The Typo That Changed The Law:

Oops! Did we say "*his*" interest in his pension? We meant "*her*" interest in his pension

By Shannon McLin Carlyle, The Villages

In *Diffenderfer v. Diffenderfer*, 491 So. 2d 265, 267 (Fla. 1986), the Florida Supreme Court reviewed a First District Court of Appeal's decision holding that a retirement pension may not be considered a marital asset in a dissolution of marriage proceeding. The court rejected the district court's analysis and expressly ruled "a spouse's entitlement to pension or retirement benefits must be considered a marital asset for purposes of equitably distributing marital property." *Id.* at 270.

Earlier in the opinion the court stated:

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

Id. at 267 (emphasis added). Unfortunately, the phrase "***her*** interest in his pension" was erroneously altered in Westlaw's online and cd-rom research databases to read "***his*** interest in his pension" (emphasis added). *Compare Lauro v. Lauro*, 757 So. 2d 523, 524 (Fla. 4th DCA 2000) (quoting Southern Second version of *Diffenderfer*) *with Shlakfe v. Shlakfe*, 755 So. 2d 706, 707 (Fla. 4th DCA 1999) (quoting Westlaw version of *Diffenderfer*).

Although Westlaw has corrected the error, the Third District Court of Appeal had already released two opinions that were premised, in part, on the incorrect language. *See, e.g.*, *Hollinger v. Baur*, 719 So. 2d 954 (Fla. 3d DCA 1998); *Waldman v. Waldman*, 520 So. 2d 87 (Fla. 3d DCA), *review denied*, 531 So. 2d 169 (Fla. 1988). Unfortunately, case law developed in other Florida jurisdictions that appears to have relied upon the erroneously reported version of *Diffenderfer*. *See Rogers v. Rogers*, 746 So. 2d 1176 (Fla. 2d DCA 1999), *Paris v. Paris*, 707 So. 2d 889 (Fla. 5th DCA 1998); *Ellis v. Ellis*, 699 So. 2d 280 (Fla. 5th DCA 1997); *Bain v. Bain*, 687 So. 2d 79 (Fla. 5th DCA 1997); and *Gentile v. Gentile*, 545 So. 2d 820 (Fla. 4th DCA 1990).

Thereafter, the Third District considered the issue in *Acker v. Acker*, 821 So. 2d 1088 (Fla. 3d DCA 2002), and the Family Law Section of The Florida Bar, hereinafter referred to as the Section, urged the court to revisit the issue and to recede, in part, from *Hollinger* and *Waldman*. The Section posited that to avoid "double dipping,"[1] the original equitable distribution should not be considered for purposes of an alimony determination, although any earnings from that original distribution should be considered. The court went one step further, however, and ruled that both an originally distributed pension benefit and any subsequent earnings from those assets should be considered for alimony purposes. *Id.* at 1091. The court also certified conflict with the line of cases from other jurisdictions that it believed evolved from the erroneously reported version of *Diffenderfer*.[2] *Id.* at 1092. Judge Gersten, however, issued a ringing dissent, asserting that the typographical error in some versions of *Diffenderfer* was nothing but a red herring, and that requiring a party's equitably distributed pension benefits to be included as a source of alimony, both initially and in a modification, was impermissible "double dipping." *Id.* at 1093 (Gersten, J., dissenting). The Florida Supreme Court has accepted jurisdiction, and will clarify the issue for family law practitioners throughout Florida. *See Acker v. Acker*, 842 So. 2d 842 (Fla. 2003).

