

**DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT**

BRIGITTE CHARBONNEAU,
Appellant,

v.

LAWRENCE CHARBONNEAU,
Appellee.

Case No. 4D17-0191

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

APPELLANT'S INITIAL BRIEF

By: s/ John Caserta

John Caserta, Esq.

FL Bar No. 39619

Email: john@casertalaw.com

JOHN CASERTA, P.A.

2025 Lavers Circle, D207

Delray Beach, FL 33444

Telephone: (954) 803-0684

Attorney for Appellant/Petitioner

I.	TABLE OF CONTENTS	ii.
II.	TABLE OF CITATIONS	v.
III.	PRELIMINARY STATEMENT	vii.
IV.	STATEMENT OF THE CASE AND OF THE FACTS.....	1
	A. Nature of the Case.....	1
	B. Course of the Proceedings.....	2
	C. Statement of the Facts and Disposition of the Lower Tribunal.....	4
	1. The Operative Pleadings	4
	2. Background on Leisure Time Coins and Former Husband’s dissipation.....	6
	3. Income generated by Leisure Time Coins from 2009-2015 and real property purchased by Former Husband and Beth Charbonneau since the 2009 Order.....	8
	4. Former Husband’s alleged retirement on August 1, 2015	10
	5. Evidence that Former Husband worked in 2016.....	13
	6. Leisure Time Coins in 2016, its dissolution, and Former Husband’s finances as of trial.....	19
	7. Former Husband’s health since 2009.....	21
	8. Former Wife’s health and finances.....	22

9.	The Final Judgment.....	25
V.	SUMMARY OF THE ARGUMENT.....	26
VI.	ARGUMENT.....	27
A.	The Final Judgment grants relief beyond the scope of the pleadings and is therefore void.....	27
B.	Assuming <i>arguendo</i> that Former Husband properly pled voluntary retirement, the trial court erred in that it failed to perform the correct legal standard for voluntary retirement as set forth in <u>Pimm</u>	32
C.	Assuming <i>arguendo</i> that the trial court correctly applied the legal standard for voluntary retirement as set forth in <u>Pimm</u> , the trial court the trial court abused its discretion in reducing Former Wife’s alimony.....	34
1.	Pursuant to <u>Pimm</u> and its progeny, Former Husband’s purported voluntary retirement was not reasonable under the circumstances.....	34
a.	Former Husband’s motivation for retirement.....	35
b.	Former Husband’s health.....	37
c.	The type of work the Former Husband performed and the age at which others engaged in that line of work normally retire.....	40
d.	The Final Judgment reduces Former Wife to poverty Former Husband’s health.....	40

e. Assuming <i>arguendo</i> that that Final Judgment held that Former Husband’s voluntary retirement was reasonable, the trial court erred.....	43
2. There is no competent and substantial evidence that Former Husband is retired or that his alleged retirement is permanent.....	44
3. The trial court erred in not imputing income and assets to Former Husband.....	47
VII CONCLUSION.....	50
VIII CERTIFICATE OF SERVICE.....	50
IX CERTIFICATE OF COMPLIANCE.....	51

