

## *Alimony Case Law Update*

(2009 – March 2011)

### **Wofford v. Wofford, 20 So. 3d 470 (Fla. 4<sup>th</sup> DCA 2009)**

Bridge-the-gap alimony was inappropriate in an eleven-year marriage where income was imputed to the wife (age 39), and the husband (age 41) earned in excess of \$ 9,000 per month. The Parties enjoyed a middle-class lifestyle but were mired in debt and the wife would not be able to meet her reasonable living expenses with an award of bridge the gap alimony.

### **Gulbrandsen v. Gulbrandsen, 22 So. 3d 640 (Fla. 3d DCA 2009)**

A cash award of \$237,000 for permanent periodic alimony was unwarranted where the husband's income producing capacity was inextricably bound to an invention. The wife elected to take a percentage interest in the invention versus a valuation and a buyout which made the further award of permanent periodic alimony duplicative and inequitable. The appellate court reversed and remanded for the trial court to award nominal periodic alimony of \$1.00 per year, so that the award could be modified if the parties' interest in the invention failed and/or the wife's needs were materially altered by other circumstances.

### **Lightcap v. Lightcap, 14 So. 3d 259 (Fla. 3d DCA 2009)**

The parties were married for thirty-years. At the time of the final judgment, the wife earned more than the husband who claimed that he was unable to work. The appellate court noted that permanent alimony is normally appropriate in a long-term marriage of thirty-years and that although the wife currently earns more than the husband, the husband has the ability to find employment. As such, the appellate court affirmed the trial court's award of nominal alimony which would allow the wife to apply for modification upon a proper showing.

### **Alcantara v. Alcantara, 15 So. 3d 844 (Fla. 3d DCA 2009)**

Appellate court found that wife was entitled to an award of permanent periodic alimony where the marital circumstances resulted in a significant disparity (even after the imputation of income to the wife) in the parties' earnings and earning capacity. The parties had a long-term marriage, the wife cared for the family for a significant period of time, and there was a large disparity in the parties' financial outlook, all of which justified an award of permanent periodic alimony.

### **Vigo v. Vigo, 15 So. 3d 619 (Fla. 3d DCA 2009)**

Appellate court reversed award of permanent periodic alimony in a 7.5 year marriage without minor children. The wife was 54 years old and the husband was 62 years old and permanently disabled. During the first 3.5 years of the marriage, the wife worked and the husband received disability payments. The wife presented evidence of poor physical health but the record on appeal noted that the wife maintained a relatively active lifestyle. As such, the appellate court found that the trial court abused its discretion by awarding permanent periodic alimony in a short-term marriage.

**Stough v. Stough, 18 So. 3d 601 (Fla. 1<sup>st</sup> DCA 2009)**

Trial court's award of \$2,000 in permanent periodic alimony, plus lump sum alimony in the amount of \$27,500 based on the husband's ability to meet his needs through investment and sedentary employment conflicted with the earlier finding that the husband's disability left him unemployable. The appellate court remanded for further evidence or argument that the husband was capable of employment which would support the imputation of income to him.

**French v. French, 4 So. 3d 5 (Fla. 4<sup>th</sup> DCA 2009)**

Where the court determined that the former wife was in a supportive relationship, it must, by necessity, either reduce or terminate alimony because the obligee's needs have changed.

**Eisemann v. Eisemann, 5 So. 3d 760 (Fla. 2<sup>d</sup> DCA 2009)**

The parties were married for 21 years at the time of divorce. Prior to the dissolution, the parties entered into a Marital Property and Settlement Agreement. Its provisions included a requirement that the husband pay to the wife the sum of \$1,900 per month in permanent alimony. The amount was based on the husband's annual earnings of between \$85,000 and \$89,000. At the time of modification, both parties' incomes had increased but the wife had unmet needs. The trial court utilized the *Bedell* exception. (In *Bedell*, 583 So. 2d 1005 (Fla. 3<sup>d</sup> DCA 1989) The court construed the statute to mean that proof of a substantial change in the financial ability of a paying spouse may by itself, properly support an order for an increase in alimony) as a basis to modify the alimony award. The appellate court reversed and remanded the trial court's decision for consideration in light of the wife's current unmet needs rather than the husband's current ability to pay.

**Kitchens v. Kitchens, 4 So. 3d 1 (Fla. 4<sup>th</sup> DCA 2009)**

Trial court erred in treating husband's discretionary IRA withdrawals as income for purposes of calculating alimony. The appellate court's rationale was that treating discretionary IRA withdrawals as income for purpose of calculating alimony forces the owner to deplete the account at a faster rate and deprives the owner of the full use of an asset, which presumably was subject to equitable distribution at the time of divorce. Mandatory or minimum IRA withdrawals which begin at age 70½ are properly treated as income for purposes of calculating alimony because they mirror payments under a defined benefit pension plan.

