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

INITIAL BRIEF ON THE MERITS OF PETITIONER LARRY W. MALLARD

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Counsel for Petitioner, Larry W. Mallard, certifies that this Initial Brief on the Merits is typed in 14 point (proportionately spaced) Times New Roman.

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INTRODUCTION

This case presents a single legal issue: whether the trial court erred in requiring the husband to pay permanent alimony substantially in excess of the wife's stipulated needs. Alimony based on the wife's stipulated needs was calculated at $4,250 per month. This amount (reached by stipulation) was already nearly twenty per cent in excess of the Wife's historical standard of living. Yet, the trial court required the husband to pay an additional $3,125 in monthly "savings alimony" based on the amount the parties tried to set aside for retirement during the last several years of their marriage. The award of this extra alimony was premised on speculation concerning the wife's future, as opposed to stipulated existing needs. The Second District affirmed the award in a split decision but certified the following question to this Court:

> WHEN THE PARTIES TO A DISSOLUTION OF MARRIAGE 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 IN AWARDING PERMANENT ALIMONY THAT EXCEEDS THE RECIPIENT SPOUSE'S CURRENT NEEDS AND NECESSITIES?

This Court should answer the certified question in the negative. The award of "savings alimony" to the wife constitutes a drastic departure from well-settled principles governing the award of permanent periodic alimony. Alimony must be based on *current* needs, not speculation as to what one spouse may need tomorrow, next year, or at retirement. Future contingencies are why modification proceedings are available. Besides being speculative, the trial court's award of extra alimony has granted the wife a continuing interest in the husband's future income directly contrary

to Florida Statutes defining marital property and the teachings of this Court. In effect, the Wife received the benefit of the family's savings twice, first by way of her equitable distribution and then in the calculation of alimony.

To erroneously affirm the decision in this case would be to significantly change Florida dissolution law. The recognition of "savings alimony" will open a floodgate of new litigation concerning the calculation of alimony. What is now a relatively simple calculation based on current expenses will become a complicated battle of experts concerning the relationship between past savings (or other forms of wealth accumulation or debt reduction) and speculative future needs. This Court should decline the lower court's invitation to reinvent alimony law and reverse.

In this brief, Appellant Larry W. Mallard refers to himself as the "husband," his capacity in the former marriage. The husband refers to Appellee, Charlene G. Mallard, as the "wife." The husband refers to the record on appeal as ("R.") and the transcript of the final hearing below as ("T.").

STATEMENT OF THE CASE AND FACTS

This appeal arises out of the dissolution of Larry and Charlene Mallard's 27-year marriage. Because virtually all of this case was resolved by stipulation, the facts need be only briefly stated.

The husband has had a successful 27-year career at NationsBank. Joining the bank upon his graduation from college, the husband has risen to the position of President of the North Florida region of the bank (T. 36-37, 69-70). The husband's career involved several moves within North Carolina and a move to Houston before the couple moved to Tampa (T. 37, 70-77).

The parties had a traditional marriage. Early in the marriage, the wife worked as a full-time public school teacher until the birth of the second of the couple's two children. The wife then became the children's primary caregiver and worked part-time as a teacher, a position that she continues to hold today. The husband continued to develop his career at NationsBank (T. 37, 70-77).

During the marriage, the parties lived very comfortably, but not extravagantly. The family built increasingly luxurious houses in North Carolina, Houston, and Tampa. The family frequently went out to dinner, took vacations, and belonged to country clubs in Houston and Tampa (T. 37-39, 81-82, 101, 103).

At the same time, the parties agreed to avoid extravagant expenditures and to save money with a goal of early retirement. During the last six years of their marriage, they set a target of saving 25% of their income (but did not realize this goal until the last few years of the marriage) (T. 38, 53, 99-100).

Unfortunately, the parties' 25-year happy marriage deteriorated after they

moved to Tampa. The wife, apparently unhappy with the move to Florida, became angry and depressed (T. 36, 44-45). The husband sought marriage counseling, which was unsuccessful, and he filed for dissolution in 1997 (T. 44-45).