II. TABLE OF CITATIONS

CASES

<u>Anderson v. Durham</u> , 162 So. 3d 65, 66 (Fla. 1st DCA. 2014).....	32
<u>Bank of New York Mellon v. Reyes</u> , 126 So.3d 304, 309 (Fla. 3d DCA 2013).....	29
<u>Bistline v. Rogers</u> , 4D16-4012, 2017 WL 1174768 (Fla. 4th DCA. Mar. 29, 2017).....	32
<u>Cleary v. Cleary</u> , 743 So. 2d 1163, 1165 (Fla. 5th DCA 1999).....	30
<u>Cooper v. Cooper</u> , 406 So.2d 1223, 1224 (Fla. 4th DCA 1981).....	29
<u>Defreitas v. Defreitas</u> , 398 So.2d 991 (Fla. 4th DCA 1981).....	29
<u>Hayden v. Hayden</u> , 662 So. 2d 713 (Fla. 4th DCA 1995), <u>as clarified</u> (Nov. 15, 1995).....	48
<u>Hemraj v. Hemraj</u> , 620 So.2d 1300, 1301 (Fla. 4th DCA 1993).....	29
<u>Jarrard v. Jarrard</u> , 157 So. 3d 332, 339 (Fla. 2d DCA 2015).....	46
<u>Johnson v. Johnson</u> , 546 So.2d 97, 98 (Fla. 4th DCA 1989).....	34
<u>Kelley v. Kelley</u> , 967 So. 2d 924, 926 (Fla. 2d DCA 2006)	42
<u>Koscher v. Koscher</u> , 201 So. 3d 736 (Fla. 4 th DCA 2016).....	47
<u>Lafferty v. Lafferty</u> , 134 So.3d 1142 (Fla. 2d DCA 2014).....	47
<u>Lopez v. Lopez</u> , 970 So. 2d 388 (Fla. 3d DCA 2007).....	30
<u>Martinez v. Martinez</u> , 2D15-5154, 2017 WL 1277736, (Fla. 2d DCA Apr. 5, 2017).....	42

<u>McCants v. McCants</u> , 984 So. 2d 678, 683 (Fla. 2d DCA 2008).....	42
<u>Medco Data, LLC v. Bailey</u> , 152 So. 3d 105 (Fla. 2d DCA 2014).....	32
<u>Melton v. Melton</u> , 79 So. 3d 154, 157 (Fla. 2d Dist. App. 2012).....	42
<u>Mullne v. Sea-Tech Const. Inc.</u> , 84 So. 3d 1247 (Fla. 4th DCA 2012).....	29
<u>Perez v. Perez</u> , 973 So. 2d 1227, 1232 (Fla. 4th DCA 2008).....	46
<u>Pimm v. Pimm</u> , 601 So. 2d 534 (Fla. 1992).....	27, 30, 31, 32, 33, 34,35, 38, 40, 41, 43, 44, 45, 50
<u>Sanchez v. Fernandez</u> , 915 So. 2d 192 (Fla. 4th DCA 2005).....	28
<u>Suarez v. Sanchez</u> , 43 So. 3d 118, 122 (Fla. 3d DCA 2010).....	33
<u>Todaro v. Todaro</u> , 704 So. 2d 138, 139 (Fla. 4th DCA 1997).....	28
<u>Voorhees v. Voorhees</u> , 204 So. 3d 75, 77 (Fla. 4th DCA 2016).....	28
<u>Wachovia Mortg. Corp. v. Posti</u> , 166 So. 3d 944 (Fla. 4th DCA 2015).....	29
<u>Wiedman v. Wiedman</u> , 610 So. 2d 681, 683 (Fla. 5th DCA 1992).....	30
<u>Wilson v. Wilson</u> , 37 So. 3d 877, 881 (Fla. 2d DCA 2010).....	44
<u>Yampol v. Turnberry Isle S. Condo. Ass'n, Inc.</u> , 143 So. 3d 1144 (Fla. 3d Dist. App. 2014).....	31

III. PRELIMINARY STATEMENT

In this brief, Appellant Brigitte Charbonneau will be referred to as “Former Wife” and Appellee Lawrence Charbonneau will be referred to as “Husband.” The Record consists of the all relevant documents in the lower tribunal’s docket as well as **all** exhibits and transcripts of proceedings filed in the lower tribunal in accordance with Rule 9.200(a)(1). References to matters of Record will be made by the following: citations to the trial transcript will be designated by (T Vol. __, __) with the appropriate volume number and page number from the trial transcript inserted; citations to the record will be designed by (R __) with the appropriate page number inserted.

IV. STATEMENT OF THE CASE

A. Nature of the Case

This case is Brigitte Charbonneau's ("Former Wife") appeal of the Final Judgment on Former Husband's Second Amended Petition to Modify or Terminate Alimony dated December 19, 2016 ("Final Judgment") (R 802), which reduced the periodic permanent alimony that she received from Lawrence Charbonneau ("Former Husband") from \$2,167 per month to \$500 per month (herein Former Wife and Former Husband will be collectively referred to as the "Parties").

