Third District Court of Appeal

State of Florida, January Term, A.D. 2011

Opinion filed March 2, 2011.
Not final until disposition of timely filed motion for rehearing.

No. 3D09-590
Lower Tribunal No. 89-46739

John Allen Hill,
Appellant,

vs.

Lucinda McCoy Hill,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Mindy S. Glazer, Judge.

Flora Jackson-Holmes, for appellant.

Michael J. Alman (Fort Lauderdale), for appellee.

Before RAMIREZ, C.J, and CORTIÑAS and ROTHENBERG, JJ.

CORTIÑAS, J.

Appellant, John Allen Hill ("the Husband"), seeks review of an initial award of permanent alimony and retroactive alimony to appellee, Lucinda McCoy Hill ("the Wife"), eighteen years after the entry of the Final Judgment. In 1990, a final judgment dissolving the parties' marriage was entered ("Final Judgment"), at which time the court ("the 1990 court") reserved ruling on the issue of alimony, to be "reassessed" upon the Husband's retirement. In 2008, the court ("the 2008 court") entered an order for an initial award of alimony to the Wife.

The question before us is whether the language of the Final Judgment, in which the 1990 court "reserve[d] jurisdiction to determine alimony and to reassess the parties' income in contemplation of [the husband's] retirement . . . ." contravenes section 61.08(1), Florida Statutes (1990). We hold that it does and, accordingly, reverse the 2008 court's initial determination of alimony eighteen years after the Final Judgment.

In construing the language of a statute, courts are required to first consider the actual language of the statute. Woodham v. Blue Cross & Blue Shield of Fla., Inc., 829 So. 2d 891, 897 (Fla. 2002) (citations omitted); Campbell v. Kessler, 848 So. 2d 369, 371 (Fla. 4th DCA 2003) (finding that a court "must interpret and construe a statute according to the precise language adopted by the legislature.") (quoting Fla. Gulf Health Sys. Agency, Inc. v. Comm'n on Ethics, 354 So. 2d 932, 933 (Fla. 2d DCA 1978)). "[T]he intent of the legislature must guide our analysis,

and that intent must be determined primarily from the language of the statute." Hale v. State, 891 So. 2d 517, 521 (Fla. 2004) (citing Miele v. Prudential-Bache Sec. Inc., 656 So. 2d 470, 471 (Fla. 1995)).

The plain language of section 61.08 authorizes the trial court to award alimony in a dissolution action, as long as the award considers "all relevant economic factors." § 61.08(2), Fla. Stat. (1990). The Final Judgment, dated September 28, 1990, compelled the Husband to pay $650 monthly in child support, carry insurance for the Wife and their children, quitclaim the couple's two properties to the Wife, and pay the mortgages on the marital home; however, it did not award any alimony, nor did it consider "all relevant economic factors" supporting an award or denial of alimony.

Prior to entering the Final Judgment, the 1990 court must have first established the Wife's "entitlement to permanent periodic alimony" based on the record. Schmidt v. Schmidt, 997 So. 2d 451, 454 (Fla. 2d DCA 2008); accord Gildea v. Gildea, 593 So. 2d 1212, 1213 (Fla. 2d DCA 1992) (citing Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980)).

> Permanent periodic alimony is used to provide the **needs and the necessities** of life to a former spouse as they have been established by the marriage of the parties. The two primary elements to be considered when determining permanent periodic alimony are the **needs** of one spouse for the funds and the ability of the other spouse to provide the necessary funds.

Canakaris, 382 So. 2d at 1201 (emphasis added). By not determining that the Wife was in need of alimony in addition to the property and assets she received in the divorce, the 1990 court foreclosed the possibility of awarding the Wife alimony at a later date.

If the 1990 court had made a finding of need and entitlement to an alimony award, but determined that the Husband had no present ability to pay, Florida law would then have "required an award of a nominal amount of permanent alimony to permit the wife to pursue a future increase . . . ." Blanchard v. Blanchard, 793 So. 2d 989, 992 (Fla. 2d DCA 2001); accord Purrinos v. Purrinos, 34 So. 3d 244, 245 (Fla. 3d DCA 2010) (remanding with directions to award wife permanent periodic alimony in a nominal amount "[i]n recognition of the desirability of providing for the real likelihood that . . . an award [of alimony], although not now appropriate because of the husband's inability to pay, may become so in the future."); Lightcap v. Lightcap, 14 So. 3d 259, 260 (Fla. 3d DCA 2009); Schmidt, 997 So. 2d at 454; Schlagel v. Schlagel, 973 So. 2d 672, 676-77 (Fla. 2d DCA 2008); Bridges v. Bridges, 842 So. 2d 983, 984 (Fla. 1st DCA 2003); Wing v. Wing, 429 So. 2d 782, 783 (Fla. 3d DCA 1983). By failing to consider "all relevant economic factors" supporting an award of alimony and, at minimum, awarding nominal permanent alimony, the 1990 court failed to "accomplish two goals: first, [to] permit the wife to petition the trial court to pursue a future increase in permanent alimony . . . , and

second, [to] preserve the jurisdiction of the trial court to revisit the matter as the parties go on with their new lives." Nourse v. Nourse, 948 So. 2d 903, 904 (Fla. 2d DCA 2007).

