SUPREME COURT OF FLORIDA

CASE NO. SC02-1925

L.T. CASE NO. 3D00-3096

CHARLES FREDERICK ACKER,

Petitioner,

vs.

BARBARA DRUMM ACKER,

Respondent.
_____/

ANSWER BRIEF OF RESPONDENT, BARBARA DRUMM ACKER

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INTRODUCTION

The Petitioner, CHARLES FREDERICK ACKER, the Petitioner/Former Husband in the lower tribunal and/or trial court and the Appellant in the appeal in the district court will be referred to as Athe Former Husband.@ The Respondent, BARBARA DRUMM ACKER, the Respondent/Former Wife in the lower tribunal and/or trial court and the Appellee in the appeal in the district court will be referred to as Athe Former Wife@.

Volume I of the Record-On-Appeal will be referenced by AR.p. ___@. Volume II of the Record-On-Appeal consists of the transcript of the trial proceedings taken on May 25, 2000. Reference to the transcript of the trial proceedings will be by the use of the symbol AT. ___ lines ___@.

Reference to the Appellant=s Exhibits will be by the use of the symbol APX ___@.

Reference to the Respondent=s Exhibits will be by the use of the symbol ARX ___@.

Where the exhibit is a transcript of a deposition, the references will be to the Exhibit number in the manner as stated above followed by the identification of the page number and lines within the transcript relevant to the reference.

SUMMARY OF THE ARGUMENT

The lump sum, cash payment of $1,066,378.00, which the Former Husband received upon his voluntary, early retirement from Delta Airlines in 1997, was not equitably distributed to the Former Husband at the time of the parties= divorce and, rather, was a windfall received by the Former Husband upon his retirement. The Former Husband now has these funds available to continue to pay permanent periodic alimony to the Former Wife. In addition, the Court may also look to the interest income that the Former Husband=s retirement benefits are generating, in order to assess his ability to pay permanent periodic alimony to the Former Wife.

The Former Wife does not need less money now than she did at time of the parties= dissolution. The Former Wife is not self-sufficient or self-supporting and relies upon the Former Husband=s monthly alimony payment to live. Given that the Former Wife still needs the support and the fact that the Former Husband has an income of approximately $170,000.00 annually, which is equal to, if not actually higher, than the income he had when the original alimony amount was established, the Former Husband failed to show the change in circumstances necessary to justify a modification of the Final Judgment of Dissolution of Marriage.

Moreover, both the Former Husband=s retirement and the Former Wife=s prospects of limited employment were considered at the time of the parties= dissolution. The record; therefore, supports an inference that the current situation was contemplated at the time of the entry of the Final Judgment and, thus, a modification

of the Former Wife=s alimony award is not justified.

The Former Husband failed to sustain his burden of proving entitlement to a modification of his alimony obligation because he failed to present any evidence that his income is any less now than it was at the time of the Final Judgment or that there has been a substantial change of circumstances. Moreover, there is sufficient basis in the record, including evidence of the Former Husband=s current income, expenses, life-style, and increased assets, to support the trial court's conclusion that the Former Husband failed to meet his burden of proof and the evidence in this case does not show an abuse of discretion by the lower tribunal in denying the Former Husband=s Petition for Modification of Final Judgment of Dissolution of Marriage Awarding Alimony.

Further, in the instant case, the Former Husband=s position was completely without merit and the Former Wife was compelled to defend the Former Husband=s Petition before the lower tribunal, as is evidenced by the uncontroverted testimony and evidence presented to the trial court. Even with the equal distribution of the parties= assets pursuant to the terms of their Marital Settlement Agreement, the Former Husband's current income is clearly greater than the Former Wife's, and he is in a better position to pay the Former Wife=s attorney's fees. As such, the Former Wife was properly awarded attorney=s fees that were required by the Former Husband=s attempt to alter the parties= existing Final Judgment of Dissolution of Marriage to his advantage.

ARGUMENT

A. THE TRIAL COURT PROPERLY CONSIDERED THE TOTALITY OF THE CIRCUMSTANCES AND THE FACTORS SET FORTH IN FLORIDA STATUTES ' 61.14 IN DENYING THE FORMER HUSBAND=S PETITION FOR MODIFICATION OF FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE AWARDING ALIMONY AND THE TRIAL COURT DID NOT ADOUBLE DIP@ INTO THE FORMER HUSBAND=S EQUITABLE DISTRIBUTION AWARD IN DETERMINING THAT THE FORMER HUSBAND HAS THE CURRENT FINANCIAL ABILITY TO CONTINUE PAY PERMANENT PERIODIC ALIMONY TO THE FORMER WIFE

The parties= Marital Settlement Agreement entered into between the parties on March 19, 1993, states in pertinent part as follows:

> The parties agree, as well, that the permanent alimony to be paid by Mr. Acker to Mrs. Acker shall not be modifiable for any reason, whatsoever, for the first three years; but are subject to modifiability at the expiration of the three year period.

Subject to modifiability at the expiration of the three year period. And we both

need to repeat that at the end of approximately six years, when the husband retires, no longer flies for Delta and is living off of his pension, we agree to revisit the matter of the amount of alimony that he pays, thereafter. (R.p. 1-19, page 11 lines 12-24).

At the time of trial, the Former Husband was 61 years of age. The Former Husband had been employed by Delta Airlines for 29 years, from 1968 until the Former Husband took voluntary, early retirement in 1997, at age 58. (T. 29 lines 19-23, T. 30 lines 1-4).

The Former Husband first learned about the possibility of early retirement from Delta Airlines, as well as modification to the Delta Airlines= retirement plan in 1996, 3 years after the parties= dissolution. The Former Husband testified at trial as follows: In 1996, there were contract negotiations between the pilots and the company

for a new contract, and there were basically, two, two plans that were available at the time, an A,B Plan, and a final average earnings plan, and because of the stock market performance, which was associated with the A,B Plan, it has performed so well, that the Delta was going to accumulate a large liability. So, they made an agreement with the negotiators, to stop the unit value that they used to compute the variable portion of that plan, and in exchange, that was frozen at that figure and

it was exchanged for an early buyout that also included an enhancement for senior pilots.

(T. 30 lines 17-25/T. 31 lines 1-4).

Quite simply, the Former Husband took under the A,B Plan upon his voluntary, early retirement from Delta Airlines because it outperformed the Final Average Earnings Plan. (T. 33 lines 14-15).

At the time of the parties= dissolution, the Former Wife=s expert, forensic accountant relied upon the information provided by Delta Airlines as to the value of the Former Husband=s pension, as well as information presented by the Former Husband in his sworn Financial Affidavit, wherein the Former Husband valued his pension at approximately $404,000.00. (T. 138 lines 25, T. 139 lines 1-5). Additionally, it is unrebutted in the instant case, that the information provided by the Former Husband and by Delta Airlines to the Former Wife=s counsel and expert, forensic accountant, Loretta Fabricant, C.P.A., during the course of the parties= dissolution proceeding, indicated that upon retirement, the Former Husband was to receive a monthly annuity in the amount of $7,400.00. (T. 135 lines 19-23). In fact, this sum is slightly less than the value of the monthly annuity that the Former Husband currently receives from Delta.

Eventually, during the course of the parties= dissolution proceeding, the parties agreed upon a compromised value for the Former Husband=s Delta Airlines= pension

for purposes of equitable distribution in the amount of $487,000.00. (T. 135 lines 19-23, T. 80 lines 1-22). However, the Former Wife=s expert, forensic accountant specifically testified at trial, that the Former Wife received no documents at the time of the parties= dissolution, as to any early retirement benefit package that the Former Husband might receive from Delta Airlines. (T. 130 lines 22-24). Further, the Former Wife=s expert forensic accountant also testified that at the time of the parties= dissolution, the Former Husband was adamant about receiving 100% of his Delta Airlines= pension. (T. 130 lines 10-16).

