SUPREME COURT OF FLORIDA

CASE NO. SC02-1925

L.T. CASE NO. 3D00-3096

CHARLES FREDERICK ACKER,

Petitioner,

vs.

BARBARA DRUMM ACKER,

Respondent.

_______________________________________/

INITIAL BRIEF OF PETITIONER, CHARLES FREDERICK ACKER

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INTRODUCTION

The Petitioner, CHARLES FREDERICK ACKER, the Petitioner in the lower tribunal and the Appellant in the appeal in the district court will be referred to as the "Petitioner." The Respondent, BARBARA DRUMM ACKER, the Respondent in the lower tribunal and the Appellee in the appeal in the district court will be referred to as the "Respondent." Volume I of the Record-On-Appeal will be referenced by "R.p.

___".

Volume II consists of 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 "T. 5/25/00, p. ___."

Reference to the Petitioner's Exhibits will be by the use of the symbol "PX ___". Reference to the Respondent's Exhibits will be by the use of the symbol "RX ___". However, 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 within the transcript relevant to the reference.

Reference to an appendix, if any, will be by the use of the symbol "AP___".

STATEMENT OF THE FACTS AND CASE

The parties ended their twenty three year marriage on July 20, 1993. (R.p. 20-21, T. 5/25/00, p. 154). The final judgment incorporated by reference, a transcript of a settlement agreement entered into by the parties with their attorneys, dictated in open court at the time of trial. (R.p. 1-19). At the time of the dissolution, the Petitioner, fifty-three (53) years old, was earning approximately $160,000.00 a year as a pilot with

Delta Airlines with whom he had been employed since 1968. (T. 5/25/00, p. 4, 10, 22-23; P.X. 2). During the marriage, the Respondent had been a mother and a homemaker. At the time of the dissolution, she was working part-time. (T. 5/25/00, p. 153-154).

Pursuant to the Agreement, the Petitioner agreed to pay alimony in the amount of $3,000.00 per month which would terminate automatically upon the death of either party or the remarriage of the Respondent. (R.p. 10). The parties further agreed that during the first three years, the alimony would be non modifiable. (R.p. 11). The parties further agreed that when the Petitioner retired, no longer flew for Delta, and was living off his pension, they would revisit the matter of the amount of any alimony that he paid thereafter. (R.p. 11). Other payments to be made by the Petitioner included the maintaining of life insurance, and paying the property taxes and insurance on the residence awarded the Respondent. (R.p. 9,13).

The agreement also resolved all equitable distribution issues. (R.p. 3-4). The Petitioner retained all of his interest in his Delta retirement benefits accumulated during the marriage which were reduced to a present value at the time of the dissolution of $487,000.00. (R.p. 3-4; T. 5/25/00, p. 128). He received his parents' house. He also received a cash account with an approximate value of $25,000.00. (R.p. 5).

The Respondent received a 401-K Plan with an approximate value of

$243,000.00. (R.p. 4). This plan was encumbered by a loan of approximately $50,000.00 which the Petitioner was required to satisfy. (R.p. 8; T. 5/25/00, p. 186, 189). The Respondent received the marital residence with the Petitioner satisfying the mortgage thereon. (R.p. 4; PX. 1, 13). The Respondent received IRA accounts totaling approximately $39,000.00. (R.p. 5) The Petitioner then agreed to pay the Respondent $69,805.00 as lump sum alimony either immediately or in the future for a period of time not to exceed six years. (R.p. 6). This obligation, which had accrued with interest to $93,000.00 was paid by the Petitioner in 1999. (T. 5/25/00, p. 161). The Respondent also received a Delta Stock Plan which at that time had a value of $4,500.00. (R.p. 4). Although the parties did not total up the figures line by line in the agreement, nevertheless, the parties attempted to accomplish an equal equitable distribution, especially in light of the lump sum alimony payment. (T. 5/25/00, p. 129-130).

The agreement was reached by the parties following a full day of trial and negotiations. (T. 5/25/00, p. 156). Both parties attested that they were entering into the agreement freely and voluntarily, and with the advise of counsel. (R.p. 14-16). The trial judge then approved the agreement on the record and concluded the dissolution proceedings. (T. 5/25/00, 16-18).

The Petitioner continued his employment as a pilot with Delta Airlines until

taking an early retirement benefit about eighteen months before his mandatory retirement at age sixty. This early retirement option was not available at the time of the dissolution but came about in 1996 as the result of contract negotiations between the pilots' union and Delta Airlines. (T. 5/25/00, p. 30-31; PX. 6, p. 15-16). Although the Petitioner took his early retirement, he continued to pay the alimony until reaching mandatory retirement of age 60. (T. 5/25/00, p. 24).

The early retirement option offered the Petitioner several options as to the manner he would take his retirement benefits. (PX. 3). He elected a 50/50 lump sum/single life annuity which yielded a monthly single life annuity of $7,803.00 a month and a lump sum award of slightly over one million dollars which was rolled-over into an IRA account. (T. 5/25/00, p. 9, 12-13; 34-35). Since the Petitioner's retirement, his only source of income has been the monthly annuity of $7,803.00 and his "roll over" Harris Trust IRA account. (PX. 4).

Upon reaching the mandatory retirement age of sixty, the Petitioner filed his petition to modify the final judgment as to alimony on February 8, 1999. (R.p. 74-97). On March 8, 1999, the Respondent answered the petition for modification petition, asserted affirmative defenses thereto, and counter-petitioned for an increase of alimony. (R.p. 112-115).

The matter was heard in a one day trial on May 25, 2000. (R.p. 253). During

the trial, the Respondent did not pursue her counter-petition to increase the alimony. (T. 5/25/00, p. 168-169). At the conclusion of the trial, the trial judge ruled from the bench, reviewing the evidence, issuing various findings and ultimately denying each parties' claim to modify the final judgment. He further found the Respondent to be entitled to attorneys's fees, reserving jurisdiction to determine a reasonable amount of attorney's fees. (T. 5/25/00, p. 207-223).

On September 21, 2000, the trial judge entered his final order. (R.p. 253-262). The Respondent timely sought a rehearing. (R.p. 218-220, 263). Following the denial of the Respondent's motion for rehearing, the Respondent filed his timely notice of appeal. (R.p. 237-249). Oral argument was heard by a panel of the district court. The panel then referred the case to the district court for an *en banc* consideration. The *en banc* court addressed among other issues whether the court should recede from two cases which interpret *Diffenderfer*: *Hollinger v. Baur*, 719 So. 2d 954 (Fla. 3d DCA 1998), and *Waldman v. Waldman*, 520 So. 2d 87 (Fla. 3d DCA 1988). On May 22, 2002, the district filed its opinion affirming the trial court's denial of the modification, holding that pension benefits equitably distributed to a party may be considered in determining that party's ability to pay alimony. The district court also certified its opinion in direct conflict with opinions from the second, fourth and fifth districts. (R. p. 270-272, 279). A timely filed motion for clarification and rehearing filed by the

Petitioner was denied on July 22, 2002.

On August 22, 2002, the Petitioner sought to invoke this court's discretionary jurisdiction under Fla. R. App. P. 9.030(a)(2)(A). This court has deferred ruling as to the issue of jurisdiction.

SUMMARY OF ARGUMENTS
POINT I

Double-dipping has historically had widespread acceptance as a method of determining when a law is applied unfairly. It has been used in criminal courts to determine whether sentencing guidelines have been followed. It has also been used in civil cases to determine whether an accounting method has been applied properly to the law. It has been used by this Court in determining when a utility was not entitled to a rate increase. It has been used in family law court setting to determine an

undervaluing of an asset as well as whether certain payments truly justified a parent's inability to pay child support.

This Court ruled in *Diffenderfer v. Diffenderfer,* 491 So. 2d 265 (Fla. 1986) that a retirement benefit could be considered as a source of alimony, or could be divided for equitable distribution purposes, but not both. The conclusions reached by the *enbanc* appellate decision that the 1988 statutory revisions replaced this Court's ruling in *Diffenderfer* are misplaced. The 1988 statute prescribes the valuation methodology to be used to determine a spouse's ability to pay alimony and the recipient's needs at the time of the divorce and not how the methodology is to be applied in a later modification proceeding. This is especially important when the determination of alimony fails at the time of divorce to follow the statute in reducing the Respondent's needs by including the her offset assets. Additionally, the amendments did not abrogate this court's prohibition against double-dipping by virtue of the cure-all provision in the equitable distribution and alimony statutes which allow courts to make adjustments to do equity and justice between the parties.