The Parties' marriage was dissolved on February 18, 1993 via a martial settlement agreement (R 30), which was incorporated into the Final Judgment dissolving the marriage on February 19, 1993. (R 281) Over the subsequent twenty-plus years, Former Husband has made multiple attempts to terminate his alimony obligation to Former Wife (R 41, 168) and has been found in contempt of court numerous times. (R 28, 37, 155-167, 192) As discussed in the next section, the present iteration of this case began on March 27, 2014. (R 207) After nearly three years of litigation, this matter preceded to trial on December 5 and 6, 2016.

The primary issue at trial was whether Former Husband had involuntarily retired on August 1, 2015 due to health reasons as alleged in Former Husband's Second Amended Supplemental Petition to Modify or Terminate Alimony ("Second Amended Petition"). (R 392)

B. Course of the Proceedings

As stated above, over the last twenty years, Former Husband has made multiple attempts to modify or terminate his alimony obligation to Former Wife. (R 41, 168) Prior to the present iteration of this case, Former Husband's most recent previous attempt to modify or terminate his alimony obligation to Former Wife was filed on November 27, 2007. (the "2007 Petition") (R 168) Former Husband's 2007 Petition was not only denied, but his alimony obligation to Former Wife was increased from \$300 per week to \$500 per week in an Order dated September 9, 2009. (the "2009 Order") (R 194)

The present iteration of this case began on March 27, 2014 when Former Husband filed his Supplemental Petition to Modify or Terminate Alimony, which alleged a change in circumstances since the 2009 Order. (R 207) Former Husband filed an Amended Supplemental Petition to Modify or Terminate Alimony on August 20, 2014. (R 273) This matter was initially set for trial on August 18, 2015. (R 330) On July 10, 2015, Former Husband filed a Motion for Leave to Amend and attached his proposed Second Amended Supplemental Petition to Modify or Terminate Alimony ("Second Amended Petition"). (R 392) The trial court granted Former Husband's Motion for Leave on August 11, 2015, at which time the Second Amended Petition became Former Husband's operative pleading in this case. (R 410) As described in detail below, the Second Amended Petition

alleged that Former Husband would be retired as of August 1, 2015 and would be unable to work at anytime in the future because the stress could jeopardize his health. (R 392)

In August 2015, Former Husband became delinquent in his alimony payments to Former Wife, and a Notice of Delinquency was sent out on August 19, 2015. (R 762) Former Wife filed her Motion for Civil Contempt/Enforcement on November 25, 2015. (R 417) In an oral order, the trial court ruled that Former Wife's Motion for Contempt would be heard concomitant with Former Husband's Second Amended Petition. (T Vol. 2, 155-156) (R 766)

On April 4, 2016, the trial court issued an Order setting this matter for final hearing on July 18, 19, and 21, 2016. (R 567) On April 28, 2016, the trial court issued its Order Imposing Uniform Pretrial Procedures of the Family Division of the Fifteenth Judicial Circuit. (R 569) The parties filed their Joint Pretrial Statement on July 15, 2016. (R 766) On July 21, 2016, due to the trial judge's illness (T 4), the trial was continued until December 5, 6, and 8, 2016. (R 788)

As stated above, Former Wife's Motion for Contempt and Former Husband's Second Amended Petition proceeded to trial on December 5 and 6, 2016. During trial, Former Husband presented only two witnesses: himself and his current wife, Beth Charbonneau. Former Wife presented four witnesses at trial: herself, Laurence Demerer, Greg Bowling, and Beth Charbonneau.