The Former Husband=s pension expert, Tony Thelen, was a pilot for Delta Airlines for over 30 years and was also chairman of the Retirement and Insurance Committee for the Delta Pilots Union from 1983 to 1997. Mr. Thelen wrote the Delta Benefits Program for Pilots, which included all pension and retirement benefits. (PX 6 5/25/00/page 4 lines 23-25, page 5 lines 1-25). Mr. Thelen, the Former Husband=s Delta Airlines= pension expert, testified as follows:

MR. KAVULICH: I believe you testified earlier that you would advise pilots from time to time as to how to handle their pension in a divorce situation.

MR. THELEN: Yes.

MR. KAVULICH: Okay. Can you tell me what that advice was?

MS. HASS: I=m going to object. You either need to limit that to Mr. Acker or you need to ask specifically who you=re referring to.

MR. KAVULICH: Okay. Let=s say as to Mr. Acker. Did you advise Mr. Acker?

MR. THELEN: Yes, I did.

MR. KAVULICH: Okay. And what advice did you render to him?

MR. THELEN: The same advice I=ve rendered to most pilots. That was to use all of your assets if necessary to buy your pension back, to protect your pension under all circumstances, don=t allow your ex-spouse into your pension because it was the only way you had to protect your future life.

MR. KAVULICH: Okay. And to do the buy out, how would that have been accomplished?

MR. THELEN: Well, usually you would end up giving the spouse the 401-K, the house, or any other assets you had, after a present value was determined as to the value of the pension. So you would buy our pension back with your other assets.

(PX 6 5/25/00/page 16 lines 3-25, page 17 lines 1-3).

* * *

MR. KAVULICH: In 1992, if you know, if an attorney on behalf of Mrs. Acker had requested pension information as to Mr. Acker=s pension and retirement benefits as of the date of him reaching retirement, what information would Delta have given as a matter of policy?

MR. THELEN: Delta only gave the FAE benefit estimates because the old plan,

> or A/B plan, or minimum benefit, was too speculative at that point. In order to achieve or obtain that guarantee, you had to work until 60, and you didn=t know what the unit value was at 60 because the market could go either up or down from whatever intermediate date you were requesting information. They never gave out the information because it was speculative, and no pilot had ever qualified for it at the time that Fred went through his divorce. Remember, it was July 1994 that the first pilot ever received an extra dollar because of the minimum benefit guarantee.

(PX 6 5/25/00/page 18 lines 24-25, page 19 lines 1-15).

It is perfectly clear from Mr. Thelen=s testimony that no information was provided to the Former Wife=s counsel or expert, forensic accountant, at the time of the parties= dissolution, which would have accurately indicated what the value of the Former Husband=s pension would be at the time of his retirement. Thus, it was not disclosed to the Former Wife that the Former Husband=s pension would be worth not $487,000.00 upon his retirement, but in excess of $1,550,000.00.

Certainly, the Former Husband was counseled by Mr. Thelen during the course of the parties= dissolution litigation to protect his pension Aunder all circumstances@. Moreover, Mr. Thelen also testified that it was not until July 1994, exactly one (1) year subsequent to the entry of the parties= Final Judgment of Dissolution, that a Delta pilot received additional benefits under the new or alternative A,B Retirement Plan, which

the Former Husband would eventually benefit from when he elected voluntary, early retirement in 1997.

Accordingly, the $1,066,378.00 lump sum, cash payment that the Former Husband received was not as a result of growth of the marital accumulations of the pension after the parties= dissolution, as the parties were divorced in 1993, and the Former Husband took early retirement in 1997. The only Delta pension that the Former Husband received in equitable distribution of the parties= marital estate, was that portion of the Former Husband=s pension valued by the parties at the time of their dissolution in the amount of $487,000.00. (T. 21 lines 4-6).

In short, the lump sum, cash payment of $1,066,378.00, which the Former Husband received upon his voluntary, early retirement from Delta in 1997, was not equitably distributed to the Former Husband at the time of the parties= divorce and, rather, was a windfall received by the Former Husband upon his voluntary, early retirement.

The testimony at trial of both the Former Wife=s expert, forensic accountant, Loretta Fabricant, C.P.A., and the Former Husband=s own expert pension witness, Tony Thelen, that information regarding this lump sum payment was not disclosed to the Former Wife at the time of the parties= dissolution and was not taken into account in the equitable distribution of the parties= marital estate, was unrebutted by the Former Husband at trial.

Again, the Former Wife=s expert forensic accountant, Loretta Fabricant,

C.P.A., who was also the Former Wife=s expert forensic accountant in the dissolution proceeding and reviewed all of the Former Husband=s pension information, testified at trial that in 1992, no information was provided to the Former Wife that there were 2 Delta Airlines= retirement plans (T. 142 lines 16-24). As such, the instant case is completely inapposite to Boyett v. Boyett, 703 So.2d 451 (Fla. 1997), and an analysis of the instant case cannot be predicated upon Boyett, as the Former Husband inaccurately suggests. Ms. Fabricant testified at trial as follows:

MS. FABRICANT: It is my understanding, now. It was not my understanding in =92, nor was it ever brought up to us in =92, there were two plans or possibly a different payout than the one that both his expert and we were given from Delta existed. Never a mention there could have been a bonus or shortfall, never.

MR. KAVULICH: And you didn=t pick it up when you read the plan document, itself?

MS. FABRICANT: No way by my picking it up.

MR. KAVULICH: Well, the plan document, meaning A, B Plan, was a guarantee; you don=t recall those terms?

MS. FABRICANT: From the new documents that were received and from Mr. Thelen=s deposition, he said nobody had ever done anything under this new plan, until 1996. So, my crystal ball would not have been that good, other than to evaluate it the way it was always valued, and the way Mr.

Acker=s own expert valued it.

MR. KAVULICH: I thought it was your evaluation?

MS. FABRICANT: No, sir. $487,000.00 was my evaluation.

MR. KAVULICH: Isn=t it true, that under the A, B Plan, back in >92, also, no pilot was taking it under at that time, the plan?

MS. FABRICANT: I don=t specifically recall that.

MR. KAVULICH: You don=t recall him saying, the first pilot that took itYunder that plan...was a pilot in >94?

MS. FABRICANT: >96, I thought is what he said.

MR. KAVULICH: okay, >96?

(T. 142 lines 19-24, T. 143 lines 1-21).

Further, the Former Husband=s own expert, pension witness, Thomas Bastian, testified at trial that he had no experience in valuing pensions; had not allocated airline pensions in the past 5 years; and, had never evaluated a Delta Airlines= pension prior to his testimony in the instant case. (T. 114 line 25/T. 115 lines 1-21). In fact, when questioned at trial, Mr. Bastian was compelled to admit and concur that no information had been provided to the Former Wife at the time of the parties= dissolution that there were 2 Delta Airlines= retirement plans and that the Former Husband had, indeed, received a windfall upon his retirement from Delta. Mr. Bastian, the Former Husband=s pension expert, testified at trial as follows:

MS. HASS: If the $7,348.00 a month annuity, per month annuity that Mr. Acker currently receives, gross, if the value of that at the time of the divorce was $437,000.00, that is what the pension was valued at, according to the final judgment?

MR. BASTIAN: Yes.

MS. HASS: If Mr. Acker then got one-million on top of that, plus his monthly annuity benefit, didn=t he actually get one-million dollar windfall in the divorce, himself?

MR. BASTIAN: Again, you are comparing the amount, the $7,348.00, which is under one type of plan that was in place, but he ultimately got paid out of a different type of plan, their A,B Plan.

MS. HASS: Well, in 1993, could we have estimated anything different than the $7,348.00?

MR. BASTIAN: Not based on the information that was in the that letter.

(T. 118 lines 22-25, T. 119 lines 1-14).

* * *

MS. HASS: Would anything have been received, anything over and above the $487,000.00, after, would have been post-dissolution?

MR. BASTIAN: I don=t= know. I understand your question.

MS. HASS: Could it have been?

MR. BASTIAN: That the pension was evaluated, based on what was in place at that time, and the assumptions that were made, which was that he was going to leave at that point and not have the A,B Plan kick in. The fact it did was because of future events that were unknown at that point, I believe.

MS. HASS: But the fact of the matter, he actually got greater assets, is that correct?

MR. BASTIAN: Yes, he did get greater assets.

