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## Alimony Modification: Awards Based on Ability to Pay Without Showing Increased Need

Helene R. Cohen\*

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## *Notes and Comments*

### Alimony Modification: Awards Based on Ability to Pay Without Showing Increased Need

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#### I. INTRODUCTION

When a marriage is dissolved, and an absolute divorce is granted, all rights and duties based upon that marriage end—except for alimony.<sup>1</sup> This single marital obligation continues beyond divorce when

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1. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 620 (1988). In its technical sense, "alimony" means nourishment or sustenance, and has for its sole object the provision of food, clothing, shelter, and other necessities for the wife. See *Fort v. Fort*, 90 So. 2d 313 (Fla. 1956); *Bredin v. Bredin*, 89 So. 2d 353 (Fla. 1956); *Floyd v. Floyd*, 108 So. 896 (Fla. 1926); see also 25 FLA. JUR. 2D *Family Law* § 433 (1981).

all other obligations have ceased.<sup>3</sup>

Historically, England and America have differed in their approaches to alimony and divorce. In England, the ecclesiastical courts only granted divorces *a mensa et thoro*, partial divorces, which authorized spouses to live apart, but did not free them from the marriage bond.<sup>3</sup> The alimony awarded by these courts merely constituted recognition and enforcement of the husband's duty to support the wife which continued after judicial separation.<sup>4</sup> In contrast, American petitions for absolute divorces are usually granted.<sup>5</sup> Even though the United States still follows the English model for alimony, requiring one spouse to financially aid the other,<sup>6</sup> changes in statutory and constitutional law, the influence of the women's rights movement, and the changes in the economic position of women have been reflected in new rules governing the support obligations of spouses.<sup>7</sup> To facilitate the determination of

2. CLARK, *supra* note 1, at 642.

3. *Id.* at 619; *see also* 2 JOEL PRENTISS BISHOP, MARRIAGE, DIVORCE AND SEPARATION § 857 (1891) (no court in England had jurisdiction to dissolve marriages until 1858).

4. CLARK, *supra* note 1, at 619; *see also* Killian v. Lawson, 387 So. 2d 960 (Fla. 1980) (a husband has a common law duty to support his wife); Floyd v. Floyd, 108 So. 896, 898 (Fla. 1926) ("Alimony is based on the common-law obligation of the husband to support the wife."); Davies v. Davies, 113 So. 2d 250 (Fla. 3d Dist. Ct. App. 1959) (money required to be paid by a man to his former wife for her sustenance derives from the legal duty to support his wife which he assumed when they married); 25 FLA. JUR. 2D *Family Law* § 433 (1981).

5. CLARK, *supra* note 1, at 620. However, the purpose for awarding alimony in an absolute divorce is less clear because a divorce acts to free two people from the marital bond. *Id.* In many instances, the final decree for a dissolution of marriage marks the beginning of one spouse's obligation to pay alimony to the other spouse. *Id.*

6. *Id.* at 619.

7. *See* Anderson v. Anderson, 333 So. 2d 484 (Fla. 3d Dist. Ct. App. 1976) (the horse and buggy days are over and women now have a place in the business community.); Sherman v. Sherman, 279 So. 2d 887 (Fla. 3d Dist. Ct. App.) (Barkdull, C.J., dissenting), *review denied*, 282 So. 2d 877 (Fla. 1973). In 1975, 48.3% of married women in the 25-34 age group participated in the labor force. THE STATISTICAL ABSTRACT OF THE UNITED STATES 384 (1990). In 1988, that figure was 68.6%. *Id.* The corresponding figures for women who were either widowed, divorced or married (spouse absent) were 67.5% in 1975 and 76.3% in 1988. *Id.*

In fact, in Florida, the Dissolution of Marriage Act of 1971 expressly provided that "[i]n a proceeding for dissolution of marriage, the court may grant alimony to either party, . . . [and] [i]n determining a proper award, . . . [t]he court may consider any factor necessary to do equity and justice between the parties." FLA. STAT. § 61.08 (1971). In contrast, the Uniform Marriage and Divorce Act states:

The court may grant a maintenance order for either spouse only if it finds

who shall receive alimony and to what extent it should be awarded, alimony is divided into the following categories: 1) temporary alimony,<sup>8</sup> 2) rehabilitative alimony,<sup>9</sup> and 3) permanent alimony.<sup>10</sup> However, only discussions which concern permanent alimony are the subject of this comment.

While many wives still do not work, those who do most often do not earn as much as their husbands.<sup>11</sup> Therefore, as a practical matter, most support litigation is brought by the wife against her husband.<sup>12</sup> For convenience in terminology, the following discussion refers to the husband's duty of support. Of course, the principles outlined apply equally to the less frequent suit by a husband.<sup>13</sup>

Doubts about how much alimony should be given<sup>14</sup> or about how

that the spouse seeking maintenance: (1) lacks sufficient property to provide for his reasonable needs; and (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

UNIFORM MARRIAGE AND DIVORCE ACT § 308(a) (1987).

8. Temporary alimony is an allowance made to a spouse for maintenance during the pendency of an action. *See, e.g., Floyd*, 108 So. at 898; *see also* 24 AM. JUR. 2D *Divorce and Separation* § 521 (1983).

9. "Rehabilitative alimony is a form of alimony designed to place the dependent spouse in an income generating position, which would [eventually] free the obligor spouse from [alimony] obligation[s] . . . ." 24 AM. JUR. 2D *Divorce and Separation* § 521 (1983); *see also* *Canakaris v. Canakaris*, 382 So. 2d 1197, 1202 (Fla. 1980) ("The principle purpose of rehabilitative alimony is to establish the capacity for self-support of the receiving spouse . . .").

10. Permanent alimony is an allowance for the support and maintenance of a spouse during his or her lifetime. *Cann v. Cann*, 334 So. 2d 325, 328-29 (Fla. 1st Dist. Ct. App. 1976); *see also* 24 AM. JUR. 2D *Divorce and Separation* § 624 (1983) (permanent alimony is used primarily for the purpose of distinguishing that allowance from temporary alimony allowed during the pendency of a suit).

11. CLARK, *supra* note 1, at 253; *see* THE STATISTICAL ABSTRACT OF THE UNITED STATES 455 (1990) which states that the mean earnings of married husbands in the 25-34 year age group in 1987 was \$25,238; however, the corresponding figure for married women in that age group was \$13,077. *Id.*

12. CLARK, *supra* note 1, at 253.

13. *Id.*

14. *See, e.g., Ray v. Ray*, 247 So. 2d 473 (Fla. 3d Dist. Ct. App. 1971) (the amount of permanent alimony to be awarded in a divorce proceeding lies within the sound discretion of the trial court); *see also* 25 FLA. JUR. 2D *Family Law* § 469 (1981) (collected cases); Jay M. Zitter, Annotation, *Excessiveness or Adequacy of Amount of Money Awarded as Permanent Alimony Following Divorce*, 28 A.L.R.4TH 786 (1984).

long the payments should continue after divorce<sup>15</sup> have been the subject of much litigation. A complex issue is raised when, after divorce, the obligor spouse's fortunes greatly improve.<sup>16</sup> The question here is whether the receiving spouse should get an increase in alimony based on this fact alone. Some cases answer this question in the affirmative.<sup>17</sup> However, this article advocates that those cases were wrongly decided. A receiving spouse should not be awarded an upward modification in her alimony simply because the obligor spouse has benefitted from increased financial wealth since the parties' divorce. Once the marital bond is broken and the relationship between the parties end, the receiving spouse does not have a right to claim an amount which would maintain her *above* that lifestyle which she was accustomed to during the marriage.<sup>18</sup>

In contrast to the author's viewpoint on whether alimony should be increased based solely on the obligor spouse's increased ability to pay, is the recently decided Florida Supreme Court case, *Bedell v. Bedell*.<sup>19</sup> In *Bedell*, the parties were divorced after thirteen years of marriage.<sup>20</sup> At the time of the dissolution, Mr. Bedell had opened his first medical office. Then, eleven years after the divorce, Mrs. Bedell filed a petition in the trial court seeking an upward modification of her alimony based solely on the fact that her former husband had an increased ability to pay.