Recently, the First District considered the precise issue before us in Gergen v. Gergen, 48 So. 3d 148 (Fla. 1st DCA 2010). In Gergen, the trial court "stated that it 'considers permanent periodic alimony appropriate,' that the former wife 'has a need,' and that former husband 'has no current ability to pay." Id. at 150. Thus, Gergen is even more compelling than our case insofar as the trial court there made certain findings of fact concerning need and entitlement to alimony while, here, the trial court made none.[1] See id. at 149-50. However, "[i]nstead of granting or denying permanent periodic alimony, the [trial] court reserved jurisdiction 'to award such alimony in the future if the circumstances justify that award.'" Id. The First District in Gergen noted that "[t]he issue of permanent periodic alimony was ripe for determination and thus the circuit court was obligated to rule on the matter without reserving jurisdiction and deferring decision for a future date." Id. (citing Collinsworth v. Collinsworth, 624 So. 2d 287 (Fla. 1st DCA 1993)). Reversing the trial court's reservation of jurisdiction and remanding for either a grant or denial of permanent periodic alimony "based upon

[1] In Gergen, the trial court made findings on the factors listed in subsections 61.08(2)(a) and (b), Florida Statutes and made a partial finding under subsection (c), but made no findings on factors (d) through (g). Gergen, 480 So. 3d at 149.

specific findings of fact or a finding of inapplicability for each of the factors listed in section 61.08(2) . . .", the First District held that "[a]n award of nominal permanent periodic alimony, if the trial court finds such an award warranted, will preserve jurisdiction of the court to revisit the matter if the parties' respective needs and abilities change substantially." Gergen, 48 So. 3d at 150-51 (citing Biskie v. Biskie, 37 So. 3d 970 (Fla. 1st DCA 2010) (finding that an award of nominal permanent alimony "would permit the wife to petition the trial court to pursue an increase in permanent alimony should the husband's income rebound. . . . [and] it would clearly preserve the jurisdiction of the trial court to revisit the matter if the parties' respective financial situations change.")) Even in dissent, Judge Kahn acknowledged that the "case must be reversed on the preservation of alimony . . . because the trial court did not apply a temporal constraint to such reservation." Id. at 151 (Kahn, J., dissenting).

The situation presented for our review also parallels Fleck v. Fleck, 958 So. 2d 1043, 1044 (Fla. 2d DCA 2007), except in that case, the trial court explicitly "found that the [w]ife 'may have a need for alimony' but that 'the [h]usband does not have the current ability to pay.'" The court ordered that the husband "shall not be obligated to pay the [w]ife any alimony **at this time**." Id. The Second District noted that "[d]espite the implication in the amended final judgment that the parties' circumstances might change, the trial court did not reserve jurisdiction by means of

an award of nominal permanent alimony that would enable it to meet the [w]ife's need for support in the future." Id. (citing Cunningham, 930 So. 2d at 720-21); Blanchard, 793 So. 2d at 990; see also Munger v. Munger, 249 So. 2d 772-73 (Fla. 4th DCA 1971) ("$1.00 per year was entirely consistent with the evidence which showed both the need of the wife and the ability of the husband to pay . . . [and was] simply a reservation of jurisdiction over the issue of periodic alimony.").

In its Final Judgment, the 1990 court failed to make any finding of need or entitlement to alimony but, nevertheless, attempted to "reserve[] jurisdiction to determine alimony and to reassess the parties' income in contemplation of the [husband's] retirement." The trial court had no authority to do this. A court may not reserve jurisdiction for a future determination of need and entitlement to alimony without originally making the statutorily required findings and awarding, at least, a nominal amount of permanent alimony or, at the very minimum, establishing a reasonable time limit upon the reservation of the alimony award. Gergen, 48 So. 3d 148; See Perkovich v. Humphrey-Perkovich, 2 So. 3d 348, 351 (Fla. 2d DCA 2008); Herman v. Herman, 889 So. 2d 128 (Fla. 1st DCA 2004); Zohourian v. Zohourian, 829 So. 2d 256, 257 (Fla. 3d DCA 2002); Castillo v. Castillo, 626 So. 2d 1035, 1036 n.1 (Fla. 3d DCA 1993); Ferguson v. Ferguson, 243 So. 2d 439, 440 (Fla. 3d DCA 1971). Here, the 1990 court did neither.