(T. 124 lines 21-25, T. 125 lines 1-9).

The lump sum, cash settlement in the amount of $1,066,378.00 that the Former Husband received from Delta upon his voluntary, early retirement was the non-marital portion of the Former Husband=s pension. As such, consistent with the third district=s opinion in Hollinger v. Baur, 719 So.2d 954, at 955 (Fla. 3d DCA 1998), this non-marital portion of the Former Husband's retirement account, may be considered in determining the Former Husband's ability to pay permanent periodic alimony to the Former Wife.

In fact, when the Former Husband was questioned by his attorney at trial, it was the Former Husband=s own testimony that the Delta Airlines pension that he received in equitable distribution of the parties= assets, was the value of his pension at the time of the parties= dissolution or $487,000.00.

MR. KAVULICH: It was your understanding you were buying out your pension rights, as they existed at the time of the marriage?

MR. ACKER: I was buying out all of the pension rights accumulated, up to that point.

(T. 29 lines 14-18).

In Diffenderfer v. Diffenderfer, 491 So.2d 265, at 267 (Fla. 1986), this Honorable Court held that a pension could be treated as an asset for equitable distribution or as income available to determine a spouse's ability to pay alimony, but not both.

Citing this Court's decision in Diffenderfer, the Former Husband contests the trial court's consideration of his pension in determining his continued ability to pay periodic alimony. Id. In Diffenderfer, this Court expressly disapproved of the use of retirement benefits for alimony purposes where the same benefits were also subject to equitable distribution. Id. at 267. In the instant case, only a portion of the Former Husband's pension that was equitably distributed was the annuity portion. The windfall that the Former Husband received upon his early retirement from Delta Airlines in the amount of $1,066,378.00 in cash, consisted of assets that were obtained by the Former Husband after the parties= dissolution B they were not valued as part of the equitable distribution of the parties= marital estate and are funds the Former

Husband has available after the parties= dissolution, which gives him the ability to continue to pay alimony. Hollinger, 719 So. 2d 954.

In Rochester v. Rochester, 616 So.2d 1200 (Fla. 2d DCA 1993), the former husband sought modification of the permanent periodic alimony provision of the final judgment of dissolution. The trial judge denied the former husband's petition, as AYthe source of the alimony payments was a substantial marital asset, the former husband's retirement benefits.@ Id.

The second district further opined in Rochester:

> In Diffenderfer v. Diffenderfer, 491 So.2d 265, 268 (Fla.1986), the supreme court recognized that often a lack of sufficient offsetting assets or other circumstances may leave the court with little option but to utilize the pension benefits in calculating permanent periodic or rehabilitative alimony. This case presents just such a situation. If the judge had modified the amount of alimony, he would have improperly eroded Audrey=s entitlement to a share of a substantial marital asset accumulated over a forty-year marriage.
>
> Id.

In the instant case, there are sufficient offsetting assets. However, as in Rochester, if the trial judge had modified or terminated the Former Wife=s alimony award, he would have improperly eroded the Former Wife=s entitlement to a share of

a substantial marital asset accumulated over a 23 year marriage. Id.

Section 61.08(2)(d) of Florida Statutes (1997) requires trial courts to consider, when fashioning awards of alimony, "all relevant economic factors, including but not limited to: the financial resources of each party, the non-marital and the marital assets and liabilities distributed to each." ' 61.08(2)(d), Fla. Stat. (1997). Section 61.08(2)(g) of Florida Statutes (1993), requires the court to consider "all sources of income available to either party." ' 61.08(2)(g), Fla. Stat. (1993). The Former Husband=s interpretation of Diffenderfer, is directly contrary to those statutory provisions. 491 So.2d 265.

In McLean v. McLean, 652 So.2d 1178, at 1181 (Fla. 2d DCA 1995), the second district observed that when a party receives an asset in equitable distribution that will result in immediate investment income, there is no reason for that income to be excluded from consideration under ' 61.08(2)(g) of Florida Statutes (1993).
' 61.08(2)(g). Similarly, there is no reason for that income to be excluded under
' 61.14. '61.14, Fla. Stat. (2001).

The Former Husband had $1,268,710.00 in his IRA at the time of trial from his cash out with Delta Airlines. (T. 73 lines 9-10). Specifically, in 1999, the Former Husband received $72,000.00 in annuity payments, the Former Husband=s IRA appreciated by $225,000.00, and he earned another $3,000.00 per month in interest income from his IRA. (T. 73 lines 14-19, T. 76 lines 22-25, T. 77 line 1, T. 78 lines 23-25, T. 132 lines 9-20). In fact, the Former Husband admitted at trial that his net worth

is substantially larger now than at the time of the parties= dissolution. (T. 82 lines 9-13). Not surprisingly, as a millionaire, the Former Husband is better off today financially, than he was at time of the parties= dissolution in 1993. (T. 131 lines 12-18).

The Former Wife=s expert, forensic accountant, Loretta Fabricant, C.P.A., confirmed this in her own unrebutted trial testimony. Specifically, Ms. Fabricant testified that the Former Husband=s interest income alone from the $1,000,000.00 in his IRA at an 8% return would be $80,000.00 annually and with the Former Husband=s annuity, which is approximately $90,000.00 per year, this yields the Former Husband $170,000.00 in income annually. The Former Husband earned approximately $160,000.00 per year from his employment with Delta Airlines during the parties= marriage. (T. 4 line 12, T. 10 lines 21-22). The Former Husband is doing as well financially on an annual basis now that he is retired, as he was during the parties= intact marriage, if not better. (T. 148 lines 6-23). Accordingly, the fact that the Former Husband has retired has not affected his ability to pay his Former Wife $3,000.00 per month in alimony. (T. 148 lines 20-23).

The income from the pension equitably distributed to the Former Husband is no different than income produced by any other asset equitably distributed to a spouse. Cummings v. Cummings, 719 So.2d 948, at 950 (Fla. 4th DCA 1998). Accordingly, if it must, under ' 61.08 of Florida Statutes (1991), be considered in determining alimony, it must also be considered in determining whether a modification of that

alimony award is also justified. ' 61.08, Fla. Stat. (1991).

Most recently, the fourth district opined in Lauro v. Lauro, 757 So.2d 523 (Fla. 4th DCA 2000) as follows:

> We hold that where a pension is currently generating income, that income must be considered in assessing the need for and the ability to pay alimony. We remind trial courts, however, that in Diffenderfer our supreme court emphasized that it was not >establishing inflexible rules that make the achievement of equity between the parties difficult, if not impossible.= Diffenderfer, 491 So.2d at 269. It also pointed out that section 61.08(2)(g) provides that, in awarding alimony, courts, >may consider any other factor necessary to do equity and justice between the parties.=

Id. at 525.

Similarly, in order to do equity and justice between the parties in the instant case, this Honorable Court may also look to the interest income that the Former Husband=s retirement benefits are generating, in order to assess his ability to pay permanent periodic alimony to the Former Wife.

In McLean, the trial court rejected the wife's need for permanent alimony because it assumed that Mrs. McLean would have approximately $74,000.00 in investment income. In addition, the trial court assumed that she would convert a pension plan into

an asset producing a present annual income of $50,000.00. 652 So.2d 1178, at 1181.

In contrast, in the instant case, the Former Wife=s expert, forensic accountant testified at trial that the Former Wife requires the Former Husband=s monthly, periodic alimony to support herself and that the Former Wife lives on her alimony, on the meager income from her part-time employment, and on the interest from her small savings account, which in 1999 was $3,900.00. (T. 133 line 11). Further, the Former Wife has no other substantial savings. (T. 132 lines 21-25, T. 133 1-17, T. 133 4-6). The Former Wife=s expert accountant also testified at trial that the 401k that the Former Wife received in equitable distribution of the marital estate cannot be invaded by the Former Wife or she will be subject to a 10% penalty for early withdrawal and will, accordingly, deplete her remaining assets even further. (T. 133 lines 18-22).