15. See, e.g., *Friedman v. Friedman*, 366 So. 2d 820 (Fla. 3d Dist. Ct. App. 1979) (former husband's petition seeking modification of divorce decree and terminating periodic alimony upon showing that former wife had become self sufficient); see also Comment, *Divorce—Alimony—Death of Divorced Husband Terminates his Obligation to Pay Alimony*, 67 HARV. L. REV. 1074, 1075 (1954) (as a general rule, alimony terminates on the husband's death unless there is a provision in the settlement agreement or in the decree that expressly states otherwise).

16. CLARK, *supra* note 1, at 662.

17. See, e.g., *England v. England*, 520 So. 2d 699 (Fla. 4th Dist. Ct. App. 1988); *Lenton v. Lenton*, 370 So. 2d 30 (Fla. 2d Dist. Ct. App. 1979), *review denied*, 381 So. 2d 767 (Fla. 1980).

18. An exception to this would be a situation in which the wife financially supported the husband while he attended school for specialized training during their marriage, and the parties divorced before the obligor spouse reached his financial potential. In this situation, the wife should be entitled to share in the husband's success, because her efforts contributed to that success which he now enjoys. See *Moss v. Moss*, 264 N.W.2d 97 (Mich. Ct. App. 1978); *Mahoney v. Mahoney*, 453 A.2d 527 (N.J. 1982); *Dewitt v. Dewitt*, 296 N.W.2d 761 (Wis. Ct. App. 1980).

19. 583 So. 2d 1005 (Fla. 1991).

20. *Id.* at 1006.

Thus, *Bedell* addressed the issue of whether an upward modification of alimony should be granted when based solely upon an increase in the payor's ability to pay without the recipient spouse proving increased or continuing need that was not initially satisfied by the original divorce decree.<sup>21</sup> The Florida Supreme Court held that a significant increase in the financial ability of the obligor spouse to pay may, standing alone, justify an order of increased alimony.<sup>22</sup>

The purpose of this comment is to critique the Florida Supreme Court's holding in *Bedell*. Emphasis is placed on Florida statutory and case law; however, other jurisdictions are referenced in order to oppose Florida's position. To this end, the comment is divided into five sections. The first section discusses permanent alimony because an understanding of permanent alimony is necessary for the discussion of *Bedell* which follows.<sup>23</sup> The second section discusses the bases upon which alimony modification may be sought.<sup>24</sup> The third section presents a chronology of prior Florida cases which lead to the conflict resolved by the Florida Supreme Court in *Bedell*. The fourth section of this comment is a critical analysis of the Florida Supreme Court's rationale as applied in *Bedell*. The final section concludes and discusses whether *Bedell* has established a uniform standard which the lower courts must follow when presented with an alimony modification issue, or whether the court sidestepped the issue and failed to resolve the conflict.

## II. ALIMONY

When a marriage ends, one spouse may be required to financially support the other spouse via permanent alimony.<sup>25</sup> This obligation owed by a husband to his former wife was initially regarded by the courts as a personal duty owed to society.<sup>26</sup> An award of permanent alimony<sup>27</sup> by

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21. *Id.*

22. *Id.* at 1007.

23. The *Bedell* controversy arose out of a permanent alimony award which was granted to Mrs. *Bedell* at the time of the divorce.

24. For an in depth discussion of what constitutes "changed circumstances" for purposes of alimony modification, see Carol Gilliam Green, Note, *Domestic Relations: Modification of Future Alimony Payments Due to Changed Circumstances*, 20 WASHBURN L.J. 66 (1980); 24 AM. JUR. 2D *Divorce and Separation* §§ 699-745 (1983).

25. For definition of permanent alimony, see *supra* note 10.

26. *Howard v. Howard*, 118 So. 2d 90, 94 (Fla. 1st Dist. Ct. App. 1960). *But see, e.g., Anderson v. Anderson*, 333 So. 2d 484, 485 (Fla. 3d Dist. Ct. App. 1976) ("The necessity of insuring that the divorced wife could not become a public

the trial court does not become a vested interest to receive alimony<sup>28</sup> and it is always subject to the jurisdiction of the court for modification.<sup>29</sup> Because the recipient of permanent alimony does not have an inherent vested right to receive alimony, the question of whether permanent alimony shall be awarded at all, and if so, what the proper amount of the award shall be, rests within the sound discretion of the trial court.<sup>30</sup>

Many Florida courts have stated that a divorced wife is entitled to live in a manner reasonably commensurate with the standard of living established during the course of the marriage.<sup>31</sup> Because many women sacrifice their own careers so that their husbands may maintain theirs, and tend to the needs of the family and the family home, this author agrees that a divorced wife should be maintained in the lifestyle which she enjoyed while the parties were married. However, the amount of alimony allowed should not be such that one spouse passes from misfor-

charge—is a thing of the past.”) (quoting *Anderson v. Anderson*, 194 So. 2d 906, 908-09 (Fla. 1967) (Roberts, J., dissenting)). Prior to 1971, section 61.08 only awarded alimony to the wife: “In every judgment of divorce in an action by the wife, the court shall make such orders about . . . alimony . . . to be made to her, and . . . the security to be given therefor, as from the circumstances of the parties and the nature of the case is equitable.” FLA. STAT. § 61.08 (1969). However, The Dissolution of Marriage Act of 1971 changed so that “[i]n a proceeding for dissolution of marriage, the trial judge may grant alimony to either party . . . .” FLA. STAT. § 61.08 (1971).

27. Permanent alimony is permanent only in the respect that it is a final provision for maintenance, contained either in a separate maintenance order or in the final judgment for dissolution of marriage. 24 AM. JUR. 2D *Divorce and Separation* § 624 (1983).

28. *O’Neal v. O’Neal*, 410 So. 2d 1369, 1373 (Fla. 5th Dist. Ct. App. 1982); *see also* *Hunt v. Hunt*, 394 So. 2d 564 (Fla. 5th Dist. Ct. App. 1981) (a wife does not have a vested right in her husband’s earnings forever).

29. *See, e.g.,* *Chastain v. Chastain*, 73 So. 2d 66 (Fla. 1954) (modification should be based on a clear showing of changed circumstances and the financial ability of the husband); *Ludacer v. Ludacer*, 211 So. 2d 64, 65 (Fla. 2d Dist. Ct. App. 1968) (“The amount of alimony . . . is, in every case, a matter of continuing jurisdiction.”).

30. *Accord* *Cyphers v. Cyphers*, 373 So. 2d 442 (Fla. 2d Dist. Ct. App. 1979); *Shultz v. Shultz*, 290 So. 2d 146 (Fla. 2d Dist. Ct. App. 1974); *Ray v. Ray*, 247 So. 2d 473 (Fla. 3d Dist. Ct. App. 1971); *McGarry v. McGarry*, 247 So. 2d 13 (Fla. 2d Dist. Ct. App. 1971); *see* *Canakaris v. Canakaris*, 382 So. 2d 1197, 1202 (Fla. 1980) (“Judicial discretion is defined as [t]he power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.”); *see also* *Patrick v. Patrick*, 399 So. 2d 72 (Fla. 5th Dist. Ct. App. 1981) (amount of monthly alimony award is within discretion of trial court).

31. *E.g., O’Neal*, 410 So. 2d at 1371.

tune to prosperity, and the other spouse passes from prosperity to misfortune.<sup>32</sup> “As a general [rule], the amount awarded as permanent alimony must be fair and just under all circumstances of the case.”<sup>33</sup> In situations where both parties maintained careers during the marriage and neither party was exclusively dependent on the income of the other, alimony should be denied.<sup>34</sup>

However, in determining those cases in which it would be fair and just for one spouse to receive permanent alimony, two factors must be present.<sup>35</sup> First, it is necessary that one spouse demonstrate a need for the funds.<sup>36</sup> Second, the other spouse must have the financial ability to supply the needed funds.<sup>37</sup> Of the two factors listed above, the receiving spouse’s need is the most significant because regardless of whether the other spouse has the financial wealth to pay a reasonable amount of alimony, the needy spouse is clearly not entitled to receive it unless her resources are not enough to maintain her in the same lifestyle that she was accustomed to during the marriage.<sup>38</sup> For example, in *Anderson v.*

32. *Canakaris*, 382 So. 2d at 1204.

