

## INTRODUCTION

Florida courts have consistently held that alimony must be based on present ability to pay, not future projections; and, that income may be imputed to a party only when that party has voluntarily limited his/her income.<sup>1</sup> The Second District deviated from these principles [A-2, A-4]:

The trial court also found that the Husband had the capacity to earn a minimum of \$400,000.00 per year. The trial court based this finding on the earnings the Husband ‘has historically made and an imputation of income to him in the future.’

\* \* \* \* \*

The trial court found that the Husband’s earnings were reduced from normal levels during the pendency of the proceedings for dissolution of marriage and were not a true indicator of his actual earning capacity. The trial court’s imputation of income to the Husband in the amount of \$400,000.00 per year was on a ‘go forward’ basis from the date of the final judgment. However, the trial court did not attribute the reduction in the Husband’s earnings during the litigation in the court below to a voluntary limitation on income that he had engineered. Instead, the trial court found that the reduction in the Husband’s income during the pendency of the proceedings was caused by a confluence of several negative-albeit temporary-events beyond his control. Unfortunately, the trial court did not make any findings concerning the sources and amount of the Husband’s income during this twenty-one-month period.

This holding by the court below expressly and directly conflicts with decisions of this Court as well as other district courts of appeal and raises

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<sup>1</sup> The importance of the case at bar to divorce jurisprudence (and the parties) is manifest, e.g., *Perlow v. Berg-Perlow*, 875 So.2d 383 (Fla. 2004)(Lewis, J., specially concurring). Also see note 10, *infra*, and associated text.

the jurisdictional question presented.

### **QUESTION PRESENTED**

MAY ALIMONY BE BASED SOLELY ON SPECULATIVE FUTURE EVENTS WHEN THERE IS NO FINDING OF PRESENT SOURCE AND AMOUNT OF INCOME AND MAY FUTURE INCOME BE IMPUTED WHEN THERE IS NO VOLUNTARY LIMITATION OF INCOME?

### **STATEMENT OF THE CASE AND FACTS**

For the purposes of conflict jurisdiction the facts as stated in the opinion below are accepted, even though the district court neglected to mention that the Husband has had life long multiple sclerosis from which the trial court thought he would “rebound.”<sup>2</sup> [A-13] Therefore, the facts as stated by the district court are included *in haec verba*. These facts include the following:

- The trial court did not make findings concerning the sources and amount of the Husband’s income during the twenty-one months preceding the dissolution judgment or his ability to pay.<sup>3</sup> [A-5]
- The Husband’s earnings “were reduced from normal levels during the pendency of the proceedings . . .” [A-4]

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<sup>2</sup> The trial court expressly stated that the Husband would “rebound” from the multiple sclerosis (MS) and other “temporary” setbacks. The Second District accepted this rebounding theory but chose not to mention the MS.

<sup>3</sup> Similarly, the trial court made no findings regarding the amount and source of future imputed income but rather, in the words of the Second District, based the future projection “on the earnings the Husband ‘has historically made and an imputation of income to him in the future.’” [A-2]

- The reduction in the Husband’s earnings was not due to a “voluntary limitation of income that he had engineered.” [A-5]
- The “imputation of income” was on a “go forward’ basis from the date of the final judgment.”<sup>4</sup> [A-4]

Thus, the opinion below expressly and directly conflicts with decisions of this Court, other district courts of appeal, and violates the principle mandated by Fla. Stat. § 61.30(2)(b).<sup>5</sup>

### **SUMMARY OF THE ARGUMENT**

An award of alimony is to be based upon present ability to pay, not future events or speculation. Present ability to pay is determined by looking to current earnings preceding the award. The court below held that the trial court had failed to determine the source and amount of the Husband’s income during the twenty-one months (almost two years) preceding the dissolution judgment. The court below held that the “. . . findings regarding the Husband’s [present] ability to pay are inadequate.” [A-5]; but, that income could be imputed in the future based not on present ability to pay, but instead upon past earnings. Although historical earnings may be a factor,

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<sup>4</sup> The Final Judgment was entered on January 29, 2003; over seven months after the last evidentiary hearing in the trial court on June 17, 2002.