We are aware that in Rey v. Rey, 755 So. 2d 181 (Fla. 3d DCA 2000) we stated, in a one paragraph opinion, that the trial court "should have reserved jurisdiction to consider an alimony award in the future." Rey, 755 So. 2d at 181. Although, in Rey, we did not elaborate that the trial court must make the required statutory findings of need and entitlement to alimony and, at minimum, award nominal alimony to retain jurisdiction, a plethora of case law from appellate courts throughout the State makes clear that a trial judge may not reserve jurisdiction over all aspects of an alimony determination and award by merely uttering those magic words. Gergen, 48 So. 3d 148; See Perkovich, 2 So. 3d at 351; Herman, 889 So. 2d 128; Zohourian, 829 So. 2d at 257; Castillo, 626 So. 2d at 1036 n.1; Ferguson, 243 So. 2d at 440.

Instead, in order to properly reserve jurisdiction for later alimony, a trial court must initially consider "all relevant economic factors" and must make a finding of need and entitlement to an alimony award. See § 61.08(2), Fla. Stat.; Gergen, 48 So. 3d 148; Purrinos, 34 So. 3d at 245. If it had found "that the [w]ife was entitled to be awarded permanent periodic alimony, [the trial court] was required to do just that—award her permanent periodic alimony, even if only a nominal amount," e.g., $1. Schmidt, 997 So. 2d at 454. Appellate courts find it is an abuse of discretion for a trial court to fail to award nominal alimony where there has been a determination of need. Gergen, 48 So. 3d 148; See id.; Schlagel, 973

So. 2d at 676-77; Nourse, 948 So. 2d at 904; Cunningham v. Cunningham, 930 So. 2d 719, 720 (Fla. 2d DCA 2006); Misiak v. Misiak, 898 So. 2d 1159, 1160 (Fla. 5th DCA 2005); Brewer v. Brewer, 898 So. 2d 986, 989 (Fla. 2d DCA 2005); Blanchard, 793 So. 2d at 990.

Similarly, where an award of permanent periodic alimony is found to be inappropriate but the trial court has made a determination of need, appellate courts will remand with instructions to award nominal periodic alimony to permit the parties to later apply for modification.[2] For example, in Squindo v. Osuna-Squindo, 943 So. 2d 232, 237 (Fla. 3d DCA 2006), the trial court made a determination of the wife's entitlement to alimony and awarded her both permanent periodic and lump sum alimony; however, this Court found that the husband had no present ability to pay and reversed both awards and "remand[ed] for the trial court's consideration of a nominal alimony amount to the former wife

[2] In some cases, this Court has found the trial court's determination of need in the past to carry over into the future. In Gulbrandsen v. Gulbrandsen, 22 So. 3d 640, 645 (Fla. 3d DCA 2009), this Court reversed an award of permanent periodic alimony, finding it duplicative of the equitable distribution of the projected income from an invention the husband was developing, and remanded for "nominal periodic alimony, $1.00 per year, so that the award may be modified if both parties' hopes for the . . . royalties prove completely unfounded and the wife's needs are materially altered by other circumstances." This Court observed that this "instruction . . . finds ample support in the case law." Id. at 645 n.8. (citations omitted). See Wing, 429 So. 2d at 783; see also Esteva v. Rodriguez, 913 So. 2d 684, 686 (Fla. 3d DCA 2005) (correcting an error of law, i.e., the trial judge's belief that she was precluded from awarding nominal alimony, and remanding for her "to exercise her discretion in determining whether nominal, permanent alimony should be granted").

and/or reservation of jurisdiction to entertain a modification motion in the future . . . ."[3] In contrast, in the case before us, because need was not previously established, the trial court could not reserve jurisdiction to return, eighteen years later, to make an initial determination of need.

Moreover, a reservation of jurisdiction to award alimony must be limited in duration due to the facts of the specific case. See 1 Brenda M. Abrams, Florida Family Law § 31.02[1][b] (2008); Herman, 889 So. 2d 128. A failure to establish a reasonable time limit on the reservation of jurisdiction is unfair to the obligor spouse, who is then burdened with the possibility of paying alimony in the future for an indefinite time. See 1 Abrams, supra. In Herman, the appellate court approved a reservation of jurisdiction to award alimony to a wife with health problems that could potentially worsen in the future, but reversed to the extent jurisdiction was reserved indefinitely. Herman, 889 So. 2d at 129. The appellate court in Herman reversed the trial court's order, in part, because "the problem the trial judge was attempting to address . . . [was] a special medical problem that will arise, if at all, within the next few years." Id. Similarly, in Gergen, the First District emphasized that the trial court was obligated to rule on the pending

[3] Poe v. Poe, 263 So. 2d 644, 645 (Fla. 3d DCA 1972), seems to give trial courts the same option ("either award periodic alimony or reserve jurisdiction"), but upon closer reading, Poe's holding is the same as those of Nourse et al.: in order to subsequently modify the final judgment, the court must first make a determination of need, then either award alimony or, if the husband has no present ability to pay, reserve jurisdiction.

question of alimony without reserving jurisdiction and deferring decision for an indefinite future date. Gergen, 480 So. 3d at 150. In our case, the 1990 court purported to reserve jurisdiction to "reassess" the alimony issue upon the Husband's retirement – which ultimately occurred eighteen years later. The 1990 court's attempted reservation of jurisdiction was of neither a limited nor reasonable duration and, therefore, jurisdiction was not properly reserved.