On December 19, 2016, the trial court issued two separate rulings. The first was an Order granting Former Wife's Motion for Contempt, awarding Former Wife \$32,979.76 in back alimony ("Contempt Order") (R 810), which stated, in pertinent part:

Additionally, the Former Husband transferred all of his business interest in Leisure Time Coins to his current wife, the Former Husband stopped taking distributions from his company, however, he continued working in the company to allow his current wife to continue taking distributions, and she increased her distributions from the company at that time. *Essentially, the Former Husband divested himself of his income which started going to his current wife...*

(R 811-812) (emphasis added)

The second was a Final Judgment on Former Husband's Amended Supplemental Petition for Modification or Termination of Alimony ("Final Judgment") that granted (in part) Former Husband's Second Amended Petition reducing his alimony obligation to Former Wife from \$2,167 per month to \$500 per month. (R 802) Former Wife filed her Notice of Appeal of the Final Judgment on January 17, 2017. (R 821)

C. Statement of the Facts and Disposition of the Lower Tribunal

1. The Operative Pleadings

As stated above, the Second Amended Petition, filed on July 10, 2015 (R 392), was Former Husband's operative pleading at the trial on December 5 and 6, 2016. (R 766) The Second Amended Petition alleged that Former Husband was

unable to meet his alimony obligation to Former Wife because of the following “substantial change in circumstances, which is sufficient, material, *involuntary*¹ and permanent in nature.”²

- a) Former Husband is sixty-six (66) years of age and in poor health. As of August 1, 2015, Former Husband will be retired;
- b) Former Husband will no longer have any ownership interest, stockholder interest, or shareholder interest in the business Leisure Time Coins, Inc.
- c) Leisure Time Coins, Inc. had a substantial loss of business and profit due to factors that include, but are not limited to, economic changes, downturn in the economy, increase in competitors, and embezzlement lawsuits resulting in severe losses that are not be recoverable. Leisure Time Coins, Inc. was forced to close a satellite location and lay off employees.
- d) Former Husband's Social Security retirement pay is less than what the Former Wife is due to receive in alimony. The Former Husband's Social Security is \$2,087.00, while the Former Wife's alimony is \$2,167.00 monthly.
- e) **Former Husband's retirement is permanent in nature. The Former Husband suffered two heart attacks which lead to open heart surgery and is being evaluated for memory deficits. There is no likelihood that the Former Husband will be able to work as the stress could jeopardize his health.**³

(R 393)

¹ Emphasis added.

² Former Husband also pled that Former Wife was in a supportive relationship in paragraphs (f-i) (R 394) of the Second Amended Compliant (R 394). However, the Final Judgment ruled that there is insufficient evidence to find that a supportive relationship exists.

³ Emphasis added.

In addition to denying that there was a substantial change in circumstances warranting modification or termination of alimony, Former Wife pled the affirmative defense of Dissipation and Bad Faith (R 415). With regard to Dissipation, Former Wife pled:

Former Husband has intentionally dissipated vast sums of money and property to his current spouse Beth Charbonneau in order to avoid his alimony obligations to Former Wife. **Beth Charbonneau has used these funds to purchase property, including real property** in the state of Florida. Therefore, Beth Charbonneau's assets **must be imputed** to Former Husband in order to determine his ability to meet his alimony obligations to Former Wife. (emphasis added)

(R 415)

With regard to Bad Faith, Former Wife pled, in pertinent part:

Former Husband's purported retirement and purported divestment in Leisure Time Coins, Inc. is a sham meant only to avoid his alimony obligations to Former Wife. Thus, any income generated by Leisure Time Coins, Inc. must be imputed to Former Husband. Also, any income that Former Husband could generate but for his attempt to avoid his alimony obligations must be imputed to Former Husband. (emphasis added)

(R 415)

2. Background on Leisure Time Coins and Former Husband's Dissipation

Former Husband founded Leisure Time Coins in 1969. (T Vol. 2, 121) Leisure Time Coins was involved in the precious metals, bullion, and rare coin business. (T Vol. 1, 65-66,) Precious metals refers to pieces of silverware, whole

pieces of jewelry, scrap metal, etc. (T Vol. 1, 65) “Bullion coins” refers to the spot price of precious metals while “rare coins” or “numismatics” refers to a premium on a coin based on its rarity. (T Vol. 2, 171) In other words, rare coins are collector’s coins, whereas, bullion relates simply to investments in precious metals. (T Vol. 1, 64-65) In the coin business, experts in “rare coins” are known as numismatists. (T Vol. 2, 171) Former Husband is a numismatist and an expert in the coin business. (T Vol. 2, 171, 242) Over the years, Former Husband developed numerous relationships with precious metals/coins dealers across the country. (T Vol. 2, 211) For example, Leisure Time Coins transacted business with: Del Greco Coins in Weymouth, Massachusetts; Edlin Co. Fine Jewelry in Louisville, Kentucky; The Scrap Spot in Ypsilanti, Michigan; and Pops Collectibles in Manhattan, Kansas.⁴ (R 1976-1984)