POINT II

Providing for spousal support is and has been a matter of public policy. Use of retirement plan benefits earned by the alimony-paying spouse has been made possible with a QDRO, allowing for a direct assignment of benefits before the

participant retires. QDRO provisions providing early payments in the Retirement Equity Act of 1984 were expanded in the Tax Reform Act of 1986, and all of this was made possible on account of public policy change. The ability to provide the support to a recipient spouse was also made possible by the retirement plan's non-assignment clause. The non-assignment clause preserved the benefits for the dual public policy purpose of both protecting the retiree so that the retiree would not be dependent upon society when no longer able to work, as well as to provide for the needs of the family unit when retirement occurs. To the extent that this court agrees with the Petitioner on the first point above, but might limit the exemption to the retirement asset without appreciation, the Petitioner asks this court to apply the double-dipping preemption it determined in *Diffenderfer* to the appreciation of the asset as a matter of public policy.

Additionally, if this court agrees with the district court ruling that the double-dipping preemption of *Diffenderfer* has been eliminated by the 1988 statute, then the Petitioner asks this court to broadly construe the statute as a matter of public policy to carve out an exception for retirement plan assets. A public policy finding is needed to make certain that when both parties to the divorce face the impairments of old age, each is afforded an opportunity to face retirement on an equal footing on that portion of the retirement plan asset provided in equitable distribution.

POINT III

The Respondent complains about unfairness, but she fails to provide grounds upon which to set aside a marital settlement agreement entered into six years earlier. Yet even though the agreement itself was not set aside, the trial court found six years after the cutoff date that she was provided less equitable distribution than the Petitioner. The trial court's finding was based upon a misapplication of the cutoff rule. As the finding was based upon the retirement plan assets that were distributed to the Respondent under the immediately offset method, and the disparity of appreciation between it and the asset against which it was offset six years later, this finding is in direct contravention of this Court's ruling in *Boyett v. Boyett*, 703 So.2d 455 (1997), that a party is not entitled to share in the earnings of an offset retirement asset after the cutoff date.

POINT IV

The trial court found that the Respondent would have to incur a 10% pre-59 1/2 excise tax penalty and, therefore, not required to use her income producing assets in determining her needs for alimony. Nothing in the 1988 statutes allows a court to ignore an income-producing asset which is accessible. Inconvenience for a former spouse does not give the court authority to ignore it. I.R.C. § 72(t)(2)(A)(iv) (2001) settles the issue in that the 401(k) money may be distributed to her over her lifetime

without penalty. She can choose to receive this income either by purchasing an annuity contract, or by direct rolling it to an IRA and have the proceeds paid to herself over her lifetime. Failure to include her asset in determining her needs is double-dipping against a previously divided asset. In addition, if this court were to find that the double-dipping issue of *Diffenderfer* survives the 1988 statutes, then what the trial court has done here amounts to triple-dipping.

POINT V

The award of attorneys' fees to the Respondent was based upon a prevailing party standard. This was error and therefore must be reversed.

LEGAL ARGUMENT

I. THE DOUBLE-DIPPING CONCERN EXPRESSED BY THIS COURT IN *DIFFENDERFER v. DIFFENDERFER* SURVIVES THE 1988 FLORIDA STATUTE REVISION

Double Dipping has been an historical benchmark standard used to determine when a law is applied unfairly whereupon the courts issuing appellate rulings have reversed trial court findings based on double-dipping reasoning. *See*, *The Citizens of the State of Florida, Inc. v. Hawkins,* 364 So. 2d 723 (Fla. 1987)*; Bain v. Bain,* 687 So. 2d 79 (Fla. 5th DCA 1997); *Ghen v. Ghen*, 575 So. 2d 1342 (Fla. 4th DCA 1991);

Porter v. State, 579 So. 2d 345 (Fla. 1st DCA 1991); *Hikes v. McNamara Pontiac, Inc.*, 510 So. 2d 1212 (Fla. 5th DCA 1987); *City of Plantation v. May*, 475 So. 2d 1325 (Fla. 4th DCA 1985); Even when the double-dipping claims were based upon erroneous argument, Florida appellate courts have shown historical concern when this issue is raised. *See*, *Stewart v. State,* 588 So. 2d 972 (Fla. 1991)*; Sasso v. Ram Property Management*, 452 So. 2d 932 (Fla. 1984); *Acosta v. Krasco, Inc.*, 471 So. 2d 24 (Fla. 1985). The unfairness principle of double-dipping has been raised in arguments in criminal law[1]. It has been raised in civil law involving damages or

benefits[2], and even under family law when issues of dividing property or calculating alimony and child support were raised[3]. This Court raised this principle of unfairness

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[1] *Stewart v. State*, supra; *Williams v. State,* 581 So. 2d 144 (Fla. 1991). These cases addressed the issue of double-dipping in the context of sentencing guidelines.

[2] *Sasso v. Ram Property Management*, supra; *Acosta v. Krasco, Inc.*, supra (double-dipping issues considered in context of social security and disability benefits); *The Citizens of the State of Florida, Inc. v. Hawkins,* supra (court addressed argument as to whether double dipping occurred in setting utility rates); *Hikes v. McNamara Pontiac*, *Inc.*, supra (addressed double dipping in a jury award of damages); *City of Plantation v. May*, supra (addressed as to whether a claimant's seeking relief under two sections of a retirement plan was double dipping).

[3] *Bain v. Bain*, supra, (appellate court applied the *Diffenderfer* prohibition of using retirement plan for both equitable distribution and alimony); *Akers v. Akers*, 582 So. 2d 1212 (Fla. 1st DCA 1991) (appellate rejected allocation of assets to wife in an

in *Diffenderfer v. Diffenderfer*, supra, when it provided the following passage:

> Because an effective exercise of this discretion through the remedies available to the trial judge presupposes that the court has all relevant information, we reject the First District's holdings that the pension may not be considered marital property. We affirm, however, its holding that such benefits may be considered as a source of payment of permanent periodic alimony. The potential income may certainly bear on the employee spouse's ability to pay, as we noted in *Canakaris*, this factor can be determined "not only from the net income, but also net worth, past earnings and the value of the parties' capital assets." 382 So. 2d at 1202, citing *Firestone v. Firestone*, 263 So.2d 223 (Fla. 1972).
> Obviously, however, injustice would result if the trial court were to consider the same asset in calculating both property distribution and support obligations. If the wife, for example, has received through equitable distribution or lump sum alimony one-half of the husband's retirement pension, her interest in his pension should not be considered as an asset reflecting his ability to pay. *Id.* at 267.

The storm of controversy evolved when the court in *Lauro v. Lauro*, 757 So. 2d 523 (Fla. 4th DCA 2000) held that the correct application of *Diffenderfer* was to first divide assets under equitable distribution and to calculate alimony only after this has been accomplished. In *Lauro v. Lauro*, supra, a pension in pay status was equally split between the parties. The trial court,citing *Diffenderfer*, refused to considered the $ 1,079 a month being received by the wife in determining her need for alimony when

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equitable distribution when she used part of those assets for support of herself and to maintain marital properties during the pendency of the dissolution); *Ghen v. Ghen*, supra (error to consider the negative implications of a debt both to arrive at a value of a business for equitable distribution purposes and to reduce income available for payment of alimony).

it determined that the husband would pay the wife $ 1,850 a month in permanent alimony. The fourth district concluded that the trial court misinterpreted *Diffenderfer* and should have considered the pension income as income to the wife for purposes of need for alimony. The district court opined further that in *Diffenderfer*, this court allowed retirement benefits to be considered in determining the ability to pay permanent periodic alimony, but went on to state:

> Obviously, however, injustice would result if the trial court were to consider the same asset in calculating both property distribution and support obligations. If the wife, for example, has received through equitable distribution or lump sum alimony one-half of the husband's retirement pension, **her** interest in his pension should not be considered in his pension should not be considered as an asset reflecting his ability to pay.