The Former Wife should not be compelled to prematurely convert her savings and retirement funds into an income source because the Former Husband who had $1,268,710.00 in his IRA at the time of trial, has decided that he no longer wants to pay alimony to his Former Wife after her 23 years of dedicated service. Makowski v. Makowski, 613 So.2d 924, at 927 (Fla. 3d DCA 1993).

Further, it is clear from the testimony and evidence in the instant case, that the Former Wife=s part-time employment will not cause her to amass savings or even provide for her ordinary monthly support. Given the parties' standard of living during the parties= 23 year intact marriage and the Former Husband's established current ability to pay said periodic alimony, it would be an abuse of discretion to force the

Former Wife to forego her future security and invade those assets equitably distributed to her, in order to support her present lifestyle. McLean, 652 So.2d 1178, at 1181. Moreover, the Former Wife did not receive any lump sum alimony as part of the parties= Marital Settlement Agreement, as the Former Husband incorrectly alleges. (T 21 lines 19-21, R.p. 1-19/pages 6-7).

In fact, the Former Husband is attempting to modify his alimony obligation based upon the receipt by the Former Wife of assets previously awarded as a part of her equitable distribution. Just as the Former Husband argues that a retirement benefit which has been awarded to a party pursuant to an equitable distribution of assets cannot also be treated as a source of alimony, similarly, the Former Husband cannot look to those assets equitably distributed to the Former Wife to provide for her continued support. Diffenderfer, 491 So.2d 265, at 267 and DeLoach v. DeLoach, 552 So.2d 324, at 325 (Fla. 1st DCA 1989).

It is important to distinguish; however, that the $1,066,378.00 lump sum payment that the Former Husband received from Delta Airlines upon his retirement was not taken into account in the equitable distribution of the marital estate at the time of the parties= dissolution, but was a windfall to the Former Husband received upon his retirement and may be treated as a source of alimony. Accordingly, the instant case underscores the inequity of the Former Husband=s attempt to relieve himself of some or all of his alimony obligation based upon the Former Wife's receipt of her equitably distributed

share of the parties= assets, without regard to her needs and his continued ability to pay such support. See, Hamlet v. Hamlet, 583 So.2d 654, at 656-57 (Fla. 1991).

In the instant case, the lower tribunal correctly considered the needs of the Former Wife and the impact a termination or reduction of alimony would engender. It is well established that in assessing those needs, the lower tribunal was correct in considering any assets which the Former Husband has accumulated or received since the entry of the Final Judgment of Dissolution of Marriage, as well as any income generated by those assets.

B. THERE WAS NO ABUSE OF DISCRETION OR MISTAKE OF FACT OR LAW IN THE TRIAL COURT=S DENYING THE FORMER HUSBAND=S PETITION FOR MODIFICATION OF FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE AWARDING ALIMONY, AS THE FORMER WIFE HAS A CONTINUING NEED FOR THE AWARD OF PERMANENT PERIODIC ALIMONY AND THE FORMER HUSBAND HAS THE CURRENT FINANCIAL ABILITY TO CONTINUE TO PAY SUCH AWARD

A modification of alimony requires a change of circumstances that is substantial, permanent, and meaningful, "relating to the needs of the spouse receiving the alimony and the ability of the other spouse to pay." Waldman v. Waldman, 520 So.2d 87, at

89 (Fla. 3d DCA 1988).

The Former Husband testified at trial that the reason he took a voluntary, early retirement from Delta Airlines was because he received a Avery nice@ retirement package. (T. 8 lines 18-25). The Former Husband also testified that he had some health problems at the time of his retirement, but offered no medical evidence to support his self-serving testimony. Further, there was no evidence that these health problems were debilitating or continuing in nature. In fact, the Former Husband testified that after his voluntary, early retirement from Delta Airlines he could have still flown as a flight engineer after age 60, the age of mandatory retirement for commercial aircraft pilots. (T. 35 line 25, T 36 lines 1-18).

Since the parties= dissolution in 1993, the Former Husband has enjoyed an extremely comfortable lifestyle and has engaged in extensive discretionary spending that attests to his ongoing financial ability to continue to pay his monthly alimony obligation to the Former Wife, despite his voluntary, early retirement from Delta Airlines. This is in juxtaposition to the Former Wife, who enjoys an extremely conservative lifestyle, endeavoring to live within her limited financial means.

Specifically, after the parties= dissolution in 1993, the Former Husband purchased a 3 bedroom, 2 bath townhouse in Tallahassee, Florida, at a cost of $155,000.00. The Former Husband further testified that his expenses to maintain said residence are approximately $1,800.00 to $2,000.00 per month (T. 16 line 10, T. 16 lines 16-20).

The Former Husband currently resides in his Tallahassee, Florida townhouse with his girlfriend, Carolyn Howell. (T. 41 lines 1-6). The Former Husband testified at trial that he pays all of the expenses for the Tallahassee home for both himself and his girlfriend, which includes the real property taxes and insurance, save for the monthly telephone bill, which is paid by Ms. Howell. (T. 54 lines 3-12, RX C 5/25/00/page 6 lines 24-25).

Further, in 1999, the very year that the Former Husband sought to terminate his alimony obligation, the Former Husband put a new roof on his Tallahassee, Florida home, which cost $4,000.00. (T. 51 lines 18-24). The Former Husband=s Tallahassee residence is now worth $180,000.00. (T. 51 lines 5-13).

Since the parties= dissolution in 1993, and since his voluntary, early retirement from Delta Airlines in 1997, the Former Husband has not suffered a reduction in his income and has not had to adjust his lifestyle in any manner. While the Former Husband swore in his Verified Financial Affidavit filed with the lower tribunal on February 10, 1999 (R.p. 98-111) that he is spending $9,385.00 per month (he later reduced this figure to $5,934.00 per month in his Verified Financial Affidavit filed with the lower tribunal on May 23, 2000 [PX 4 5/25/00]), the Former Wife is spending between $3,500.00 and $4,000.00 per month to live. (T. 157 lines 13-16).

In fact, since the parties= dissolution, the Former Husband has enjoyed a jet-set lifestyle, traveling, purchasing homes, and enjoying his status as a millionaire. Specifically, when the Former Husband retired from Delta Airlines in April 1997, he

took a group of family members and friends to France to celebrate his retirement and paid for all of the air travel expenses, accommodations, food, and entertainment. (T. 52 lines 21-25, T. 53 lines 1-25, T. 54 lines 1-2).

The Former Husband has also taken vacations with his girlfriend, Carolyn Howell. The Former Husband=s most recent trip as of the date of the trial, was a vacation to Arizona, where the Former Husband and his girlfriend stayed at various hotels, dined out, and shopped. (T. 69 lines 1-25, T. 70 lines 1-25, T. 71 lines 1-14).

The Former Husband testified at trial that he spends approximately $150.00 per month on gifts for family members and friends, which includes his girlfriend=s family members as well. (T. 58 lines 16-25). In fact, the Former Husband gave his girlfriend=s son $500.00 as a wedding gift (RX C 5/25/00/page 22 lines 7-8). The Former Husband also purchased for his girlfriend, a $600.00 Omega watch and a ring that cost $900.00. (T. 56 lines 13-19). Generally, the Former Husband testified at trial that he spends a lot of money on gifts. (T. 59 lines 1-4). Perhaps as a gift to himself, the Former Husband has plans to purchase a new motor home.
(T. 64 lines 2-12).

Further, the Former Husband has been very generous to his girlfriend. In April 1997, the Former Husband gave Carolyn Howell $9,000.00 to purchase a house in Tallahassee, Florida. (T. 54 lines 23-25, T. 55 line 1, RX C 5/25/00/page 14 lines 1-12). Apparently, the Former Husband has also been very generous to his friends, as the

Former Husband loaned his friend $13,000.00 in 1997. (T. Page 61 lines 3-25).

The Former Husband also pays for all of girlfriend=s meals and the Former Husband and his girlfriend dine out approximately 5 times per week. (T. 58 lines 12-15, RX C 5/25/00/page 8 lines 18-25). The Former Husband further testified that he typically spends $300.00 to $400.00 per month on meals outside the home or dining out, and typically incurs $950.00 per month in credit card charges. (T. 59 lines 18-21, T. 59 lines 9-15). Additionally, as of time of trial, the Former Husband had paid his attorney the sum of $10,000.00 for representing him in the modification action before the lower tribunal. (T. 71 lines 16-20).