The Financial Settlement

Prior to the final hearing, the parties were able to resolve nearly all financial issues by stipulation (T. 48; R. 177). The husband agreed to an equitable distribution that resulted in a 50/50 split of the parties' assets and an identical resulting net worth for the husband and the wife. They split their securities accounts equally with each receiving over $300,000 in securities. The wife also received over $270,000 of the couple's retirement accounts. The wife was awarded the four-bedroom, 3800-square-foot marital home valued at $542,300 which she received free and clear of any liabilities (R. 177-78).

The parties also largely agreed on the husband's future financial obligations. The husband agreed to pay the wife a non-taxable lump-sum payment of $18,125 in retroactive support (R. 178). The husband agreed to pay all of their minor child's private school tuition, as well as the child's automobile insurance, health insurance and reasonable and necessary non-covered medical bills (T. 33-36, 90; R. 178). Finally, the husband agreed to pay all of the wife's attorneys' fees and costs in the trial court so that there was no diminution of her share of the equitable distribution (R. 178-79).

[1]

Most importantly for the purposes of this appeal, prior to the final hearing, the wife

[1] By contrast, the Husband's share of the equitable distribution was diminished by his agreement to pay fees.

stipulated that her adjusted, post-divorce need based on her projected "adjusted" standard of living was $5,910 per month (T. 92-93; R. 177). This stipulated need included a nearly twenty percent upward adjustment from the wife's historical standard of living which was stipulated to be $5,060 per month. The court found that $4,250 was the amount of permanent periodic alimony required to meet the wife's adjusted needs, taking into consideration her salary and stipulated projected income (R. 183).[2] The stipulation ensured that the Wife would not have to invade the principal of her equitable distribution to meet her needs and that no income was imputed to her from her share of the retirement account (leaving the account free to compound its growth). The husband also agreed to pay child support of $1,875 per month based on a guideline calculation that assumed that the wife would receive $4,250 per month in alimony while the minor child lived at home (R. 178).

The Trial Judge Awards "Savings Alimony"

Instead of awarding the wife $4,250 — the amount the wife agreed was necessary to meet her stipulated adjusted, post-divorce needs, the trial court ruled that the husband must pay the wife $4,250 *plus* an additional $3,125 every month which represented one half of the couple's savings goal during their marriage. The court applied the couple's 25 per cent savings goal to the husband's $300,000 base salary to

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[2] There was one additional issue below which the husband did not raise on appeal. The parties disputed whether income should be imputed to the wife for the purposes of calculating alimony based on her decision to live in the 3,800 square foot marital home after the children were gone. The Husband suggested at trial that the Wife could have moved into an equally luxurious, but smaller, residence and invested the difference. The parties stipulated to two different levels of alimony depending upon how the trial judge resolved the issue. The trial judge chose not to impute income to the wife and settled on the more generous alimony award, allowing her to remain in the $542,000, five bedroom residence.

come up with an anticipated savings amount of $75,000 per year. The court then awarded half of this amount to the wife resulting in the additional $3,125 monthly alimony payment (for a total alimony award of $7,375 per month) (R. 183). The trial court did not recalculate the husband's child support obligations in light of the substantial increase in the wife's alimony payments. *Compare* R. 178 *with* R. 183.

Believing the trial court's award of savings alimony to be in error, the husband appealed. The Second District agreed that Florida law does not recognize "savings alimony" but, in a split decision, affirmed the award holding that the court could consider a "savings" component in assessing the wife's needs. The court then certified the following question to this Court:

WHEN THE PARTIES TO A DISSOLUTION OF MARRIAGE HAVE HISTORICALLY DEMONSTRATED THE REGULAR AND CONSISTENT PATTERN TO SAVE MONEY FOR AN EXTENDED PORTION OF THEIR LONG-TERM MARRIAGE, MAY A TRIAL COURT CONSIDER THIS FACTOR IN AWARDING PERMANENT ALIMONY THAT EXCEEDS THE RECIPIENT SPOUSE'S CURRENT NEEDS AND NECESSITIES?

