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

REPLY BRIEF ON THE MERITS OF PETITIONER LARRY W. MALLARD

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CERTIFICATE OF TYPE, SIZE AND STYLE

Counsel for Petitioner certifies that the size and style of type used in this Reply Brief is 14 point (proportionately spaced) Times New Roman.

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ARGUMENT IN REPLY

Unable to dispute the legal foundations of the husband's argument, the wife first argues for an incorrect standard of review, suggesting that the alimony award here is reviewed for abuse of discretion. To the contrary, the isolated legal question certified to this Court is reviewed *de novo.* The wife's brief then suggests, erroneously, that "savings alimony" is necessary to compensate her for the family's prudent spending pattern during the marriage. Overlooked is the fact that this same conservative lifestyle built an estate of $3 million in which she shared equally. Thus, it is the husband who has been penalized by the erroneous decision in this case. Under the majority opinion, the wife received the benefit of the families' savings twice—first in the form of a substantial equitable distribution, and then in the form of "savings" alimony. The trial judge's decision to award the wife alimony substantially in excess of her stipulated needs was legal error and must be reversed.

Standard of Review

This case presents a legal rather than factual question. Although alimony determinations are generally reviewed for abuse of discretion, in this case the wife concedes that the material facts are not in dispute. *See* Wife's Brief ("WBr." at 2).[1] In fact, the parties have stipulated to nearly every element of the final settlement

[1] The wife's brief contains two factual errors of note. The wife suggests that the husband's salary excluding bonuses, options and investments was $428,750. See Wife's Brief at 5. In fact, the financial affidavit referenced by the wife's record cite (R. 111) shows that the husband's base salary was $293,748 as of May, 1998 when he signed his affidavit (R. 141-153). The wife also suggests that the parties agreed that the wife's needs were $5900 per month plus tithes and savings. To the contrary, although the parties agreed that the wife's needs were $5900 per month, the parties disputed whether tithes and savings could be defined as a "need" for the

leaving just the one remaining legal issue which has now been certified to this Court. The trial court's application of the law to these undisputed facts is reviewed *de novo*. As noted by the husband's initial brief, this Court and other Florida appellate courts have not hesitated to reverse errors in the award of alimony when the trial court has failed to follow existing precedent. *See e.g., Boyett v. Boyett*, 703 So. 2d 451 (Fla. 1997) (Court rules as a matter of law that the evaluation of a retirement plan for purposes of equitable distribution should not include contributions made after dissolution).

[2]

The Award of "Savings Alimony" Was Not Based on Need.

The husband's initial brief demonstrated that the trial court's award of savings alimony conflicted with the core principles that govern the award of permanent alimony in Florida. The wife concedes these points. She admits that the purpose of alimony is to provide for the current necessary support of the receiving spouse (WBr. at 11-12, 21-22). She also acknowledges that, once marital property is divided, neither spouse has any vested interest in the good fortune or future income of the

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purposes of calculating alimony.

[2] *See also, Kilgannon v. Champiny,* 684 So. 2d 304 (Fla. 2d DCA 1996) (reversing trial court's award of interest in husband's future bonuses because they were not based on need); *Joseph v. Joseph,* 681 So. 2d 888 (Fla. 4th DCA 1996) (legal error to give spouse a prospective interest in the other spouse's future bonuses); *Hamilton v. Hamilton,* 552 So. 2d 929 (Fla. 1st DCA 1989) (legal error to give spouse a continuing interest in other spouse's future income); *Irvin v. Irwin,* 539 So. 2d 1177 (Fla. 5th DCA 1989) (reversing alimony award based solely on spouse's increased ability to pay without examination of the other spouse's need).

other former spouse (WBr. at 21-22). She agrees that alimony cannot be based on future unforeseen contingencies or speculation (WBr. at 28).

However, while acknowledging these principles in theory, her brief ignores them in practice. Based on nothing more than the husband's alleged ability to pay, the wife argues that she should receive a monthly alimony award of $3,125 in excess of her stipulated needs. This is nothing more than her attempt to participate in the husband's future earning capacity in violation of the substantial precedent argued in the husband's initial brief (HBr. at 12-19).