**Cohen v. Cohen, 39 So. 3d 403 (Fla. 4<sup>th</sup> DCA 2010)**

The Fourth District held that 5 year award of bridge-the-gap alimony was improper because the wife had not made any effort to secure employment despite a separation of 15 months. Throughout the separation, the wife received temporary alimony payments of \$15,140 per month and enjoyed exclusive occupancy of the marital home.

**Engesser v. Engesser, 35 Fla. L. Weekly D1528a (Fla. 5<sup>th</sup> DCA 2010)**

Fifth District receded from prior opinions rejecting the use of bridge-the-gap alimony, which is recognized in every other District in Florida. The trial court did abuse its discretion in awarding bridge-the-gap alimony for a year and permanent alimony of one dollar per year. The significance of the Fifth District's recognition is lessened by the 2010 statutory revisions which authorize an award of the bridge-the-gap alimony in all cases pending or filed after July 1, 2010.

**Biskie v. Biskie, 35 Fla. L. Weekly D1380c (Fla. 1<sup>st</sup> DCA 2010)**

Abuse of discretion to deny or waive permanent periodic alimony following 15 year marriage given the parties earning capacities. The 15 year marriage fell in the grey area and earning capacity becomes a significant factor for the trial court to consider in deciding whether permanent alimony is appropriate. Trial court should have awarded at least nominal permanent alimony.

**Martinez v. Abinader, 35 Fla. L. Weekly D1316b (Fla. 2d DCA 2010)**

Trial court erred in failing to consider all sources of husband's income when it found the husband did not have the ability to pay permanent periodic alimony. The trial court must consider all sources of income, including actual overtime pay, actual income from part time employment at secondary jobs, as well as husband voluntary contributions to his investment properties and 401(k).

Trial court erred in treating husband's mortgage payment as to additional alimony. The parties should equally be making mortgage payment during the dissolution proceedings, thereby contributing equally to reducing debt on the home. By treating the husband's mortgage payments as transitional alimony and awarding each party a one-half interest in the equity in the home, the Court effectively made the wife solely responsible for mortgages on the property without crediting her for her greater role in reducing the debt on the properties.

**Purrinos v. Purrinos, 34 So. 3d 244 (Fla. 3d DCA 2010)**

Trial court erred in failing to award nominal permanent periodic alimony where the parties had been married for 16 years and had three (3) school aged children and where although the husband was temporarily unemployed, he had the expectation of securing a position shortly thereafter. On remand, the trial court was ordered to consider an award of nominal permanent alimony.

**Garcia v. Garcia, 35 Fla. L. Weekly D194a (Fla. 4<sup>th</sup> DCA 2010)**

Former husband argued that the court erred in its calculation of the amount of permanent alimony awarded based on the former wife's net income not matching her claimed living expenses. Trial court specifically found that former wife's "vacation and travel expenses" were part of the parties' lifestyle for purposes of calculating alimony. Appellate court did not reverse

but remanded to the trial court to reconsider the award of alimony in accordance with the former wife's needs.

**Schmachtenberg v. Schmachtenberg, 35 Fla. L. Weekly D462 (Fla. 3d DCA 2010)**

Trial court erred in reducing alimony by imputing the former wife's previously imputed income amount as income to her. The previous imputation does not meet the evidentiary threshold for imputation.

**Sharon v. Sharon 35, Fla. L. Weekly D1034a (Fla. 2d DCA 2010)**

Trial court awarded permanent periodic alimony as well as three (3) years of rehabilitative alimony, which was upheld by the appellate court. The appellate court remanded to the trial court to consider the tax consequences of the alimony award, and noted that the trial court failed to make any finding as to whether the alimony was taxable/deductible or to include federal income tax on the list of wife's expenses.

**Buoniconti v. Buoniconti, 35 Fla. L. Weekly D1217a (Fla. 2d DCA 2010)**

The trial court did not abuse its discretion in awarding the former wife permanent alimony in the form of a lump sum upon finding that the former husband had a history of unfair unilateral financial decisions, waste, and current reluctance to work. It was not unreasonable for the Court to suspect that the former husband might find ways to avoid the payment of permanent periodic alimony. The availability of liquid assets coupled with the former husband's lack of current income constitute the type of "special circumstances" necessary to support the trial court's discretionary decision to award permanent alimony payable as a lump sum.

Court erred in calculating the former wife's monthly need because the court failed to consider the interest income that would be available to her from the assets she received as part equitable distribution. In addition, the trial court should have reduced the amount of the lump sum alimony award to present value.