33. 24 AM. JUR. 2D *Divorce and Separation* § 653 (1983); see FLA. STAT. § 61.08(2) (1989) (“The court may consider any factor necessary to do equity and justice between the parties.”).

34. For example, in *Campbell v. Campbell*, the evidence showed that the former wife was able to support herself adequately and to a degree comparable with the standard of living enjoyed by the parties during their marriage. 432 So. 2d 666, 669 (Fla. 5th Dist. Ct. App. 1983), *review denied*, 453 So. 2d 1364 (Fla. 1984).

35. See FLA. STAT. § 61.08(2)(d) (“In determining a proper award of alimony, the court shall consider . . . [t]he financial resources of each party.”); 25 FLA. JUR. 2D *Family Law* § 454 (1981).

36. 25 FLA. JUR. 2D *Family Law* § 454 (1981); see *O’Neal v. O’Neal*, 410 So. 2d 1369 (Fla. 5th Dist. Ct. App. 1982) (permanent alimony is used to provide the former wife with the necessities of life as was established by the marriage between the parties); *Johnson v. Johnson*, 386 So. 2d 14 (Fla. 5th Dist. Ct. App. 1980) (permanent alimony award to wife was proper where she had been a housewife during the parties twenty year marriage and did not work outside the home); *Cyphers v. Cyphers*, 373 So. 2d 442 (Fla. 2d Dist. Ct. App. 1979) (amount of alimony award was not excessive where wife was not in a position to support herself without assistance from her former spouse); *McAllister v. McAllister*, 345 So. 2d 352 (Fla. 4th Dist. Ct. App. 1977) (alimony is predicated on the needs of the wife).

37. *Chastain v. Chastain*, 73 So. 2d 66 (Fla. 1954) (in determining ability to pay, the court must consider the nature of the obligor spouse’s capital assets as well as his income); *O’Neal v. O’Neal*, 410 So. 2d 1369 (Fla. 5th Dist. Ct. App. 1982) (the obligor spouse must be able to meet the needs of the recipient spouse); *McAllister v. McAllister*, 345 So. 2d 352 (Fla. 4th Dist. Ct. App. 1977) (alimony is predicated on the husband’s ability to pay it); 25 FLA. JUR. 2D *Family Law* § 454 (1981).

38. See CLARK, *supra* note 1, at 647-48.



*Anderson*, the court stated:

In determining the question of what alimony, if any, should be awarded to the wife in a divorce proceeding, [the wife's] monetary need must first be met by her own resources—her wage, earning capacity, and her separate estate—and only then, if they are not adequate, may the husband be called upon to provide her with such additional funds as from the circumstances of the parties . . . .<sup>39</sup>

Florida Statute section 61.08 further provides that in addition to the financial circumstances and needs of the parties, the trial court may take into consideration any factor necessary to do equity and justice between the parties, including such factors as the length of time the parties have been married, the standard of living established during the marriage, age, health and the conduct of the parties.<sup>40</sup> Because every

39. *Anderson v. Anderson*, 333 So. 2d 484, 486 (Fla. 3d Dist. Ct. App. 1976).

40. See FLA. STAT. § 61.08(1)(2) (1989) which provides:

- (1) The court may consider the adultery of a spouse . . . in determining . . . the amount of alimony, if any, to be awarded.
- (2) In determining a proper award of alimony, . . . the court shall consider all relevant economic factors, including but not limited to:
  - (a) The standard of living established during the marriage.
  - (b) The duration of the marriage.
  - (c) The age and the physical and emotional condition of each party.
  - (d) The financial resources of each party.
  - (e) When applicable, the time necessary for either party to acquire sufficient education or training to enable such party to find appropriate employment.
  - (f) The contribution of each party to the marriage . . . .

The court may consider any other factor necessary to do equity and justice between the parties.

See also *Canakaris v. Canakaris*, 382 So. 2d 1197, 1204 (Fla. 1980) (award of alimony was proper given the income of the parties, the length of the marriage, the standard of living enjoyed by the parties, and the education of the wife); Ira Mark Ellman, Note, *The Theory of Alimony*, 77 CALIF. L. REV. 1 (1989). However, The Uniform Marriage and Divorce Act which primarily considers the factors only of the proposed recipient spouse:

- (b) The maintenance order shall be in amounts . . . [as] the court deems just, without regard to marital misconduct, and . . . considering relevant factors including:
  - (1) the financial resources of the party seeking maintenance . . . ;
  - (2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
  - (3) the standard of living established during the marriage;
  - (4) the duration of the marriage;

case revolves around a unique set of facts, the consideration of these additional factors help assure that justice between the parties will be attained in each case.

### III. CHANGED CIRCUMSTANCES

Subsequent to a final judgment for dissolution of marriage which includes an alimony award, either party may petition for modification based upon a change in circumstance.<sup>41</sup> "Changed circumstances may warrant modification of future payments on the theory that alimony is a substitute for support, and support [which is] subject to modification, alimony should [also] be [modifiable]."<sup>42</sup> The authority to modify permanent alimony awards based upon the requisite showing of changed circumstances is usually within the sound discretion of the trial court.<sup>43</sup> Likewise, in Florida, changed circumstances, may, as a matter of law, warrant a modification of the amount of existing alimony payments, either upward or downward, according to the particular facts of each case.<sup>44</sup> Even though it is not expressly stated in section 61.14, there is a

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(5) the age and the physical and emotional condition of the spouse seeking maintenance; and

(6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

UNIFORM MARRIAGE AND DIVORCE ACT § 308(b) (1987).

41. See FLA. STAT. § 61.14(1) (1989). The term "change of circumstance" is defined as a condition used to show a need for modification of a support order. BLACK'S LAW DICTIONARY 231 (6th ed. 1990).

42. Note, *supra* note 24, at 69.

43. The authority to grant permanent alimony awards is given to the trial court by statute in many states. *E.g.*, COLO. REV. STAT. § 14-10-122 (1973); CONN. GEN. STAT. ANN. § 46b-86 (1986); FLA. STAT. § 61.14(1) (1989) ("The court has jurisdiction to make orders as equity requires . . ."); KAN. STAT. ANN. § 60-1610 (Supp. 1986); MINN. STAT. ANN. § 518.64 (Supp. 1987); TENN. CODE ANN. § 36-5-101 (Supp. 1986); WIS. STAT. ANN. § 767.32 (Supp. 1986); see also CLARK, *supra* note 1, at 655. *But see* Pope v. Pope, 342 So. 2d 1000, 1001 (Fla. 4th Dist. Ct. App. 1977) ("A petition to modify an award of alimony . . . may not be denied when the change is clearly shown.") (quoting Chord v. Chord, 209 So. 2d 281 (Fla. 3d Dist. Ct. App. 1968)).

44. Rogers v. Rogers, 229 So. 2d 618, 620 (Fla. 2d Dist. Ct. App. 1969); see, *e.g.*, Schlesinger v. Emmons, 566 So. 2d 583 (Fla. 2d Dist. Ct. App. 1990) (where former wife's need was not originally met, great improvement in former husband's income due to inheritance warranted an upward modification); Waskin v. Waskin, 484 So. 2d 1277 (Fla. 3d Dist. Ct. App. 1986) (reduction of former husband's financial condition resulting from voluntary act did not warrant a downward modification of his

general agreement among the courts that to warrant modification, the changed circumstances must be substantial<sup>45</sup> and permanent.<sup>46</sup> Courts will not ordinarily modify an alimony decree based on a mere expectation that circumstances will change in the future.<sup>47</sup>

Many courts have struggled with the concept of what constitutes a substantial change so as to warrant a modification of the alimony decree. Since each case is unique, a court's decision on whether to modify an alimony award lies within the particular facts of each case. Some of the more common grounds for modification in Florida include changes in the recipient spouse's needs; reduction of the obligor spouse's income; and an increase in the obligor spouse's income without a corresponding increase in the need of the recipient spouse.

### A. *Changes in the Recipient Spouse's Needs*

If the needs of the recipient spouse have increased since the divorce, her alimony may be increased provided that the obligor spouse has the present financial ability to meet those increased needs.<sup>48</sup> The

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alimony obligations).

