

**IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT, STATE OF FLORIDA**

JOANNE FERRARO MILLER,

Appeal No: 2D07-346

L.T. Case No: 03-011122-FD-25

Appellant;

vs.

WILLIAM ALAN MILLER,

Appellee.

_____ /

**ON APPEAL FROM THE CIRCUIT COURT OF
THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA**

INITIAL BRIEF OF APPELLANT, JOANNE FERRARO MILLER

NATHANIEL B. KIDDER, Esq.
FBN: 00750335
696 First Avenue, Suite 303
St. Petersburg, Florida 33701
Attorney for Appellant

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STATEMENT OF THE CASE AND FACTS

Appellant will be referred to in this brief as the “former wife” and Appellee will be referred to as “former husband,” their respective posture in the trial court. All matters referred to herein will be cited “(T.xx, L.xx) for matters appearing in the transcript of the proceedings, or “(App. xx) for matters that otherwise appear in the Appendix attached hereto.

The parties were divorced pursuant to an Amended Final Judgment entered by the trial court on February 21, 2006. The Amended Final Judgment provided for the equitable distribution of the marital estate, utilizing matrices of marital assets and liabilities set forth in the Amended Final Judgment (App. 20-29). Included in the matrix of marital assets was a parcel of real property located in North Carolina. (App. 22). The North Carolina property was determined to be marital in nature. (App. 22). As set forth in that matrix, the proceeds of the sale of the North Carolina property were allocated equally between the parties. (App. 22). Based upon the schedule of assets and liabilities set forth in the Amended Final Judgment the trial court set forth a “Plan of Distribution” and determined that the former husband was to pay to the former wife \$34,971.77 to “equalize distribution” between the parties. (App. 24). The Amended Final Judgment further made provision for lump sum alimony, which the court denominated as “Bridge-the-Gap” alimony, in the amount of \$60,000.00 to be paid by the Former husband to the Former wife in \$2,000.00 monthly payments for a thirty month period. (App. 27).

The former wife, Joanne Ferraro Miller, subsequently filed in the trial court her

Amended Motion to Enforce Final Judgment with a certificate of service date of May 5, 2006. (App. 31, 32). That motion sought to compel the former husband to distribute funds relating to the equitable distribution provision of the final judgment relating to the sale of real property in North Carolina. The motion did not seek modification of any provision of the Amended Final Judgment and did not address any issue related to the award of alimony. At the hearing on the motion for enforcement, the trial court orally ruled in favor of the Appellant, and ordered the distribution of the proceeds of the sale of the subject property. (App. 15, 16; T. 15, L.3 - T.16, L.7) The trial court initially asked counsel to draft an order containing a reservation on the question of alimony, (T. 15, L. 6,7) the reversed itself on that issue. (T. 15, L. 8 - 13). The trial court subsequently entered a written order containing a provision not only granting the equitable distribution enforcement, but thereafter added a provision reducing the alimony award contained in the final judgment. In that written order, the trial court explained that it considered the original Amended Final Judgment to be erroneous where it set forth the payment to equalize equitable distribution. (Appendix XX) The trial court opined that “. . . it incorrectly ordered that this [payment to equalize equitable distribution] amount be taken from the

proceeds of the sale of the North Carolina Home.¹ The amount to equalize should have been paid in addition to distributing the proceeds from the North Carolina Home leaving the Petitioner / Former wife with a total cash distribution of \$74,903.65.” (App. 40 paragraph 4). In seeking to correct its perceived error, the trial court thereafter went on to modify the lump-sum alimony award contained in the Amended Final Judgment by reducing that award “by \$39,931.88 which represents the corrected additional cash amount awarded Petitioner / Wife in equitable distribution.” (App. 41). The former wife then timely filed her Motion for Rehearing (App. 43 - 44), which was denied by written order issued without a hearing on December 18, 2006. (App. 46, 47). Appellant therefore appeals the provision of the Order on Petitioner’s Amended Motion for Enforcement of Final Judgment reducing the alimony award.

SUMMARY OF THE ARGUMENT

The trial court substantively modified the final judgment entered below by reducing the lump-sum alimony award, which would ordinarily be non-modifiable.