The award to the former wife of retroactive alimony was supported by evidence, but in determining the amount of retroactive alimony the court erroneously failed to account for the former wife's use of the former husband's share of certain marital assets to support her during dependency of the case. Remanded to the trial court to consider whether the former husband was entitled to a credit against retroactive alimony for the former wife's use of a shared bank account and brokerage account during the proceedings.

**McQuaig v. McQuaig, 35 Fla. L. Weekly D1158b (Fla. 1<sup>st</sup> DCA 2010)**

In determining the amount of alimony, the trial court did not err in failing to deduct business expenses when computing the former husband's income. There was no showing that the expenses were ordinary and necessary to running the former husband's business and the fact that he could deduct expenses for tax purposes does not make them ipso facto "ordinary and necessary" for purposed of Chapter 61 income calculation.

No abuse of discretion in the amount of temporary alimony set by the court where the amount did not exceed or deplete the former husband's income.

**Mondello v. Torres, 35 Fla. L. Weekly D1624a (Fla. 4th DCA, 2010)**

It was error for the court to award the husband lump sum alimony rather than permanent alimony, which was requested by him, without making special findings as to why the lump sum award was appropriate and without indicating consideration of the statutory factors as applied to a grey area marriage. The parties were married for 16.5 years, the husband was twenty years older than the wife, and the wife was awarded 1.5 million in non-marital assets.

**Sootin v. Sootin, 35 Fla. L. Weekly D1738a (Fla. 3d DCA 2010)**

Under UIFSA, a Florida court has continuing exclusive jurisdiction over spousal support order throughout the existence of the support obligation. The trial court had no authority to transfer Florida post final judgment dissolution case to foreign state in which both former spouses now reside. Correct procedure under UIFSA, is to register the spouse's support judgment in the other state for enforcement, but even after registration, the foreign state must sent the case back to Florida to consider any modification.

**Suarez v. Sanchez, 35 Fla. L. Weekly D1879a (3<sup>rd</sup> DCA 2010)**

The trial court abused its discretion in terminating the former husband's alimony obligation established by an MSA where the evidence did not establish that he did not have the ability to pay any amount of alimony or that former wife was capable of support. Although former husband's decision to retire at age 81 was reasonable, the former husband's retirement was a substantial and material change in circumstances. Termination of alimony is improper unless the former husband is no longer able to pay any amount of alimony. The appellate court noted that modification would be proper.

**Halikman v. Halikman, 35 Fla. L. Weekly 23048a (Fla. 5<sup>th</sup> DCA 2010)**

The wife suffered a debilitating stroke that left the wife dependent upon others. She went to reside with her parents in Texas. The primary issue before the court was the determination of the amount of permanent alimony the wife required in light of her parents' generosity. On appeal, the wife argued that but for her parent's largesse, the permanent alimony award would be inadequate to meet her needs and appealed the final judgment. Applying the law from *Rogers v. Rogers*, 824 So. 2d 902 (Fla. 3d DCA 2002), the trial court held that income may be imputed based on gifts that are continuing and ongoing, not sporadic, where the evidence shows the gifts will continue in the future. The appellate court affirmed.

**Stanton v. Stanton, 35 Fla. L. Weekly D2750 (Fla. 2d DCA 2010)**

An award of \$75,000 per month in temporary alimony and child support was not supported by competent, substantial evidence. The wife's financial affidavit stated \$72,000 per year for

vacations, \$13,800 per year for entertainment, \$2,000 each month for clothing, and \$2,600 per month for groceries and meals outside of the home. The Second District remanded with instructions to consider the wife's needs and not the parties' standard of living as established during the marriage and quoting *Levine v. Levine*, 964 So. 2d 741, 742-743 (Fla. 4<sup>th</sup> DCA 2007).

**Suit v. Suit, 48 So. 3d 195 (Fla. 2d DCA 2010)**

The parties were married for 23 years and had one adult child. They were both in their mid-fifties. The husband was a financial planner who earned in excess of \$600,000 per year and the wife had not been employed during much of the marriage but had operated two small businesses and earned a modest income. The trial court concluded that the wife needed \$13,569 per month in alimony in addition to the \$6,500 which was spent on the parties' adult child. After adjusting the amount for income tax, the trial court awarded the wife \$17,825 per month in permanent periodic alimony. The wife also received half of the marital assets, approximately \$500,000 in retirement accounts and an additional \$800,000 in other assets. The Second District reversed based on the fact that the trial court failed to consider the wife's income from other assets awarded to her in the equitable distribution for support. The court distinguished this case from *Holley v. Holley*, 380 So. 2d 1098 (Fla. 2d DCA 1980)

The trial court appropriately refused to impute income to the wife who was in her mid-fifties and had not been employed for many years.

In dicta, the appellate court stated that it is appropriate for alimony to be based on reasonable housing expenses, however, it is inappropriate for the trial court to authorize the wife to buy a house at some time in the future and to require the husband to purchase much of that house for her through alimony payments.