Pre-*Acker* Cases

In *Hollinger v. Baur*, 719 So. 2d 954 (Fla. 3d DCA 1998), the Third District considered a former husband's appeal after the trial court considered his 401(k) account in determining his ability to pay alimony. Relying on *Diffenderfer v. Diffenderfer*, 491 So. 2d 265 (Fla. 1986), the former husband argued that the supreme court had expressly disapproved of the use of retirement benefits for alimony purposes where the same benefits were also subject to equitable distribution. *Id.* at 954 (citing *Diffenderfer*, 491 So. 2d at 267). The Third District concluded that the same assets distributed pursuant to the equitable distribution could not be considered for purposes of determining ability to pay alimony. *See id.; see also* Peter C. Cushing, *Navigating the Former Spouse Protection Act* 71 FLA. B. J. 61, 63 (Dec. 1997) (stating that "[r]etirement plans should not be treated *simultaneously* as both assets and sources of income") (emphasis added). However, the opinion incorrectly stated "the trial court erred in considering *earnings* from the equitably distributed portion of the former husband's 401(K) in determining his ability to pay alimony." *Hollinger*, 719 So. 2d at 954 (emphasis added). The appellate court also improperly concluded that the trial court should have subtracted the marital portion from the husband's total monthly earnings when examining whether his rehabilitative alimony should have been modified. *Id.* It appears that such language is contrary to the corrected opinion in *Diffenderfer*,[3] and undermines the statutory intent of subsection

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61.08(2), of the Florida Statutes. *See* §61.08(2), Fla. Stat. (2001).

Waldman v. Waldman, 520 So. 2d 87 (Fla. 3d DCA), *review denied*, 531 So. 2d 169 (Fla. 1988), also seems to be based on the erroneous version of *Diffenderfer*. In *Waldman*, after a 22-year marriage, the trial court awarded the wife assets totaling more than $157,000, which included a one-half interest in the parties' marital home. Further, the wife received $4,000 per month in combined permanent alimony and child support, which was to be reduced to $2,000 per month after the last of the parties' four children reached majority. The court awarded the husband, a doctor, $9,500 worth of equity in a townhouse and the entire interest in his medical practice's pension and profit sharing plan that was valued at approximately $137,000. *Id.* at 90. Approximately 10 years later, the wife filed a petition for an upward modification of alimony and child support citing a substantial change in circumstances. In the interim, the wife had dissipated all of the assets acquired pursuant to the original dissolution order. On the other hand, the husband's pension had increased in value by almost 1,000 percent to $1,200,000. *Id.* On appeal, the Third District noted that the trial court had considered the increased value of the pension, along with the husband's doubling of salary, as sufficient evidence that he had an "increased ability to pay increased alimony." *Id.* The court then held that in doing so, the trial court had "incorrectly applied the rule of law set out in *Diffenderfer v. Diffenderfer*, 491 So. 2d 265 (Fla. 1986)." *Id.*

Later cases also determined that pension benefits received as part of one's equitable distribution could not then be considered when determining need for or ability to pay alimony. *See Rogers v. Rogers*, 746 So. 2d 1176 (Fla. 2d DCA 1999), *Paris v. Paris*, 707 So. 2d 889 (Fla. 5th DCA 1998); *Ellis v. Ellis*, 699 So. 2d 280 (Fla. 5th DCA 1997); *Bain v. Bain*, 687 So. 2d 79 (Fla. 5th DCA 1997);[4] and *Gentile v. Gentile*, 545 SO. 2d 820 (Fla. 4th DCA 1990).

Acker provides an opportunity for clarification

Following oral argument, the Third District elected to consider *Acker* en banc. It also requested that the Family Law Section appear as amicus curiae on the issue. The result was a 9-1 decision that receded from *Hollinger* and *Waldman* and certified conflict with the other districts' contrary holdings. The majority went beyond the Section's recommendation that only earnings from distributed assets be considered; instead, the court concluded that trial courts should even consider the original asset when determining need for and ability to pay alimony. Judge Gersten's dissent opines that the majority opinion is contrary to fundamental fairness and well-established Florida Supreme Court precedent.

The *Acker* majority

In a 9-1 decision, the en banc panel of the Third District held that trial courts must consider a party's pension benefit distributed pursuant to an equitable distribution when determining whether an alimony award is appropriate. In doing so, the court aligned itself with the Fourth District's analysis in *Lauro v. Lauro*, 757 So. 2d 523 (Fla. 4th DCA 2001).

In *Lauro*, the husband had retired from the Air Force with a pension that was generating more than $25,000 per year at the time of the parties' marital dissolution. The trial court found that the pension was a marital asset and distributed one half to the wife. As a result, the wife would immediately be receiving $1,079 per month as income from the pension. However, relying on *Diffenderfer*, the lower court refused to consider the amount when it awarded the wife $1,850 per month in permanent alimony.