Former Husband has been married to his current wife, Beth Charbonneau, for approximately 23 years. (T Vol. 1, 20) After they were married, Beth Charbonneau worked with Former Husband in the business known as Leisure Time Coins. (T Vol. 1, 20) Beth Charbonneau is not a numismatist and is not qualified to deal in rare coins. (T Vol. 1, 66)

Between 1993 and 2015, Former Husband paid his alimony obligation to Former Wife through checks written by Leisure Time Coins for which Former

⁴ This list is non-exhaustive.

Husband took a distribution. (T Vol. 1, 40-41) In 2004, Former Husband gave Beth Charbonneau 49% ownership interest in Leisure Time Coins for no consideration. (T Vol. 1 20, 51; T Vol. 2, 146) On August 1, 2015, approximately two weeks after filing his Second Amended Petition, Former Husband gave Beth Charbonneau his remaining 51% interest in Leisure Time Coins; once again for no consideration. (T Vol. 1, 21, 51; T Vol. 2, 146) Therefore, as of August 1, 2015, Beth Charbonneau owned 100% interest in Leisure Time Coins. (T Vol. 1, 21)

3. Income Generated by Leisure Time Coins from 2009 – 2014 and real property purchased by Former Husband and Beth Charbonneau since the 2009 Order

Since the date of the 2009 Order, Beth Charbonneau and Former Husband extracted a substantial amount of money from Leisure Time Coins. (T Vol. 1, 60, Vol. 2, 124) Specifically between 2009 and 2014, Beth Charbonneau and Former Husband took the following amounts in property distributions:

- 2009 - \$251,510 (T Vol. 1, 60)(R 871);
- 2010 - \$447,206 (T Vol. 1, 61)(R 885);
- 2011 - \$81,311 (T Vol. 1, 61)(R 1036);
- 2012 - \$587,480 (T Vol. 1, 61)(R 919);
- 2013 - \$147,804 (T Vol. 1, 62)(R 1005);
- 2014 - \$14,478 (T Vol. 1, 62)(R 963).

Thus, between 2009 and 2014, Former Husband and his current wife, Beth Charbonneau, received a total **\$1,529,789** in property distributions from Leisure

Time Coins. Therefore, although Beth Charbonneau paid no consideration for the 49% interest in Leisure Time Coins she acquired in 2004, during this time period (2009-2014), Beth Charbonneau received \$749,596.61 in property distributions from Leisure Time Coins. Additionally, during that time Beth Charbonneau and Former Husband each received annual salary of \$35,000 a year each. (T Vol. 1, 40) Therefore, between 2009 and 2014, Former Husband and his current wife Beth Charbonneau received a total of approximately \$1,880,149 from Leisure Time Coins.

Sine the 2009 Order, Former Husband and Beth Charbonneau both purchased real property in Palm Beach County. (T Vol. 1, 40) Beth Charbonneau purchased a property on Flagler Drive (“Flagler”) in West Palm Beach in 2012 and Former Husband purchased a condo at “Whitehall,” on Village Blvd. in West Palm Beach (“Whitehall”) in 2014. (T Vol. 1, 40) As of the date of trial, both Flagler and Whitehall were listed for sale with their approximate values at \$350,000 - \$380,000 for Flagler and approximately \$110,000 - \$115,000 for Whitehall. (T Vol. 1, 43) Also, as of the date of trial, neither Flagler nor Whitehall had any mortgage or other encumbrance. (T Vol.1, 43-44)