On the basis of sympathy, our dissenting colleague would have us bend clear legal principles and rules requiring an initial alimony determination prior to final judgment. This we cannot do. If, for every occasion that evokes our emotions, we would be prepared to alter and ignore statutory requirements, what law would we have left? It is like Sir Thomas More's metaphor in Robert Bolt's play, *A Man for All Seasons*, likening laws to trees in a forest. Bolt, Robert. *A Man for All Seasons.* Samuel French, Inc., New York, 1990. Near the end of the first Act, More's wife, daughter, and future son-in law, Roper, implore him to arrest a character that they consider "dangerous" and "bad." Id. at 55. More refuses, and the characters argue:

> Wife: While you talk, he's gone.
>
> More: And go he should, if he was the Devil himself, until he broke the law.

> Roper: So now you'd give the Devil benefit of law.
>
> More: Yes. What would you do? Cut a great road through the law to get after the Devil?
>
> Roper: I'd cut down every law in England to do that.
>
> More: Oh? And when the last law was down – and the Devil turned round on you – where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast – Man's laws not God's – and if you cut them down – and you're just the man to do it – d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.

Id. at 56. Like Sir Thomas More, courts must not bend and alter legal principles for short term solutions.

Because the 1990 court did not make any determinations concerning the Wife's need or entitlement to alimony or awarded her, at a minimum, nominal alimony and also failed to provide for a reasonable and limited duration of its reservation, the 2008 court could not assume jurisdiction on the alimony claim eighteen years after the Final Judgment. [4] Accordingly, the 2008 court lacked authority to revisit the alimony issue.

Reversed and remanded.

ROTHENBERG, J., concurs.

[4] Contrary to the dissent's claim, the failure to make the required statutory findings and determinations concerning an alimony award has nothing to do with the use of any magic words.

ROTHENBERG, J. (concurring).

The issue debated in the majority and dissenting opinions has not been squarely addressed by any Florida court, and thus requires this Court to interpret section 61.08(1), Florida Statutes (1990), and to look to prior case law for guidance. The majority opinion correctly relies on the plain language of the statute, which permits the trial court to award permanent periodic alimony after it considers all relevant economic factors. See § 61.08(2). Additionally, the Florida Supreme Court in Canakaris v. Canakaris, 382 So. 2d 1197, 1201 (Fla. 1980), found that the two primary elements to be considered when determining permanent periodic alimony are: (1) the needs of the spouse seeking such an award; and (2) the ability of the other spouse to provide the necessary funds.

Subsequent decisions rendered by the various district courts of appeal in this state have reversed permanent periodic alimony determinations where the trial court failed to make specific findings of fact in the final judgment, as required by section 61.08, or where the trial court did not confine the award to the need and ability to pay at the time the award was made. See, e.g., Austin v. Austin, 12 So. 3d 314, 317-18 (Fla. 2d DCA 2009) (reversing final judgment in a dissolution action where the trial court failed to include specific findings of fact in awarding

permanent periodic alimony, specifically finding that '"**[t]he determination of whether there is need and ability to pay is made at the time of the final hearing**, and the trial court may not speculate on what might happen in the future'") (quoting Italiano v. Italiano, 873 So. 2d 558, 560 (Fla. 2d DCA 2004) (emphasis added)); Schmidt v. Schmidt, 997 So. 2d 451, 454 (Fla. 2d DCA 2008) (finding that entitlement to permanent periodic alimony must be based on the record and determined prior to entry of the final judgment); Searcey v. Searcey, 923 So. 2d 528, 530 (Fla. 2d DCA 2006) (finding that "[i]t is the Husband's **present need** and the Wife's **present ability** to pay that are relevant") (emphasis added); Hollinger v. Hollinger, 684 So. 2d 286, 288 (Fla. 3d DCA 1996) (finding that alimony must be based on current circumstances, not on possibilities likely but not yet realized, and if future events so warrant, **modification** may be an available remedy).

Where the trial court considers the relevant economic factors specified in section 61.08(2); considers the needs of the spouse seeking alimony and the ability of the other spouse to provide the necessary funds; makes specific findings of fact as required by section 61.08; and concludes that permanent periodic alimony is warranted, it must make the award in the final judgment, even if the award is nominal. Schmidt, 997 So. 2d at 454; Schlagel v. Schlagel, 973 So. 2d 672, 676-77 (Fla. 2d DCA 2008); Nourse v. Nourse, 948 So. 2d 903, 904 (Fla. 2d DCA

2007); Cunningham v. Cunningham, 930 So. 2d 719, 720 (Fla. 2d DCA 2006); Misiak v. Misiak, 898 So. 2d 1159, 1160 (Fla. 5th DCA 2005).