¹ The Amended Final Judgment does not, in fact, provide that the payment to equalize the equitable distribution be “taken out of the proceeds from the sale of North Carolina home.” The trial court’s confusion evidently stems from its order dated February 27, 2006, wherein the court ordered the release from escrow of the proceeds of the sale of the North Carolina house to Appellant in the exact amount of the *payment to equalize equitable distribution* rather than the amount the division of proceeds should have been. (Appendix 31). Thus, in effect, the Appellant’s payment to equalize was taken *from her own proceeds* of the sale of the North Carolina home and she has yet to realize the proceeds of that sale.

A predicate to the modification of any final judgment is the invocation of the jurisdiction of the court by way of filing proper pleadings and notice and the opportunity to be heard. In the case at bar, there were no such pleadings and the Former wife was not provided notice or opportunity to be heard on that issue. Thus, the subsequent modification should be deemed invalid.

Further, the trial court properly took the original equitable distribution matrices and schedules of distribution into account in entering the alimony award in the Amended Final Judgment, and thus erred in taking its subsequently perceived errors into account in otherwise arriving at the reduced alimony amount set forth in the Order on Petitioner's Amended Motion for Enforcement of Final Judgment.

Finally, even had such perceived errors had indeed occurred, the trial court was without jurisdiction to correct them under the general reservation of jurisdiction clause contained in the Amended Final Judgment as no appeal had been taken by either party and the time for perfecting such appeal had long since expired.

ISSUE ONE

THE TRIAL COURT ERRED IN MODIFYING THE AMENDED FINAL JUDGMENT IN THE ABSENCE OF ANY PLEADING TO SUPPORT SUCH A MODIFICATION.

Standard of Review:

The failure to raise the subject of modification by appropriate pleading has been deemed a failure to properly invoke the subject matter jurisdiction of the trial court. See generally *Dept. of Health and Rehabilitative Services v. Porbansky*, 569 So. 2d 815, (Fla. 5 DCA 815 1990); *Dept. of Health and Rehabilitative Services v. Nolden*, 556 So. 2d 1176 (Fla. 5 DCA 1990). There is currently a conflict between the district courts of appeal within the state of Florida as to the correct standard of review applied to the question of the proper invocation of subject matter jurisdiction.

“Whether a court has subject matter jurisdiction is a question of law reviewed de novo.” *Jacobsen v. Ross Stores*, 882 So. 2d 431 (Fla. 1 DCA 2004); *Sanchez v. Fernandez*, 915 So. 2d 192 (Fla. 4th DCA 2005). It should be noted that the *Sanchez* court noted conflict with its sister courts in a footnote as follows: “We note that the de novo standard of review used here for this issue is in conflict with the abuse of discretion standard of review used in the third and fifth districts. 945 So. 2d at 193, at FN 1. In that footnote, the court referred to *Birnbaum v. Birnbaum*, 615 So. 2d. 241, 242 (Fla. 3 DCA 1993) (“[T]he trial court did not abuse its discretion or authority in concluding it was vested with subject matter jurisdiction to proceed on the issue of custody.”); *Munnerlyn v. Wingster*, 825 So. 2d 481, 482 (Fla. 5 DCA

2002) ("A trial court's determination of subject matter jurisdiction is subject to an abuse of discretion standard of review").

No opinion as to the proper standard of review has been expressed as of this writing by the Second District Court of Appeal.

Argument:

The provision for lump-sum alimony in a final judgment is vested at the time of the issuance of the judgment and is non-modifiable. *Rentz v. Rentz*, 535 So.2d 613 (Fla. 2 DCA 1988); *Philipose v. Philipose*, 431 So.2d 698 (Fla. 2 DCA 1983).

Because the adjudication of a vested and substantive right by modification of the final judgment in the absence of any pleading seeking such modification would constitute an abuse of discretion by the trial court, under either standard of review the modification in the case at bar should be reversed.

In this case, the former wife filed her Amended Motion for Enforcement of Final Judgment seeking a ruling enforcing the then existing provisions of the Amended Final Judgment. Since the former husband in the case at bar did not move for a modification, the former wife had a right to expect that no ruling on any modification would be rendered by virtue of the hearing on her motion for enforcement. See *Geiger v. Geiger*, 632 So.2d 693, (Fla. 1st DCA 1994) (citing *Sentz*

v. Sentz, 548 So. 2d 297 (Fla. 4 DCA 1989) finding modification of child support exceeded scope of contempt proceeding and constituted deprivation of due process). *See also: Anthony v. Snell*, 630 So. 2d 606 (Fla. 1 DCA 1993) (modification of child support reversed as beyond the scope of contempt proceedings and parties not noticed that modification would be at issue).

