the Parties spent money lavishly, the Wife would not have enjoyed the equitable distribution that she did. (HB:12). The Husband appears to take the position that the Wife's share of the Parties' assets received in the equitable distribution portion of the dissolution is somehow a gift

or an award to her when in reality, it is *her* share of the Parties marital assets. Additionally, the equitable distribution that occurred has no bearing on the award of alimony.

C. The Inclusion of the Savings Expense in the Marital Standard of Living is Perfectly Aligned with Well-Settled Principles of Alimony Law.

An award of permanent periodic alimony that includes the savings expense in the marital standard of living is perfectly aligned with the well-settled principles of alimony law. This inclusion is based on the pattern of behavior demonstrated by the Parties throughout the duration of their long-term marriage. The Husband states that "the Wife can hardly be said to be without a contingency fund . . . because she received an equitable distribution in excess of one million dollars." (HB:19). First, the Husband is incorrectly pointing out the equitable distribution result of the dissolution and second, the Wife's argument is not based on the notion that she wants a contingency fund. The Wife's argument is premised on her right for the law to be correctly applied.

The Husband asserts that an award to the Wife that includes the marital savings expense is an award that is "substantially in excess of her needs based on speculation that her nest egg may someday be gone or that the Husband may someday no longer have the ability to pay alimony." (HB:20). Such an award assumes neither of the Husband's assertions. What such an award does is correctly apply the law to the facts after carefully

analyzing the unique circumstances involved. Further, the lower court did not speculate as to the amount of the savings expense. Instead, the lower court relied on the historic pattern of behavior of the Parties to determine an objective and correct amount.

The Husband has cited several cases[3] wherein the courts have either: 1) denied a recipient spouse's claim for a portion of a speculative or contingent future income of the payor spouse or 2) reversed an award to a recipient spouse of a portion of a speculative or contingent future income of the payor spouse.

The Wife is not asking this Court to award her anything that is subjective, speculative, or contingent. As to the subjectivity of the amount awarded, the Wife has stated ad infinitum, the Parties determined the twenty-five percent savings standard together and during the course of their long-term marriage. With regard to the speculative and/or contingent nature of the award, the Wife's award is neither. The Wife is asking this Court to affirm her award of $3125 which represents the Parties' marital saving expense. She is not asking that the amount of the savings expense she receives increase automatically as the Husband receives increases in salary or bonuses. The Wife is asking

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[3] Joseph v. Joseph, 681 So.2d 888 (Fla. 4th DCA 1996); Kilgannon v. Champiny, 684 So.2d 304 (Fla. 2d DCA 1996); Condren v. Condren, 475 So.2d 268 (Fla. 2d DCA 1985); Nelson v. Nelson, 651 So.2d 1252 (Fla. 1st DCA 1995); Echols v. Elswick, 638 So.2d 581 (Fla. 1st DCA 1994); Edwards v. Sanders, 622 So.2d 587 (Fla. 1st DCA 1993); Traylor v. Traylor, 214 So.2d 15 (Fla. 1st DCA 1968); Kinzler v. Kinzler, 497 So.2d 909 (Fla. 5th DCA 1986).

that she receive the amount that the Parties developed together throughout the duration of their marriage. Though all of the cases cited provide good law, they are all irrelevant to the issue in the present case.

The Husband attempts to disarm the Wife's position by proposing arguments to this Court riddled with assumptions and speculation. (HB:21-2). The Wife shall address each assumption on its own accord:

First, the money will be saved. (H:21). Whether or not the Wife saves the money is the Wife's choice. The lower court stated that had the evidence shown that the Parties purchased a new vehicle every two years for the Wife, the court would have undoubtedly considered that when figuring out the amount of alimony to be paid. See Mallard v. Mallard, 24 Fla. L. Weekly D1560, 1561 (Fla. 2d DCA July 9, 1999). However, the court would have no way of knowing nor would it bother to inquire whether every two years the Wife actually went out and bought a car. See id. "The law thus acknowledges that a person's lifestyle may change following dissolution of marriage but that *the trial court's initial alimony award must be grounded upon the marital lifestyle of the past."* See id. (Emphasis added.) For the Husband to argue that the Wife's award should be decreased because she *may not* save the money would call for a decision based entirely on speculation which the Husband is arguing is not allowed.