On appeal, the Fourth District reversed, commenting that the trial court misinterpreted *Diffenderfer*, and concluded that it should have considered the pension income as income to the wife when it determined the issue of permanent alimony. The court reasoned that *Diffenderfer* requires both need for and ability to pay alimony to be analyzed based on the parties' financial situation after the equitable distribution, not before. *Id.* at 524.

The *Lauro* court noted that the income produced from the pension that was equitably distributed to the wife was no different from income produced by any other asset equitably distributed to a spouse. It reasoned that under subsection 61.08(2) of the Florida Statutes, the income should have been considered in determining alimony just as it is in determining child support. *Id.* (citing *Cummings v. Cummings*, 719 So. 2d 948 (Fla. 4th DCA 1998) (finding that income from assets obtained pursuant to equitable distribution would be included in calculating income for purposes of child support)). The court therefore held that "where a pension is currently generating income, that income must be considered in assessing the need for and the ability to pay alimony." *Id.* at 525.

In following *Lauro*, the *Acker* majority was persuaded by the legislature's intervening amendments to both the equitable distribution and alimony statutes. *See Acker*, 821 So. 2d at 1092 (citing §61.075(8), §61.08(2), Fla. Stat. (2001)). Subsection §61.075(8) provides in relevant part:

> The court may provide for equitable distribution of the marital assets and liabilities without regard to alimony for either party. ***After the determination of an equitable distribution of the marital assets and liabilities, the court shall consider whether a judgment of alimony shall be made.***

Id. (emphasis added). Likewise, §61.08(2) states in part:

> In determining a proper award of alimony or maintenance, the court shall consider all relevant economic factors, including but not limited to:
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> * * *
>
> (d) The financial resources of each party, the nonmarital and the marital assets and liabilities distributed to each.

* * *

(g) All sources of income available to either party.

§61.08(2), Fla. Stat. (2001). The legislature also directed courts to "consider any other factor necessary to do equity and justice between the parties." *Id.*

The *Acker* court noted that "[b]y its own language, section 61.08 requires the court to consider the assets and liabilities which have been equitably distributed to each party." *Acker*, 821 So. 2d at 1092. It therefore reasoned that "an equitably distributed pension is an asset to be considered on the issue of alimony." *Id.* (Citing *Lauro v. Lauro*, 757 So. 2d 523 (Fla. 4th DCA 2000)). The court concluded that regardless of *Diffenderfer*, the legislature has determined that "a pension benefit is subject to equitable distribution ... [and] [i]n determining the payor's ability to pay an alimony award, and the payee's need for alimony, the court shall consider all assets equitably distributed." *Id.* The court therefore certified direct conflict with *Rogers, Paris, Ellis, Bain, and Gentile, supra.*

Judge Gersten's Dissent

Judge Gersten disagreed with the majority's analysis in a number of respects. First, he opined that *Diffenderfer's* holding clearly prohibits "double dipping" by allowing trial courts to treat pension benefits as either part of an equitable distribution or as a source for paying alimony, but not both. Judge Gersten continued that the *dicta* utilized as an example in *Diffenderfer* did not alter that result, irrespective of the erroneous typographical error in some versions of the reported version. Judge Gersten characterized the majority's discussion of this error as "Much Ado About Nothing."[5] *Id.* at 1094 (Gersten, J., dissenting).

Second, Judge Gersten distinguished the case upon which the majority relied, *Lauro v. Lauro*, 757 So. 2d at 523. The pension in *Lauro* was a military pension that was not distributed as an offsetting asset. Instead, because of controlling federal law, the trial court was required to treat the plan as a vested interest to both the husband and the wife, which thereafter, would be automatically distributed by the government. Judge Gersten reasoned that this difference demonstrated why it was proper for the *Lauro* court to treat the plan's benefits as income to both parties in subsequent modification proceedings. *Acker*, 821 So. 2d at 1094 (Gersten, J., dissenting).