The purpose of alimony has long been settled in Florida. As the wife concedes, the primary factors to be considered are the "necessities of the wife and the financial ability of the husband" (WBr. At 11). As this Court has made clear, "need" refers to the necessities of life: "Alimony, which apparently is a derivative of the alimentum of the civil law, was designed primarily to provide food, clothing, habitation, and other necessaries for the support of the wife." *Bredin v. Bredin*, 89 So. 2d 353, 355 (Fla. 1956). *See Jacobs v. Jacobs,* 50 So. 2d 169, 173 (Fla. 1951) (alimony is for nourishment or sustenance); *Welsh v. Welsh,* 160 Fla. 380, 35 So. 2d 6, 9 (Fla. 1948) (alimony is to supply "the necessities of the wife").

The wife's analysis entirely ignores this fundamental principle. Nowhere does she make any attempt to identify what "need" is being met by the "savings alimony" she seeks. Certainly, the savings portion was not designed to meet any present need of the wife. The parties stipulated to a base alimony award that, not only meets all of

her needs, but adds a twenty percent cushion over her historical pattern of expenses. The wife has not identified any need that has not been met nor has she identified any portion of her standard of living that is unsatisfactory to her or cannot be attained by the alimony stipulated to by the parties. To the contrary, the parties were able to reach stipulations that very generously meet the family's needs on every issue relating to support.

If the savings alimony awarded by the court below was not designed to meet the wife's current needs, then it could only be for wealth accumulation or to meet her future needs upon retirement, neither of which, as the wife concedes, provides a legal basis for the award. *See* WBr. at 16-17, 19, 22, 28. As to the wife's needs upon retirement, the husband demonstrated in his initial brief that an alimony award cannot be based upon speculation concerning the wife's needs in the future (HBr. at 19-23). Future needs can be dealt with by modification proceedings. Similarly, the husband's brief demonstrated that one spouse has no interest in the other spouse's post-dissolution income. Savings alimony is simply a back-door method to give the wife an interest in the husband's future income contrary to every Florida decision that has addressed the question. *See* HBr. at 12-19.

Other than the split decisions in this case and in *Messina*[3], *the wife has been unable to cite a case from any jurisdiction in the United States permitting the use of alimony to accumulate savings in the absence of a*

[3] *Messina v. Messina,* 676 So. 2d 483 (Fla. 1st DCA 1996).

demonstrated need. The only two cases that the parties have found from other jurisdictions specifically reject the concept of savings alimony. Brooks v. Brooks, 957 S.W.2d 783 (Mo. App. 1997) (alimony is to meet current needs and was never designed to provide for contributions to a retirement fund); *Dehm v. Dehm,* 545 P.2d 525 (Utah 1976) ("one of the functions of alimony is not to provide retirement income").

The wife's response is to suggest that the parties' practice of saving in this case was part of the family's standard of living to be considered in awarding alimony. What the wife overlooks is that a family's marital standard of living is defined by how the parties met the necessities (and luxuries) of everyday living, not how they invested for the future or otherwise accumulated wealth. Although spending patterns for food, clothing, shelter and entertainment will vary dramatically from marriage to marriage, the focus of the court's analysis in awarding alimony has always been on approximating the parties' expense patterns, not their efforts at wealth accumulation. The parties' wealth accumulation, of course, is considered when the parties' marital property is equitably divided.

Perhaps the most common example of wealth accumulation is saving for retirement. Many families make a habit of regular contributions to IRA's, 401(k) plans, or other investment accounts to prepare for retirement. Yet, the wife cannot cite a single case where these contributions have been considered an expense or need for the purposes of calculating alimony. Quite the opposite, at least one Florida case

has confirmed that regular contributions to a retirement plan should not be classified as an expense for purposes of calculating alimony. *Atkins v. Atkins,* 611 So. 2d 570, 572 (Fla. 1st DCA 1992), *rev. denied*, 623 So. 2d 493 (Fla. 1993). If the wife's view of standard of living is correct, then virtually every case where the parties had a regular pattern of saving for retirement or other investments would be a candidate for reconsideration or modification. All future cases would likewise be subject to a complicated analysis during which the court would have to determine what sorts of investments or other wealth accumulation must be factored into the calculation of alimony.

The wife's final argument on this point is to suggest, erroneously, that the 1978 amendment to Section 61.08 changed the standard for awarding alimony. This amendment effected no substantive change. Prior to 1978, courts already had the power to consider "any factor necessary to do equity and justice between the parties." § 61.08(2), Fla. Stat. (1977). The 1978 statute simply listed some of the factors the court could consider. None of these factors signaled any change in the fundamental purpose of alimony. Not surprisingly, after the 1978 amendment, Florida courts continue to reiterate that the primary factors in the calculation of alimony are need and ability to pay.