Standard of Review

Because the parties stipulated to the amount of the wife's adjusted, post-divorce living expenses, this appeal concerns only the legal issue of whether future savings alimony is a permissible component of permanent periodic alimony. This Court reviews this issue *de novo*. *Walter v. Walter*, 464 So. 2d 538, 539 (Fla. 1985).

SUMMARY OF THE ARGUMENT

The award of savings alimony violates several important principles of Florida alimony law. First, the court erroneously awarded the wife $3,125 per month in excess of her stipulated projected needs. In effect, the award gives the wife a substantial interest in the husband's future income, which is directly contrary to the statutory definitions of marital and non-marital property. The court's decision also conflicts with the many cases expressly holding that no spouse has an interest in the future income or good fortune of the other spouse after divorce. Each spouse has the right to an equitable division of marital property and to have his or her financial needs met, but beyond that, neither spouse has the right to share in the fruits of the other spouse's labors after dissolution.

Finally, the trial court's ruling overlooks that modification is always available to cover unforeseen future contingencies. Here, the trial court engaged in unbridled speculation that the wife may need a "rainy day" fund for later. The court's order ignores the very substantial equitable distribution already made to the wife and the Florida cases that prohibit the award of alimony based on speculation concerning future needs.

The Court's award of savings alimony should be reversed.

ARGUMENT

THE TRIAL COURT'S AWARD OF SAVINGS ALIMONY TO THE WIFE IS CONTRARY TO WELL-SETTLED PRINCIPLES GOVERNING THE AWARD OF PERMANENT PERIODIC ALIMONY

The trial court's award of "savings alimony" over and above the wife's stipulated adjusted need is contrary to bedrock principles which govern the award of permanent alimony in Florida. As we show below, the purpose of alimony is to provide for the "current necessary support" of the receiving spouse. A "rainy day" fund for retirement or other unforeseen contingencies is not a component of "current necessary support." Moreover, a former spouse has no vested interest in the good fortune or future income of the other former spouse. Finally, an award of alimony cannot be based on speculation concerning future needs. The decision below should be reversed.

A. The Award of Permanent Periodic Alimony Must Be Based Upon the Current Needs and Necessities of the Recipient Spouse.

The purpose of permanent periodic alimony is well-settled in Florida law. In *Welsh v. Welsh*, 160 Fla. 380, 35 So. 2d 6, 9 (1948), this Court emphasized that the basis for the allowance of permanent alimony is the "*necessities* of the wife and the financial ability of the husband to *supply the necessity.*" (emphasis added).

This principle has been reiterated time and again. For example, in the landmark *Canakaris* decision, this Court explained this principle as follows:

> Permanent periodic alimony is used to provide the *needs and necessities* of life to a former spouse as they have been established by the marriage of the parties. The *two primary elements* to be considered when determining permanent periodic alimony are the *needs* of one spouse for the funds and the *ability* of the other spouse to provide the

necessary funds.

Canakaris v. Canakaris, 382 So. 2d at 1201-1202 (Fla. 1980) (emphasis added).

Most recently, in *Rosen v. Rosen*, 696 So. 2d 697, 703 (Fla. 1997), this Court reemphasized the purpose of permanent periodic alimony when it succinctly stated that "the point of our findings in *Canakaris* was that an award of alimony is to provide the *current necessary support*." (emphasis added).

There can be no argument about the wife's current need here. The parties stipulated that the wife's adjusted, post-divorce needs equal $5,910 per month, which was already a nearly twenty percent increase over her historical standard of living. There is no dispute that $4,250 in alimony adequately covers her standard of living in light of her other stipulated income. The husband has no dispute with this amount. The Court's award of an additional $3,125 in "savings" alimony above and beyond her needs is without support.