<sup>5</sup> *Note also*, Fla. Stat. 61.14(5)(a). Interestingly, the Second District opinion even conflicts with the cases cited below, for example, *Woodard v. Woodard*, 634 So.2d 782 (Fla. 5<sup>th</sup> DCA 1994) [A-3].

it is error to project future earnings by looking to the past without determining the present source and amount of income.

Further, it is improper to impute income absent the predicate finding that a party is voluntarily limiting income. Imputation of income was improper here, as the trial court explicitly determined that the Husband had not voluntarily limited his income and the Second District expressly agreed. The only finding regarding present ability to pay was that the Husband's reduced income during the twenty-one month (almost two year) period preceding the judgment was both "involuntary" and "temporary." [A-4-5]

Thus, the absence of a finding of present source and amount of income [A-5] coupled with the award of alimony on a "go forward' basis" [A-4] predicated on future events and speculative future income imputation absent a voluntary reduction of income [A-4], expressly and directly conflict with settled Florida law (as well as common sense).

### **ARGUMENT I**

#### **ALIMONY AWARDS SHOULD BE BASED ON CURRENT EXISTING CIRCUMSTANCES.**

"It is well settled that alimony awards should be based upon current existing circumstances and not on possibilities likely but not yet realized."

*Lasala v. Lasala*, 806 So.2d 602, 603 (Fla. 4<sup>th</sup> DCA 2002). Here, the Second District held that the trial court failed to determine the source and amount of

the Husband's current and existing income at the time of trial and for the twenty-one months before the final judgment. [A-5] Nevertheless the Second District upheld the trial court determination of the Husband's future income after judgment on a "go forward" basis.<sup>6</sup> [A-4]

Clearly, the Second District holding is contrary to the opinion in *Mallard v Mallard*, 771 So.2d 1138, 1141 (Fla. 2000), where this Court acknowledged,

. . . the well-settled rule that 'trial courts may not consider future or anticipated events in setting current alimony and child support amounts due to the lack of an evidentiary basis or the uncertainty surrounding such future events.'

The decision below also directly conflicts with *Davis v. Davis*, 691 So.2d 626, 627 (Fla. 5<sup>th</sup> DCA 1997): "The ability of a spouse to pay alimony must be based on present ability. It is improper for a court to look to past earnings or speculate on future earnings."<sup>7</sup> At its most simple, the concept is

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<sup>6</sup> Note also, *Greenberg v. Greenberg*, 793 So.2d 52, 55-56 (Fla. 4<sup>th</sup> DCA 2001). Held: Where income has been reduced, "current income must be determined and 'past average income, unless it reflects current reality, simply is meaningless in determining a present ability to pay.'"

<sup>7</sup> See also, *Ruiz v. Ruiz*, 821 So.2d 1112 (Fla. 3<sup>rd</sup> DCA 2002)Held: Finding of present ability to pay alimony is required by Fla. Stat. 61.14(5)(a): "Judgments of dissolution which incorporate a consideration of future events in setting support amounts are usually improper . . ." An optimistic expectation husband would become employed again in the near future improper. But, the court below explicitly approved imputed alimony on a "go forward" basis, acknowledging absence of findings on present amount and source of income.

that “present ability to pay” is the rule, *e.g.*, Florida Supreme Court Approved Family Law Form 12.994(b). *See also, Amendments to Florida Supreme Court Approved Family Law Forms*, 811 So.2d 113 (Fla. 2004).