Additionally, in 2016, Former Husband and Beth Charbonneau sold their golf villa in Atlantis and netted approximately \$36,000. (T Vol. 1, 41-42) Former Husband and Beth Charbonneau used these funds to invest in renovations for a

property owned by Beth Charbonneau's family trust. (T Vol. 1, 64) Former Husband also testified that upon sale, at least a portion of the proceeds from Whitehall would be used to renovate the property owned by his current wife's family trust. (T Vol. 3, 236)

4. Former Husband's alleged retirement on August 1, 2015

The Second Amended Petition alleged that Former Husband involuntarily⁵ retired as of August 1, 2015 and that there was "no likelihood that the Former Husband will be able to work as the stress could jeopardize his health." (R 392) Beth Charbonneau testified that Former Husband continued to occasionally work for Leisure Time Coins for a few months in late 2015 after his alleged retirement on August 1, 2015. (T 65) She testified that between August 1, 2015 and mid-November 2015, Former Husband continue to transact business for Leisure Time Coins on a very limited basis because she needed to visit her mother in Orlando during this time period. (T Vol. 1, 35, 67) Beth Charbonneau testified that she did not compensate Former Husband during this time period because he "wasn't really working." (T Vol. 1, 74) During trial, Beth Charbonneau testified on multiple occasions that Former Husband did not transact any business in 2016 (T Vol. 1, 78, 80, 86):

⁵ Former Husband pled that the changes warranting modification or termination of alimony were "sufficient, material, involuntary⁵ and permanent in nature." (emphasis added)

QUESTION: And in the year 2016, Mrs. Charbonneau, did Leisure Time Coins pay Mr. Charbonneau anything for the work he performed for Leisure Time Coins?

ANSWER: In 2016?

QUESTION: This year, yes.

ANSWER: **He didn't work in 2016**

(T Vol. 1, 78) (emphasis added)

Later in her testimony, Beth Charbonneau reaffirmed her position that Former Husband did not transact business in 2016:

QUESTION: And for the record, did Mr. Charbonneau continue working in December 2015 or you testified that he stopped November 2015?

ANSWER: He was at the house, but he wasn't working.

QUESTION: **But he wasn't conducting business in 2016?**

ANSWER: **No.**

(T Vol. 1, 86) (emphasis added))

Additionally, during trial, Former Husband repeatedly and unequivocally testified that **he did not transact any business in 2016.**

QUESTION. Would you say that -- from the time that Leisure Time Coins opened, did you transact more business in 2015 or behalf of Leisure Time Coins than you did in 2016?

ANSWER: I'm sure. **By 2016, I was fully retired.** I wasn't doing anything.

(T Vol. 2, 121) (emphasis added)

QUESTION: Okay. So as of the date of your financial affidavit, which is March 3, 2016, both you and your wife were working?

ANSWER: The date again?

QUESTION: March 3, 2016.

ANSWER: **I wasn't working, no. I had retired. If I'm wrong, correct me.**

(T Vol. 2, 153) (emphasis added)

QUESTION: Mr. Charbonneau, isn't it true that you continued to transact business on behalf of Leisure Time Coins in the year 2016?

ANSWER: I've answered this several times. Yes, I've helped out.

QUESTION: In the year 2016?

ANSWER: Give me a second to think. No.

(T Vol. 2, 162) (emphasis added)

QUESTION. And since January 1, 2016, have you transacted business with Elemetal?

ANSWER: Personally?

QUESTION: On behalf of Leisure Time Coins.

ANSWER: Not to my knowledge.

(T Vol. 2, 163) (emphasis added)

QUESTION: Mr. Charbonneau, since January 1, 2016, have you bought or sold any rare coins?

ANSWER: No.

(T Vol. 2, 164)

5. Evidence that Former Husband worked in 2016.

As stated above, while it is undisputed that Former Husband continued to work for Leisure Time Coins between August 1, 2015 and mid-November 2015, (T 65, 67), Former Husband and Beth Charbonneau repeatedly and unequivocally testified that Former Husband ***did not transact any business in 2016***. However, despite Former Husband's and Beth Charbonneau's repeated testimony that Former Husband ***did not work in the year 2016***, the evidence overwhelmingly

showed that their testimony was false and that Former Husband worked extensively in the precious metals and coin business in 2016.