In Cowie v. Cowie, 564 So.2d 533, at 534 (Fla. 2nd DCA 1990), at a modification hearing, the former husband testified that he had remarried and had purchased a home with an adjustable rate mortgage. These obligations sometimes made it difficult for him to pay his alimony obligation. The second district opined that, AAs a matter of law, these obligations, which the former husband had voluntarily created, are not sufficient grounds to modify the amount of alimony.@ Id. at 534-35. Similarly, in the instant case, the Former Husband=s current financial obligations created since the parties= dissolution and discretionary spending are not sufficient grounds to modify or terminate the Former Husband=s alimony obligation. Rather, the Former Husband=s spending and accumulation of assets since the parties= dissolution, substantiate the Former Husband=s ongoing ability to pay said alimony award.

Accordingly, since 1994, the Former Husband=s son has resided in the Former Husband=s Miami, Florida home, which the Former Husband received in equitable distribution of the parties= marital estate. The Former Husband pays the monthly mortgage and real property taxes related to said residence and the Former Husband testified at trial that he has mortgage expenses of $1,778.00 per month, which includes his residences in Tallahassee and Miami. (T. 17 lines 6-9, T. 43, T. 56 lines 20-25, T. 57 lines 1-8, T. 57 lines 9-19, T. 65 lines 24-25, T. 66 lines 1-3). The Former Husband also testified that since 1994, his son has not paid any rent for living in the Former Husband=s Miami home and the Former Husband has not requested of his son that he pay any rent. (T. 58 lines 3-11).

The Former Wife=s expert witness at trial, Demaris Quintero, who has been a licensed realtor in the State of Florida for twenty (20) years and who specializes in Coral Gables, Florida properties, testified that she has sold numerous homes in the Coral Gables area and within 1 mile of the Former Husband=s residence. (T. 94 lines 1-7). Ms. Quintero further testified that she has inspected both the interior and exterior of the Former Husband=s residence.

More importantly, Ms. Demaris Quintero provided unrebutted testimony at trial that the Former Husband=s Miami residence, in which the Former Husband=s son is currently residing Arent free@, could be sold for $200,000.00. (T. 96 lines 23-25). The residence was valued at $85,000 at the time of the parties= dissolution in 1993. (T. 27 line 4). Further, Ms. Quintero also provided unrebutted testimony that the Former

Husband could be renting his Miami home for $2,000.00 per month. (T. 97 lines 2-18).

For someone who claims not to be able to meet his monthly alimony obligation, the Former Husband certainly appears to be able to meet all of his other expenses, as well as forego additional rental income of $2,000.00 per month!

The Former Husband also testified at trial that in 1997, he purchased a residence on 5 acres of land in Cairo, Georgia for his girlfriend, Carolyn Howell, for which the Former Husband paid $105,000.00. (T. 41 lines 10-18, T. 63 lines 10-22). In contrast, Carolyn Howell testified that the residence in Cairo, Georgia was purchased for both she and the Former Husband. (RX C 5/25/00/page 12 line 25, page 13 lines 1-2). Additionally, the Former Husband and his girlfriend have no agreement for Ms. Howell to pay back the money to the Former Husband for the purchase of the Cairo residence for as Ms. Howell testified, ANo, because it=s actually his.@ (RX C 5/25/00/page 13 lines 23-25). Oddly, the Former Husband failed to list the Cairo residence as an asset on his Verified Family Law Financial Affidavit. (T. 65 lines 5-17). Further, Ms. Howell testified that although the residence in Cairo is titled in her name, should she predecease the Former Husband, the Cairo residence has been quit claimed to the Former Husband. (RX C 5/25/00/page 11 lines 20-25, page 12 lines 1-3).

The Former Husband also contributes for expenses related to the Cairo residence that he purchased for his girlfriend. (T. 43 lines 21-24). Specifically, in 1999, the Former Husband paid the property taxes related to the residence, which was approximately $600.00. (T. 65 lines 5-13, RX C 5/25/00/page 17 lines 9-15). The

Former Husband also gave his girlfriend $10,000.00 to purchase tractors and Atoys@ for their residence in Cairo and purchased all of the materials and equipment for the repair of said residence. (RX C 5/25/00/page 15 lines 13-15, RX C 5/25/00/page 24 lines 12-13). Accordingly, despite the fact that the Former Husband testified that his poor health contributed to his decision to take a voluntary, early retirement from Delta Airlines, the Former Husband is fit enough to paint and sand and effect repairs to the house in Cairo. (T. 64 lines 2-6, RX C 5/25/00/page 18 lines 6-10, RX C 5/25/00/page 24 lines 9-10). The Former Husband=s girlfriend also testified that the Former Husband rides a tractor and does all of the landscaping for his Georgia and Tallahassee homes. (RX C 5/25/00/page 24 lines 15-24).

Moreover, when the Former Husband retired from Delta Airlines it was not that he could not pilot an airplane anymore, he just could not fly a large commercial aircraft. As such, the Former Husband was not prevented in any way from seeking alternative employment after his voluntary, early retirement from Delta Airlines. In fact, the Former Husband testified at trial that he could have still flown as a flight engineer after age 60. (T. 35 line 25, T. 36 lines 1-18). Accordingly, the Former Husband=s voluntary, early retirement from Delta Airlines had nothing whatsoever to do with his health; the Former Husband retired because he received a Agreat@ early retirement package. (T. 52 lines 5-10).

In the instant case, AA significant portion of the husband=s monthly expenditures cannot be deemed basic necessities and must therefore yield to his

obligation to the former wife.@ McManus v. McManus, 638 So.2d 1051, at 1053 (Fla. 2d DCA 1994). Moreover, this Court opined in Schiff v. Schiff, 54 So.2d 36, at 37 (Fla. 1951):

> Misfortune or sharp decline in income is the criterion by which alimony payments may be reduced; $26,800 for one year's living looks like luxurious living to most of us. Schiff seems to think he should be permitted to squeeze some of it from the old wife's alimony, despite the fact that the late allowance to her is less than he and wife number two pay for lodging. A Court of Equity cannot function on any such provender. When wife number one has the equities in her favor shown here she is entitled to an orchid every time wife two gets one and Schiff cannot take bread from wife one to pay for wife two's orchid. One who deliberately takes on himself the pleasure of supporting two wives, both of whom are shown to have been faithful, should not in Equity be permitted to welsh on his agreement.
>
> Id.

The Former Husband made discretionary decisions to purchase a residence in Tallahassee, Florida; to permit his son to reside in his Miami, Florida home Arent free@ when said property could be generating rental income of $2,000.00 a month; and to give his girlfriend $9,000.00 to purchase a residence in Tallahassee and $105,000.00 to

purchase a residence in Cairo. However, in 1999, the Former Husband decided that he was no longer going to pay his Former Wife alimony, after he made an agreement to do so, and has the financial ability to continue to pay such periodic support to his Former Wife. (T. 74 lines 2-25). Rather, it is the Former Husband=s contention that he should be able to do what he wants to with his money and not pay alimony.

MR. ACKER: You know, it is my money. I earned it. It is my pension, and I should be able to give it to anybody I want to. Or buy whatever I want to. This is what I worked for, for thirty four years.

(T. 75 lines 2-5)

The Former Husband=s actions appear to negate the fact that the Former Wife worked for 23 years in the marital home raising the parties= minor children and attending to the needs of the Former Husband. Further, the money that the Former Husband gave his girlfriend to purchase the homes in Cairo and Tallahassee could have paid approximately 38 months of the Former Husband=s alimony obligation. (T. 132 lines 3-8).

When the Former Wife was asked at trial why, in her opinion, she received permanent periodic alimony as part of her dissolution settlement, the Former Wife responded as follows:

MRS. ACKER: Because Mr. Acker refused to give me any part of the pension,

and it was something that was negotiated at the time of the divorce. He was not willing to give any portion at all or split the pension at all.

