

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO  
FILE MOTION FOR REHEARING AND  
DISPOSITION THEREOF IF FILED

PATRICIA S. DUNN,

Appellant,

v.

Case No. 5D18-111

WILLIAM J. DUNN,

Appellee.

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Opinion filed July 12, 2019

Appeal from the Circuit Court  
for Volusia County,  
Karen A. Foxman, Judge.

Michael J. Korn, of Korn & Zehmer, P.A.,  
Jacksonville, and Mitchell A. Gordon, of  
Mitchell A. Gordon, P.A., Daytona Beach,  
for Appellant.

John N. Bogdanoff, of The Carlyle Appellate  
Law Firm, Orlando, for Appellee.

COHEN, J.

Patricia S. Dunn (“Former Wife”) appeals the final judgment of modification (“modification order”) entered in favor of William J. Dunn (“Former Husband”), reducing her permanent alimony award. We reverse.

The parties married in 1979. During the marriage, Former Wife was a homemaker and the primary caregiver for the parties' four children. Former Husband was an ophthalmologist and established a successful practice.

In 1999, Former Husband filed for divorce. By that time, the parties had accumulated over \$3,000,000 in assets. The court awarded Former Wife the marital home, which was anticipated to have approximately \$200,000 in equity, but urged her to "strongly consider selling [it] as soon as possible."<sup>1</sup> The court also awarded Former Wife \$1,013,238 in cash, stocks, and securities, consisting of a \$538,238 investment account and an airplane worth approximately \$475,000, which Former Wife was to sell. Additionally, the court awarded Former Wife an IRA valued at \$35,124 and other personal property, for a net total of \$1,342,526.

As to alimony, the court found that Former Wife had a need for alimony and that Former Husband had the ability to pay. Former Husband's financial affidavit reflected that he earned close to \$80,000 per month and that his monthly expenses were over \$34,000. The court determined that at a 6% rate of return on a principal investment of \$950,000,<sup>2</sup> Former Wife would yield an annual gross income of \$57,000, amounting to approximately \$4750 per month. Former Wife's total monthly expenses were \$17,913. Accordingly, it found that Former Wife was entitled to a permanent periodic alimony award of \$12,000

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<sup>1</sup> Judge Patrick G. Kennedy presided over the original dissolution. The court did not include the prospective proceeds Former Wife would receive from the sale of the marital home as part of her cash award. Following the dissolution, Former Wife sold the marital home, netting approximately \$220,000, and secured a more modest home.

<sup>2</sup> While Former Wife's cash, stock, and securities award amounted to \$1,013,238, the court likely utilized the \$950,000 figure because the sale proceeds of the airplane was an estimation. The actual sale netted approximately \$408,500.

per month. The judgment also required that Former Husband secure his alimony (and child support<sup>3</sup>) obligations with \$1,500,000 in life insurance policies, designating Former Wife as the irrevocable beneficiary.

In October 2014, Former Husband filed a petition to modify and amend the final judgment of dissolution (“modification petition”). He requested that the trial court substantially reduce Former Wife’s alimony award and eliminate his obligation to secure the award with life insurance. At that time, the parties’ four children were adults. Approximately three years passed between Former Husband’s filing of the modification petition and the trial on the petition.

At the trial, Former Husband testified first and explained that he earned approximately \$101,000 per month, which amounted to \$54,000 per month after paying taxes and alimony. He estimated that his tax rate was 39%–40%. His ability to pay alimony was not in dispute.<sup>4</sup> Former Husband also testified to the parties’ standard of living during the marriage. Neither parents nor children wanted for anything. The parties owned two airplanes, had two fly-in homes, and took frequent trips to their vacation homes and to see out-of-state family, as well as other vacations.

Former Wife was questioned extensively about her living arrangements and expenses. She testified that her father had lived with her for approximately three years prior to his death. During that time, she cared for him, and he reimbursed her for expenses

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<sup>3</sup> At the time of the divorce, one of the parties’ children was eighteen but still in high school.

<sup>4</sup> Former Husband’s assets increased from approximately \$1,700,000 as of the time of the final dissolution to over \$5,400,000 as of December 2014, as reflected in his financial affidavit.

associated with his care. Former Wife also testified that the parties' adult son, who suffered from mental health problems, resided with her since 2014. Former Wife paid his expenses, which were approximately \$700 per month, from an account containing \$63,000 in VA death benefits left to her by her father. Former Wife admitted that the account bore her name but stated that she did not disclose it on her financial affidavit because she "d[id] not consider it [her] money." The trial court considered this omission particularly egregious. Former Wife testified that her father's estate was not yet settled but that it included an unencumbered home, valued around \$500,000. She and her four brothers listed the home for sale and intended to split the proceeds.