In order to demonstrate that Former Husband had continued to work in 2016, Former Wife was forced to review Former Husband's phone records⁶ and compare them to the phone numbers of Former Husband's known business associates, which were confirmed by Former Husband via a Request for Admissions. (R 1976-1984) These confirmed contacts between Former Husband and known business associates were then juxtaposed to the Sales Tickets/Receipts that were produced from Leisure Time Coins for the time period from February 29, 2016 to April 27, 2016. (R 1438-1618) Additionally, Former Wife was forced to subpoena the business records of Former Husband's business associates at NCII, Inc. and Elemental Direct (described below).

Former Wife adduced the testimony of Larry Demerer ("Demerer"). Demerer is the owner of NCII, Inc. ("NCII"), which is in the business of buying and selling numismatics and bullion coins. (T Vol. 2, 170-171) Demerer has owned NCII for the "better part of 40 years." (T Vol. 2, 171) Demerer met Former Husband more than 20 years ago, and Demerer's company, NCII, had a business relationship with Leisure Time Coins. (T Vol. 2, 173)

⁶ Received both from Former Husband (R 2075-2133) and via a subpoena to Former Husband's cellular phone carrier – Verizon (R 2001-2074)

In response to a subpoena, NCII produced all of its purchase orders and invoices with Leisure Time Coins from August 1, 2015 through November 4, 2016. (R 1949-1975, 1932-1943) These documents along with Demerer's testimony demonstrate that Former Husband picked up coins that Leisure Time Coins purchased from NCII on: February 5, 2016; February 6, 2016; February 29, 2016; March 9, 2016; March 28, 2016; April 4, 2016; May 24, 2016; June 1, 2016. (R 1949-1975)(T 173-176). Conversely, there is no evidence that Beth Charbonneau picked up any coins from NCII in the year 2016.

Former Husband testified that he had not bought or sold any rare coins in 2016. (T Vol. 2, 164) However, Demerer testified that he purchased a rare coin known as an 1836 Gobrecht for \$10,500 from Former Husband on March 17, 2016; and that Beth Charbonneau was not present for this transaction (T Vol. 2, 175-178)

Additionally, Former Husband's Verizon Wireless telephone records indicate that he called or received calls from NCII or Demerer dozens of times in 2016.⁷ (R 2213) In fact, Former Husband's Verizon Cell Phone records demonstrate that Former Husband contacted NCII via telephone on the following days in 2016 in which Leisure Time Coins and NCII transacted business:

⁷ NCII's phone number is (561) 997-2882 and Demerer's cell phone number is (561) 945-1155. (T Vol. 2, 170)

February, 4, 2016; February 17, 2016; March 9, 2016; March 17, 2016; March 29, 2016, April 14, 2016; May 24, 2016; and June 1, 2016. (T Vol. 2, 193-203)

Former Wife also adduced evidence related to Leisure Time Coins' business relationship in 2016 with Elemetal Direct ("Elemetal), which is a precious metals refinery. (T Vol. 2, 108) Elemetal was the refinery that Leisure Time Coins primarily used in 2016. (T Vol. 2, 109) In this regard, Former Wife admitted into evidence Elemetal's register reports and invoices with Leisure Time Coins (R 2135; 2235), Former Husband's phone records, and the testimony of Elemetal employee Greg Bowling ("Bowling). Former Husband testified that he did not have many phone calls with Elemetal in 2016. (T Vol. 2, 211-212) However, Former Husband's Verizon Wireless telephone records indicate that he called or received calls from Elemetal or Bowling hundreds of times in 2016.⁸

Former Husband testified that he did not transact business with Elemetal in 2016. (T Vol. 2, 163) However, Bowling testified that he transacted business with Former Husband (working on behalf of Leisure Time Coins) in 2016. (T Vol. 3, 311-313) In fact, Former Husband's Verizon Cell Phone records demonstrate that Former Husband contacted Elemetal via telephone on the following days in which Leisure Time Coins and Elemetal transacted business:

⁸ Elemetal's Boca Raton Office phone number is (561) 988-9424 (R 1976-1984). Mr. Bowling's cell phone number is (423) 494-6137 (T Vol. 3, 310).