45. See, e.g., *Canakaris v. Canakaris*, 382 So. 2d 1197 (Fla. 1980) (Once awarded, permanent alimony is subject to modification upon a substantial change of circumstances.); *Bloemendaal v. Bloemendaal*, 275 So. 2d 30 (Fla. 4th Dist. Ct. App. 1973); *Cheves v. Cheves*, 269 So. 2d 414 (Fla. 2d Dist. Ct. App. 1972); Note, *supra* note 24, at 69; J. Matthew Carey, Note, *Reduction in Alimony as a Result of Changes in Financial Condition: A Guide for the Practitioner*, 15 J. FAM. L. 300, 306 (1977) ("The determination of substantiality . . . must be made by evaluating the collective impact of the alleged change on both parties . . .") (emphasis in original). The Uniform Marriage and Divorce Act provides for modification "only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable." UNIFORM MARRIAGE AND DIVORCE ACT § 316(a) (1987). Furthermore, the spouse petitioning for modification of the alimony decree has the burden of showing a "substantial change in the material circumstances since the decree was entered." 24 AM. JUR. 2D *Divorce and Separation* § 711 (1983).

46. See, e.g., *Henderson v. Henderson*, 463 So. 2d 485 (Fla. 2d Dist. Ct. App. 1985); *Thibodeau v. Thibodeau*, 461 So. 2d 1035 (Fla. 2d Dist. Ct. App. 1985); *Bish v. Bish*, 404 So. 2d 840 (Fla. 1st Dist. Ct. App. 1981); Note, *supra* note 45, at 307.

47. 24 AM. JUR. 2D *Divorce and Separation* § 712 (1983); see *Penland v. Penland*, 442 So. 2d 1054 (Fla. 1st Dist. Ct. App. 1983) (alimony may not be modified for anticipated changes in circumstances).

48. *McArthur v. McArthur*, 95 So. 2d 521 (Fla. 1957); see *Pope v. Pope*, 342 So. 2d 1000 (Fla. 4th Dist. Ct. App. 1977); *Howard v. Howard*, 118 So. 2d 90 (Fla. 1st Dist. Ct. App. 1960); M. L. Cross, Annotation, *Change in Financial Condition or Needs of Husband or Wife as Ground for Modification of Decree for Alimony or*

increased need may be due to ill health,<sup>49</sup> a general increase in the cost of living,<sup>50</sup> and other similar factors.<sup>51</sup> “In assessing the recipient’s need for increased alimony, the court should not be limited to the bare necessities of life, but rather should consider the recipient’s reasonable needs in relation to the obligor spouse’s income, just as in the case when alimony is initially being granted.”<sup>52</sup> Therefore, if the receiving spouse is no longer able to maintain the lifestyle she has been accustomed to on the present alimony received from the obligor spouse, then an upward modification in her alimony should be awarded by the trial court.<sup>53</sup>

However, where the former wife’s increased need is “due to a voluntary change in her way of life, the courts have been reluctant to grant her an increase in alimony.”<sup>54</sup> In situations where the recipient spouse purposefully increased her standard of living, such as when the alimony recipient obtains employment and becomes self supporting, she should, at the very least, be required to provide that amount which is above the standard of living she enjoyed during the marriage.<sup>55</sup> This situation was illustrated in *Anderson v. Anderson* where the former husband filed a petition for modification of the divorce decree, seeking to be relieved from the order requiring him to pay alimony on the

*Maintenance*, 18 A.L.R.2D 10, 59 (1951).

49. *McArthur*, 95 So. 2d at 524.

50. *Powell v. Powell*, 386 So. 2d 1214, 1215 (Fla. 3d Dist. Ct. App. 1980) (“[A] rise in the cost of living is a change of circumstances which may be properly considered by a trial judge in increasing the financial obligations of a husband . . . [where his] ability to pay has also increased.”); see Annotation, *supra* note 48, at 10. A.L.R.2D 10 (1951).

51. See, e.g., *Howard*, 118 So. 2d 90.

52. CLARK, *supra* note 1, at 661.

53. For example, in *Wolfe v. Wolfe*, the court stated that “[i]f the party seeking a modification of alimony cannot ‘go it alone,’ if he or she is unable to ‘be in a position reasonably to continue to maintain the lifestyle to which the parties had become accustomed during the marriage,’ the petition for modification should be granted.” 424 So. 2d 32, 35 (Fla. 4th Dist. Ct. App. 1982) (quoting *Lee v. Lee*, 309 So. 2d 26, 28 (Fla. 2d Dist. Ct. App. 1975)).

54. CLARK, *supra* note 1, at 661; see, e.g., *Sistrunk v. Sistrunk*, 235 So. 2d 53 (Fla. 4th Dist. Ct. App. 1970).

55. CLARK, *supra* note 1, at 661. *Contra Punie v. Punie*, 291 So. 2d 23 (Fla. 3d Dist. Ct. App. 1974) (It was not an abuse of discretion for the trial court to deny the former husband a reduction in his alimony obligation, because even though the financial circumstances of the former wife had improved, the husband’s ability to pay had improved even more substantially than the wife’s.).

ground that his former wife had become self supporting.<sup>56</sup> The trial court denied his petition, and the Third District Court of Appeal affirmed.<sup>57</sup>

The husband subsequently petitioned unsuccessfully to the Supreme Court of Florida for review.<sup>58</sup> Then, approximately ten years after filing his first petition for modification, the former husband filed a second petition asking the court to reduce or terminate his alimony obligation.<sup>59</sup> It is from Justice Roberts' dissent<sup>60</sup> that the Third District Court of Appeal, in reviewing the former husband's second petition for modification, adopted the following language regarding the capability of the wife for self support:

[T]he marriage status, once achieved by the wife, does not carry with it the right forever after to be supported by her former husband in veritable ease and comfort, regardless of her capabilities for self support. The horse and buggy era when the husband's vow to take care of his wife 'till death do us part' was accepted by both parties as a sacred promise and an essential part of the marriage contract—required, as well, by the mores of the society of that era and the necessity of insuring that the divorced wife could not become a public charge—is a thing of the past.<sup>61</sup>

The order denying the former husband's second request for termination of his obligation to pay alimony was reversed on the ground that the former wife had become self supporting, even though he had a much larger income.<sup>62</sup>

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56. *Anderson v. Anderson*, 180 So. 2d 360, 362 (Fla. 3d Dist. Ct. App. 1965).

57. *Id.* at 363.

58. *Anderson v. Anderson*, 194 So. 2d 906 (Fla. 1967) (dismissed for want of conflict jurisdiction).

59. *Anderson v. Anderson*, 333 So. 2d 484, 486 (Fla. 3d Dist. Ct. App. 1976).

60. Even though Mr. Anderson's first petition was dismissed for want of conflict jurisdiction, Justice Roberts filed a dissenting opinion. *Anderson*, 194 So. 2d 906 (Roberts, J., dissenting).

61. *Anderson*, 333 So. 2d at 485 (quoting *Anderson*, 194 So. 2d at 908 (Roberts, J., dissenting)).

62. *Id.* at 488. "Assuming, [however], that a reduction [or termination] of alimony payments is proper where the [recipient] spouse has secured employment, the court ordinarily will not reduce the payments in the exact amount of earnings, [because] that may take away an incentive to work." 24 AM. JUR 2D *Divorce and Separation* § 715, 707 (1983); see Annotation, *supra* note 48, at 63-7.

## B. *Reduction in the Obligor Spouse's Income*

A change in the financial condition of the obligor spouse, if substantial, often constitutes a change in circumstance so as to warrant a modification of an alimony award.<sup>63</sup> Florida's modification statute provides that if "the financial ability of either party changes, . . . either party may apply to the circuit court . . . for an order decreasing or increasing the amount of . . . alimony."<sup>64</sup> When an obligor spouses's earnings are reduced to such a point that he is unable to comply with the alimony payments, an order for a reduction or termination of alimony obligations may be granted.<sup>65</sup>

However, an abatement of the obligor spouse's earnings must not have been caused by his own willful actions.<sup>66</sup> "[T]he clean hands doctrine prevents a court of equity from relieving a former husband of his obligation to pay alimony to his former wife where the decrease in the former husband's financial ability to pay has been brought about by the former husband's voluntary acts."<sup>67</sup> Thus, an obligor spouse who volun-

63. Note, *supra* note 24, at 75; see James R. Higgins, Jr., *Modification of Spousal Support: A Survey of a Confusing Area of the Law*, 17 J. FAM. L. 711, 730 (1979); Annotation, *supra* note 48, at 16.