[4]

The Wife Already Received the Benefits of the Family's Conservative Lifestyle.

The wife complains that, without savings alimony, she would be penalized by the family's choice to be fiscally prudent. In essence, she suggests that she 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 needs below (which included a twenty per cent increase over the parties' historical standard of living). Secondly, as the wife concedes, alimony must be based on the standard of living as established by the parties during the marriage. *See* WBr. at 10, 12; HBr. at 8-10. 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.

[5]

But most importantly, the wife's argument overlooks the fact that she benefited very substantially from the parties' prudence. As her brief candidly acknowledges,

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[4] *Canakaris v. Canakaris,* 382 So. 2d 1197, 1201-02 (Fla. 1980); *Crowley v. Crowley,* 672 So. 2d 597 (Fla. 1st DCA), *rev. denied*, 680 So. 2d 421 (Fla. 1996); *Womble v. Womble,* 521 So. 2d 149, 150 (Fla. 5th DCA), *rev. denied*, 528 So. 2d 1184 (Fla. 1988); *Wood v. Wood,* 528 So. 2d 508 (Fla. 2d DCA 1988).

[5] 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.

"due to the frugal lifestyle they lived, they ended the marriage with over $3 million in assets and virtually no debts." (WBr. at 4). This $3 million marital estate was divided equally between the wife and the husband. Thus, the family's decision to lead a frugal lifestyle has left her with a substantial nest egg which need not be invaded for her support.

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.

[6]

Put simply, the wife seeks the benefit of the family's fiscal conservatism twice, first in the calculation of her equitable distribution and then in the calculation of alimony. In other words, for the purposes of calculating her equitable distribution, she wants the benefit of these savings. But then, for the purposes of alimony, she wants this Court to treat these monies as if they were spent rather than saved. She cannot have it both ways. *See Diffenderfer v. Diffenderfer,* 491 So. 2d 265, 267 (Fla. 1984) ("obviously, injustice would result if the trial court were to consider the same asset in

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[6] To illustrate, assume that the parties had spent their twenty-five per cent savings target by living a more lavish lifestyle. In that case, the wife may have had an argument for higher alimony, but her equitable distribution would have been very substantially less. The $3 million nest egg accumulated by the parties through their efforts to save (in which she participated equally) would have been reduced by $75,000 per year (the money they spent instead of saved) as well as the income that accumulated over time as a result of these savings.

calculating both property distribution and support obligations"). The husband freely acknowledges that the wife is entitled to benefit from the family's pattern of saving, but only once.

This Case is Not About Parsimony.

In light of the exemplary way in which the husband handled his financial and support obligations arising out of the divorce, it is unfair for the wife's brief to accuse him of parsimony. The husband and wife left the marriage with an identical net worth in excess of $1 million. The wife received $300,000 in securities, $270,000 of the couple's retirement accounts and the 3800 square foot marital home valued at $542,300 which she received free and clear of any liabilities. The husband agreed to a non-taxable lump sum payment of $18,125 in retroactive support and agreed to pay their minor child's private school tuition, as well as the child's auto insurance, health insurance and reasonable and necessary non-covered bills. Finally, the husband paid all of the wife's attorney's fees in the trial court.

Having stipulated to virtually everything, the husband presented only two isolated issues to the trial court for decision: the issue of savings alimony now before this Court and an issue, not raised on appeal, concerning the wife's decision to continue to live in the 3800 square foot 4-bedroom marital home after the minor children graduate and leave for college when a smaller home might be more suitable.[7] In light of the very generous settlement reached by the parties and the husband's

[7] The husband suggested that income should be imputed to the wife based on the difference involved between the $547,000 4-bedroom marital home and a more reasonable home in the

level of cooperation in achieving this settlement without rancor or unnecessary litigation expense, it defies belief that the wife's brief accuses him of miserly conduct. If all spouses were this "parsimonious," Florida's family law courts would be far less busy.

$300,000 range. However, the court ruled against the husband on the issue of imputed income and he has not raised this issue on appeal.

CONCLUSION

For all the foregoing reasons, the trial court's award of savings alimony must be 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 February, 2000.

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