Citing, *Diffenderfer*, supra at 267. (Emphasis added to show Southern Second version quoted). See, *Lauro v. Lauro*, supra. at 524.

In discussing what it perceived to be a misinterpretation of *Diffenderfer* by both the trial court and by inference, fourteen years of precedent, the district court in *Lauro*, stated:

> The trial court in this case apparently construed the first sentence in the above quote as meaning that the trial court could not consider the income the wife would be receiving from the pension in determining from the pension in determining her need for alimony. What the supreme court meant, however, is explained by the next sentence, which is that the one-half of the husband's pension distributed to the wife could not be "considered as an asset reflecting his ability to pay." In other words, the

> ability of the husband in *Diffenderfer* to pay alimony should be based on his financial situation after equitable distribution, not before. Similarly, the needs of the wife in this case should be based on her financial situation after equitable distribution, not before. This would include her income from the pension.

Id., supra at 524.

Although the majority opinion of the district court in *Acker* determined the typographical error in the Westlaw/Premise version of *Diffenderfer* to be moot by virtue of the 1998 equitable distribution statute and the 1998 amendments to the alimony statute, a discussion as to the intent behind *Diffenderfer* is still warranted. In rendering its admonition in *Diffenderfer* of the consideration the same asset for equitable distribution and alimony obligations, this court did not limit its discussion of this issue with the example given which formed the basis of the present day typographical error controversy. Instead, this court subsequent to the language which formed the controversy as to the typographic error went on to state in its *Diffenderfer* opinion:

> In most cases, for the following reasons, it may be preferable to deal with pension rights as a marital asset rather than merely a source of support obligations. First, on purely theoretical grounds, recognizing the non-employee spouse's entitlement to the other's pension reflects an appreciation of the former's contribution, indirect though it may be, to the economic success of the latter. . . . To the extent acquired during the marriage, the expected benefits are a product of marital teamwork. This, of course, may vary on the facts of each case.
>
> . . . .

> Other problems may result from framing the parties' rights to pension benefits in terms of one's financial need and the other's largesse. . . . [I]f [the husband] should die, [the wife's] alimony would die with him. . . while in the event of her death he would merely experience an increase in income as his alimony obligation terminated.
>
> . . . .
>
> Finally, we note that an attempt to fairly provide for both spouses through a distribution of property often results in a superior resolution of a painful situation. By giving the parties economic independence rather than shackling them to the shattered remnants of a marriage which is irretrievable broken, one through dependence and the other through a duty to pay, the individuals stand a better chance of recovering from the often devastating experience of divorce and beginning to heal.
>
> . . . .
>
> Fully recognizing, however, 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, we have no desire to disapprove those Florida decisions in which the court has done just that.
>
> *Diffenderfer*, supra, at 267-268. (citations omitted).

Although this court in *Diffenderfer* expressed a preference to divide a pension as part of an equitable distribution, this court avoided making the preference mandatory in order to "avoid establishing inflexible rules that make the achievement of equity between the parties difficult, if not impossible." *Id.* at 268. If this court had intended the pension assets to be considered both as an asset for equitable distribution and a source of alimony, there would have been no need for this court to have devoted an entire page of its opinion to setting forth its reasons for its preference to "deal with

pension rights as a marital asset rather than merely a source of support obligations." *Id.* (emphasis added). In other words, if the district court's interpretation of the effects of the typographical error in the *Diffenderfer* opinion is affirmed, the lengthy discussion of this court's preference that pension rights be distributed as part of a marital asset division as opposed to a source of support obligations becomes meaningless surplusage.

Within months of rendering its opinion in *Diffenderfer*, this court rendered its opinion of *Pastore v. Pastore*, 497 So. 2d 635 (Fla. 1986). In that opinion, this court reinstated the trial court's distribution of a military retirement plan as a property interest citing its observation in *Diffenderfer* of the preference "to deal with pension rights as a marital asset rather than merely a source of support obligations." *Id.* at 637. (emphasis added). If this court was of the opinion that the pension benefits were both a source of alimony and subject to equitable distribution, this court in both *Diffenderfer* and *Pastore* would have so stated and not employ the word "rather" in indicating its preference as to the manner of dealing with pension assets in dissolution proceedings.

The Third District determined in the case at bar that the application of *Diffenderfer* discussed in *Lauro* was moot following the 1988 revisions because the statute clearly provides that the calculation of alimony is to be determined only after

all assets accrued during the marriage have been divided and in consideration of those assets. Whether alimony is determined before or after equitable distribution is irrelevant to the concern raised by this court in *Diffenderfer* that the same asset should not be considered twice. Irrespective of whether the calculation is made before or after equitable distribution, changing the date that the calculation is made only changes the method which must be applied to avoid double dipping of the same pension asset. Double-dipping of an asset is only a valuation result. The date and the order of the calculation prescribed by the 1988 revisions only defines the specific method of valuation. That is all the 1988 revisions did. The mere fact that the statute changed the method used to calculate alimony did not cancel the valuation result concern of double dipping raised in *Diffenderfer*.

This Court expressed an understanding of the distinction between the valuation method used in awarding of alimony and a particular valuation result of a method when it warned in *Canakaris v. Canakaris,* 382 So. 2d 1197 (Fla. 1980):

> The judge possesses broad discretionary authority to do equity between the parties and has available various remedies to accomplish this purpose, including lumpsum alimony, permanent periodic alimony, rehabilitative alimony, child support, a vested special equity in property, and an award of exclusive possession of property. As considered by the trial court, these remedies are interelated, to the extent of their eventual use, the remedies are part of an overall scheme. *Canakaris* at 1202.

When the date that the calculation of the alimony recipient's needs and the

alimony payor's ability to pay changes, as it did with this case, if double-dipping is to be prevented, the calulation must impute to both parties the same share of the divided asset at the later date so that if the recipient's original award of alimony failed to consider this asset in satisfying the recipient's needs, then the delicate overall scheme provided in *Canakaris* at the time of the dissolution is not disturbed. Of course, no double-dipping occurs by the court's use of the changed values of the divided pension asset if when the trial court making the original alimony award used the asset to meet the spouse's alimony needs.[4]

This Court noted in *Diffenderfer* and recently in *Boyett v. Boyett,* supra that valuations involving pension plan assets are fact intensive, and therefore,

> .... No recitation of formulae, considered in the abstract, could capture the variety of considerations necessary in order to do equity. *Diffenderfer* at 269; *Boyett* at 453 quoting *Diffenderfer.*

The inequities of the *Acker* district court opinion together with an application of *Lauro* beyond its facts are illustrated by the facts of *Lauro* contracted with other examples. In the examples that follow, the *Diffenderfer* criteria of ensuring that double-dipping

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[4] As pointed out in the dissent in the *Acker* district court opinion, this is what occurred in the *Lauro* case. In *Lauro*, a military pension in pay status was allocated to each spouse and thus properly treated as income to both parties. If post-dissolution modification proceedings were to occur in *Lauro*, each party's share would be considered without running afoul of the *Diffenderfer* double-dipping prohibition.

does not occur is applied as follows: If the pension asset that was divided pursuant to equitable distribution was not used to determine the spouse's alimony needs, then the changes that occurred to the divided asset through the passage of time are neutralized by forced-setting the alimony payor's value of the divided share to equal the actual value of the divided share of the alimony recipient's remaining offsetting assets.[5] This procedure eliminates the double dipping concern raised in *Diffenderfer*. It also properly reflects the 1988 statute requirement that an income producing asset be used to satisfy alimony needs by using the exact amount of assets available to meet the recipient's need before the payor adds in income not previously divided as equitable distribution. The adjustment is also permitted under § 61.08(2)(g), Fla. Stat. (1997) which provides that "**The court may consider any other factor necessary to do equity and justice between the parties**." (Emphasis added).