64. FLA. STAT. § 61.14(1) (1989).

65. See *Rieder v. Rieder*, 157 So. 2d 93 (Fla. 3d Dist. Ct. App. 1963).

66. *E.g.*, *Waskin v. Waskin*, 484 So. 2d 1277, 1278 (Fla. 3d Dist. Ct. App. 1986) (ex-husband's act of hiring someone to rid his ex-wife did not result in a change of circumstance so as to modify the alimony award when he incurred great expenses in defending the criminal charge against him); *Coe v. Coe*, 352 So. 2d 559 (Fla. 2d Dist. Ct. App. 1977) (economic hardship due to increased spending by the obligor spouse is not sufficient to relieve him from his alimony obligation); *Kalmutz v. Kalmutz*, 299 So. 2d 30 (Fla. 4th Dist. Ct. App. 1974) (reduction of alimony was not granted to former husband, a physician, who did not lack the requisite earning capacity, but allowed his practice to close down to avoid his alimony obligation); see Note, *supra* note 24, at 76; 24 AM. JUR. 2D *Divorce and Separation* § 712 (1983); M. L. Cross, Annotation, *Husbands Default, Contempt, or Other Misconduct as Affecting Modification of Decree for Alimony, Separate Maintenance, or Support*, 6 A.L.R.2D 835 (1949).

67. *Waskin*, 484 So. 2d at 1277. However, a problem arises when the obligor spouse reaches an age where he voluntarily terminates himself from employment in pursuit of permanent retirement from the workplace. The issue of whether the postjudgment retirement of a spouse who is obligated to make alimony payments pursuant to a dissolution of marriage decree may be considered as a change of circumstance in which the alimony decree may be modified, has been a subject of conflict among the Florida district courts of appeal. *E.g.*, *Pimm v. Pimm*, 568 So. 2d 1299 (Fla. 2d Dist. Ct. App. 1990); *Ward v. Ward*, 502 So. 2d 477 (Fla. 3d Dist. Ct. App. 1987).

In *Ward*, the former husband, age 63, sought a reduction in his alimony obligation since he had retired from his long-held job and his retirement necessarily resulted in a

tarily reduces his income may be forced to continue the lifestyle that existed at the time of the divorce in order to comply with his alimony obligations.<sup>68</sup> However, the obligor spouse should not be penalized if he, in good faith, no longer wishes to maintain that lifestyle, and instead wants to lead a less lucrative life which emphasizes personal val-

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substantial decrease in his income. 502 So. 2d at 477. The Third District Court of Appeal held that "while Ward was . . . entitled to retire from his more than forty years of steady employment, he was not entitled to have his former wife defray the cost of his retirement through a reduction of his long-standing obligations to her." *Id.* at 478. The court noted that at the time of Ward's voluntary retirement, he was fully capable of working. *Id.* Furthermore, the court stated that the obligor spouse may have the amount of his obligation reduced only when the inability to pay is affected by circumstances beyond the obligor spouse's control—such as ill-health or where the decision to retire was mandated by his employer. *Id.*

In *Pimm v. Pimm*, the court refused to follow the ruling in *Ward* that, as a matter of law, an obligor spouse "cannot rely on the reduced income at retirement as a change in circumstances that may be considered on a petition for modification of alimony." *Pimm*, 568 So. 2d at 1300. Instead, the court held that an obligor spouse's voluntary retirement is a factor to be considered in determining whether the obligor spouse is entitled to a downward modification of his alimony obligation. *Id.* at 1301. The court reasoned that even if the parties had remained married, the 65 year old husband more than likely would have retired, as often people do, and they would have been expected to live on a reduced income. *Id.* at 1300. In criticizing the holding in *Ward*, the court stated that to follow the *Ward* decision would "place many supporting spouses in the position of being unable to retire at any age so long as their alimony obligations remained unchanged." *Id.*

In acknowledging the conflict between the *Ward* decision and the *Pimm* decision, and in finding the affects of a spouse's voluntary retirement a subject of great public importance in the state of Florida, the *Pimm* court certified the following question to the Florida Supreme Court:

IS THE POSTJUDGMENT RETIREMENT OF A SPOUSE WHO IS OBLIGATED TO MAKE SUPPORT OR ALIMONY PAYMENTS PURSUANT TO A JUDGMENT OF DISSOLUTION OF MARRIAGE A CHANGE OF CIRCUMSTANCE THAT MAY BE CONSIDERED TOGETHER WITH OTHER RELEVANT FACTORS AND APPLICABLE LAW UPON A PETITION TO MODIFY SUCH ALIMONY OR SUPPORT PAYMENTS?

*Id.* at 1301.

Oral arguments concerning this issue were heard by the Florida Supreme Court on September 5, 1991. Its decision is now pending. See *Pimm v. Pimm*, No. 76,885 (Fla. Oct. 12, 1991).

68. Note, *supra* note 24, at 76; see also David A. Giacalone, *The Drop Out Ex-Husband's Right to Reduce Alimony and Support Payments*, 1 Fam. L. Rep. (BNA) 4065 (1975) (more Americans are choosing a career and lifestyle to better suit their personal values).

ues over material ones.<sup>69</sup> Therefore, a self-induced decline in the obligor spouse's income should, only upon a substantial showing of good faith or cause therefor, constitute a change in circumstance so as to provide a basis for modifying the alimony award.

### C. *Increase in Obligor Spouse's Income Without Increase in Recipient Spouse's Need*

Although a downward modification of alimony may be awarded if the obligor spouse's financial condition worsens, does it follow that alimony should be increased if the obligor spouse should suddenly prosper?<sup>70</sup> The answer to this question should be no. However, Florida's modification statute<sup>71</sup> reads in pertinent part:

When the parties enter into an agreement for payments for . . . alimony, . . . or when a party is required by court order to make any payments, and the circumstances or the *financial ability of either party changes*, . . . *either party may apply* to the circuit court . . . for an order decreasing or *increasing* the amount of . . . *alimony*, and the court has jurisdiction to make orders as equity requires . . . .<sup>72</sup>

It appears from the modification statute's plain language that an increase in the financial ability of the obligor spouse is sufficient enough to support a modification of alimony in Florida.<sup>73</sup> Recently, however, Florida courts have continued to disagree on this issue when interpreting the meaning of the modification statute.

#### 1. Florida Supreme Court

In *McArthur v. McArthur*, the Florida Supreme Court suggested

69. *Id.*

70. CLARK, *supra* note 1, at 662. This was the question posed before the Florida Supreme Court in *Bedell*. See 583 So. 2d 1005 (Fla. 1991).

71. FLA. STAT. § 61.14(1) (1989).

72. *Id.* (emphasis added).

73. See *id.* The Uniform Marriage and Divorce Act is silent on the issue of whether a modification can be granted based on a showing of a change in the financial ability of either party. Section 316(a) provides "[e]xcept as otherwise provided . . . any decree respecting maintenance or support may be modified . . . *only* upon a showing of changed circumstances . . . ." UNIFORM MARRIAGE AND DIVORCE ACT § 316(a) (1987) (emphasis added).



that an increase in the former husband's financial condition may, by itself, warrant an upward modification in alimony payments to his former wife.<sup>74</sup> The former wife filed a petition for an increase in alimony alleging, among other things, that the former husband's income had greatly increased.<sup>75</sup> Even though the former wife sought an increase in alimony based upon a change in circumstance of both parties, the supreme court expressly stated that the former wife could "have filed a petition for an increase in alimony on the basis of the change in [the former husband's] financial condition . . . ."<sup>76</sup>

The supreme court, however, in ultimately deciding this case, found that there had been a change of circumstance as to both parties.<sup>77</sup> This case, therefore, represents the traditionally accepted situation of a "changed circumstance."<sup>78</sup>

## 2. Second District Court of Appeal

The second district's position on the issue of whether an increase in the obligor spouse's financial ability is, by itself, sufficient enough to warrant an upward modification in the alimony decree is well illustrated by *Terry v. Terry*<sup>79</sup> and *Lenton v. Lenton*.<sup>80</sup>

In *Terry*, the Second District Court of Appeal stated that there had been a sufficient change in the former husband's financial condition so as to warrant an increase in the former wife's alimony.<sup>81</sup> The court

74. *McArthur v. McArthur*, 95 So. 2d 521 (Fla. 1957).