We already did spend a day in court with Judge Fierro, and he said to try to settle it, and I personally didn=t want to be there, and I agreed to getting permanent alimony, thinking it would be permanent.

(T. 156 lines 3-14).

The Former Husband asserts that the Former Wife=s circumstances have changed because she is now able to further supplement her income through gainful employment. The record; however, supports the trial court=s findings that the Former Wife=s ability to work is extremely limited.

At the time of the trial, the Former Wife was 51 years of age. The Former Wife relies upon the alimony of $3,000.00 per month to meet her monthly expenses. From these funds the Former Wife pays her household utilities, repairs to her home, which is 28 years old, automobile maintenance, gasoline, and similar expenses. (T. 152 lines 4-9, T. 152 lines 10-11, T. 156 lines 24-25, T. 157 line 1).

The Former Wife=s health is also poor. The Former Wife suffers with migraine headaches, colitis, and asthma, and takes medication for her several ailments. Sometimes the Former Wife must stay in bed for a day or two when she suffers with a migraine headache. (T. 159 lines 13-17). The Former Wife was also in a serious

accident, as a result of which she both fractured and crushed bones in her foot. As such, the Former Wife is limited as to what type of shoes she can wear and how long she can stand on her feet and it is painful for the Former Wife to walk or stand for any length of time. The Former Wife also injured her knee in this accident. (T. 152 lines 24-25).

The parties were married for 23 years and the Former Wife did not work for 22 of those years. The Former Wife only worked part-time during the last year of the parties= marriage. (T. 154 lines 12-19). In fact, during the parties= intact marriage it was never contemplated that the Former Wife would work outside of the home. The Former Wife was primarily a full-time homemaker, engaged in cooking, cleaning the marital residence, Acar pooling@ the parties= 2 children, and providing for the welfare and well being of the children and the family unit, generally. (T. 155 lines 4-14).

The Former Wife currently works only part-time due to her poor health and the fact that she is compelled to wear a special sandal or sneaker and cannot stand on her feet for very long periods of time. (T. 154 lines 2-11). The Former Wife currently earns approximately $1,500.00 more a year now than she did at the time of the parties= dissolution. Consequently, in 1999, the Former Wife had gross income of $9,000.00, which included her interest income. (T. 154 lines 20-24, T. 158 lines 20-24).

The Former Wife=s testimony at trial that she has used her best efforts to work and to earn as much as possible since the parties= dissolution, and certainly as much

as her physical condition will permit, was unrebutted at trial. (T. 159 lines 4-7). Further, the Former Wife=s testimony at trial that she has no typing skills (the Former Wife has not typed in 25 years), no computer skills and, generally, no marketable employment skills was also unrebutted. (T. 159 lines 18-25, T. 160 lines 1-9).

Although the Former Wife=s income after the parties= dissolution may be very slightly higher than at time of the parties= dissolution, it is not substantially higher. The Former Wife=s expert forensic accountant testified at trial that the Former Wife=s gross income in 1999 from her part-time employment was approximately $6,000.00. (T 145 lines 14-17). Moreover, the Family Law Financial Affidavit that the Former Wife presented at the modification trial was not challenged and clearly showed that she requires the full alimony amount to support her modest life-style, which is much more conservative that the life-style enjoyed by the parties during their intact marriage. These changes in the Former Wife's financial condition are certainly not sufficient to justify a downward modification or a termination of her alimony award. Cowie, 564 So.2d 533, at 535 and Galligher v. Galligher, 527 So.2d 858, at 860 (Fla. 1st DCA 1988).

In Tinsley v. Tinsley, 502 So.2d 997, at 997-98 (Fla. 2d DCA 1987), the second district held that an award of $1,200 a month agreed to by the parties as permanent period alimony at the time of the parties= dissolution should not have been reduced to $1,075.00 per month where the husband had more spendable income at the time of his application for a modification than he did at time of the dissolution and where no

appreciable increase in income had come to the wife beyond an amount which was contemplated by the parties at time of the divorce. Id.

In the instant case, when the original alimony of $3,000.00 per month was ordered, the Former Husband had a monthly gross income of approximately $11,400.00 per month. (T. 11 lines 4-13). In 1999, the Former Husband had capital gains or interest income of $200,000.00 on the $1,000,000.00 he has in his IRA plus $88,000.00 in annuity income. (T. 132 lines 9-20).

The unrebutted trial testimony of the Former Wife=s expert, forensic accountant, Loretta Fabricant, C.P.A., was that conservatively speaking, the Former Husband=s interest income alone from the $1,000,000.00 in his IRA at a standard return of 8% would be $80,000.00 annually and the Former Husband=s annuity of $90,000.00 per year, yields the Former Husband a combined annual income of $170,000.00. The Former Husband earned approximately $160,000.00 per year from his employment with Delta Airlines during the parties= intact marriage. Accordingly, now that the Former Husband is retired, he is in the same place financially, if not better, as when he was employed as a full-time pilot. (T. 148 lines 6-23).

The Former Husband=s income and assets have increased by a significantly greater amount since the parties= dissolution than that of the Former Wife=s. Further, the Former Wife continues to require the full amount of alimony originally awarded to permit her to enjoy a semblance of the lifestyle enjoyed during the parties= intact marriage. The Former Husband has the current financial ability to continue to pay the

original award and easily enjoy the lifestyle that he has established since the parties= dissolution, which in contrast to the Former Wife=s current lifestyle is at least as comfortable, if not more comfortable, as that established during the parties= marriage. Webb v. Webb, 659 So.2d 336, at 337 (Fla. 1st DCA 1995).

The Former Wife has not lived at the same standard of living since the parties= dissolution, as she did during her intact marriage to the Former Husband. The Former Wife has not taken any vacations; she has not been at liberty to buy the things she did during the marriage; and she has to be extremely conservative in her spending, as the majority of her money goes to maintain her residence and pay her ordinary expenses. The Former Wife also has to pay for her own health insurance. (T. 168 lines 5-12).

In sharp contrast to the Former Husband=s lifestyle and spending since the parties= dissolution, the Former Wife has had to invade her savings to support herself, which she received in equitable distribution, as the Former Husband has failed to pay alimony since May 1999. (T. 161 lines 6-14). The Former Wife had $92,000.00 in savings as of the date of trial, which were the only funds the Former Wife could draw upon to meet her living expenses after the Former Husband stopped paying alimony. (T. 177 lines 12-15). The law is well settled that a wife is not required to deplete her capital assets in order to maintain a standard of living. Kaufman v. Kaufman, 541 So.2d 743, at 744 (Fla. 3d DCA 1989) and De Cenzo v. De Cenzo, 433 So.2d 1316, at 1318 (Fla. 3d DCA 1983).

In order to terminate permanent, periodic alimony, the complaining party must

allege that he or she is no longer able to pay any amount of alimony or that the recipient is able to support himself or herself through his or her own efforts or resources. Townsend v. Townsend, 585 So.2d 468, at 470 (Fla. 2d DCA 1991) and Withers v. Withers, 390 So.2d 453, at 455 (Fla. 2d DCA 1980). In the instant case, there was no showing that the Former Husband's retirement had rendered him unable to meet any degree of the alimony obligation. Nor had the Former Wife's financial circumstances improved so that she can support herself through her own efforts or resources.

Moreover, the parties did not agree to an award of rehabilitative alimony to the Former Wife and the lower tribunal did not award the Former Wife rehabilitative alimony, in order for the Former Wife to obtain education or improve her employment opportunities. Consequently, it was never anticipated that the Former Wife would ever be rehabilitated or self supporting.

The Former Wife does not need less money now than she did at time of the parties= dissolution. The Former Wife is not self-sufficient or self-supporting and relies upon the Former Husband=s monthly alimony payment to live. (T. 168 lines 13-19). Given that the Former Wife still needs the support and the fact that the Former Husband has an income of approximately $170,000.00 annually, which is equal to, if not actually higher, than the income he had when the original alimony amount was established, the Former Husband failed to show the change in circumstances necessary to justify a modification of the Final Judgment of Dissolution of Marriage. Further, the

Former Husband could draw on the interest his lump sum, cash settlement provides to pay his monthly alimony obligation as he does his discretionary expenses, and could be charging his son rent for the Miami residence, which would provide the Former Husband with an additional $2,000.00 a month in income (T. 97 lines 2-18). Thus the Former Husband cannot be heard to complain that he does not have the current financial ability to pay his monthly alimony obligation, given the evidence presented to the lower tribunal and the totality of the circumstances in the instant case. Pagano v. Hunt, 745 So.2d 478, at 479 (Fla. 5th DCA 1999).