Fact Intensive Example 1: Under the facts of *Lauro*, treatment of the divided asset was inconsequential because the divided amount represented the same monthly income to each party, both before and after equitable distribution. Double-dipping

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This forced-setting of value is used in lieu of actual assets available at the date of modification only when the asset under scrutiny was divided under equitable distribution, but not considered when alimony was first determined. Otherwise, the alimony-payor receives a discount on an asset that was never awarded in determining his ability to pay. This misapplication of the procedure results in reverse-double dipping, by having an asset discounted for an award of property that was never made.

would have resulted if the Respondent's theory was adopted by the Fourth District, namely that the husband's share of the divided pension be used to demonstrate his ability to pay alimony, and the wife's share may not be used to determine her alimony needs. This inconsequential result making the *Lauro* ruling correct was due to the nature of the specific retirement plan in *Lauro*, a defined benefit plan, sponsored by the federal government. As the wife's awarded interests in *Lauro* were provided under the deferred distribution method, and that this interest was earned under a governmental plan exempted from ERISA and 29 USC §1056(d)(1) (1997), and therefore a (d)(3) QDRO, she could not have been provided her interest at any time different than when the husband retired, a fact which is not true of private defined benefit plans subject to ERISA. *See*, 29 USC §§ 1056(d)(3)(E)(i)(I) and(ii) (1997).

Fact Intensive Example 2: Suppose that a spouse is awarded one-half of an employed spouse's $8,000 per month pension to begin at the plan's normal retirement date, i.e. age 65. Suppose further that permanent alimony is awarded at $1000.00 per month without respect to the alimony recipient's ability to receive her half-interest in this asset at the plan's early retirement date of age 55, because at the time of the original award, the court was either unfamiliar with what a QDRO under 29 USC §1056(d)(3) (1997) could provide, or that the employed spouse had not reached age 55. A typical 5% reduction for each year by which the pension is received earlier than

age 65 would reduce the alimony recipient's share of $4,000 per month to $2,000 per month, if she begins receiving her interests at his age 55, i.e., ten years earlier. Suppose also that the alimony receiving spouse elects to take the earlier distribution and uses it to increase her standard of living. When the alimony paying spouse retires at age 65, he seeks reduction in alimony based upon his lesser ability to pay. Double-dipping occurs if the alimony paying spouse's ability to pay alimony includes all of his $4,000 per month of the divided asset, but the alimony receiving spouse's needs are are credited with only $2,000 per month even though she chose to elect this reduced form at the earlier age. The value of his $4,000 per month pension is forced-set at $2,000 per month, because that is what the former wife receives of the $4,000 per month pension due to her election to receive the benefit ten years before the former husband. Failure to force-set his value at $2,000 per month when determining his ability to pay allows her to receive $5,000 per month of the $8,000 per month divided benefit ($4,000 as equitable distributions and $1,000 as alimony), while he is left with only $3,000 per month.

Fact Intensive Example 3: Suppose that an alimony recipient spouse is awarded one-half of $1,000,000 from a 401(k) plan and that the alimony that she is awarded at the time of the divorce fails to use her awarded interest in determining her remaining needs, but only uses the alimony payor's employment income. Now suppose that the

alimony payor's half share-interest in his retained 401k plan share grows with passive earnings to $2 million dollars by the time of his retirement. The wife discovers sometime after the divorce that she can receive her interest immediately, simply by presentation of a QDRO, and she so does. Instead of leaving that money to grow to when she reaches an age when she can no longer work, she instead elects to draw against it slowly, and as a result, she has only $300,000 left when the former husband retires. They were each provided the same asset at divorce, but calculation of her original alimony award did not consider what that asset could provide immediately in the form of income. As a result, his current value of the $500,000 that he was awarded at the time of divorce must be forced-set at her current value of $300,000 when determining his ability to pay. Failure to do this continues to reduce the true percentage of the 401 k plan he received as he is required to pay alimony from this source[6] As appreciation of an asset is an integral part of the asset itself, and is often little more than an adjustment to its value in order to recognize the rising cost of living, allowing her to keep what is left of her asset without making an appropriate adjustment

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If he is forced during retirement to expend $.85 million of this asset to continue to pay alimony, he has left only $1.15 million and thus retains only 57.5% of his equitable distribution of that property. Accordingly, as he was awarded half of that property, his share is really 50% of the 57.5% or $28.75%. The wife then receives 71.25% of the marital asset through a combination of alimony and equitable distribution.

to his asset is equivalent to allowing his former spouse to share much greater than her 50% distribution of the original $1,000,000 of divided pension.

The double-dipping concern raised by *Diffenderfer* is created by the ruling itself, by finding that pension benefits earned during the marriage are marital property. They are marital property because the court finds that they are received in lieu of other (higher) compensation, which would have otherwise enhanced the marital standard of living or marital assets. See, *Diffenderfer*, supra, at 267; *Kelson v. Kelson*, 647 So. 2d 959 (Fla. 1st DCA 1990); *Griffiths v. Griffiths*, 563 So. 2d 773 (Fla. 3d DCA 1990); *In re Marriage of Iverson*, 508 So. 2d 391 (Fla. 1st DCA 1987) (ruled applied as to a tax deferred savings plan). In other words, these pension assets represent income that was earned during the marriage, but that will be paid later. Before these assets were treated as property, either by the *Diffenderfer* holding in 1986 or by enactment of the 1988 Equitable Distribution Statute, they could only be used as income when they were paid. By awarding such rights to future income as property, either by the *Diffenderfer* holding or pursuant to the 1988 revisions, and then using the same income to later determine alimony, the same income is used twice for the same purpose just as if alimony was awarded twice, with the second payment lopped on top of the first, with each derived from the exact same (identical) income. This was the entire point of the *Diffenderfer* double dipping concern, and whether the earned retirement benefits are

property by case law or by statute is irrelevant to whether the *Diffenderfer* double-dipping preemption still applies.

Under the facts of this case, the Petitioner provided the Respondent with all of the proceeds from his 401(k) plan, which at the time of the divorce, equaled $243,000. (R.p. 4) His defined benefit pension plan was valued at $467,000. (R.p. 3-4;T. 5/25/00, p.128). While the agreement between the parties allowed him to keep this asset, he nevertheless provided his wife $467,000 in other marital assets. The record does not reflect that these assets were used to determine the Respondent's need for a $3,000 per month amount of agreed alimony payment which was provided to her.

The retirement assets that the Respondent received under equitable distribution had grown substantially since the divorce, from $243,000 on the 401(k) plan to $451,493. (T. 5/25/00, p.189-190). The IRA accounts grew from $39,000 to $60,000, and the securities provided to her grew from $4,500 to $59,752. (T. 5/25/00, p. 181-187). The wife also received a lump sum alimony payment of $69,805, which was paid with interest in 1999 in the amount of $93,000. (T. 5/25/00, p. 161). The growth of these assets evidences that the $3,000 per month of alimony payment adequately provided for her needs.

The Respondent argued at trial that the husband received a windfall from his

defined benefit plan due to union negotiations, which resulted in his ability to take early retirement and elect his A/B plan benefit. His ability to actually elect early retirement was made possible by a major stock market upswing at the time that his union negotiated an early retirement option. (PX 6, p 15-16). The so-called successful negotiations were a mis-characterization of what actually occurred, because he possessed an ability to elect the A/B plan benefit from the time of his employment. (PX 6, p 9-11). This entire issue has to do with the fact that the condition placed on his ability to elect the A/B benefit required that he attain age 60 and still be employed as a pilot at the time of the election. But when the company sought elimination of the benefit, it was required to offer its employees an ability to elect the benefit at the earlier age or the plan would have been in violation of I.R.C. § 411(d)(6)(B)(ii) (2001) due to the company adopting a plan amendment which would have had the effect of reducing accrued benefits. This violation would have caused the plan to be disqualified for favorable tax treatment under the tax laws.

The Petitioner's initial retirement plan consisted of an old A/B plan, which based benefits on stock market performance of contributions made to each employee's account. These contributions were a fixed percentage of each employees salary for the year in which the contribution was made. This was a plan provided to older pilots before the Employment Retirement Income Security Act (ERISA) became effective.