## ARGUMENT II

### **INCOME MAY NOT BE IMPUTED FOR ALIMONY WHEN THERE HAS BEEN NO VOLUNTARY LIMITATION OF INCOME**

The Second District recognized and held that there was no voluntary reduction of income or findings of current income [A-4-5]:

[T]he trial court did not attribute the reduction in the Husband’s earnings during the litigation in the court below to a voluntary limitation on income . . . Instead, the reduction . . . was caused by a confluence of several negative-albeit temporary events beyond his control . . . [T]he trial court did not make any findings concerning the sources and amount of the Husband’s income during this twenty-one month period.

But it nonetheless held that it was proper to impute future income on a “go forward’ basis.” [A-4] Imputation of future income on this basis conflicts with the law in other districts: “To impute income to a former spouse, the trial court must find that the unemployment [or underemployment] is voluntary . . .” *Andrews v. Andrews*, 867 So.2d 476, 478 (Fla. 5<sup>th</sup> DCA 2004). “Historical income,” upon which the Second District explicitly relied [A-2], is plainly insufficient as *Andrews* also points out, 867 So.2d at 479:

. . . [P]rior income, although relevant, is insufficient to support the amount currently imputed . . . As we said in

*Woodard v. Woodard*, 634 So.2d 782 (Fla. 5<sup>th</sup> DCA 1994), ‘Past average income, unless it reflects current reality, simply is meaningless in determining a present ability to pay. Past average income will not put bread on the table today. *Woodard* at 782-783.

The Second District cannot cure the conflict by characterizing the involuntary reduction in income as “temporary.”<sup>8</sup> Even where a spouse temporarily removes himself from the labor market, it is improper to impute income if such temporary reduction is justified: “We hold that a spouse who suffers a temporary reduction in income to complete his education has not voluntarily reduced his income.” *Sotnick v. Sotnick*, 650 So.2d 157, 158 (Fla. 3<sup>rd</sup> DCA 1995). Absent voluntary and unjustified reduction, the test is current ability to pay, not projected future income. “When a husband obligated to pay support voluntarily reduces his income, the trial court has discretion to impute to him the income he is capable of earning.” *Kovar v. Kovar*, 648 So.2d 177, 178 (Fla. 4<sup>th</sup> DCA 1994). Hence, the opinion below that there was no voluntary reduction of income [A-4-5], but that income should be imputed nonetheless [A-3] conflicts with the other district courts.

For example, although a modification case, the principle enunciated in *Levin v. Levin*, 613 So.2d 556 (Fla. 4<sup>th</sup> DCA 1993), conflicts with the decision below. In that case the Husband’s income fell in the two years

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<sup>8</sup> [A-5] *Note also, Polley v. Polley*, 588 So.2d 638 (Fla. 3<sup>rd</sup> DCA 1991). Held: Income imputation improper where underemployment involuntary.

(twenty-four months) prior to the judgment, similar to the twenty-one month income decline here [A-4]. The judgment was by agreement, as the parties hoped that the Husband's income would increase. However, it did not. The Fourth District held that the downward modification of alimony was insufficient, 613 So.2d at 557:

There is no indication here of undisclosed or imputed income, of a voluntary reduction, or of willful misconduct. . . . The only basis the trial court gave for failing to modify Appellant's obligation further was that the permanency of the Appellant's changed circumstances is 'debatatable,' presumably because the court anticipated an improvement in his economic circumstances in the future. However, having found a substantial changed condition of over two year's duration, the amount of Appellant's present obligation should not be based on speculation or conjecture regarding an uncertain future.

Because of its speculation and conjecture, the opinion below directly and expressly conflicts with *Levin*. The court below inconsistently found that there was insufficient evidence regarding current earnings to establish present (retroactive) alimony. Yet, somehow or another, it held that as the involuntary almost two year reduction of income was only "temporary," future alimony could be imputed after the final judgment.<sup>9</sup> As succinctly

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<sup>9</sup> The Second District held that the trial court's "findings regarding the Husband's ability to pay are inadequate." [A-5] *Cf.*, *Nicholas v. Nicholas*, 870 So.2d 245 (Fla. 2<sup>nd</sup> DCA 2004): Absent evidence of present earnings, evidence insufficient to establish husband's income or income-earning potential. *Nicholas* was decided by a different panel of the Second District.



stated in *Fusco v. Fusco*, 616 So.2d 86 (Fla. 4<sup>th</sup> DCA 1993), “. . . [T]he trial court erred in imputing additional income to him, other than his current actual income, and directing the payment of permanent alimony based upon such imputed income.” [Compare A-2 with A-4-5 in the opinion below.]