Second, the Wife will receive no outside income. (HB:21). To decrease the award because someone *may* leave the Wife a substantial inheritance or *may* give the Wife a substantial gift would again be basing a decrease of the award on a speculative and/or contingent future event which the Husband argues is against well-settled principles. Further, it is important to turn back to the Final Judgment wherein the court already imputed income of $1669 to the Wife by awarding $4250 per month although the Parties had stipulated to the Wife's needs as being $5919, excluding the amount for the savings expense.

Third, the Wife's expenses will increase. (HB:21). If the Wife's expenses do increase, then the Wife would be entitled to seek a modification. At that time she would than have the burden of meeting the test of substantial change in circumstances in order to prevail.

Fourth, the Husband's retirement will eliminate his ability to pay. (HB:22). As similarly stated under the previous point, the Husband would likewise have a modification claim if his ability to pay decreased. It would then be incumbent upon him to prove that there has been a substantial change in circumstances with regard to his income in order to prevail. If the court would have assumed what the Husband's income would be in the future and based the Wife's alimony award on that speculative future event, the court certainly would have erred.

Fifth, the Wife's substantial equitable distribution will prove inadequate. (HB:22). The trial court certainly must not have considered the equitable distribution that occurred. If the court had so considered, it would have incorrectly fused the concepts of equitable distribution and alimony, as the Husband has attempted to do. The court simply gave each issue the separate attention that each deserved. The court rightfully did not even consider the Wife's equitable distribution because it should not have had any bearing on the separate issue of alimony.

Sixth, the Wife will not remarry and neither spouse will die. (HB:22). First, the Husband's contention that the Wife will receive the inclusion of the savings expense "up front before a need is generated" (HB:22) is incorrect. The Wife's needs have already been demonstrated by the actions of the Parties throughout the history of the marriage. Second, for the Husband to premise any argument on an assumption that the Wife will never remarry or that neither party will ever die is utterly illogical. It is absurd for the Husband to imply that there has been an exception of law made for the Wife in this case that if she should remarry she would continue to receive alimony. Further, no exception has been made for the Wife to continue receiving payments from the Husband's estate in the event that he dies or for her estate to continue receiving payments should she die.

The Husband cites Stith v. Stith, 384 So.2d 317 (Fla. 2d DCA 1980) in which the trial court made an obvious error. In Stith, the trial court awarded the wife lump sum

alimony of $240,000 payable at $1000 per month for twenty years. See Stith v. Stith, 384 So.2d 317, 318 (Fla. 2d DCA 1980). The husband argued, and the court agreed that this award allowed the wife to continue receiving payment even if: 1) she remarried or 2) the husband died. See Stith v. Stith, 384 So.2d 317, 318 (Fla. 2d DCA 1980). Additionally, this award would have allowed the wife's estate to continue receiving payments upon her death. See Stith, 384 So.2d at 318. Lump sum alimony is to help to equalize any inequities that occur in equitable distribution. See Stith, 384 So.2d at 320. On appeal, the court stated that due to the size of the marital estate and net worth of the parties, the trial court was not justified in awarding the wife $240,000 lump sum alimony as an equitable distribution of property acquired during the marriage. See id. Ultimately, the court reversed the award of lump sum alimony and awarded the wife permanent periodic alimony at $1000 per month and awarded other assets as lump sum alimony to the wife. See Stith, 384 So.2d at 321. Stith is not only factually off-point but legally irrelevant to the present case.