The trial court cannot modify a support order or other adjudicated right unless the court's subject matter jurisdiction has been properly invoked by appropriate pleadings, and that invoked jurisdiction has been perfected by the proper service of process and due process notice and an opportunity to be heard on that issue has been had. None of this was done here. Because neither party filed a proper pleading for a modification, the trial court was without jurisdiction to modify the final judgment. *Cortina v. Cortina*, 98 So.2d 334 (Fla.1957); *Ksaibati v. Ksaibati* 824 So.2d 219 (Fla. 2d DCA 2002) citing to *Notarianni v. Notarianni*, 622 So.2d 1144, 1145 (Fla. 2d DCA 1993) (“It was error to modify the final judgment simply upon the wife's motion for contempt without a pending petition for modification.”) and *Brady v. Jones*, 491 So.2d 1272, 1273 (Fla. 2d DCA 1986) (“As the order adjudicated issues neither presented by the pleadings nor litigated by the parties, it denied the wife fundamental due process……”).

Because the trial court was without subject matter jurisdiction, and because the

modification of the Amended Final Judgment without notice or opportunity to be heard constitutes a violation of the due process rights of the former wife, the provision of the trial court's order containing such modification should be reversed and that provision should be stricken.

ISSUE TWO.

THE TRIAL COURT ERRED IN TAKING ITS SUBSEQUENTLY PERCEIVED ERRORS INTO ACCOUNT IN REDUCING THE ALIMONY AMOUNT BECAUSE IT PROPERLY TOOK THE ORIGINAL EQUITABLE DISTRIBUTION MATRICES AND SCHEDULES OF DISTRIBUTION INTO ACCOUNT IN ENTERING THE ORIGINAL ALIMONY AWARD.

In this case the trial court entered an eleven page Amended Final Judgment on February 21, 2006. (App. 20-30). In that final judgment, the court detailed its findings relating to the financial issues between the parties. Neither party appealed that final judgment. In Section IV of the Amended Final Judgment, entitled "Alimony," the court awarded the former wife "Bridge-the-Gap" alimony in the lump-sum amount of \$60,000.00 to be paid at \$2000.00 per month for a period of thirty months. (App. 28). Subsection 2 of Section IV sets forth the court's rationale for that award. (App. 28, 29). In determining whether the trial court mistakenly believed that

it erred, (thus in the mind of the trial court necessitating the instant modification), it is necessary to resort to the language of the original Amended Final Judgment to analyze this matter. Significantly, included in paragraph (d) of subsection 2 is the court's determination relating to: "**The financial resources of each party, the non-marital and marital assets and liabilities distributed to each:** As part of the final distribution of assets, the court has divided marital assets and liabilities equally between the parties." (Emphasis in the original). In the course of dividing the marital assets and liabilities equally, the trial court set forth in Section I (1)(b) its schedule of marital assets. (App. 21, 22). This schedule was used in arriving at the "Plan of Distribution" set forth in Section I(4)(a). (App. 25). Included in the schedule of marital assets is the North Carolina home, which the court valued at \$79,863.75 and *equally apportioned* that asset between the former husband and the former wife. Using that equal apportionment, the court determined the assets and liabilities of the marriage and determined that to arrive at an equal distribution of the net assets of the marriage, the former husband would be required to pay to the former wife \$34,971.77 to equalize the equitable distribution. See Section I(4)(a). (App. 25). Because the trial court evenly divided the marital estate, the court did not err in determining the subsequent alimony award, as it correctly identified in the alimony rationale that "the

court has divided marital assets and liabilities equally between the parties.”² Whether or not those sums had been actually distributed as set forth in the final judgment was the subject of the Amended Motion for Enforcement, and not the predicate for the modification by the court.

The remainder of the reasons set forth by the trial court in its award of lump-sum alimony contained in Section IV (2) remain undisturbed. Because the court properly distributed the assets of the marriage equally in the Amended Final Judgment, its rationale for the lump-sum alimony provision was not incorrect and therefore the trial court should not have modified that provision of the Amended Final Judgment.