The court below correctly noted that there is no such thing as "savings alimony" under Florida law but then proceeded to award it anyway. The majority justified its decision by suggesting that the wife should not be "penalized" by the family's choice to be fiscally prudent. In essence, the majority suggested that the wife should receive alimony in excess of her needs because her standard of living during the marriage was artificially low. This argument is incorrect on a number of levels. To begin with, the wife is in no position to complain about the calculation of her reasonable needs. She stipulated to her reasonable projected needs below. This stipulation already included a nearly twenty percent adjustment upward from her historical standard of living. Secondly, as the wife has conceded, alimony must be based on the standard of living

as established by the parties during the marriage. The wife has cited no authority suggesting that alimony should be set based on what she believes in hindsight her standard of living should have been. If the wife were correct, calculating the needy spouse's reasonable need would be changed from a relatively straightforward objective analysis of the parties' financial history to a subjective determination of what the parties should have been spending. No doubt many spouses could argue that they could have spent more.

But most importantly, the wife's argument overlooks the fact that she benefited very substantially from the parties' prudence. As her brief below candidly acknowledged, "due to the frugal lifestyle they lived, they ended the marriage with over $3 million in assets and virtually no debts." (Wife's Answer Brief at 4). This $3 million marital estate was divided equally between the wife and the husband. The wife is living in a $542,000 house which she owns free and clear and has over $300,000 in liquid assets plus another $270,000 in a retirement account, none of which need be invaded for her support. The alimony stipulated to by the Husband was to meet a prospective standard already twenty percent higher than her historical standard of living. Thus, the family's decision to lead a prudent lifestyle has left her with a substantial nest egg, as well as an extremely comfortable lifestyle.

Thus, it is simply incorrect to suggest that the wife would have been better off had the family lived a lavish lifestyle. Perhaps she would have had an argument for higher alimony based on a higher historical standard of living, but the marital estate of which she received a fifty percent share would have been significantly less. In effect, the Wife received the benefits of the family's savings twice, both in the equitable

distribution and the calculation of alimony. This was error. *See Diffenderfer v. Diffenderfer,* 491 So. 2d 265, 268 (Fla. 1986) ("injustice would result if the trial court were to consider the same asset in calculating both property distribution and support obligations.").

B. The Wife Has No Continuing Right to a Share of the Husband's Future Income

Equally fundamental in the award of permanent periodic alimony is the principle that divorce accomplishes an economic separation between the former husband and wife. *See Diffenderfer*, 491 So. 2d at 266. The parties' marital assets are to be divided equitably and provisions must be made to ensure that the needs of both spouses are met. Once these objectives are accomplished (and they were accomplished by stipulation here) neither party has any future interest in the income generated by the other spouse. *Cummings v. Cummings*, 330 So. 2d 134, 136 (Fla. 1976).

Thus, absent a showing of need, neither spouse has any right to share in the post-dissolution earning capacity of the other spouse. This principle is unambiguously stated in Section 61.075(5)(a), Florida Statutes, which limits the definition of marital assets to assets acquired during the marriage. Applying this definition, Florida courts have rejected numerous attempts by one spouse to establish an interest in the other spouse's future income or income potential. Perhaps most relevant is this Court's recent decision in *Boyett v. Boyett*, 703 So. 2d 451 (Fla. 1997). In *Boyett*, the Court examined how the definition of marital property applies to retirement assets. According to the Court, the valuation of a vested retirement plan does not include any contribution made after dissolution. To rule otherwise unfairly compensates one

spouse for the efforts and labor of the other spouse following the dissolution. *Id.* at 452. *See also Hamilton v. Hamilton*, 552 So. 2d 929, 931 (Fla. 1st DCA 1989) ("marital property rights cannot inure in property acquired after dissolution of the parties' marriage").

Boyett effectively settles the issue of "savings alimony." In *Boyett* there was a pattern of wealth accumulation in the pension plan just as the parties had a pattern of savings in this case. But there is no hint in *Boyett* that this pattern of wealth accumulation could be considered a "need" for alimony purposes. Instead, this Court divided the pension plan as part of the equitable distribution of the parties' assets.