75. *Id.* at 522. The statutory basis for the former wife's petition for modification of alimony was FLA. STAT. § 61.15 (1955), the predecessor to Florida's current modification statute, FLA. STAT. § 61.14 (1989). Section 61.15 contained essentially the same language as the current modification statute.

76. *McArthur*, 95 So. 2d at 524.

77. *See id.* The Florida Supreme Court stated:

It seems to us that the changes in circumstances in the financial condition of Mr. McArthur and Mrs. McArthur's condition of health and inability to work in themselves constitute sufficient cause to justify an increase in the amount of alimony which she should receive. The further change in Mr. McArthur's financial condition . . . might perhaps justify even a greater increase in the sums which she should receive.

*Id.*

78. *See CLARK, supra* note 1, at 660; Annotation, *supra* note 48, at 59.

79. *Terry v. Terry*, 126 So. 2d 890 (Fla. 2d Dist. Ct. App.), *review denied*, 133 So. 2d 321 (Fla. 1961).

80. *Lenton v. Lenton*, 370 So. 2d 30 (Fla. 2d Dist. Ct. App. 1979), *review denied*, 381 So. 2d 767 (Fla. 1980).

81. *Terry*, 126 So. 2d at 892.

further noted that the increase in the former husband's financial condition "must necessarily [have been] contemplated by the language of [the modification statute]."<sup>82</sup> However, it is apparent from the facts in *Terry* that the former wife's needs had increased since the final divorce decree.<sup>83</sup> The parties incorporated into their final divorce decree an agreement made between them whereby the former husband would pay his former wife \$375.00 per month in alimony. Subsequent to their agreement, the former husband's salary had increased from \$600.00 to \$1,000.00 per month and he was also deriving other income from various investments. The former wife stated in her petition for modification that her needs had increased, and that her existing alimony award was inadequate to meet those needs.<sup>84</sup> As in *McArthur*,<sup>85</sup> it is clear that the change in the former husband's financial ability to pay did justify an upward modification in the alimony payments because the former wife also expressed a corresponding need for the additional funds.

However, in *Lenton*, the former wife petitioned for modification of her alimony because of a "dramatic improvement in her former husband's financial condition."<sup>86</sup> The trial court denied the former wife's request for an upward modification, based on the fact that her financial needs had not changed since the dissolution of marriage.<sup>87</sup> In reversing the trial court's decision, the Second District Court of Appeal stated that "[a] change in circumstances of only one of the parties is sufficient to justify a modification of alimony."<sup>88</sup>

Nevertheless, the facts in *Lenton* clearly show that the former wife's needs were not initially met by the original divorce decree, because the husband had submitted an inaccurate financial affidavit upon which the award of alimony was based.<sup>89</sup> The former wife accepted a

82. *Id.*; see also *McArthur*, 95 So. 2d at 524.

83. *Terry*, 126 So. 2d at 891.

84. *Id.*

85. *McArthur v. McArthur*, 95 So. 2d 521 (Fla. 1957).

86. *Lenton*, 370 So. 2d at 31.

87. *Id.*

88. *Id.*; see *England v. England*, 520 So. 2d 699 (Fla. 4th Dist. Ct. App. 1988); *Sherman v. Sherman*, 279 So. 2d 887 (Fla. 3d Dist. Ct. App.), review denied, 282 So. 2d 877 (Fla. 1973); see also *Rogers v. Rogers*, 229 So. 2d 618 (Fla. 2d Dist. Ct. App. 1969) (alimony decree can be modified based on a change of the former wife's circumstances without a corresponding change in the former husband's financial ability).

89. At the time of the divorce, the former wife needed \$1,650 per month from the former husband to maintain the standard of living the parties enjoyed during their marriage. *Lenton*, 370 So. 2d at 31. In reliance on the former husband's inaccurate financial affidavit, the former wife agreed to accept \$500 per month for alimony. *Id.*

decrease in her standard of living, because her former husband apparently did not have the financial means to maintain her in the lifestyle that she had been accustomed to during the marriage.<sup>90</sup> The Second District Court of Appeal stated that a recipient spouse should not be held to an agreement where the obligor spouse's financial limitations were not accurate.<sup>91</sup> Because the needs of the former wife were not initially met by the original divorce decree, and had continued to be unmet at the time of her request for modification, the upward modification based on an increase in the former husband's ability to pay was justified.

### 3. Fourth District Court of Appeal

The leading case in the fourth district on the issue of whether a substantial increase in the former husband's financial condition can, standing alone, warrant a modification of the alimony decree, is *England v. England*.<sup>92</sup> In denying the former wife's request for an increase in permanent periodic alimony, the trial court found that the former husband had the ability to pay additional support, but concluded that there was no showing of a substantial change of circumstance on the wife's part so as to warrant a modification.<sup>93</sup>

However, the Fourth District Court of Appeal, in reversing the lower court's decision, stated that "to succeed in a motion to increase an alimony award, it is only necessary for a petitioner to prove *either* an increase in need or the ability to pay."<sup>94</sup> From this, it would appear that a court does not have to look at the needs of the recipient spouse when determining whether to grant an upward modification. An increase in the ability of the obligor spouse to pay would be enough of a showing to warrant a modification. However, the court contradicted its earlier statement by stating "[o]f course, alimony should not be increased absent a demonstration of need for increased support and the other spouse's ability to respond to that need."<sup>95</sup>

In the court's view, there was no question that the facts reflected both, a substantial increase in the former wife's need for alimony and a

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90. *Id.*

91. *Id.*

92. *England v. England*, 520 So. 2d 699 (Fla. 4th Dist. Ct. App. 1988).

93. *Id.* at 701.

94. *Id.* (emphasis added).

95. *Id.* at 700.

substantial increase in the former husband's ability to pay alimony.<sup>96</sup> Therefore, the court ultimately decided this case based on the change of circumstance as to both parties.<sup>97</sup> Under these facts, the upward modification was proper.

#### 4. Third District Court of Appeal

In interpreting Florida's modification statute,<sup>98</sup> case law in the third district has been erratic.<sup>99</sup> The inconsistent laws in this district are well illustrated by three cases.

In *Sherman v. Sherman*, the question presented to the court was whether "[permanent] periodic alimony can be increased upon a petition for modification when the only change of circumstance shown was a substantial increase in the earnings of the former husband."<sup>100</sup> Upon the authority of Florida's modification statute,<sup>101</sup> the Third District Court of Appeal held that the question presented must be answered in the affirmative.<sup>102</sup> However, a strong dissenting opinion written by Chief Judge Barkdull stated in part:

I have strong convictions that the former wife in the instant matter is not entitled to a raise in alimony . . . . [P]eriodic alimony . . . . is to be awarded for the purpose of permitting the former wife to live in the manner and custom established by the husband. [Here, the original alimony award] was commensurate with the scale of living maintained by the [former husband] during the time the parties were man and wife . . . . Following the majority's opinion to a logical conclusion, a former wife receiving periodic alimony could hold her former husband to an increase in alimony upon increased earnings at any time during the remainder of his life. I do not think the courts should condone such action.<sup>103</sup>

As will become evident, Judge Barkdull's dissent was to be followed by

96. *Id.* at 701.

97. *See England*, 520 So. 2d at 701.

98. *See* FLA. STAT. § 61.14(1) (1989).

99. *See Sherman v. Sherman*, 279 So. 2d 887 (Fla. 3d Dist. Ct. App.), *review denied*, 282 So. 2d 877 (Fla. 1973). *But see Powell v. Powell*, 386 So. 2d 1214 (Fla. 3d Dist. Ct. App. 1980).

100. *Sherman*, 279 So. 2d at 888.

101. *See* FLA. STAT. § 61.14(1) (1989).

102. *Sherman*, 279 So. 2d at 888.

103. *Id.* at 889 (Barkdull, C.J., dissenting).

other court decisions involving this issue.