The Husband cites to Penkoski v. Patterson, 440 So.2d 45 (Fla. 1st DCA 1983) which allowed for automatic increases in a child support award as the child got older. See Penkoski v. Penkoski, 440 So.2d 45, 46 (Fla. 1st DCA 1983). The increases were to continue to occur without any consideration to external circumstances. See Penkoski, 440 So.2d at 46. Such a holding successfully contradicts well-settled principles of law. See

id. As the Wife stated previously, she is not asking for automatic increases in the amount awarded to her for the savings expense based on the Husband's receipt of future increases in salary and/or future bonuses. The Wife is asking for an award of the amount that the Parties historically saved during the marriage - $3125 per month. If there is to be a change in this amount, upward or downward, it will be the result of one of the Parties prevailing on a modification claim.

D. In Order for Other Jurisdictions to Comply with Their Well-Settled But Different Law, Those Jurisdictions Denied the Award of Including a Savings Expense in the Parties' Marital Standard of Living.

The Husband crossed to other jurisdictions in an attempt to find a foundation for his stance. The Husband begins by citing Brooks v. Brooks, 957 S.W.2d 783 (Mo. App. 1997) which had a similar issue to decide. The Brooks court had to decide whether, under applicable Missouri law, "a former spouse can be required to contribute, in the form of present maintenance, to an ex-spouse's retirement fund to provide for his/her future support." See Brooks v. Brooks, 957 S.W.2d at 791 (Mo. App. 1997). The court answered in the negative. See id. However, the Brooks court was not presented with even remotely similar facts to the present case. The Brooks court set forth reasoning that was five-fold which will be discussed below. See id. at 791-93.

Ms. Brooks contributed, by payroll deduction, $149.62 to her retirement fund each month. See id. at 790. There was no mention in the recitation of facts in Brooks of a

frugal, or even a lavish, lifestyle. There was no mention of a lifestyle so consumed by the act of saving money that it altered the lives of those involved. There was no mention of foregone luxuries. There was no mention of a conscious effort to save money so that it transformed what is often viewed as a luxury into a way of life. Without such facts being mentioned, Brooks has little, if any, comparative value to the present case.

The first point of reason the Brooks court heavily relied upon was the legislative intent behind the enactment of Missouri's Maintenance Statute (the equivalent of Florida's Alimony Statute). See Brooks, 957 S.W.2d at 791. In 1973, Missouri discontinued its award of alimony and began awarding maintenance. See id. Whereas alimony was seen as an obligation for support favoring the wife, maintenance was derived from "the need for reasonable support by one spouse from the other after the disruption of marriage." See id. As previously stated, § 61.001 lays out the purpose and intent of the Chapter 61[4].

The legislative intent as set forth in the Judiciary Committee Staff Summary dated October 4, 1977 states, "The intent of this bill is to set up a list of criteria which shall be

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[4] As previously mentioned, § 61.001 states that the Chapter shall be liberally construed and applied. § 61.001(1), Fla. Stat. (1997). Additionally, the Chapter's purpose is to preserve the integrity of marriage and to safeguard meaningful family relationships, promote the amicable settlement of disputes that arise between parties to a marriage, and mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage. § 61.001(2), Fla. Stat. (1997).

considered by the judge when deciding whether alimony should be awarded." (A:3). The legislative intent was merely to codify factors for judge's to apply when determining the issue of alimony. Among those factors is the inclusion of the marital standard of living which is all the Wife is asking for in this instance.

Additionally, the Brooks court states that "requiring a former spouse to contribute to an ex-spouse's retirement would impose a continuing financial obligation on the obligor spouse and promote continuing financial dependency between them..." See Brooks, 957 S.W.2d at 791. In Florida, the award of permanent periodic alimony already does impose a continuing obligation on the payor spouse unless the payor spouse wants to be charged with a violation of a court order for refusing to comply with the court order's demand to pay alimony.