The principle of post-divorce economic separation has been affirmed in a number of contexts in which one spouse has sought a continuing interest in the other parties' post-dissolution income. For example, courts have held that no spouse has a vested interest in the other spouse's educational decree or professional experience. *See Barner v. Barner*, 23 Fla. L. Weekly D1589 (Fla. 4th DCA July 1, 1998) (husband's future earnings ability not an asset for purposes of distribution); *Hughes v. Hughes*, 438 So. 2d 146 (Fla. 3d DCA 1983) (education degree is not property subject to distribution as lump sum alimony because its value, which measured by future earning capacity, is too speculative). Perhaps the strongest statement of this principle appears in *Severs v. Severs*, 426 So. 2d 992 (Fla. 5th DCA 1983). Addressing the wife's claim to a portion of the husband's future income the court observed: "the wife's claim to a vested interest in the husband's education and professional productivity, past and future, is unsupported by any statutory or case law. Indeed, such an award by the trial court would transmute the bonds of marriage into the bonds of

involuntary servitude contrary to Amendment XIII of the United States Constitution". *Id.* at 994.[3]

Similarly, the courts of this state have repeatedly rejected the notion that an award of alimony can be based merely on the husband's ability to pay without a corresponding need of the recipient spouse. For example, in *Wood v. Wood*, 528 So. 2d 508 (Fla. 2d DCA 1988), the court held that the trial court erred in awarding the wife one-half of the gross income of the husband's business, instead of a specific amount, as this award was not based on either her needs or the husband's ability to pay. *See also Gordon v. Gordon*, 335 So. 2d 321, 322 (Fla. 4th DCA 1976) ("there is not necessarily an ordained equality between these two factors, i.e., the enormity of the ability to pay does not dictate a corresponding need to receive an amount commensurate with such ability to pay."), *cert. denied*, 344 So. 2d 324 (1977).

The courts have also rejected the concept of "good fortune" alimony. This principle is clearly explained in *Irwin v. Irwin*, 539 So. 2d 1177 (Fla. 5th DCA 1989), in which the trial court awarded an upward modification of alimony. The District Court of Appeal reversed, holding that the alimony was improperly enhanced due to the husband's increase in wealth in the absence of any substantial increase in the former wife's *need*. The court rejected the wife's right to share in the husband's salary increase:

> However, in a petition for modification, the recipient's *need* is sine qua non of the determination; unless and until it is established that there has been a substantial increase in *need*,

[3] Similarly, Florida courts have held that no spouse has a vested interest in any future bonus earned by the other. *See Kilgannon v. Champiny*, 684 So. 2d 304 (Fla. 2d DCA 1996); *Joseph v. Joseph*, 681 So. 2d 888 (Fla. 4th DCA 1996).

> ability to pay must not be considered. Once that *need* is established, the question is whether or not the husband has the ability to meet that *increased need*, in whole or in part. To hold otherwise *improperly grants the alimony recipient a continuing interest in the former spouse's good fortune*.

Id. at 1178 (emphasis added). The *Irwin* court found persuasive the argument that:

> To permit this award to stand would give credence to the popular view of alimony as a *judicially sanctioned state of indentured servitude*, rather than a remedial tool to support a spouse unable to provide for himself or herself.

539 So. 2d at 1178 (emphasis added). *See also Hamilton v. Hamilton*, 552 So. 2d 929, 931 (Fla. 1st DCA 1989) (spouse has no interest in other spouse's post-dissolution income).

The Court's award of savings alimony in this case is contrary to the important principle of post-dissolution financial independence articulated by these many cases. The additional $3,125 per month awarded above the wife's stipulated needs serves no purpose here but to give her a vested share of her husband's future income, perhaps forever. The husband has no quarrel with the wife's right to have her needs generously met — he stipulated to that. He has no dispute that she should share equally in the wealth accumulated during the marriage as a result of his successful career — he stipulated to such a distribution. By splitting equally the wealth accumulated during the marriage, the stipulation ensures that the wife receives an equal distribution of the parties' liquid assets as well as a substantial share of the parties' retirement accounts. In sum, the parties wound up with an identical net worth..