A party seeking modification of permanent periodic alimony must show a substantial change of circumstances. Section 61.14(1) of Florida Statutes (2001) and Wiedman v. Wiedman, 610 So.2d 681, at 682 (Fla. 5th DCA 1992). ' 61.14(1), Fla. Stat. (2001). The Former Husband failed to sustain his burden of proving entitlement to a modification of his alimony obligation because he failed to present any evidence that his income is any less now than it was at the time of the Final Judgment.

In fact, the Former Husband retains considerable ability to pay the award of permanent periodic alimony to the Former Wife. Moreover, both the Former Husband=s retirement and the Former Wife=s prospects of limited employment were considered at the time of the parties= dissolution. The record; therefore, supports an inference that the current situation was contemplated at the time of the entry of the Final Judgment. Landry v. Landry, 436 So.2d 353, at 354 (Fla. 1st DCA 1983).

Accordingly, there is sufficient basis in the record, including evidence of the

Former Husband=s current income, expenses, life-style, and increased assets, to support the trial court's conclusion that the Former Husband failed to meet his burden of proof and the evidence in this case does not show an abuse of discretion by the lower tribunal. Murphy v. Murphy, 596 So.2d 513 (Fla. 4th DCA 1992).

C. THERE WAS NO ABUSE OF DISCRETION OR MISTAKE OF FACT OR LAW IN THE TRIAL COURT=S DENYING THE FORMER HUSBAND=S PETITION FOR MODIFICATION OF FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE AWARDING ALIMONY, AS THE FORMER HUSBAND=S RETIREMENT WAS ANTICIPATED AT THE TIME OF THE ENTRY OF THE FINAL JUDGMENT AND THAT THERE HAS BEEN NO SUBSTANTIAL CHANGE OF CIRCUMSTANCES SINCE ENTRY OF THE PARTIES= FINAL JUDGMENT JUSTIFYING A MODIFICATION OF THE FORMER HUSBAND=S ALIMONY OBLIGATION

As a matter of law, a petitioner seeking a modification of alimony or support must present an adequate showing of a permanent, unanticipated, substantial change in financial circumstances to demonstrate an entitlement for any relief. Rahn v. Rahn, 768 So. 2d 1102, at 1105 (Fla. 2d DCA 2000) and Pimm v. Pimm, 601 So.2d 534, at 537 (Fla. 1992). In this case, the Former Husband had the burden of proving a substantial change of circumstances since entry of the parties= Final Judgment of

Dissolution of Marriage, which burden the Former Husband could not meet.

The Former Husband incorrectly interpreted the parties= Marital Settlement Agreement as automatically terminating his alimony obligation immediately upon his attaining retirement. It is well settled law that it is error to provide for an automatic, future change or termination of alimony based upon the anticipated occurrence of a future event, such as the Former Husband=s retirement from his employment with Delta Airlines. Hitt v. Hitt, 571 So.2d 79, at 80 (Fla. 4th DCA 1990). In Antonini v. Antonini, 473 So.2d 739, at 742 (Fla. 1st DCA 1985), the first district opined that "Absent a clear evidentiary basis that the financial needs of the receiving spouse will change in the future, it is error to provide for an automatic reduction in future permanent periodic alimony payments."

Alimony may not be modified for anticipated changes in circumstances. Jaffee v. Jaffee, 394 So.2d 443, at 445 (Fla. 3d DCA 1981). In the instant case, when the parties entered into their Marital Settlement Agreement March 19, 1993, and when the trial court entered the Final Judgment of Dissolution of Marriage on July 20, 1993, the parties knew that the Former Wife would have assets received in equitable distribution and extremely limited non-alimony income from her part-time employment and, perhaps, limited income from those assets received in equitable distribution. In fact, at trial, the Former Wife=s expert, forensic accountant, Loretta Fabricant, C.P.A., provided unrebutted testimony that in 1999, the Former Wife had $3,900.00 of reportable interest on her federal income tax return, which she utilized to meet her

expenses and that the Former Wife=s meager gross income in 1999 from her part-time employment was approximately $6,000.00. (T. 145 lines 14-17). The parties also knew that the non-alimony income either from the Former Wife=s part-time employment or from her assets might decrease and eventually terminate due to a number of factors including, but not limited to, the Former Wife=s ill health. Like the Former Husband=s retirement from Delta Airlines, these changed financial circumstances were also anticipated and may not serve as a basis for a modification of the Former Husband=s alimony obligation. Penland v. Penland, 442 So.2d 1054, at 1055 (Fla. 1st DCA 1983).

In Goodwin v. Goodwin, 640 So.2d 173, at 174 (Fla. 1st DCA 1994), the trial court, in the original judgment of dissolution, provided that alimony would be terminated when the former wife reached the age of 62, the age at which the retirement accounts distributed to her could be accessed without penalty. The trial court later entered an amended final judgment that set forth that the attainment of the age of 62 years by the former wife would constitute a change of circumstances with respect to the alimony award. Id.

In Goodwin, the first district, in reversing the lower tribunal=s order opined as follows:

> While there is evidence in the record that the former wife will have access to greater funds once she is able to draw on her share of the retirement accounts awarded to her as equitable distribution, there is no evidence as to the former wife's needs at the age of 62. As previously noted, the

> former wife has had long-standing health problems; there is simply no way of knowing what her condition will be at age 62. Also, given the inevitable consequences of inflation, there is no indication that the alimony awarded will be sufficient to maintain the wife according to the standard to which she had become accustomed during the marriage.

Id. at 176.

As in the instant case, the language contained in the parties= Marital Settlement Agreement cannot be interpreted to provide for an automatic reduction or termination of the Former Husband=s alimony obligation, consistent with his retirement from Delta Airlines, absent a showing of a substantial change of circumstances in light of the totality of the evidence, especially, the Former Husband=s current financial ability to provide for such continued support.

Again, it is well established that an alimony award may not be modified because of a change in circumstances of the parties which was contemplated and considered when the original judgment or agreement was entered. AThe reason for this doctrine is an obvious one: if the likelihood of a particular occurrence was one of the factors which the court or the parties considered in initially fixing the award in question, it would be grossly unfair subsequently to change the result simply because the

anticipated event has come to pass.@ Jaffee, 394 So.2d 443, at 445.

There is no question that the Former Husband=s retirement from Delta Airlines, was an anticipated event at the time the parties entered into their Marital Settlement Agreement. What was not anticipated was that the Former Husband would take a voluntary, early retirement from Delta Airlines, at which time his pension would be worth not $487,000.00, but over $1,550,000.00. Further, if the Former Wife had anticipated that her permanent alimony award would automatically terminate upon the Former Husband=s retirement, certainly she would never have agreed to the equitable distribution of 100% of the Former Husband=s pension to him, but, rather, would have demanded that the pension be apportioned between the parties, in order that she would also have retirement income to rely upon for her future support.

Clearly, this would be the case in every dissolution action in the State of Florida involving an award of permanent periodic alimony or extended rehabilitative alimony and the award of a substantial pension to the payor spouse. If this Honorable Court reverses or remands the lower tribunal=s Final Order of September 21, 2000, for a reduction or termination of the Former Wife=s alimony award, this Court will be sending a message to every spouse involved in a dissolution proceeding, such that no spouse should ever agree to give up their interest in the payor spouse=s pension or retirement account. For when the payor spouse retires, the payor will claim they no longer have the current financial ability to pay said alimony award, despite the value of the pension or retirement fund.