Former Wife detailed her transfers of money to the parties' children and discussed the joint bank accounts she shared with them. She stated that her name was no longer on the joint accounts. She also testified that she gave the parties' son \$1250 per month while he attended college but denied a routine practice of giving him money beyond paying for school expenses. Implicit in the questioning was Former Husband's apparent disapproval of her financial assistance to the parties' children.

Former Husband examined Former Wife about her travel between 2015 and 2017. She testified that she visited the parties' children and grandchildren in Los Angeles, Denver, and North Carolina; attended her father's funeral in New Jersey; participated in their daughter's wedding in Maine; visited her family and her parent's home in New Jersey; traveled for the births and birthdays of all their grandchildren; and made a weekend road trip to North Carolina. Former Wife paid for these trips entirely herself and paid some expenses, such as airline tickets or accommodations, for the parties' children so that they could participate.

Former Husband also disputed Former Wife's inability to work; she previously underwent back surgery and believed she was unemployable. Even though she had not worked outside the home for the entire marriage, Former Husband pointed to the care she provided for her father as evidence that she could earn a living caring for the elderly. The trial court declined to impute any income to Former Wife.

Former Husband also disputed Former Wife's current income and ability to pay her own expenses. At the time of the trial, Former Wife's investment account reflected a balance of \$1,714,820. Former Husband's forensic accountant, Adam Magill, examined Former Wife's financial records, albeit from two years before the trial.<sup>5</sup> Overall, Magill opined that Former Wife's monthly expenses totaled \$8488. He estimated that Former Wife's monthly income after taxes was \$7015.<sup>6</sup> His overall opinion was that Former Wife did not need alimony to cover her actual expenses because she would not have to invade the original \$950,000 principal investment through her life expectancy of 85 years and could use the growth accumulated from the principal investment to cover her monthly expenses. Former Wife presented experts who challenged Magill's findings.

The trial court granted Former Husband's modification petition, finding (1) a substantial increase in Former Wife's ability to pay her expenses, and (2) a significant reduction in Former Wife's monthly expenses. In doing so, the court accepted Magill's

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<sup>5</sup> Magill's report came into evidence without objection.

<sup>6</sup> Magill calculated a 4% rate of return on Former Wife's principal investment, totaling \$3442 per month; an additional \$3622 per month from the return on investment growth beyond Former Wife's original principal; and \$1530 per month from Former Wife's share of Former Husband's military pension. Former Wife's tax rate, which was 28% at its peak, would be 25% without the alimony payments.

testimony in its entirety, finding Former Wife's monthly expenses to be \$8488 and her monthly net income to be \$7015. The court found that Former Wife lacked credibility and veracity, citing her failure to disclose the \$63,000 received from her father upon his death. It also discounted Former Wife's testimony as to her monthly expenses, finding that her claimed expenses were unsupported by her Merrill Lynch account statements. It considered Former Wife's financial growth "phenomenal" and unanticipated at the time of the original final judgment. It also noted that Former Wife would be receiving "substantial proceeds" from the distribution of her father's estate. Accordingly, it reduced Former Wife's monthly alimony from \$12,000 to \$1819.19. It also applied its ruling retroactively to the time Former Husband filed for modification, ordering Former Wife to repay Former Husband nearly \$400,000.<sup>7</sup>

"[T]he standard for an appellate court's review of a trial court's decision to modify alimony is abuse of discretion." Jarrad v. Jarrad, 157 So. 3d 332, 336 (Fla. 2d DCA 2015) (citations omitted). Section 61.14(1)(a), Florida Statutes (2017), provides for the modification of alimony when "the circumstances or the financial ability of either party changes" and explains that "the court has jurisdiction to make orders" decreasing or increasing alimony "as equity requires, with due regard to the changed circumstances or the financial ability of the parties." To justify the modification of an alimony award, the moving party must show: (1) a substantial change in circumstances, (2) that was not contemplated at the time of the final judgment of dissolution, and (3) that is sufficient,

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<sup>7</sup> This figure is derived based on 38 months of litigation and \$10,180.81 per month in over-payments.

material, involuntary, and permanent in nature. Pimm v. Pimm, 601 So. 2d 534, 536 (Fla. 1992) (citations omitted).

“Once a trial court has determined that the party with the burden of proof has established an entitlement to a decision to modify alimony, the actual decision to modify is a discretionary one.” Jarrad, 157 So. 3d at 336. “If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion.” Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980). “When faced with a request to modify alimony, a court should consider the parties’ income, the payee’s need for alimony, and the payor’s ability to pay.” Anderson v. Durham, 162 So. 3d 65, 66 (Fla. 1st DCA 2014) (citing Leonard v. Leonard, 971 So. 2d 263, 267 (Fla. 1st DCA 2008)).