What the law does not permit, however, is an additional monthly award to the wife based solely on the husband's larger income. There is no requirement going

forward that the parties' future wealth accumulation be equal. To so decree ignores the financial independence of the parties post-dissolution and gives the wife an unfair share in the husband's future labors — precisely the result rejected by every court in Florida.[4]

Put simply, the court 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. This dramatic departure from the traditional principles governing alimony law must be rejected.

The majority opinion below suggests that it has done no more than include the historical pattern of savings in its assessment of the wife's marital standard of living.[5] However, the only authority for suggesting that savings can be part of the analysis of "the needs and the necessities of life" called for by *Canakaris* is a split decision of the First District in *Messina v. Messina*, 676 So. 2d 483 9 Fla. 1st DCA 1996). However, the *Messina* decision leaves no doubt that savings alimony, however characterized, is a way to permit the dependent spouse to "continue to share in a substantial portion of the earning capacity which was achieved during the marriage." *Id* at 485. *Messina* was incorrect to ignore the post-dissolution economic separation of the parties required by Florida law. As discussed extensively above, Florida law does not permit one spouse to continue to share in the future income of the other (once his or her

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[4] *See Boyett*, 703 So. 2d 451 (Fla. 1997); *Hamilton*, 552 So. 2d 929 (Fla. 1st DCA 1997); *Wood*, 528 So. 2d 508 (Fla. 2d DCA 1988); *Hughes,* 438 So. 2d 146 (Fla. 3d DCA 1983); *Barner*, 34 Fla. L. Weekly D1589 (Fla. 4th DCA 1998); *Severs*, 426 So. 2d 992 (Fla. 5th DCA 1983).

[5] The "historical" standard utilized by the trial court was actually only a goal and was realized only in the last few years of the marriage.

legitimate needs have been met.)

To answer the certified question in the affirmative would be to seriously blur the distinction between alimony and equitable distribution and invite a floodgate of litigation. In most long-term marriages there is a pattern of wealth accumulation. Prior to *Messina* and the decision below, this wealth accumulation was handled through the equitable division of the accumulated assets. If the holdings of Messina and the decision below are not rejected, any form of wealth accumulation can be tacked onto the alimony award as well. For example, suppose one spouse were able to show that the family's net worth increased regularly. Could that spouse then argue that this pattern of increase must be reflected in the calculation of alimony? It takes little imagination to envision future hordes of expert witnesses disagreeing over which forms of wealth accumulation or debt reduction can be included in the needs analysis and factored into the alimony decision. This Court should keep the lid on this Pandora's box firmly closed.

C. The Award of Savings Alimony Constitutes a Prospective Award of Alimony Based on Speculative Future Needs.

The award cannot be justified by the argument that the wife might need these additional savings for future contingencies or "retirement." To do so requires the court to speculate concerning the future, contrary to the many decisions of this and other district courts of appeal.

Before proceeding to an examination of the relevant cases, there are two important facts that should not be overlooked. First, the wife can hardly be said to be without a contingency fund. She received an equitable distribution in excess of $1

million of which over $318,000 was in liquid assets and $270,000 of which was in retirement funds. Neither can it be said that she is without "retirement" sources. Her husband will be obligated to assist in meeting her needs so long as he has an ability to pay. Moreover, even if his payments did stop and she is forced to rely on her own assets, the record reflects that her current assets, which will not have to be dissipated, could be worth several million dollars by the time of her retirement.