ISSUE THREE

THE TRIAL ERRED IN MODIFYING THE ALIMONY BASED UPON THE RESERVATION OF JURISDICTION CONTAINED IN THE ORIGINAL AMENDED FINAL JUDGMENT

In its order denying rehearing regarding the modification of alimony, the trial

² In support of her argument at the hearing below, the former wife tendered to the court a distribution matrix showing that the required payment to equalize would have been \$74,903.64 had the proceeds of the sale of the North Carolina home been allocated solely to the former husband. (App. 35, 36). The trial court characterized its belief that both the ordered payment to equalize and the full alimony amount constitute a “windfall,” however since the proceeds were evenly apportioned to arrive at an equal distribution of assets, it is difficult to understand why such alimony would be anything but reasonable.

court opined that “If this court’s decision is legally sound, it is so because the court in both the final judgment and the amended final judgment reserved the jurisdiction to ‘modify’ the final judgment.” (App. 48).

Usually a court has no jurisdiction to modify property rights after those rights have been adjudicated in a final judgment of dissolution. *Mason v. Mason*, 371 So. 2d 226, 227 (Fla. 2DCA 1979) (Although the dissolution judgment in this case contained a reservation of jurisdiction for its enforcement, this general reservation did not empower the court to, in essence, change the wife's award of tangible personal property into an award of money damages.) *See also Harman v. Harman*, 523 So.2d 187, 188 (Fla. 2DCA 1988) (holding a general reservation of jurisdiction did not preserve the court's jurisdiction to alter the property rights determined in the final judgment of dissolution).

Appellant does not contest the fact that the trial court has inherent authority to retain jurisdiction over its final judgments for the purpose of modifying alimony under conditions that manifest a substantial change in circumstances, however Appellant does contest the trial court’s ruling allowing that such a reservation provides the trial court with a vehicle for entering *sua sponte* orders providing the former husband relief from the judgment as a result of what it perceived to be “clear judicial error.” See (Appendix, denial of mtn. to rehear at p.3).

Judicial errors must be corrected by way of an appeal. *Paladin Properties v. Family Investment Enterprises*, 2007 WL 420220 (Fla. 2DCA 2007). In determining that a motion for relief from judgment filed under Fl. R. Civ. P. 1.540(b)³ does not provide a party with relief from judicial errors, the *Paladin* court cited with approval the opinion of the court in *In Re the Estate of Beeman*, 391 So. 2d 276 (Fla. 4DCA 1980) as to the distinction between clerical error and judicial error:

The key factor is whether or not the court reached a decision in the intentional or purposeful exercise of its judicial function. If the pronouncement reflects a deliberate choice on the part of the court, the act is judicial; errors of this nature are to be cured by appeal. *Id.* at 281.

In the case at bar, the trial court “reached a decision in the intentional or purposeful exercise of its judicial function” when it rendered the Amended Final Judgment. Thus, its well intended, although incorrect, determination that it had judicially erred was not a matter that was subject to a judicial “correction.”

The reservation of jurisdiction clause contained within the Amended Final Judgment simply provides the court with ongoing jurisdiction to determine the rights and liabilities of the parties in the event that such jurisdiction is properly invoked by a party by way of a pleading directed to the specific issue. Because that has not been

³ No motion for relief from judgment had been filed in the case at bar.

done, the jurisdiction reserved in the final judgment remains inchoate, and is insufficient to proceed to modification. Accordingly, the provision of the trial court's order modifying the original alimony award contained in the Amended Final Judgment should be reversed.

CONCLUSION

The trial court erred in modifying the lump-sum alimony provision of the Amended Final Judgment because no pleading had been filed invoking the court's jurisdiction to do so, and thus the former wife's due process right was violated by that modification. The trial court incorrectly determined that it had made a mistake of fact requiring the court to correct the Amended Final Judgment, and even in the event that a proper motion for relief from judgment had been filed, such correction of judicial error would only have been cognizable on direct appeal of that judgment. Further, the trial court's reservation of jurisdiction in the final judgment is, in itself, insufficient for the court to proceed to modify that final judgment.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the forgoing Answer Brief is set in Times New

Roman typeface and complies with the provisions of Fl. R. App. P. 9.210.

CERTIFICATE OF SERVICE

_____ I HEREBY CERTIFY that a true and correct copy of the forgoing Initial Brief of Appellant was sent by U.S. Mail to: William Miller, *pro se*, P.O. Box 932, Safety Harbor, Fl 34695 on this the ___ day of February, 2007.

Respectfully submitted,

Nathaniel B. Kidder, Esq.
FBN: 0705535
696 First Avenue North, Suite 303
St. Petersburg, Florida 33701
(727) 821-8000; Fax (727)896-0709
Attorney for Appellant