By making the required findings of fact and an award of permanent periodic alimony in the final judgment, even in a nominal amount, the judgment permits the parties to later apply for a modification. See Perkovich v. Humphrey-Perkovich, 2 So. 3d 348, 351 (Fla. 2d DCA 2008) (reversing the permanent periodic alimony awarded but remanding for consideration of "whether to award a nominal amount of permanent periodic alimony so as to reserve jurisdiction"); Schmidt, 997 So. 2d at 454 (finding that because "the [w]ife was entitled to be awarded permanent periodic alimony, [the trial court] was required to do just that–award her permanent periodic alimony, even if only a nominal amount"); Fleck v. Fleck, 958 So. 2d 1043, 1044 (Fla. 2d DCA 2007) (reversing the amended final judgment where the trial court found that the wife might need alimony, but the husband did not have the current ability to pay because the trial court failed to reserve jurisdiction by not making an award of nominal permanent alimony); Cunningham, 930 So. 2d at 720-21 (reversing the final judgment and remanding for entry of an amended final judgment awarding nominal permanent alimony of one dollar per month where the husband expected his income to increase in the future); Blanchard v. Blanchard, 793 So. 2d 989, 990 (Fla. 2d DCA 2001) (finding that "the trial court abused its discretion when it failed to award the wife $1 in permanent periodic alimony to

reserve her future right to alimony in light of the husband's work history during [the parties'] long–term marriage"); Wing v. Wing, 429 So. 2d 782, 783 (Fla. 3d DCA 1983) ("Recognizing that Mr. Wing's temporarily reduced income renders an additional award impractical at the present time, we remand for entry of a nominal award of permanent alimony which would permit Mrs. Wing to apply for modification, when appropriate."); Munger v. Munger, 249 So. 2d 772, 773 (Fla. 4th DCA 1971) (affirming the one dollar per year award of permanent periodic alimony to reserve jurisdiction should the husband's ability to pay changes).

In the instant case, the trial court failed to make any findings of fact regarding permanent periodic alimony in the final judgment as required by section 61.08, and specifically did not address the wife's present (at the time) entitlement to such alimony or the husband's ability to pay alimony. Instead, the trial court left the matter to be determined at some future date: "[T]he Court hereby reserves jurisdiction to determine alimony and to reassess the parties' income by reason of a pension which vests upon [his] retirement." This was error.

I therefore agree with the majority that the trial court erred by granting the wife permanent periodic alimony eighteen years after the final judgment was rendered. While I sympathize with the former wife's medical and financial conditions, when the trial court failed to make the requisite statutory findings, and, if appropriate, to award her permanent periodic alimony in a nominal amount to

allow for modification in the future, she should have appealed. Failing to do so in 1990, when final judgment was entered, precludes remedying the error twenty years later.

RAMIREZ, C.J. (dissenting).

> Alice thought the whole thing very absurd, but they all looked so grave that she did not dare to laugh; and, as she could not think of anything to say, she simply bowed, and took the thimble, looking as solemn as she could.

LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND (1865).

I dissent. The majority takes the extraordinary step of **reversing a final judgment that is more than twenty years old**. Despite the sixteen pages of attempted judicial legerdemain, the majority is illegally reaching back to reverse a judgment that became final thirty days after its effective date—September 28, 1990.[5] Neither the majority opinion, nor the concurring opinion, makes any bones about it. The majority states very clearly that it is reversing what happened in 1990:

> The question before us is whether the language of the Final Judgment, in which the **1990** court 'reserve[d] jurisdiction to determine alimony and to reassess the parties' income in contemplation of [the husband's] retirement. . . .' contravenes section 61.08(1), Florida Statutes (**1990**). We hold that it does and, accordingly,

[5] I call it judicial legerdemain because the majority says in the block quote below that it is reversing the 2008 determination of alimony, but a scrupulous reading of the opinion makes clear that it is really reversing the determination made in 1990 in which the court reserved jurisdiction to award alimony at a later date. Calling a duck a swan does not make it so.

> reverse the 2008 court's initial determination of alimony eighteen years after the Final Judgment.

The order awarding alimony pursuant to a reservation of jurisdiction was contained in the parties' 1990 divorce decree. No appeal was taken from the Final Judgment entered on September 28, 1990. Left unanswered in the majority and concurring opinions is—what rule of procedure confers jurisdiction on this Court to review a twenty-year old judgment?

Furthermore, in neither the majority nor concurring opinion can I find a scintilla of criticism, much less discussion of, the Report of the General Magistrate signed on November 25, 2008, nor the Order Denying Exceptions to the General Magistrate Report dated February 6, 2009. That is all that is before us.

Finally, the grounds upon which this Court reverses the 1990 Final Judgment were never argued before the Magistrate, never argued in the exceptions to the Magistrate's Report, never argued at the hearing before the trial court, and never argued in the briefs. Counsel for the appellant would have been hard pressed to do so because there was no appeal of the reservation of jurisdiction when the 1990 judgment was rendered. In reversing a twenty-year-old judgment, the majority has sought input from no one. Because counsel for the former husband never challenged the validity of the reservation of jurisdiction in the trial court nor raised it as a point on appeal, the briefs never addressed this issue. The majority has neither requested nor obtained supplemental briefs, nor has it requested any

amicus briefs. Even at oral argument, neither attorney was prepared to discuss the issue.[6] Undeterred, the majority proceeds to attack the decades-old judicial act of retaining jurisdiction.