It was error to award the wife 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. This speculation on what may or may not occur in the future is not permitted. For example, in *Joseph v. Joseph*, 681 So. 2d 888 (Fla. 4th DCA 1996), the court reversed a ruling that the wife was entitled to receive a percentage of the husband's future bonuses, because there was no evidence of what the wife's needs would be if and when he received bonuses.[6]

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[6] *See also*, *Kilgannon v. Champiny*, 684 So. 2d 304 (Fla. 2d DCA 1996)(the Court reverses an award of ten percent of the father's future bonuses for child support because the order did not take into account what the child's needs or mother's income would be at the time he receives the bonus; *Condren v. Condren*, 475 So. 2d 268, 269 (Fla. 2d DCA 1985) (without evidence to support a finding that a wife's financial picture will, in fact, change in the future, there can be no provision for an automatic reduction in alimony); *Nelson v. Nelson*, 651 So. 2d 1252 (Fla. 1st DCA 1995) (as a general rule, trial courts may not consider future or anticipated events in setting current alimony and the child support amounts due to the lack of an evidentiary basis or the uncertainties surrounding such future events); *Echols v. Elswick*, 638 So. 2d 581, 582 (Fla. 1st DCA 1994) (the possibility that the wife would receive retirement or Social Security benefits in the future was not a valid reason for denying her permanent periodic alimony); *Edwards v. Sanders*, 622 So. 2d 587, 588 (Fla. 1st DCA 1993) (reliance on husband's anticipated Social Security benefits in determining alimony was erroneous); *Traylor v. Traylor*, 214 So. 2d 15, 16 (Fla. 1st DCA 1968) (determination of amount of permanent periodic alimony based on anticipated military retirement reversed because military retirement had not yet begun, and alimony awards should be based on current existing circumstances, and not on possibilities likely as yet unrealized); *Kinzler v. Kinzler*, 497 So. 2d 909, 910 (Fla. 5th DCA 1986) (there is no way to pre-determine factors that may occur in some future time and,

The trial court's award of savings alimony could only have been based on speculation concerning a number of future events which were not (and could not have been) part of the evidence below. To justify such an award in the instant case, the trial court must have made the following speculative assumptions:

- **The money will be saved.** The order assumes the wife will place the amount of savings alimony into a retirement account and not use the funds for any other purpose (in fact, there is no mechanism provided in the law to require the wife to earmark the "savings" alimony). Therefore, this money will simply be an additional windfall for the wife above her identified current needs. In fact, a recipient of such a windfall has every incentive to spend the money now to more easily demonstrate need at some point in the future.
- **The wife will receive no outside income.** The order assumes that the wife will not receive any income from any source during her lifetime, such as a gift or inheritance which would obviate the fictional "need" for an additional retirement or contingency fund;
- **The wife's expenses will increase.** The order assumes that the wife's expenses will increase substantially beyond the needs identified at the time of the dissolution of marriage;
- **The husband's retirement will eliminate his ability to pay.** The order assumes that the husband will retire with an inability to pay his alimony

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therefore, the determination of a need for alimony is based on evidence of present need and ability to pay).

obligation and that, as a result, the husband will seek a downward modification of his alimony obligation. Coupled with this assumption is the unwarranted conclusion that, if the husband does seek a downward modification, the Court will find that he does not have sufficient income or capital assets to continue to pay the alimony obligation originally awarded and, adjust the husband's alimony obligation downward;

- **The wife's substantial equitable distribution will prove inadequate.** The trial court's award also assumes that the wife's equitable award of over $1 million will prove inadequate for her needs. The order also ignores the substantial growth possibilities presented by such a fund.

- **The wife will not remarry and neither spouse will die.** Under Florida law periodic alimony ceases upon the death of either spouse or the death of the receiving spouse. Thus, by awarding savings alimony up front before any need is generated, the court necessarily assumes that neither contingency will occur. Otherwise, the court is improperly awarding alimony that may otherwise never have been due. *See Stith v. Stith*, 384 So. 2d 317 (Fla. 2d DCA 1980) (the payment of post-mortem alimony prohibited by Florida common law); Abrams, *Florida Family Law* § 31.03[2] (collecting cases).