**Gergen v. Gergen, 35 Fla. L. Weekly D2575 (Fla. 1<sup>st</sup> DCA 2010)**

The parties were married for 18 years and had five children. The husband worked as a salesperson for Ryder Truck Company and earned substantially more than the wife who was a flight attendant for Delta Airlines. Wife had substance abuse and mental health issues but would be able to return to work and maintain the seniority she had acquired based on her many years of service. During the dissolution proceeding, the husband was laid off and diagnosed with prostate cancer. At the time of final hearing, the husband had not sought new employment. The trial court reserved jurisdiction to award permanent periodic alimony. The First District stated that an indefinite deferral of a final decision is error and that an award of nominal alimony would allow the trial court to return to the alimony issue if the parties' needs and abilities underwent a substantial change of circumstances.

**Hornyak v. Hornyak, 48 So. 3d 858 (Fla. 4<sup>th</sup> DCA 2010)**

**Hornyak v. Hornyak, 2010 WL 4962711 (Fla. 4<sup>th</sup> DCA 2010)**

The parties were married for 14 years and had two children. The husband worked for Volvo Finance and the wife was a legal secretary who did not work for the majority of the marriage.

The wife did obtain training as a massage therapist and worked sporadically as one. The trial court awarded the wife \$3,100 per month in permanent alimony and \$3,000 per month in bridge-the-gap alimony for 3 years while she transitions to full-time employment.

Appellate court reversed award of bridge-the-gap alimony based on the fact that the wife could make \$40,000 as a massage therapist and the fact that jobs were available in the community. The appellate court found that it was error for the trial court to impute a lesser amount of income to the wife.

Court later amended opinion to reverse bridge the gap alimony and remand for reconsideration of the imputed income to the wife.

**Pearce v. Pearce, 43 So. 3d 95 (Fla. 3d DCA 2010)**

The parties were married for 9 years and had no children. Third District affirmed trial court's decision in denying permanent alimony stating that there is a rebuttable presumption against an award of permanent periodic alimony in a short term marriage.

**Valladares v. Junco-Valladares, 30 So. 3d 519 (Fla. 3d DCA 2010)**

The parties were married for 14 years and had two minor children. The children were 9 and 10 at the time of trial, and the wife was 42 years old and the husband was 70 years old. The husband was a general surgeon in solo practice and the wife was a doctor who did not have a license to practice medicine in the State of Florida. At trial, the court awarded the wife 1.25 million as a lump sum alimony award based on one-half of the value of the marital home which appreciated during the marriage. The court also awarded the wife an additional \$173,469 as an equalization payment and permanent periodic alimony in the amount of \$2,200 per month.

The appellate court reversed based on the trial court's failure to consider the wife's finances in light of its concurrent award to her of \$1.25 million as lump sum alimony.

**Janssens v. Janssens, 51 So. 3d 1183 (Fla. 5<sup>th</sup> DCA 2010)**

Trial court awarded periodic alimony in the amount of \$1.00 despite the wife's need for spousal support and the great disparity in the parties' income based on the fact that the husband's liabilities meant that he did not have sufficient funds to support him and therefore had no present ability to pay. The appellate court noted that the parties' pre-existing debt, most of which was apportioned to the husband, does not take priority over the wife's current needs and remanded for the trial court to consider the income of the parties, their financial needs and obligations in providing an increase in the permanent periodic alimony award.

**Bentancourt v. Bentancourt, 50 So. 3d 768 (Fla. 2d DCA 2010)**

The parties were married for 23 years and had one adult child. The trial court included income from gross rentals in the husband's total income ordered the husband to pay the wife \$900 per month in permanent periodic alimony including retroactive alimony to the date of the filing of

the wife's petition. The Second District reversed holding that the gross rental income was not available to the husband for purposes of paying alimony.

**Zinovoy v. Zinovoy v. Miken Corporation, 36 Fla. L. Weekly D34a (Fla. 2d DCA 2010)**

Parties were married 16 years and four months. Both parties were 48 years old and the husband had a superior earning capacity than the wife with a monthly income of \$38,707. The parties also had significant assets over 1 million. The trial court awarded the wife the sum of \$6370 in monthly pretax alimony. The appellate court stated that viewing the totality of uncontested circumstances, the alimony award was not commensurate with the husband's ability to pay or the wife's need. The appellate court found that the final judgment "unnecessarily confides the wife to a lifestyle far below the standard of living established during the marriage, while it allows the husband to continue enjoying a level of affluence that far exceeds that of the wife." The appellate court remanded with instructions that the trial court consider that the monthly alimony should be no lower than the amount to which the husband's expert testified and no higher than the amount which the wife requested at trial.