The General Magistrate heard the matter over four days and determined that the seventy-four-year-old former wife, cancer survivor, who had raised nine children, four of which were fathered by the appellant, had demonstrated that she had the need for, and the husband had the ability to pay, the alimony award.[7] But the majority never addresses the proceedings that took place in the 21st century.

I.

The parties were married in 1972. The wife, Lucinda McCoy Hill, was a widow with five children. After the parties' marriage, they had four children of their own. During the marriage, the husband worked as a sanitation worker for the City of Miami. The wife worked as a school cafeteria worker and later stayed at home to take care of the children.

The parties divorced in 1990 after seventeen years of marriage. The husband at that time was earning approximately $1100 biweekly. The trial court

[6] I did not participate in the oral argument, but I have reviewed the recording.

[7] There is, however, an error in the arrearage award, which should be remanded for further proceedings.

awarded $650 monthly in child support for the children of the marriage.[8] The court also ordered the husband to carry health insurance for the former wife and children, and ordered him to discharge certain other financial obligations.

The final judgment provided that "the Court hereby reserves jurisdiction to determine alimony and to reassess the parties' income in contemplation of the Respondent's [husband's] retirement and increase in income by reason of a pension which vests upon Respondent's retirement." The order also required the husband to give notice to the wife of his retirement.

In February 2004, the former husband entered the City's Deferred Retirement Option Program ("DROP"). In February 2006, he ceased working for the City. He began receiving his retirement pay and received a lump sum payout from DROP.

The former husband met with the former wife and initially offered her the option of receiving a lump sum payment but thereafter instead began paying her $250 per month. After seven months, he stopped making any payments.

The former wife initiated the current proceedings, maintaining that she was entitled to permanent alimony under the 1990 reservation of jurisdiction. The matter was referred to the General Magistrate who conducted evidentiary hearings

[8] The children of the previous marriage received social security benefits (on account of the death of their father) until each became eighteen.

and recommended permanent alimony. The former husband filed exceptions, which were denied. The former husband has appealed.

II.

The majority opinion takes the position that the reservation of jurisdiction to award alimony in the future is legally ineffective. If I were sitting on an appeal of the 1990 judgment, I might agree that the trial court failed to make the requisite findings. At that point, assuming that the issue had been preserved and argued, we would reverse and remand with directions. We normally do not find that a needy spouse has forfeited her rights to alimony because the trial court failed to make findings. But in any event, this is 2011, not 1990 or 1991.

When the trial court entered the final judgment of dissolution of marriage in 1990, it ordered:

> 4. That the Court hereby reserves jurisdiction to determine alimony and to reassess the parties' income in contemplation of the Respondent's retirement and increase in income by reason of a pension which vests upon Respondent's retirement.
>
> . . . .
>
> 6. That the Respondent shall give notice to the Petitioner of retirement.

In the current proceedings, the former wife requested permanent alimony pursuant to this reservation of jurisdiction. The trial court granted the former wife's request and awarded alimony. This award was based on findings that no

one has challenged. The former husband was found to be in good health, had accumulated substantial assets and drove a $38,000 truck. The former wife, on the other hand, had cancer, lost her home in a foreclosure, and drove a ten-year-old car. Having reviewed all of the factors, the Magistrate concluded that this was "a classic alimony case" after a long-term marriage.

Even if we could climb into a time machine and sit as a panel of a nonexistent appeal in 1990, we would not have the right *sua sponte* to raise an issue that was not preserved below nor argued on appeal. But if the issue had been preserved, and if an appeal had been taken in 1990, the decision would have been reversed and remanded, giving Lucinda Hill the opportunity to make the proper showing and include the proper language in the final judgment. See, e.g., Johnson-Gainer v. Gainer, 921 So. 2d 798, 799 (Fla. 5th DCA 2006) (reversing a final judgment that did not contain the requisite findings and remanding "for entry of an amended final judgment which contains the requisite finding of fact"). Thus, even in 1990, the result would not have been to hold that Lucinda Hill forfeited her right to claim alimony simply because the judgment lacked the proper findings. We cannot assume that Lucinda Hill had no need for alimony back in 1990 while she was in the midst of raising nine children.

The majority also attacks the alimony award because it was not limited in duration. I always thought the whole point of permanent alimony was that it was

not limited in duration. The majority cites to Herman v. Herman, 889 So. 2d 128 (Fla. 1st DCA 2004), but that case stated that "because this case does **not** involve a potential claim for permanent alimony, jurisdiction should not have been reserved indefinitely."[9] (emphasis added). In fact, I have not found any case reversing an award of permanent alimony because it was permanent. Chapter 31.02 in Abrams' Florida Family treatise, which the majority cites, actually states, "A reservation of jurisdiction to award alimony must be limited in duration **if there is no potential claim for permanent alimony** due to circumstances such as the obligee's youth or the duration of the marriage." (emphasis added).