(PX 6, p 9-11). In 1972, the company changed the plan to a traditional defined benefit plan, the FEC Plan, which provided guaranteed monthly benefits which were related to earnings, but not to market conditions. (PX 6, p 9-11). As defined contribution pension plans often favor employees with many years of service over a traditional defined benefit pension plan, many older employees who had been with the company many years, expressed dissatisfaction with changing the retirement plan. To keep these older pilots happy, the company grandfathered in the older plan by guaranteeing that it would be a minimum of what pilots would receive at retirement and the company continued to fund both plans. But as the company would not be providing both benefits, the funds of the A/B plan would be used an offset to the defined benefit guarantee, unless it turned out to be the greater of the two plans for the retiring pilot. (PX 6, p 9-11). At the time of the divorce, the A/B benefit was less than the defined benefit monthly (guaranteed) benefit at age 60. But market conditions in the 90's caused the value of the A/B benefit to rise well above the traditional defined (monthly) benefit amount and he was able to elect benefits under this plan. (PX 6, p 19).

The Respondent’s argument that the Petitioner received a windfall is nothing more than her complaining that she entered into an marital settlement agreement and that the unknown future market conditions benefitted her former husband more than she. Accordingly, her argument is little more than a complaint about the terms of the

agreement. Yet, the agreement was a fair one and was entered into freely. The Petitioner secured certain mortgages and assumed various debts in order to be able to provide the Respondent with the assets that she received at the time of the divorce. (T. 5/25/00, p. 18-19, 27-28). It was unknown to either party at that time of the divorce whether the Petitioner would even live to retirement and see one dime of the retirement plan that he kept, let alone that the stock market would begin to post record gains. At all times, however, the Respondent had access to her funds of the 401(k) plan, and the other liquid assets as well as the unencumbered marital residence provided to her in exchange for the Petitioner keeping his retirement plan.

A calculation of retirement benefits earned before and after the divorce shows that 86.12% of all benefits paid to the Petitioner were marital property. Therefore, based upon the *Differenderfer* finding, only 13.84% of this benefit may be used for purposes of demonstrating the Petitioner's ability to pay alimony. This court should reverse the trial court ruling on account of this Point 1.

II. WHEN RETIREMENT ASSETS ARE DIVIDED PURSUANT TO A DISSOLUTION OF MARRIAGE, SHOULD IT BE FLORIDA PUBLIC POLICY THAT THE ACTUAL PORTION OF THE DIVIDED RETIREMENT ASSETS NOT FIGURE IN DETERMINING ALIMONY SO THAT BOTH PARTIES ARE GIVEN AN OPPORTUNITY TO FACE RETIREMENT ON AN EQUAL FOOTING?

Retirement benefits fill a social need. They provide our aged a continued income when they are no longer able to work. This fills a social purpose of providing the retiree with independence so that he/she can live out the balance of his/her remaining years without dependence upon family members for support or public assistance. People who have worked all their lives have provided a contribution to society and are entitled to keep the provisions that they have made for themselves when they are unable to work. It is for this reason that all retirement benefits contain a nonassignment clause, because public policy creates a need to place the welfare of our elder citizens over the interests that creditors are paid money owed them.

Congress focused on retirement benefits to help solve this social need. The entire purpose of ERISA was to make certain, to the extent possible, that these benefits would be available when workers could no longer support themselves.[7] This was accomplished with sweeping changes in law. First and foremost, Congress has

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[7]

In the report to the full house before voting on the proposed ERISA bill, its full purpose is disclosed. A particular passage is revealing: *In the same time period, a presidential fact finding commission in presenting its report on the steel industry labor dispute in 1949 stated that: "We think all industry in the absence of adequate Government programs, owe an obligation to the worker to provide for the maintenance of the human body in the form of medical and similar benefits and full depreciation in the form of old age retirement - in the same way it provides for plant and machinery*." H.R. Rep. No. 533, 93rd Cong., 2nd Sess. 1974, II-Background, 1973 W.L. 12549 (Leg.His.).

continued and expanded tremendous tax incentives for private employers to adopt retirement plans.[8] The Act provides minimum vesting standards which must be adopted. *See*, 29 USC §§ 1053(a), 1054 (1997). It also provides assurances to participants that once earned, the benefits cannot be cutback. *See*, I.R.C. § 411 (d)(6) (2001). Many other provisions are added to make certain that the benefits that were earned possess real value so that employers are prevented from cutting back benefits through a backdoor approach. *See*, McGill, *Fundamentals of Private Pensions, Ch 2 "Regulatory Environment"*, 4th ed., Richard D. Irwin, Inc., (Homewood, Il 1979). ERISA also provides employees entitled to benefit many remedies for enforcement of that entitlement. The IRS could levy taxes against an employer who was not in compliance of ERISA requirements. I.R.C. §§ 4971, 4975 (2001). The Department of Labor could sue on behalf of the plan participant. 29 U.S.C. § 1132(a) (1997). It could provide the employer steep fines. *Id.* § 1132(l). The participant had specific authority to file an action in state or federal court for benefit disputes and could be awarded benefits for his or her trouble. *Id.* § 1132(a). These cumulative rights resulted in a strong congressional message that the promised benefits are a participant's

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[8] An employer contribution made to a retirement plan is deductible under I.R.C. §404(a) (2001) to the extent that it is a qualified under I.R.C. §401(a) (2001). *See also*, *Smith v. Mirmar*, 749 F.2d 181, at 182 (4th Cir. 1984).

"contractual" right and that the employer-sponsor would be forced to honor them. As strong as the congressional message may be, if creditors were not prevented from invading these assets, little, if any would be left for people to retire. The social purpose could also not be met without also placing the same restrictions on the employees entitled to these benefits. Employees could not pledge these assets in order to borrow money. *Id.* § 1056(d)(1). Access to these funds were generally denied to the participant except at a normal or designated early retirement date. *Id.* § 1056(a).

Payment of alimony to dependent spouses has long been a matter of public policy so as to protect the public from assuming the support responsibility of the dependent spouse. *See*, *Miami v. Spurrier*, 320 So.2d 397 (Fla. 3d DCA 1978). *See also*, *Cleveland v. Board of Trustees*, 229 N.J. Super 156, 550 A.2d 1287 (1988); *Young v.Young*, 507 Pa. 40, 488 A.2d 264 (1984). It is this public policy that supports invasion of pension assets when the interest of the family for whom the nonassingment clause in such plans was meant to protect may have stood in the way of forstering that public policy.[9] Alimony was paid from pension plans long before

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See, *Miami v. Spurrier*, supra; *Rev. Rul. 80-27* 1980-1 C.B. (The rule against assignment or alienation of plan benefits was intended to assure that the accrued benefits of a plan participant are actually available for retirement purposes. Therefore, the participant's benefits are not subject to attachment by general creditors. However, the rule was not intended to defeat the enforcement of the obligation of the plan participant to support the spouse or children of the participant through alimony or

Congress created an exception to the non assignment clause under 29 USC §1056(d)(1) (1997) with the QDRO in the Retirement Equity Act of 1984. Likewise, payment of alimony from retirement plans was ruled to defeat the nonassingment clause found in public pension plans long before the exceptions that were provided in governmental plans, or for that matter, the exceptions that many states adopted in statutes allowing for the direct payment of these benefits. The 1970's and early 80's saw an extensive line of federal and state rulings that found that the nonassignment clause of all pension plans were in place to protect the family interests to receive this future income above those of the creditors, against whom the clause was established and thus did not prevent direct payment of alimony or a property distribution to the

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support payments.) *Young v. Young*, supra. (The Pennsylvania Supreme allowed the attachment of pensions despite a non-assignment clause stating that public policy " forces individuals to be responsible for their obligations and does not permit them to hide behind the shield of statutory exemption. It also protects the public from having to assume the responsibility of supporting family members when individuals refuse to comply with court orders to provide support"); *Lindner v. Lindner,* 137 Mich. App. 569, 358 N.W. 2d 376 (1984),(The purpose behind the rule exempting pension from legal process is to protect the employee from claims of creditors. The marital relationship is not that of a debtor and creditor. Although a spouse is similar to a partner, the relationship is unique in family law and need not be analogized to any other type of legal entity. A spouse is a spouse. The law governing the creations and dissolution of a marriage is unique unto itself and a rule that applies to commercial transactions need not apply to marriage where the public policy considerations relating to the protection of divorcing spouses, e.g., the desirability of adequate support and an equitable distribution of joint property are entirely different.)

recipients from the plan.[10] In other words, the public policy behind retirement plans is to include the employee's spouse and children within the class benefitting from the protections encompassing retirement plans.