Seven years later, in *Powell v. Powell*, the third district receded from its prior decision in *Sherman*.<sup>104</sup> The court noted in a footnote “[o]f course, an increase in the husband’s ability *would not itself justify an upward modification of alimony* if the wife’s needs are already fully met either by the existing award or otherwise.”<sup>105</sup> However, the court’s award of an upward modification of alimony rested on the finding that there had been a material increase in the former wife’s needs.<sup>106</sup> Furthermore, the former husband stipulated that his ability to pay had materially changed for the better.<sup>107</sup> Therefore, this case suggests that before an upward modification in alimony can be granted, the recipient spouse must demonstrate that either her needs were initially unmet by the original divorce decree and continue to be unmet, or that a substantial change in her needs has taken place since the original award.<sup>108</sup>

Likewise, the third district’s decision in *Frantz v. Frantz*<sup>109</sup> represents a continued shift away from the *Sherman*<sup>110</sup> decision. In *Frantz*, the court affirmed the lower court’s decision to deny the former wife an increase in alimony.<sup>111</sup> The court essentially adopted the footnote in *Powell*,<sup>112</sup> by holding that “an increase in the husband’s ability to pay would not itself justify an upward modification of alimony if the former wife’s needs are already fully met . . . by the existing award.”<sup>113</sup> Several of the Florida cases analyzed in this comment state that an upward modification in alimony can be granted if there is a substantial change in the financial ability of only one party; namely an increase in the obligor spouse’s ability to pay.<sup>114</sup> However, these courts justified

104. *Powell v. Powell*, 386 So. 2d 1214, 1216 (Fla. 3d Dist. Ct. App. 1980).

105. *Id.* at 1216 n.6.

106. *Id.* at 1215.

107. *Id.* at 1216 n.4.

108. *See Powell*, 386 So. 2d 1214.

109. *Frantz v. Frantz*, 453 So. 2d 429 (Fla. 3d Dist. Ct. App.) *review denied*, 459 So. 2d 1040 (1984).

110. *Sherman v. Sherman*, 279 So. 2d 887 (Fla. 3d Dist. Ct. App.) *review denied*, 282 So. 2d 877 (Fla. 1973).

111. *Id.* at 430.

112. *See supra* text accompanying note 105.

113. *Id.*

114. *See, e.g.,* *McArthur v. McArthur*, 95 So. 2d 521 (Fla. 1957); *England v. England*, 520 So. 2d 699 (Fla. 4th Dist. Ct. App. 1988); *Lenton v. Lenton*, 370 So. 2d 30 (Fla. 2d Dist. Ct. App. 1979), *review denied*, 381 So. 2d 767 (Fla. 1980); *Sherman v. Sherman*, 279 So. 2d 887 (Fla. 3d Dist. Ct. App.), *review denied*, 282 So. 2d 877

their decisions to grant modification on the basis of the recipient spouse's demonstrated need for the increased funds.<sup>115</sup>

The question, therefore, is still open as to whether a recipient spouse can request and receive an upward modification in her alimony based solely on the obligor spouse's increase in his financial ability to pay. On May 30, 1991, with the decision in *Bedell v. Bedell*,<sup>116</sup> the Supreme Court of Florida directly confronted this issue.

#### IV. *BEDELL v. BEDELL*

##### A. *Facts*

In 1962, Diane Bedell and Robert Bedell were married. During the parties' eleven year marriage, Mrs. Bedell did not work outside the home, while Mr. Bedell attended medical school and subsequently obtained a medical degree. The marriage was dissolved in July, 1975, and at that time Mr. Bedell had just opened his first medical office. Under the terms of the final judgment, which incorporated a settlement agreement, Mrs. Bedell received \$415 per month in permanent alimony.<sup>117</sup> Thereafter, on July 12, 1986, Mrs. Bedell filed a petition for modification in the trial court, seeking an increase in her alimony.

##### B. *The Lower Courts*

After a non-jury trial, the trial court entered an order denying Mrs. Bedell's request for an upward modification in her alimony.<sup>118</sup> Mrs. Bedell's primary contention for seeking an increase in her alimony

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(Fla. 1973); *Terry v. Terry*, 126 So. 2d 890 (Fla. 2d Dist. Ct. App.), *review denied*, 133 So. 2d 321 (1961).

115. See *McArthur v. McArthur*, 95 So. 2d 521 (Fla. 1957); *England v. England*, 520 So. 2d 699 (Fla. 4th Dist. Ct. App. 1988); *Lenton v. Lenton*, 370 So. 2d 30 (Fla. 2d Dist. Ct. App. 1979), *review denied*, 381 So. 2d 767 (Fla. 1980); *Terry v. Terry*, 126 So. 2d 890 (Fla. 2d Dist. Ct. App.), *review denied*, 133 So. 2d 321 (Fla. 1961). *But see* *Sherman v. Sherman*, 279 So. 2d 887 (Fla. 3d Dist. Ct. App.), *review denied*, 282 So. 2d 877 (Fla. 1973).

116. *Bedell v. Bedell*, 583 So. 2d 1005 (Fla. 1991).

117. Furthermore, Mrs. Bedell received \$250 per month in child support for each of her two children. *Id.* at 1006. In 1977, Mrs. Bedell relinquished custody of the two children to the husband and at that time, Mr. Bedell ceased making the child support payments to Mrs. Bedell. *Id.*

118. *Bedell v. Bedell*, 561 So. 2d 1197, 1181 (Fla. 3d Dist. Ct. App. 1989), *juris. accepted*, 569 So. 2d 444 (1990).

was that the cost of living had increased since the time that she and Mr. Bedell were divorced.<sup>119</sup> The trial court found that Mrs. Bedell “failed to demonstrate that she had been detrimentally effected by the rise in the cost of living or that such a rise has caused an increase in her need.”<sup>120</sup> Mrs. Bedell appealed to the Third District Court of Appeal.<sup>121</sup>

The third district considered Mrs. Bedell’s appeal en banc because of the conflict of decisions within the district.<sup>122</sup> Mrs. Bedell argued that she was entitled to an increase in alimony as a matter of law under Florida’s modification statute, and that this entitlement was based solely on the husband’s stipulated substantial upward shift of his financial capacity since the final judgment.<sup>123</sup>

The court admitted that the “[modification] statute authorizes a recipient spouse to apply for an increase in alimony when the financial ability of the obligor spouse changes for the better.”<sup>124</sup> However, the court noted that it was “not required by the statute to grant such a motion.”<sup>125</sup> The court reasoned that the recipient spouse’s needs are the controlling factor in determining an alimony modification, and to hold otherwise would grant that spouse a continued interest in the former spouse’s good fortune.<sup>126</sup> The court recognized that the exception to the

119. Answer Brief of Respondent at 5-6, *Bedell v. Bedell*, 583 So. 2d 1005 (Fla. 1991) (No. 75894) [hereinafter Answer Brief].

120. Initial Brief of Petitioner at 2, *Bedell v. Bedell*, 583 So. 2d 1005 (Fla. 1991) (No. 75894) [hereinafter Initial Brief].

121. *Bedell*, 561 So. 2d at 1181.

122. *Id.* at 1180; see *Frantz v. Frantz*, 453 So. 2d 429 (Fla. 3d Dist. Ct. App.), review denied, 459 So. 2d 1040 (Fla. 1984); *Powell v. Powell*, 386 So. 2d 1214 (Fla. 3d Dist. Ct. App. 1980); *Sherman v. Sherman*, 279 So. 2d 887 (Fla. 3d Dist. Ct. App.), review denied, 282 So. 2d 877 (Fla. 1973).

123. *Bedell*, 561 So. 2d at 1181; see FLA. STAT. § 61.14(1) (1989) The Third District Court of Appeal and the Supreme Court of Florida analyzed *Bedell* under FLA. STAT. § 61.14 (1985). However, FLA. STAT. § 61.14 (1989) contains essentially the same language. Therefore, the 1989 version of Florida’s modification statute will be the one cited to by the author.

124. *Bedell*, 561 So. 2d at 1181.