Former Wife conceded at oral argument that some modification of alimony was appropriate, and we accept that stipulation. However, we find that the nearly 85% reduction in Former Wife’s alimony award was unreasonable, constituting an abuse of discretion. Likewise, we find the court utilized the wrong standard in determining Former Wife’s need.

First, the court’s finding of a substantial increase in Former Wife’s ability to pay her monthly expenses is unsupported by the evidence. We disagree that Former Wife’s financial growth was “phenomenal” and unanticipated. While there has been an increase in Former Wife’s investment account, the trial court mischaracterized the growth, as it did not amount to the 6% rate of return anticipated and utilized by the original judge when setting the initial alimony award.

Second, regarding the finding of a significant reduction in Former Wife's needs, we find error in that the trial court viewed this case entirely from the perspective of Former Wife's current standard of living. As is apparent through its criticism of Former Wife's travel and assistance to the parties' children, the court ignored the standard of living enjoyed by the parties during the course of their marriage. "The purpose of permanent periodic alimony is to provide for the needs and necessities of life for a former spouse as they were established during the marriage of the parties." Mallard v. Mallard, 771 So. 2d 1138, 1140 (Fla. 2000) (emphasis added) (citing Cankaris, 382 So. 2d at 1201). The record demonstrates that the parties owned two airplanes, multiple residences, traveled extensively, and as testified by Former Husband, did not live on a budget. This was the lifestyle to be considered in determining Former Wife's standard of living. See id. Former Wife has lived a more modest lifestyle since the parties' divorce. She lives in a less expensive home, does not own an airplane, and spends less than she did prior to the dissolution. The court effectively punished Former Wife for her decision to live a more modest lifestyle than that enjoyed during the marriage and currently enjoyed by Former Husband. While Former Husband is not responsible for funding Former Wife's investment account, see id. (noting that alimony may not include a savings component), she should not be penalized for attempting to ensure her financial future by limiting her expenditures.

We agree that some modification based upon Former Wife's decreased needs is appropriate. See Regan v. Regan, 217 So. 3d 91, 93 (Fla. 4th DCA 2017) ("Given the broad discretion which section 61.14(1)(a) gives the trial judge to make a reduction, 'as equity requires with due regard to the changed circumstances,' the trial court did not abuse its discretion in reducing alimony where the former wife had cut her expenses by

more than half, as a result of moving to another state and reducing the size of her home.”); Antepenکو v. Antepenکو, 824 So. 2d 214, 215 (Fla. 2d DCA 2002) (finding 38% decrease in former wife’s need “clearly meets the ‘substantial change in circumstances’ test”). However, the trial court’s 85% reduction in alimony dramatically altered the landscape of Former Wife’s marital standard of living. Modification of this magnitude demonstrated a disregard for the parties’ established standard of living during the marriage. Cf. Regan, 217 So 3d. at 93 (holding that trial court did not abuse its discretion in reducing former wife’s alimony award by 13% following a 50% voluntary reduction in her expenses). Accordingly, the trial court abused its discretion in reducing Former Wife’s monthly alimony award from \$12,000 to \$1819.19.

The other errors relate to the court’s ruling on the retroactive application of its decision. The modification order did not specify whether Former Wife was to pay Former Husband in lump sum, installments, or another manner, and did not state when such payment(s) were due. Additionally, despite ordering repayment in an amount totaling approximately 25% of Former Wife’s investment account, the court accepted Magill’s figures without consideration of the retroactive payment. This was error. Former Wife’s monthly investment income will substantially decrease following the repayment to Former Husband. Accordingly, the court should have recalculated Former Wife’s need based on her monthly investment income following the repayment. The court also erred in failing to address the tax consequences of its retroactive ruling. The parties presented evidence that Former Wife paid income tax on her alimony and that Former Husband received a tax deduction on those payments. However, the court awarded Former Husband the entire overpayment without considering the relevant tax implications.

Accordingly, because the trial court abused its discretion in reducing Former Wife's alimony award by approximately 85%, made multiple errors in ordering the retroactive award, and made findings of fact unsupported by the record, we reverse the modification order and remand for further proceedings. On remand, the trial court should set an amount of alimony commensurate with Former Wife's needs, taking into consideration the parties' standard of living established during the marriage and accounting for the retroactive alimony award prior to determining her interest income. Additionally, the trial court should order a retroactive award consistent with Former Wife's modified alimony award, and the order should account for the tax implications of the ruling and mode of payment. Cf. Winn v. Winn, 669 So. 2d 1155, 1157–58 (Fla. 5th DCA 1996).

REVERSED and REMANDED for a new trial.

EVANDER, C.J., and WALLIS, J., concur.