In *Majauskas v. Majauskas*, 463 N.E. 2d 15 (N.Y. 1984), the New York Court of Appeals reasoned to support both the division of pension as property and the inapplicability of the city's non-assignment clause in receiving a direct payment as follows:

> Although section 410 of the Retirement and Social Security Law contains similar protections of police pensions against assignment or legal process, such as provisions have been consistently construed not to have the effect of depriving the non-employee spouse of the rights accorded him or her upon dissolution of marriage by decree of divorce.

Id. at 21. In *Young v. Young*, supra at p. 266, the Pennsylvania Supreme Court stated in defense of a liberal interpretation of the non-assignment clause of citing *Fowler v. Fowler*, 116 N.H. 446, 362 A.2d 204 (1976):

> Retirement funds ... are created for the protection of not only the employee, but for the protection of his family as well. Hence, the provisions exempting assignments and attachments contained therein are to relieve the person exempted from the pressures of claims that are hostile to his and his dependents' essential needs.

In *Stone v. Seafarers International Union*, 450 F. Supp. 919 (N.D. Cal.1978), the

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[10] See footnote 9, supra.

federal district court in recognizing a direct assignment of property interests long before the QDRO was adopted in the Retirement Equity Act of 1984 stated:

> Members of the families of employees are included in the class which ERISA protects. The basic purpose of ERISA is to protect the literally millions of people who depend upon benefits from private pension plans for financial independence after retirement. H. Rep. No 93-533, 93rd Cong., 2d Sess., 1974 U.S. Code. Cong. & Adm. News 4639, 4640-4641; S. Rep. No. 93-127, 93rd Cong., 2d Sess., 1974 U.S. Code Cong & Adm. News 4838, 4839-4840. Congress was concerned not only about the workers themselves whose employment entitles them to benefits. Congress was also concerned about the **families** of those workers who depend to the same degree on the actual availability of those benefits. (emphasis added).

Id. at 926. The Illinois Supreme Court noted in *Smithberg v. Illinois Municipal Retirement Fund,* 192 Ill. 2d 291, 733 N.E.2d 560 (2000) that the purpose and legislative intent behind its non-assignment clause as to its governmental retirement plans was to protect retired employees and their beneficiaries from creditors. *Id.* at 304.[11]

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[11] Other rulings that have endorsed the public policy interest of providing direct payment for municipal and state plans include: *Koelsch v. Koelsch*, 148 Ariz. 187, 713 P.2d 1234 (1986)*; In re Marriage of Sedbrook*, 16 Kan. App. 2d 668, 827 P.2d 1222 (1992); *Glidewell v. Glidewell*, 859 S.W. 2d 675 (Ky.App. 1993); *Eskine v. Eskine*, 518 So.2d 505 (La. 1988); *Prince George's County Police Pension Plan v. Harman*, 321 Md. 699, 584 A.2d 702 (1990); *Early v. Early*, 413 Mass. 720, 604 N.E.2d 17 (1992); *Lindner v. Lindner*, supra; *Faus v. Faus*, 319 N.W.2d 408 (Minn 1982); *Cleveland v. Board of Trustees*, supra; *McDermott v. McDermott*, 119 A.D. 2d 370, 507 N.Y.S 2d 390 (N.Y.1986) interpreting *Majauskas* v. *Majauskas,* supra; *Furia v. Furia* , 638 A.2d 548 (R.I. 1994); *Rice v. Rice*. 762 P.2d 925 (Okla 1988); *Custer*

Not to lose focus, the primary provider is also part of this family unit and also entitled to public policy protection. Social Security law recognizes this principle when it limits attachment of social security benefits to spouses in need, and defined alimony so as to preclude any possible lump sum alimony used to provide equitable distribution. 42 USC §407(a) (2001). *See also*, 42 UCS §§ 662(c) (2001) applicable to §659. Congress appears to have balanced the needs of the primary provider with those of his/her former spouse when it added law that prevents equitable distribution of social security benefits, because social security benefits are available to the other spouse in his/her own right following divorce if such person was married for 10 years. *See*, 42 USC §402(a) to (f) (2001). In this way, Congress provided a basic double-dipping preemption when it prevented attachment of social security benefits for other than need.

In the case at bar, the primary provider is also no less worthy of this double-dipping preemption when it comes to retirement benefits. While a payment of $3,000 per month of alimony may not render this particular primary provider poor, the fact of the matter is that his spouse would not be rendered poor either by receiving less income because, she has as a result of equitable distribution over $660,000 on

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v. Custer, 776 S.W. 2d 92 (Tenn.App. 1988); *Irving Firemen's Relief v. Sears*, 803 S.W. 2d 747 (TX.App 1990).

which to live, in addition to a debt-free house worth $250,000. Allowing the trial court ruling to stand would not serve the public interest. Most primary providers have barely enough on which to live following retirement, and still less after going through a divorce. It is inequitable to provide a spouse equitable distribution and alimony following a divorce and give that spouse the understanding that if the assets provided through equitable distribution can produce immediate income, but are nonetheless not used for determining need when the calculation of an alimony provision is made, that the alimony supported-spouse can increase his/her need by spending those assets and then later seek reimbursement in a subsequent modification hearing. Such a result is supported by the district court's holding in *Acker*.

It can be beyond this court's control whether a asset distributed for equitable distribution purpose may be used to satisy the needs of the alimony recipent at the time of the divorce. The arguments presented in the previous section above amply demonstrated numerous situations when this can occur. It would be wrong for this court to set precedent that would allow a spouse who may be later able to access retirement assets an incentive to wrecklessly spend them, as was the case in *Waldman v. Waldman*, 520 So.2d 87 (Fla. 3d DCA 1988), or use them to even modestly improve her/his comforts, and allow her an ability to recapture the assets used in a modification of alimony proceeding.

As noted above, the alimony payor is seldom able to secure an in-service distribution due to the public policy purpose of preventing retirement benefits from being used as other than retirement benefits. The obligated spouse is also prevented by case law from voluntarily retiring early and receiving a reduction in his/her alimony obligation. See, *Pimm v. Pimm*, 601 So. 2d 534 (Fla. 1992); *Wiedman v. Wiedman*, 610 So. 2d 681 (Fla. 5th DCA 1992). Accordingly, the payor spouse is prevented from using retirement assets to improve his/her lifestyle while working. The other spouse is not prevented from spending her/his share of the equitably distributed asset. If that other spouse is not made to account what she/he spends of the equitably distributed asset in a later modifciation proceeding, it forces the alimony providing spouse to pay for it from that spouse's previously awarded retirement assets upon his retirement.

In further support of the public policy argument against double dipping an equitably distributed retirement asset and the appreciation thereon, one need only compare the difference between an ordinary asset and a retirement asset. Allowing the income of an ordinary asset does not effect the nature of the asset. The holder of the asset always has the ability to recoup that income through continued employment or other means. Retirement assets, whether in the nature of a defined benefit plan or a defined contribution plan such as a 401k plan or IRA, contemplate a conservative rate of return in order to meet the retirement needs of retirees over their life expectancy.

To use the appreciation or the asset itself for alimony depletes the availability of the asset over the remaining lifetime of the retiree. The retiree is no longer of age to make up that loss by simply returning to the workforce. One might further argue in this case that the Petitioner enjoyed a better than average return on the retirement assets. But that good return is offset by the reduced return that occurs in a down economy such as the economy of today.[12] Based on the forgoing, public policy would dictate that retirement assets and the appreciation thereon exchanged in an equitable distribution not be used to determine the ability to pay alimony.

III. THE TRIAL COURT ERRED WHEN IT PROVIDED THE FORMER WIFE RELIEF FROM THE MARITAL SETTLEMENT AGREEMENT BY REFUSING TO REDUCE HER ALIMONY WHEN THE PETITIONER'S ABILITY TO PAY ALIMONY AT HIS RETIREMENT DEPENDED UPON HIS SHARE OF THE DIVIDED PENSION PROPERTY.