After a long discussion and numerous citations—none of which, of course, reversed a twenty-year old judgment—the majority finds that it was "an abuse of discretion for the 2008 court to assume jurisdiction on the alimony claim eighteen years after the Final Judgment . . . ." Having cited to Canakaris v. Canakaris, 382 So. 2d 1197 (Fla. 1980), the majority should not object if I quote from that seminal case. "Discretion . . . is abused when the judicial action is arbitrary, fanciful, or unreasonable . . ." Id. at 1203 (quoting from Delno v. Market St. Ry. Co., 124 F.2d 965, 967 (9th Cir. 1942)). In another quote: "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,

[9] In Herman, the parties separated after only three and one-half years. Here, the Hills were married nineteen years and had four children.

382 So. 2d at 1203. Thus, the trial judge in 2008 was arbitrary, fanciful and unreasonable when it applied the language contained in the 1990 judgment, even though no appeal from that judgment had been taken. No reasonable jurist would have enforced the reservation of jurisdiction, even though the former husband never objected to its enforcement.

III.

The reservation of jurisdiction was placed in the final judgment in 1990, from which the former husband did not appeal. If the former husband believed that this was not an appropriate case for a reservation of jurisdiction, then he should have taken an appeal at that time. The former husband did not challenge the validity of the reservation of jurisdiction before the General Magistrate, by taking exceptions to the trial court, or by raising this as a point on appeal in this Court.

It is surprising that the issue of preservation is not discussed in either the majority or concurring opinions, considering that the authors of both opinions have previously insisted on such a requirement. In Clear Channel Communications, Inc. v. City of North Bay Village, 911 So. 2d 188, 189-90 (Fla. 3d DCA 2005), Judge Cortiñas wrote: "Appellate review is confined to issues decided adversely to appellant's position, or issues that were preserved with a sufficiently specific objection below." Yet neither is present here. In State v. Shaw, 990 So. 2d 1172 (Fla. 3d DCA 2008), Judge Rothenberg wrote: "'An issue is preserved for appeal

if the attorney's articulated concern is sufficiently specific to inform the court of the alleged error. State v. Paulk, 813 So. 2d 152, 154 (Fla. 3d DCA 2002).'"; State v. Perdomo, 990 So. 2d 1173 (Fla. 3d DCA 2008) (same). And in an opinion authored by Judge Rothenberg, with Judge Cortiñas concurring, the majority stated:

> Prudence alone suggests that an appellate court should not resolve a complex case, such as this one, on an issue that was not addressed by the litigants and not ruled upon below. Judicial restraint requires it. As P & O did not attempt to obtain a ruling by the trial court on the legal effect of its "Notice of Revocation," did not seek to halt the proceedings below on jurisdictional or mootness grounds, and did not argue on appeal that its "Notice of Revocation" was controlling, we conclude that appellate review is precluded on this issue, and have ruled on the issues properly preserved, briefed, and argued before this court.

P & O Ports Fla., In. v. Continental Stevedoring & Terminals, Inc., 904 So. 2d 507, 511 (Fla. 3d DCA 2005). Why does not prudence give pause to this appellate panel? Or, is the requirement of preservation not applicable in alimony cases?

Even at oral argument, counsel for the former husband repeatedly conceded that the trial court "was very well within its discretion to reserve [jurisdiction] . . ." Her argument was simply that the court had used the wrong date in awarding alimony. Even when pressed, counsel admitted that the former husband should have appealed the issue back then, but she was not representing him at the time.

As stated previously, the majority is simply enunciating the new rule with input from no one.

It is difficult to envision what course of action the majority would set out for the former wife. Was she supposed to appeal the reservation of jurisdiction back in 1990 even though she was the beneficiary of the ruling? Perhaps the argument could have been this:

> Your honor, thank you for reserving jurisdiction, but even though my former husband has not objected, you should make some findings that I am a needy spouse. Raising nine kids is not cheap, you know. I know the Third District just stated in Eckroade v. Eckroade, 570 So. 2d 1347, 1348 (Fla. 3d DCA 1990), that a trial court may 'reserve jurisdiction to award the wife alimony in the future,' but in case some appellate panel twenty years from now has a problem with your reservation, put some findings in there that will better protect my rights to seek a modification later.

The majority also seems to find fault in the fact that the 1990 judgment did not award a nominal amount of alimony. In numerous cases, this Court has directed the trial court to enter a reservation of jurisdiction to award alimony in the future, without ordering an award of nominal alimony. Wood v. Wood, 359 So. 2d 23 (Fla. 3d DCA 1978). The trial court entered a reservation of jurisdiction to award permanent alimony to the wife at some time in the future. The former husband appealed, challenging the reservation of jurisdiction. Id. This Court said that the trial court:

> reserved jurisdiction to award same at such future date as appellee could demonstrate a material change in the circumstances of the parties as would warrant such an award. **A reservation of jurisdiction for such a purpose is, of course, permissible.** Marshall v. Marshall, 273 So. 2d 107 (Fla. 3d DCA 1973); Poe v. Poe, 263 So. 2d 644 (Fla. 3d DCA 1972).