The Brooks court's second point of reason for denying the inclusion of the savings expense was that the obligation of maintenance support is to terminate upon the death of either party or the remarriage of the recipient spouse. See Brooks, 957 S.W. 2d at 792. Again, the Wife in the present case is not asking this Court for an exception to be made that would allow her to continue receiving alimony after her remarriage or the Husband's death or for her estate to continue receiving alimony after her death.

The court states that if the maintenance paid to her allows her to contribute any money to her retirement fund then the husband is potentially being required to contribute

to the wife's support after her remarriage or after the husband's death. See Brooks, 957 S.W. 2d at 792. The literal application of this statement would mean that if the recipient spouse had *any* money left over at the end of the month after all the bills were paid then the recipient is receiving too much support. In essence, this statement is saying that if the recipient does not deplete her monetary resources to *zero* each month, there should be a modification proceeding to reduce her support. Certainly this reasoning does not perpetuate the stated purpose or intention of § 61.001.

The third point of reason of the Brooks court was that to determine the payor's support obligation, the court would have to know the recipient's future circumstances since "need" is to be based on needs existing at the time of the award. See Brooks, 957 S.W.2d at 792. This reasoning is not at all applicable to the present case. The Parties' savings expense was twenty-five percent of their income during the marriage and that is all the Wife is asking to be awarded. If there is an increase in her needs, she is well aware that a modification proceeding will have to occur.

The fourth point of reason for the Brooks court was that the recipient would be "accumulating capital or building an estate, which is not allowed." See Brooks, 957 S.W.2d at 792. In the present case, accumulating capital and building an estate was part of the Parties' marital standard of living. All of the foregone indulgences mentioned

above enabled the Parties to accumulate capital and build an estate. It was their lifestyle and the Wife is entitled to maintain that lifestyle.

The fifth and final point of reason for the Brooks court was that "it would be difficult, if not impossible, for the court to ensure that the maintenance ordered now and earmarked for future support by way of payments to a retirement fund would actually be used for retirement purposes. See Brooks, 957 S.W.2d at 793. The Second District addressed this issue in its opinion which the Wife cited to previously. The Second District stated that what the Wife did with the money paid to her as alimony was her own business and, further, it is incumbent on the court to award alimony based on the "marital lifestyle of the past." Mallard v. Mallard, 24 Fla. L. Weekly D1560, 1561 (Fla. 2d DCA July 9, 1999).

Whether the Brooks decision was the correct decision to uphold the legislative intent of Missouri law is not for the Wife in the present case to decide. The Brooks decision is not controlling law in this jurisdiction and for the aforementioned reasons, the decision should be disregarded.

The Husband goes on to cite Dehm v. Dehm, 545 P.2d 525 (Utah 1976) which was a case in which the former husband filed for a modification to reduce or eliminate alimony. See Dehm v. Dehm, 545 P.2d 525, 525 (Utah 1976). The former wife filed a counter-motion for an increase in alimony with the specific intent of "augmenting" her

retirement income. See Dehm, 545 P.2d at 525, 528. The court ultimately ruled for the former husband and reduced her alimony. See id. at 529.

Again, the facts in Dehm and the facts in the present case are so irreconcilable and the legal issue is so different that Dehm cannot provide a competent comparison that would aid this Court's decision.

CONCLUSION

This Court should follow the well precedented case law and statutory authority and affirm the decision of the court below by including the Parties' savings expense in their marital standard of living. The Parties' act of saving money consumed their lives and ultimately transformed into their standard of living. The Parties did not incidentally save whatever money they had left over at the end of each month. Instead, the Parties saved first and lived a miserly existence on whatever was leftover after saving.

The Parties forewent the luxurious material possessions and activities they could have easily afforded which undoubtedly would have been included in the marital standard of living. Instead of lavish indulgences, they chose their luxury to be saving money. While the form of the luxury is not typical, it does not mean the luxury did not exist or that it should be ignored. The trial court followed the law and did equity and justice between the Parties.

Respectfully Submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Steven L. Brannock, Esquire, Post Office Box 1288, Tampa, Florida 33601-1288 this _____ day of January, 2000.

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