This Court determined the condition necessary to set aside a marital settlement agreement entered into between the parties in *Casto v. Casto*, 508 So.2d 330 (Fla. 1987). The spouse seeking to set aside the agreement must show that the agreement was reached by fraud, deceit, duress, coercion, misrepresentation, or overreaching. A marital settlement agreement may also be set aside when it is unfair or provides an

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[12] One cannot ignore the 30 to 40 per cent drop in the stock markets from when this matter was tried in May, 2000.

unreasonable provision for that spouse. This court in *Macar v. Macar*, 803 So.2d 707 (Fla. 2001), has determined that the sole procedural vehicle to accomplish this is a motion under Fla. R. Civ. P. 1.540(b). *See also*, *Seiffert v. Seiffert*, 702 So. 2d 273 (Fla. 1st DCA 1997).

This Court revisited this issue following the 1993 amendment to the Civil Rules Procedures, in particular, Fla. R. Civ. P. 1.540(b), which added that there shall be no time limit for motions based upon fraudulent financial affidavits in marital cases. *See*, *Cerniglia v. Cerniglia*, 679 So. 2d 1160 (Fla. 1996). Time limits refer to the one year time limit placed on motions when the moving party is able to show intrinsic fraud. Extrinsic fraud falls outside the time limits, is collateral to the issues tried, and prevents one party from participating in the activities of the proceedings. *Gordon v. Gordon*, 625 So. 2d 59 (Fla. 4th DCA 1993).

The Respondent has maintained that the agreement is unfair, but she fails to allege any criteria necessary to set aside the agreement for any type of fraud, nor does she prove a single element necessary to set aside the agreement. The Respondent further maintained that the Petitioner received a windfall of approximately $1,000,000 from the the retirement plan, which he kept, even though the retirement plan was in exchange for other marital assets and the trade was based upon a value that was agreed to by both parties. (T. 5/25/00, p. 135-136, 148-149). She argues further that what the

Petitioner received was a windfall because of the events that occurred three years following the divorce whereupon the union (ALPA) negotiated for certain plan changes that allowed the Petitioner to retire early and receive the value of his alternative A/B plan, which at the time of the divorce, was less valuable than the Final Average Earnings Plan in effect. (PX 6, p. 14-15). She argues that she would never have agreed to accept a buyout of her interests in the retirement plan had she known the way things would turn out and speculates that the Petitioner must have known about these future events, which is why he was eager to buy out her interests. (T. 5025-00, p. 134-135, 156).

Her arguments are wrong as a matter of law. They are also based upon facts which are not supported by the record.. Mr. Thelen testified (and his testimony was not controverted) that, until 1994, one year after the divorce, no pilot had elected benefits from the A/B plan, which was grand fathered in as a guarantee of minimum benefits, because the value it produced in earlier years, based upon performance of the stock market, had not risen sufficiently to make the benefit more valuable than the Final Average Earnings plan benefit on the cutoff date. (PX 6, p. 14-15). The mere fact that the union negotiated a provision which allowed the Petitioner an opportunity to retire early (as one way to avoid the cutback in benefits) is irrelevant as to whether the appreciated benefit that the A/B plan produced rendered her agreement with the

Petitioner unfair.[13]

Even before the plan change was made, the Petitioner could have retired under the A/B plan at his age 60, in accordance with the plan as was adopted back in 1958. Accordingly, the argument raised by the Respondent reduces to nothing more than that the Respondent's expert had not considered whether the A/B plan could produce more benefits when the Respondent accepted the terms of the agreement, nor did she even take the time to investigate the matter further by reading the provisions of the plan document. Instead, she relied upon the benefit statement from Delta, submitted to her through the Respondent's attorney during the dissolution, which benefit statement accurately reflected the benefit to the Petitioner if he quit his job on the cutoff date used for equitable distribution purposes. (T. 5/25/00, p. 137-140).

The trial judge committed error when he relied on the testimony of the Respondent's expert to find that the actual sum the Respondent " received from the pension plan when he retired was greater than that contemplated at the time of the Property Settlement Agreement and, in addition, the one million dollars ($1,000.000.00) that the Former Husband received, at the time of his retirement, gave him a greater equitable distribution than the Former Wife . . ." (R. p. 256). The

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The Respondent conceded that a portion of the increase in the Petitioner's retirement was due to stock market appreciation. (T. 5/25/00, p. 133-134, 146-147).

Respondent's position at trial was to take unanticipated events occurring subsequent to the dissolution which effected the retirement plan growth, i.e. an unprecedented growth in the stock market, and then to relate these events back to the dissolution to support her claim that the property settlement as to the retirement plan was unfair. However, unfairness alone does not constitute grounds to vacate an agreement. *Macar v. Macar*, supra, approving *Petracca v. Petracca*, 706 So. 2d 904 (Fla. 4h DCA 1998); *Schreiber v. Schreiber*, 795 So. 2d 1054 (Fla. 4th DCA 2001); *Sieffert v. Seiffert*, 702 So. 2d 273 (Fla. 1st DCA 1997).

The purpose for a cutoff date is to have a common date when all assets and all liabilities accruing during the marriage end. That purpose is defeated when a court makes the same measurement at a different date long after the marriage ends and concludes that the agreement was unfair. Such a finding allows the distribution measurement to be based upon events as well as contributions and liabilities accruing subsequent to the end of the marriage. This ruling is therefore in direct violation of this court's ruling in *Boyett v. Boyett*, supra.

Certainly, what each party has in terms of assets at some later date is determined by the accumulation of post marital assets, the accruing of expenses after the marriage ends, a party's use of the marital assets for the comforts of life, and/or what philosophies are adopted in both investing those assets and saving future

earnings on those assets. This court determined in *Boyett*, that the equitable distribution of marital pension assets cannot include contributions made after the cutoff date nor can offset assets share in passive increases after the cutoff date. Thus, the trial court's finding violates this court's ruling in *Boyett*. As this finding was relied upon by the trial court in establishing the Petitioner's ability to pay the current level of alimony, this court should reverse the trial court's ruling on this point alone.

IV. THE TRIAL COURT ERRED BY NOT CONSIDERING THE INCOME THAT COULD BE PRODUCED BY THE RESPONDENT'S DIVIDED PENSION ASSET WHICH INCLUDES THE 401 (K) PLAN ASSET THAT SHE RECEIVED AND OTHER INCOME PRODUCING ASSETS PROVIDED TO HER IN EXCHANGE FOR HER INTEREST IN THE RETIREMENT PLAN.

In the event that this Court determines that none of the first three points are valid, then the trial court still had an obligation to follow the Florida Statutes. In particular, the court cannot use the Petitioner's share of the previously divided pension asset in determining his ability to pay alimony (irrespective of whether he is entitled to have most of it excluded under the *Diffenderfer* double-dipping preemption) without the court correspondingly using the Respondent's divided portion. *See, Lauro v. Lauro*, supra. Her liquid assets had grown to about $660,000 at the time of the trial and she could have invested those assets at that point in long-term treasurey bills capable of throwing off more than $39,600 of income without ever touching the

principle.[14]

In his trial memorandum submitted to the trial judge two days before trial, the Petitioner pointed out that the Respondent's financial position as reflected by her substantial liquid appreciated assets had a substantially reduced her need for alimony.[15] The Petitioner argued that *Lochridge v. Lochridge*, 526 So. 2d 1010 (Fla. 2nd DCA 1988) required the court to consider those assets in determining need for alimony, and that *Feidelman v. Feidelman*, 699 So. 2d 744 (Fla. 4th DCA 1997) permitted the trial court to consider an assumed return rate of 6.5% on such assets in determining need. (R. 208-213). At trial, the Respondent's expert advanced testimony that liquid assets could expect a return of 8 %. (R. 148-150). With $ 660,000.00 in liquid assets, the Respondent could expect a gross return from $ 42,900.00 to $ 52,800.00 per year based on those percentages. The mere fact that she potentially faced a pre-59 ½ penalty tax is not grounds for ignore her assets in determing her

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[14] 30 year Treasury Bill rates were paying over 6% at midyear.