Third, Judge Gersten concluded that contrary to the majority's conclusion, "[s]ection 61.075, Florida Statutes (2001) is in complete accord with *Differnderfer* and its progeny, including *Hollinger* and *Waldman.*" *Id.* at 1094-95 (Gersten, J., dissenting). Judge Gersten reasoned that the legislature required a distinct, sequential analysis to prevent the type of double dipping the majority mistakenly concludes is proper:

> The statute provides that in initial dissolution proceedings a trial court is to consider the pension benefits as a marital asset subject to equitable distribution. After assets are equitably distributed, the trial court is to consider whether alimony should be awarded.

Id. at 1095 (Gersten, J., dissenting). Because of the two-step process, Judge Gersten opined that "the initial dissolution proceedings are distinct from those raised in a post-dissolution scenerio," and therefore treatment in a modification proceeding depends on how the assets were originally treated. *Id.* (Gersten, J., dissenting).

Finally, Judge Gersten criticized the majority's decision to rule contrary to *Diffenderfer*, a Florida Supreme Court case. Judge Gersten concluded that if the en banc panel disagreed with *Diffenderfer*, the proper action was to follow that precedent and certify the question to the Florida Supreme Court. *Id.* (Gersten, J., dissenting).

Conclusion

The Third District's opinion in *Acker* finally clarifies a glitch in Florida family law caused by a typographical error. According to the Third District, the erroneous holding in *Diffenderfer* has been superceded by statute. Case law, statutes, and logic dictate that once a pension-type benefit is treated as an asset and equitably distributed pursuant to a dissolution of marriage, its growth or earnings should be considered a source of income when analyzing the need for and the ability to pay alimony in a subsequent modification proceeding. There is no justification for treating pension assets any differently than other types of assets in a modification analysis.

To avoid "double dipping" however, while at the same time accounting for all sources of income, the Supreme Court should consider the Section's recommendation that trial courts consider the growth of or earnings from the marital portion of the pension when analyzing the need for and the ability to pay alimony while not considering the original distribution.[6] Just as an increase in income from pension assets might yield an increased alimony obligation by a payor, a decrease in income could yield a decrease in alimony. Likewise, an increase in income from pension assets held by an alimony recipient might yield a decrease in alimony by the obligor during a modification proceeding. The question is: Will the en banc panel's analysis rule the day, or will the Section's recommendation or Judge Gersten's dissent justify another result? The answer lies with the Florida Supreme Court.

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Endnotes:

[1] *See Bain v. Bain*, 687 So. 2d 79, 82 (Fla. 5th DCA 1997) (stating that husband's "pension income ... should not ... be considered in determining his ability to pay alimony [because t]hat would be 'double-dipping' and inequitable since that asset was equitably divided by the parties as part of the dissolution decree.") (Sharp, J., concurring in part and dissenting in part).

[2]*See Rogers v. Rogers*, 746 So. 2d 1176 (Fla. 2d DCA 1999), *Paris v. Paris*, 707 So. 2d 889 (Fla. 5th DCA 1998); *Ellis v. Ellis*, 699 So. 2d 280 (Fla. 5th DCA 1997); *Bain v. Bain*, 687 So. 2d 79 (Fla. 5th DCA 1997); and *Gentile v. Gentile*, 545 So. 2d 820 (Fla. 4th DCA 1990).

[3]*See Diffenderfer*, 491 So. 2d at 267.

[4]In *Bain*, the Fifth District concluded that the part of a pension distributed as marital property could not also be considered as a source for paying alimony. Notably, however, the court did not explicitly state that the growth of or earnings from that portion could not be considered when determining ability to pay alimony

[5]Judge Gersten analogized William Shakespeare's famous play in which a nonevent "paradoximcally becomes the center of [its] significance." *Id.* at 1094 n.13 (Gersten, J., dissenting) (quoting David Lucking, Plays Upon the World: Shakespeare's Drama of Language, 22, Collana di Studi e Testi (Lecce: Millella, 1997)).

[6] This rule should generally extend to all cases involving pensions, except those involving a defined benefit life annuity that has no lump sum settlement option. The reason for this exception is that there is only one way to value such a pension, *i.e.*, the present value of the benefit payments, multiplied by the discount rate, adjusted for the putative pensioner's remaining life expectancy. Where, however, there is an increasing benefit — *e.g.*, where the pensioner continues to work and contribute to the plan — the exception would not apply.