Id. (emphasis added).

In Schiff v. Schiff, 123 So. 2d 295 (Fla. 3d DCA 1960), the former wife appealed the denial of alimony. Id. at 296. This Court remanded for further consideration, saying that the trial court should **either** "make an award of alimony, **or** reserve jurisdiction on alimony . . . ." Id. at 297 (emphasis added). See Rey v. Rey, 755 So. 2d 181 (Fla. 3d DCA 2000); Eckroade v. Eckroade, 570 So. 2d 1347 (Fla. 3d DCA 1990); Frantz v. Frantz, 447 So. 2d 1042 (Fla. 3d DCA 1984); Lockwood v. Lockwood, 354 So. 2d 1267 (Fla. 3d DCA 1978); Mumm v. Mumm, 353 So. 2d 134 (Fla. 3d DCA 1977); Weinman v. Weinman, 310 So. 2d 442 (Fla. 3d DCA 1975); Marshall v. Marshall, 273 So. 2d 107 (Fla. 3d DCA 1973); Steele v. Steele, 177 So. 2d 873 (Fla. 3d DCA 1965); Dings v. Dings, 161 So. 2d 227 (Fla. 3d DCA 1964). Was Mrs. Hill in our case supposed to file a motion for rehearing, even though four days after the judgment was signed, this Court issued its opinion in Eckroade? What was she supposed to argue in the motion?

The majority is denying the seventy-year-old former wife any alimony, not because she does not need it,[10] not because the former husband cannot afford it, but because the trial judge twenty years ago did not use the magic words. We have never required the use of magic words because such a requirement invariably elevates form over substance. See Weatherly v. Louis, 31 So. 3d 803, 806 (Fla. 3d DCA 2009); Carrillo v. State, 962 So. 2d 1013, 1016 (Fla. 3d DCA 2007).

Even if we were to accept the majority's view that a trial court can only reserve jurisdiction over alimony by awarding a nominal amount, the issue was waived. All jurisdictional issues can be waived except subject matter jurisdiction, and I do not believe the majority is saying that a circuit court judge has no subject matter jurisdiction over this case. See, e.g., Miller v. Marriner, 403 So. 2d 472, 475 (Fla. 5th DCA 1981) ("The first step which a defendant takes in a case, whether it be the filing of a preliminary motion or a responsive pleading, must raise the issue of personal jurisdiction or that issue is waived.")

IV.

Turning now to the merits of the trial court's award, the former husband raises a meritorious point. The final judgment in this case required the former

[10] Amazingly, the majority states at page ten, that "need was not previously established." I find this absurd. A single, African-American, stay-at-home mother of seven children could not possibly have any need for alimony. Like Alice, I do not dare to laugh.

husband to advise the former wife of his retirement. The court reserved jurisdiction to reassess the parties' income when the former husband retired.

The Magistrate ruled that the former husband retired when he entered the DROP program on February 22, 2004. The magistrate ruled that alimony would be retroactive to the February 22, 2004 date. This was error.

When an eligible employee enters DROP, the employee has technically retired, but it is a **deferred** retirement. The actual name of the DROP program is, as already stated, **Deferred** Retirement Option Program. A DROP employee continues to work and continues to receive a regular salary. The DROP employee also starts to draw monthly pension benefits, but these pension benefits go into a special account to which the employee has no access.

Upon ceasing to work, the employee stops receiving a salary and instead begins receiving a monthly pension (which is no longer paid into the special account). The lump sum in the special account then becomes available to the employee who may choose to transfer it into a tax deferred account, or may choose to receive a direct payout (which is subject to tax). But in either event, after ceasing to work, the DROP account becomes available to the employee to do with as he or she wishes.

It should be clear from this description that the relevant retirement date was the date the former husband really did stop working, which was in February 2006.

That would be properly viewed as the date of retirement, not the date that the former husband entered DROP. The trial court erred by calculating the alimony arrearage retroactive to the 2004 date on which the former husband entered DROP.[11] There is no merit to the other points the former husband has raised in this appeal.

V.

In conclusion, I do not advocate for sympathy. The only allusion to sympathy is in the concurring opinion. I certainly do not seek to bend clear legal principles. It is the majority of this panel that abandons such bedrock principles as the finality of judgments, the preservation of issues, res judicata, jurisdiction, and equality before the law. It is the epitome of *chutzpah* to quote from Sir Thomas More while the majority disowns precedent.

For the stated reasons, the trial court had jurisdiction to make the alimony award in this case, and we should affirm the alimony award. We should, however, reverse in part and remand for recalculation of the arrearage.

[11] It is not clear whether the date for alimony arrearage should relate back to the February 2006 date the former husband ceased working for the City, or to the October 2006 date on which the wife filed the present proceedings. In the event of a remand, the parties should address this issue.