In addition, the decision of the Second District conflicts with the child support statute, Fla. Stat. 61.30(2)(b) (2004).<sup>10</sup> The Second District has established one standard for alimony imputation and, oddly enough, a more stringent standard for child support income imputation. Under the child support statute, the unemployment or underemployment explicitly must be “voluntary”.<sup>11</sup> Further, *Stebbins v. Stebbins*, 754 So.2d 903, 907 (Fla. 3<sup>d</sup> DCA 2000), holds:

The imputation provisions of *section 61.30(2)(b), Florida Statutes*, have been construed to include an ‘intent’ element

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<sup>10</sup> The Petitioner is unaware of any cases which explicitly state that Fla. Stat. 61.30(2)(b) is applicable in determining alimony unconnected with child support under Fla. Stat. 61.08(2) & 61.14(5)(a). The district courts either assume the applicability of the statutory requirement of voluntary reduction in earnings or have crafted a common law rule requiring same. *Cf.*, *Cochran v. Cochran*, 819 So.2d 863 (Fla. 3<sup>rd</sup> DCA 2002)(alimony) with *Garone v. Goller*, 878 So.2d 430 (Fla. 3<sup>rd</sup> DCA 2004)(child support). In either event, clarification of the law by this Court is important.

<sup>11</sup> *Brock v. Brock*, 695 So.2d 744 (Fla. 1<sup>st</sup> DCA 1997). Held: Absent a specific finding that the underemployment was voluntary, improper to impute income because the court believed the former husband “has a prospect of regaining a foothold” in the construction business. *Smith v Smith*, 2004 Fla. App. LEXIS 6101 (Fla. 1<sup>st</sup> DCA 2004)(same).

supported by findings of fact, The district court in *Hogle v. Hogle*, 535 So.2d 704 (Fla. 5<sup>th</sup> DCA 1988), stated:

In order to impute income, the trial judge must find that the parent owing a duty of support has the actual ability to earn more than he or she is currently earning, and that he or she is deliberately refusing to work at that higher capacity to avoid support obligations. *Id.* at 705.

Hence, until the opinion below, it was clear that income could only be imputed for alimony or child support purposes, “when a husband obligated to pay support **voluntarily reduces his income . . .**” *Bronson v. Bronson*, 793 So.2d 1109, 1111 (Fla. 4<sup>th</sup> DCA 2001)[emphasis supplied]. In the case at bar, in the face of an express holding that there was not even a determination of current sources and amount of earnings or ability to pay, the district court erroneously upheld imputation of income “where the trial court did not attribute the reduction in the Husband’s earnings . . . to a voluntary limitation of income that he had engineered.” [Emphasis added]

### CONCLUSION

The decision below, therefore, expressly and directly conflicts with decisions of the other district courts of appeal as well as this Court. The Court should accept discretionary review, resolve the conflict, and consider this case on the merits. The applicability *vel non* of Fla. Stat. 61.30(2)(b) to 61.08(2) & 61.14(5)(a) also merits consideration by this Court.

Respectfully submitted, this 23<sup>rd</sup> day of December, 2004.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to Stanford R. Solomon, Esquire of THE SOLOMON TROPP LAW GROUP, P.A., 400 North Ashley Plaza, Suite 3000, Tampa, FL 33602-4331 by regular U.S. Mail, postage prepaid, this 23<sup>rd</sup> day of December, 2004.

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**CERTIFICATE OF TYPE SIZE AND STYLE**

Counsel for the Petitioner hereby certifies that 14 point Times New Roman is used in this brief.

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