[15] The Respondent's last financial affidavit filed on the eve of trial reflected before the payment of the alimony a deficit of $3,258.60. (RX. C) The Petitioner's obligations under the settlement agreement consisted of the $3000.00 per month alimony, the monthly property taxes on the wife's residence at $328.00 per month, the insurance on the residence at $171.00 per month, and the maintenance of life insurance at $107.00 per month, totaling $3,616.00. (R. p. 9-13, PX. 4, RX. C). The Petitioner's obligations actually exceed the Respondent's needs.

needs for alimony. It is not supported by the case law and it is certainly not supported by the district court's interpretation of the 1988 changes in the alimony statute and the 1988 equitable distribution statute in its opinion rendered below.

To the extent that this court rules that the trial court could permissibly exclude the Respondent's assets when she faces this 10% penalty, then the Petitioner argues that the Court excluded her assets based upon the testimony of law by both the Respondent's expert, and the Respondent, each of whom committed legal error on their interpretaion of the tax law. In particular, I.R.C. 72(t)(2)(A)(iv) (2001) provides an exception to the pre-59 ½ early excise tax penalty, and this exception applies when the assets come from either a qualified retirement plan or are IRA assets which were rolled over from a qualified plan. The Respondent can avoid imposition of the tax by either purchasing an annuity or, in the event she desires to maintain her own investments, by making withdrawls of equal payments over her life expectency. As the ruling to exclude her assets was based the court's finding that the Respondent was unable draw on those assets without imposition of a penalty, which is wrong as a matter of law, the ruling is flawed and must be reversed.[16] The ruling should also be

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Although the district court's opinion in *Acker* receded from its discussion of *Diffenderfer* in *Hollinger v. Baur*, 719 So.2d 954 (Fla. 3d DCA 1998), the third district in *Hollinger v. Baur*, at 955, reminded the trial court that consideration must be made for any tax penalty incurred in making premature withdrawals from the

reversed because nothing in the statues or case law supports any reason to exclude assets which may be used to meet expenses solely because it is not convenient for that party to use the asset at that time. Accordingly, this Court should reverse the trial court on this point alone.

V. TRIAL COURT ERRED IN FINDING THE FORMER WIFE ENTITLED TO AN AWARD OF REASONABLE ATTORNEYS FEES.

In Paragraph 41 of the Final Order, the court found as follows:

> Predicated upon the Former Wife's statement in open court, her claim for increased alimony is denied. The Former Wife has funds from which to pay her own attorneys fees and costs and so does the Former Husband. However, the Former Wife was put into the posture of defending this modification and has successfully defended this claim. (R.p. 253-262).

The court further went on to grant attorneys fees to the Respondent while reserving on the determination as to the amount. It is the Petitioner's contention that this determination of entitlement of attorneys fees and costs to the Respondent constituted error as a matter of law.

In Rosen v. Rosen, 696 So.2d 697 (Fla. 1997) in expanding the factors a trial court can take into consideration in awarding attorneys fees and costs in family law

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retirement account, citing *Gentile v. Gentile*, 565 So.2d 820 (Fla. 4th DCA 1990). The existence of the penalty did not preclude the consideration of the asset.

proceedings, this court stated at 700 of the opinion:

> [4] Section 61.16 constitutes a broad grant of discretion, the operative phrase being "from time to time." The provision simply says that a trial court may from time to time, i.e., depending on the circumstances surrounding each particular case, award a reasonable attorney's fee after considering the financial resources of both parties. Under this scheme, the financial resources of the parties are the primary factor to be considered. However, other relevant circumstances to be considered include factors such as the scope and history of the litigation; the duration of the litigation; the merits of the respective positions; whether the litigation is brought or maintained primarily to harass (or whether a defense is raised mainly to frustrate or stall); and the existence and course of prior or pending litigation. Had the legislature intended to limit consideration to the financial resources of the parties, the legislature easily could have said so. . . We further find that a court may consider all the circumstances surrounding the suit in awarding fees under Section 61.16. (Emphasis added).

The Trial Judge's justification for the attorneys fee award to the Respondent was that she was forced to defend the modification proceedings and had successfully defended those proceedings. This reasoning clearly suggests a prevailing party standard. However, attorneys fees awarded pursuant to § 61.16, Fla. Stat. (2001) are not based upon a prevailing party standard. *See*, *Abraham v. Abraham*, 753 So.2d 625 (Fla. 3d DCA 2000). As stated in *Cervoni v. Cervoni*, 715 So.2d 282 (Fla. 3d DCA 1998), this court in *Rosen v. Rosen*, supra, reiterated that the primary purpose of a fee award in family law proceedings is to ensure that both parties have access to competent counsel. *See also*, *Satter v. Satter*, 709 So.2d 617 (Fla. 4th DCA 1998).

Here, the Trial Court found both parties to have the ability to pay counsel.

In order to award attorneys fees and costs to a prevailing party and without regard to a parties need or ability to pay, the record in the case must show that the non-prevailing party asserted unreasonable positions, prolonged litigation, or otherwise engaged in abusive litigation practices. *See*, *Taylor v. Taylor*, 746 So.2d 577 (Fla. 1st DCA 1999); *King v. King*, 719 So.2d 920 (Fla. 5th DCA 1998); *Wilkinson v. Wilkinson*, 714 So.2d 524 (Fla. 5th DCA 1998). *cf.*, *Kay v. Kay*, 723 So.2d 366 (Fla. 3d DCA 1998). The record in this case does not indicate any prolonging of this case or the maintaining of abusive litigation on the part of the Petitioner. The Petitioner filed his proceedings in February of 1999. (R.p. 74-97). Following referral of this matter to a general master, the Respondent objected to the referral. (R.p. 139-143). Upon the setting of the matter for trial for September of 1999, the Respondent obtained a continuance. (R.p. 146-148, 157). Following the trial in this cause, the Respondent filed a motion for rehearing. (R.p. 218-220). Furthermore, notwithstanding the fact that the Petitioner accrued an arrearage when he stopped paying alimony after reaching mandatory retirement, the trial court did not hold him in contempt, resulting in inference that the trial judge recognized a degree of reasonableness as to the Petitioner's position in the litigation. Surely, with what has occurred on appeal, i.e. an initial oral argument, a rehearing *en banc* on the district court's own motion, and an

opinion whereupon the district court recedes on the very authority relied upon by the Petitioner as a basis to pursue his modification, a certification of a conflict of decisions which effects the ultimate merits of the case, and a strong dissent, can there be any basis to find that the Petitioner has maintained frivolous or spurious proceedings. Accordingly, with the record being devoid of any evidence of prolonged or spurious litigation on the part of the Petitioner, in the event that the trial judge is not reversed on the merits, the attorneys fee award to the Respondent must be reversed.

CONCLUSION

The trial judge's denial of the Petitioner's modification of alimony request should be reversed. This Court should hold that the *Diffenderfer* double dipping prohibition is still applicable on the basis that the 1988 equitable distribution statute and the amendments to the alimony statute were irrelevant to the *Diffenderfer* holding as well as for public policy reasons. This court should further reverse the trial judge when he erroneously found some six years later that the Respondent received an unequal division of assets. As this court found that inclusion of equitably distributed assets in the ability of the husband to pay alimony constitutes double-dipping, the trial court's failure to include the Respondent's portion of the equitably distributed assets (after wrongfully including the Petitioner's) results in triple-dipping.

Finally, the trial court erred in the attorneys' fee award to the Respondent based on a prevailing party standard. The award should be reversed, especially if this court should not grant relief to the Petitioner as to the alimony.

Respectfully Submitted,

By:_______________________________
Jerome J. Kavulich, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true copy of the above has been sent via U. S. First Class Mail to Nancy A. Hass, Esq., Nancy A. Hass P.A., The Prince George, 1865 S. Ocean Drive/Suite 5K, Hallandale, Fl. 33009, this ____ day of October, 2002.

By:______________________________
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CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY, that the foregoing has been submitted in Times New Roman 14 point font.

By:________________________________
JEROME J. KAVULICH, Esq.