125. *Id.*

126. *Id.* at 1182 (citing *Irwin v. Irwin*, 539 So. 2d 1177, 1178 (Fla. 5th Dist. Ct. App. 1989)). The court stated:

[W]here the financial needs of the recipient spouse, as established by the standard of living maintained during the marriage, have not substantially increased since the final judgment, the trial court is justified in denying a motion to modify upward the alimony award, even though there has been a substantial increase in the financial circumstances of the paying spouse.

rule that the recipient spouse must demonstrate an increased need before a request for an upward modification can be considered is,

the rare case where the recipient spouse's needs, as established by the standard of living maintained during the marriage, were not, and could not be initially met by the original divorce decree due to the then existing financial inability of the paying spouse to meet those needs, which needs continue to remain unmet at the time the modification is sought.<sup>127</sup>

In affirming the trial court's decision, the district court acknowledged that its decision stood in conflict with the decision in *Sherman*,<sup>128</sup> but in support of Judge Barkdull's dissenting opinion in that case.<sup>129</sup> Thereafter, the Supreme Court of Florida decided to review the case.<sup>130</sup>

### C. *Supreme Court of Florida*

On appeal, Mrs. Bedell argued that the Third District Court of Appeal's restrictive interpretation of the modification statute was directly contrary to the express language contained in the statute.<sup>131</sup> In opposition, Mr. Bedell argued that if a modification can be granted as a matter of law, based on a change in the financial ability of either party, namely the obligor spouse, without considering equity principles, then there would no longer be any such thing as a divorce.<sup>132</sup> Instead, former spouses would continue to be required to share their increased income with their ex-spouses, without limitation, for all time.<sup>133</sup>

The Florida Supreme Court began its analysis by acknowledging

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*Id.*

127. *Bedell*, 561 So. 2d at 1182.

128. *Sherman*, 279 So. 2d 887.

129. *Bedell*, at 1183; see *supra* text accompanying note 103.

130. *Bedell*, 583 So. 2d 1005. The Supreme Court of Florida accepted *Bedell* for review because the decision rendered by the Third District Court of Appeal in that case directly conflicted with the language stated in *England v. England*, 520 So. 2d 699 (Fla. 4th Dist. Ct. App. 1988) and *Lenton v. Lenton*, 370 So. 2d 30 (Fla. 2d Dist. Ct. App. 1979), *review denied*, 381 So. 2d 767 (Fla. 1980). *Id.*

131. Initial Brief, *supra* note 120, at 16. In determining the legislative intent of a statute, the general rule is, "when the words of a statute are clear and unambiguous, judicial interpretation is not appropriate . . ." *Citizens of Fla. v. Public Serv. Comm.*, 435 So. 2d 784, 786 (Fla. 1983).

132. Answer Brief, *supra* note 119, at 13.

133. *Id.*



that alimony modification may be granted when the circumstances or the financial ability of either party changes.<sup>134</sup> The court observed the line of Florida cases that represented the proposition that the recipient spouse's need, as established by the standard of living during the marriage, should be the first determination made, and only then, if a substantial need had been shown, could the obligor spouse's ability to pay be considered.<sup>135</sup> The court then noted that "at least two courts have held that in order to succeed with a motion to increase an alimony award, it is only necessary for a petitioner to prove either an increase in need or an increase in the ability to pay."<sup>136</sup> In interpreting the preceding two lines of authority in light of the modification statute's intent,<sup>137</sup> the court stated that they were not irreconcilable, and that the solution lied between the two positions.<sup>138</sup>

In analyzing the legislature's intent, the supreme court stated that the "[modification] statute gives an ex-spouse an [unconditional] right to file a petition for an increase in alimony where the circumstances or the financial ability of either party has changed."<sup>139</sup> However, the court construed the statute's provision for equitable jurisdiction to mean that a court is not required to grant an increase in alimony simply upon a showing of a substantial increase in the financial ability of the obligor spouse, because equity dictates whether such a modification should be ordered.<sup>140</sup> Thus, "a substantial increase in the financial ability of the paying spouse, standing alone, may justify but does not require an order of increased alimony."<sup>141</sup>

By using the language "may justify" in their holding, the supreme court equivocated on this issue. The supreme court further stated that it "would expect that a raise in alimony would be ordered when no

134. *Bedell*, 583 So. 2d at 1007 (citing FLA. STAT. § 61.14(1) (1985)).

135. *Bedell*, 583 So. 2d at 1007; *see, e.g., Irwin v. Irwin*, 539 So. 2d 1177 (Fla. 5th Dist. Ct. App. 1989); *Bess v. Bess*, 471 So. 2d 1342 (Fla. 3d Dist. Ct. App.), *review denied*, 476 So. 2d 672 (Fla. 1985), *review denied*, 482 So. 2d 347 (Fla. 1986); *Frantz v. Frantz*, 453 So. 2d 429 (Fla. 3d Dist. Ct. App.), *review denied*, 459 So. 2d 1040 (Fla. 1984); *Powell v. Powell*, 386 So. 2d 1214 (Fla. 3d Dist. Ct. App. 1980).

136. *Bedell*, 583 So. 2d at 1007; *see England v. England*, 520 So. 2d 699 (Fla. 4th Dist. Ct. App. 1988); *Lenton v. Lenton*, 370 So. 2d 30 (Fla. 2d Dist. Ct. App. 1979), *review denied*, 381 So. 2d 767 (Fla. 1980).

137. *See* FLA. STAT. § 61.14(1) (1989).

138. *Bedell*, 583 So. 2d at 1007.

139. *Id.*

140. *Id.* *See* FLA. STAT. § 61.14(1) (1989) which provides that in a proceeding for modification "the court has jurisdiction to make orders as equity requires . . . ."

141. *Bedell*, 583 So. 2d at 1007.

increased need was shown only in extraordinary cases where the equitable considerations were particularly compelling."<sup>142</sup> However, the court failed to state the type of extraordinary cases that would be "particularly compelling" enough to warrant an increase in alimony when no concomitant increased need was shown.

Finally, the court concluded that based on these facts, the wife was entitled to an increase in her alimony because she "clearly demonstrated an increased need."<sup>143</sup> In so holding, the court accepted Mrs. Bedell's testimony that the original alimony award was sufficient only because she was receiving \$500 per month for child support in addition to alimony.<sup>144</sup> In addition, the court also accepted her argument that because the cost of living had gone up since the divorce, her standard of living had gone down and she was not living in the manner she was accustomed to during the marriage.<sup>145</sup> Therefore, a substantial increase in Mrs. Bedell's needs coupled with Mr. Bedell's ability to pay justified an upward modification of alimony.<sup>146</sup>

## V. CONCLUSION

In rendering its decision in *Bedell*, the Supreme Court of Florida evaded the application of its own precedent on the issue of whether an upward modification in alimony could be granted based on the sole fact that the obligor spouse had an increased ability to pay. The court did not base its decision upon the stipulated finding that the obligor spouse had a substantial increase in his income. To the contrary, in ultimately deciding on whether to grant an upward modification, the court found that a need was demonstrated by the recipient spouse.<sup>147</sup>

This decision sends a confusing message to the lower Florida courts. A clear precedent has not been set because the Florida Supreme Court did not take a firm stand on the very issue that brought *Bedell* to the supreme court. Therefore, the inconsistency among the decisions rendered from the various district courts in Florida will most likely continue. It is conceivable that an obligor spouse may be required to pay an additional sum to a spouse who has not demonstrated a substan-

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142. *Id.*

143. *Id.* at 1008.

144. *Id.*

145. *Id.*

146. *Bedell*, 583 So. 2d at 1008.

147. *Id.*

tial need solely based on his increase in income. Perhaps *Pimm v. Pimm*, which is now pending before the Florida Supreme Court, will decide this issue.<sup>148</sup>

*Helene R. Cohen*

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148. See *Pimm v. Pimm*, No. 76, 885 (Fla. Oct. 12, 1990). The issue before the supreme court in *Pimm* is factually converse to *Bedell*. Compare with *Pimm v. Pimm*, 568 So. 2d 1299 (Fla. 2d Dist. Ct. App. 1990). *Pimm* involves whether an obligor spouse who retires and, therefore, no longer has an income can reduce or terminate his alimony obligation based on that fact alone, and without a corresponding showing that the recipient spouse's need has decreased. see also *supra* discussion at note 67.