Such speculation is entirely unnecessary. Florida already provides an efficient mechanism for dealing with future contingencies. At any time either spouse feels that circumstances warrant a change, either because of increased or decreased need or other unforeseen events, either party may seek a modification. Based on the parties' then

current needs and ability to pay, the court can determine whether modification is appropriate. What is important is that the decision regarding modification will be based on facts, not guesswork. *Penkoski v. Patterson*, 440 So. 2d 45, 46 (Fla. 1st DCA 1983) (an alimony award "based on clairvoyance of the trial judge would be clearly less desirable than one which enables the judge to make a decision based on present conditions, leaving the parties to make their own decisions when monetary ability and needs change.").

D. The Award of Future Savings Alimony Has Been Rejected by Courts in Other Jurisdictions.

The only other reported decisions found by the parties that discuss savings alimony unequivocally reject the concept for the same basic reasons discussed by this brief. In *Brooks v. Brooks*, 957 S.W. 2d 783 (Mo. App. 1997), the appellate court was faced with precisely the decision faced by this Court. The trial court required the husband to pay a reasonable monthly expense for payments made by the wife to her retirement fund. 957 S.W. 2d at 790. The appellate court reversed, finding five distinct problems with this approach.

First, the court observed that maintenance (which is Missouri's equivalent to Florida's alimony), was never intended to provide for a spouse's future retirement as opposed to the spouse's current needs. 957 S.W. 2d at 791.

Second, the appellate court recognized that a forced contribution to an ex-spouse's retirement would mean that the payor spouse would potentially be contributing to the recipient's support after her remarriage, or after death. 957 S.W. 2d at 792. In Missouri, as in Florida, alimony is terminated upon the death of either

spouse or the remarriage of the recipient. *Canakaris*, 382 So. 2d at 1202.

Third, the court in *Brooks* was concerned that savings alimony must be based on speculation. To award an amount for future support, the court would have to guess at the future circumstances of the parties. As in Florida and Missouri, alimony awards are predicated on current needs. The court noted that such future contingencies are more properly addressed by modification proceedings. *Id.*

Fourth, the court noted that contributions to retirement in an award of maintenance should not be allowed as a reasonable expense because to do so would properly allow the recipient to build an estate or accumulate capital which did not fulfill the purpose of maintenance. This is particularly true in the instant case where the wife has already received marital assets worth over $1 million.

Fifth, it is difficult, if not impossible, for the court to ensure that the funds earmarked for future support are actually saved for retirement. 957 S.W. 2d at 793. Perversely, there would be a substantial incentive to spend the money now, thus lowering the funds available later and building a better case of need at retirement. As the court observed, the obligor might be required to pay additional support in the future which he or she had technically already paid.[7] *Id.*

Similarly, in *Dehm v. Dehm*, 545 P.2d 525 (Utah 1976), the Supreme Court of Utah rejected the wife's argument that she needed the alimony to augment her

[7] The only way to avoid this inequitable result would be to put the court in the awkward position of determining whether previous savings alimony payments had been wasted.

retirement income and to maintain the insurance policy for the two children where she was making a salary sufficient to meet her needs. The court noted that "no claim is made that the alimony is needed for her support, nor could such a claim be made, in view of her present ability to support herself." 545 P.2d at 528. The court stated that "one of the functions of alimony is not to provide retirement income. We do not want to confuse alimony with annuity." 545 P.2d at 528-529. The wife has been able to cite no reported case in the nation other than *Messina* which approves an award of future savings alimony. Thus, *Messina* and the decision below are not only contrary to well-settled principles governing the award of alimony in the State of Florida, but stand alone as an aberration in the law which should not be adopted by this Court.

The trial court was wrong to award alimony substantially in excess of the wife's needs. The judgment below should be reversed.

CONCLUSION

For all the foregoing reasons, the certified question should be answered in the negative and the trial court's award of "savings" alimony reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. MAIL to: **Raymond A. Alley, Jr., Esquire,** 805 West Azeele, Tampa, FL 33606, counsel for appellee, this ____ day of November, 1999.

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