Moreover, if we take the Former Husband=s argument on its face, the courts of this State cannot look to said pension or retirement account or the income generated from said asset equitably distributed to the payor spouse as a source of income for the payment of alimony. Such a narrowly draw principle or argument flies in the face of the public policy of the State of Florida and was certainly not the intent of this Court in its holding in Diffenderfer. Diffenderfer, 491 So.2d 265.

Further, the Former Wife is not attempting to change the parties= Marital Settlement Agreement as to equitable distribution, as the Former Husband incorrectly alleges. Practically speaking, the only Delta Airlines= pension that the Former Husband received in equitable distribution of the parties= marital estate, was that portion of the Former Husband=s pension valued by the parties at the time of their dissolution in the amount of $487,000.00. As such, the lump sum, cash payment that the Former Husband received from Delta Airlines in 1997, in the amount of $1,066,378.00, was not equitably distributed to the Former Husband at the time of the parties= divorce and, rather, was a windfall received by the Former Husband upon his voluntary, early retirement.

The testimony at trial of both the Former Wife=s expert, forensic accountant, Loretta Fabricant, C.P.A., and the Former Husband=s own pension expert, Tony Thelen, that information regarding this lump sum payment was not disclosed to the Former Wife at the time of the parties= dissolution and was not taken into account in the equitable distribution of the parties= marital estate, was unrebutted by the Former

Husband.

The trial judge did not consider the Former Husband=s alimony obligation Anon-modifiable@. Based upon the totality of the circumstances in the instant case, the lower tribunal properly reasoned that the Former Husband has the financial ability to continue to provide permanent periodic alimony to the Former Wife, who continues to have the need for same. Accordingly, the trial judge disagreed with the Former Husband=s interpretation of the language contained in the parties= Marital Settlement Agreement, whereby the Former Husband believed that said language provided for an automatic modification of his alimony obligation or for the complete termination of his alimony obligation, without consideration to the factors set forth in ' 61.14 of Florida Statutes (2001). ' 61.14, Fla. Stat. (2001).

Thus, the trial judge was entirely accurate in opining that the Former Husband was incorrect in his analysis that the paragraph contained in the parties= Marital Settlement Agreement relating to Arevisiting@ the alimony issue on his retirement, warrants a termination of the Former Husband=s alimony obligation. (R.p. 253-262 paragraph 38). Rather, the lower tribunal=s obligation was to examine the totality of the circumstances, in order to determine whether there had been a substantial change of circumstances since entry of the parties= Final Judgment of Dissolution of Marriage, justifying a modification of the Former Husband=s alimony obligation. As there had been no such change, the Former Husband=s Petition was properly denied by the lower tribunal.

D. THERE WAS NO ABUSE OF DISCRETION BY THE TRIAL COURT AND THE TRIAL COURT WAS CORRECT IN FINDING THAT THE FORMER WIFE WAS ENTITLED TO AN AWARD OF ATTORNEY=S FEES

Section 61.16 of Florida Statutes (1996), authorizes the lower tribunal to Aorder a party to pay a reasonable amount for attorney's fees, suit money, and the cost to the other party of maintaining or defending any proceeding under this chapter, including enforcement and modification proceedings and appeals.@

' 61.16, Fla. Stat. (1996). The purpose of the Statute is to ensure that both parties will have the same opportunity to secure counsel in dissolution and post-dissolution proceedings. Here, the Former Wife was simply defending herself against the Former Husband=s efforts to terminate her alimony award upon which she depends for her financial sustenance. The fact that the Former Wife ultimately succeeded in obtaining

an order denying the Former Husband=s Petition for Modification of Final Judgment of Dissolution of Marriage Awarding Alimony did not diminish the Former Wife=s need for funds with which to pay her attorney for defending the Former Husband=s Petition in the first place. Payne v. Payne, 481 So.2d 551, at 552 (Fla. 2d DCA 1986).

In Rosen v. Rosen, 696 So.2d 697, at 700 (Fla. 1997), this Honorable Court held that proceedings under chapter 61 of the Florida Statutes are in equity and governed by basic rules of fairness as opposed to the strict rule of law and that

' 61.16 of Florida Statutes (1996) should be liberally, not restrictively, construed to allow consideration of any factor necessary to provide justice and ensure equity between the parties. ' 61.16.

Accordingly, the trial court may consider all factors not only financial circumstances of the parties, including whether the modification action brought or defended by the party seeking fees was meritorious or was litigated in good faith and whether the actions of one party compelled the other party to resort to the courts for a remedy. Thornton v. Byrnes, 537 So.2d 1088, at 1090 (Fla. 3d DCA 1989).

In the instant case, the Former Husband=s position was completely without merit and the Former Wife was compelled to defend the Former Husband=s Petition before the lower tribunal, as is evidenced by the uncontroverted testimony and evidence presented to the trial court. As such, the Former Wife was properly awarded attorney=s fees that were required by the Former Husband=s attempt to alter the parties= existing Final Judgment of Dissolution of Marriage to his advantage. Goldman

v. Smargon, 524 So.2d 479, at 480 (Fla. 3d DCA 1988).

If it is necessary for a spouse to seek enforcement of a Final Judgment because of the willful refusal of the other spouse to comply with its terms, the trial court may take into account the disregard by that other spouse of the court=s order in considering a motion to assess attorney=s fees. Patterson v. Patterson, 399 So.2d 73, at 74 (Fla. 5th DCA 1981) and Spencer v. Spencer, 305 So.2d 256, at 259-60 (Fla. 3d DCA 1974).

Similarly, in Baker v. Green, 732 So.2d 6, at 7 (Fla. 4th DCA 1999), the former wife frustrated the former husband=s summer visitation with the parties= child, so that the former husband was forced to resort to the court as a result of the former wife's conduct. Under these circumstances, the fourth district held that the lower tribunal=s award of attorney's fees to the former husband was completely proper. where the former husband. Id.

Further, even with the equal distribution of the parties= assets pursuant to the terms of their Marital Settlement Agreement, the Former Husband's current income is clearly greater than the Former Wife's, and he is in a better position to pay the Former Wife=s attorney's fees. Leonard v. Leonard, 613 So.2d 1339, at 1341 (Fla. 3d DCA 1993) and Creel v. Creel, 568 So.2d 942, at 943 (Fla. 3d DCA 1990). It is apparent from the record that the Former Wife would have to invade her assets in order to pay attorney's fees, while the Former Husband could pay such fees from his annuity income, or interest income, or from the windfall cash settlement that he received when he took voluntary, early retirement from Delta Airlines. Under these circumstances, the

trial court=s award of attorney's fees to the Former Wife was also entirely justified. Hough v. Hough, 739 So.2d 654, at 655 (Fla. 4th DCA 1999) and Nisbeth v. Nisbeth, 568 So.2d 461, at 462 (Fla. 3d DCA 1990).

Accordingly, based upon the totality of the evidence in the instant case, the lower tribunal did not abuse its discretion in awarding the Former Wife attorney=s fees or in requiring the Former Husband to bear such fees incurred by the Former Wife in defending the Former Husband=s Petition for Modification of Final Judgment of Dissolution of Marriage Awarding Alimony.

CONCLUSION

There was no abuse of discretion by the trial court in this matter and the trial court=s order of September 21, 2000, which denied the Former Husband=s Petition for Modification of Final Judgment of Dissolution of Marriage Awarding Alimony dated February 8, 1999, and awarding the Former Wife attorney=s fees should be affirmed. Further, the Former Husband has not properly preserved the issues raised in his Initial Brief for argument before this Honorable Court and is arguing many of these issues for the first time. The issues raised by the Former Husband in his Initial Brief were not argued in the court below and; accordingly, are improperly included in the Former Husband=s Initial Brief, should this Honorable Court deem them to have any merit.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true copy of the above has been sent via United States First Class Mail to JEROME J. KAVULICH, ESQUIRE, Attorney for the Former Husband, Russo & Kavulich, P.L., 2655 Le Jeune Road, PH 1-D, Coral Gables, Florida 33134, this _____ day of December, 2002.

By: _____

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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY, that the Former Wife's Answer Brief has been submitted to this Honorable Court in Times New Roman 14 point font.

By: _____

NANCY A. HASS, ESQUIRE
Florida Bar No. 881635