February 4, 2016; February 5, 2016; February 8, 2016; February 9, 2016; February 10, 2016; February 16, 2016; February 17, 2016; February 22, 2016; February 23, 2016; March 1, 2016; March 2, 2016; March 4, 2-16; March 8, 2016; March 10, 2016; March 16, 2016; March 22, 2016; March 28, 2016; March 29, 2016; March 31, 2016; April 4, 2016; April 7, 2016; April 11, 2016; April 14, 2016; April 15, 2016; April 19, 2016; April 21, 2016; April 25, 2016; April 26, 2016; May 3, 2016; May 10, 2016; May 13, 2016; May 16, 2016; May 17, 2016; May 18, 2016; May 20, 2016; May 24, 2016; May 25, 2016; May 27, 2016; May 31, 2016; June 1, 2016; June 2, 2016; June 6, 2016; June 7, 2016; June 21, 2016; June 24, 2016; June 28, 2016; June 29, 2016; July 5, 2016; July 7, 2016; July 11, 2016; July 15, 2016; July 18, 2016; July 20, 2016; July 27, 2016.

(T Vol. 2, 216-222; Vol. 3, 259-282)

Additionally, Bowling testified that, during 2016, Former Husband would deliver gold to Elemetal's Boca refinery; sometimes on his own and sometimes with his current wife. (T Vol. 3, 315)

Former Wife also introduced evidence related to Leisure Time Coins' transactions with other business partners in 2016 on the same days that Former Husband contacted these individuals.

- Former Husband made phone calls to Joel Langbaum, on the following days in which Leisure Time Coins transacted business with him: February 29, 2016; March 29, 2016; and April 15, 2016. (T Vol. 3, 247-249)

- Former Husband made phone calls to Leonard Vono on the following days in which Leisure Time Coins transacted business with him: March 15, 2016 and April 6, 2016. (T Vol. 3, 250-251)

- Former Husband made phone calls to Edlin Co. Fine Jewelry in Louisville, Kentucky on the following days in which Leisure Time Coins transacted business with it: March 22, 2016; March 24, 2016; and March 31, 2016. (T Vol. 3, 251-253)

- Former Husband made phone calls to GNC Pawn Shop on the following days in which Leisure Time Coins transacted business with it: March 24, 2016 and April 26, 2016. (T Vol. 3, 253-255)

- Former Husband made phone calls to Barbara Aridas on the following days in which Leisure Time Coins transacted business with her: March 23, 2016. (T Vol. 3, 255-257)

Additionally, Former Wife presented evidence of a series of transactions that Former Husband conducted in 2016 that serve as a sample of the ease with which Former Husband is able to make income in his industry. In April 2016, a gentleman named William Mathers called Former Husband in order to purchase 150 1/10 ounce American Gold Eagles (T Vol. 3, 238) Former Husband then contacted a business associate of his in California, Charlie Zink and purchased the 150 1/10 ounce American Gold Eagle Coins for \$20,205. (T Vol. 3, 238) Former Husband then sold the 150 1/10 ounce American Gold Eagle Coins to William Mathers for \$21,750. (T Vol. 3, 238) All of the conversations with Charlie Zink were done over the phone. Former Husband made approximately \$1,500 in these

two transactions, which only required Former Husband to speak with Mr. Mathers and Mr. Zink over the telephone and meet with Mr. Mathers in Former Husband's home.⁹ (T Vol. 1, 70)(T Vol. 3, 239, 240) Former Husband testified that, as of the date of trial, he could "possibly" repeat these types of transactions. (T Vol. 3, 239, 240)

6. Leisure Time Coins in 2015-2016, its dissolution, and Former Husband's finances as of trial

Prior to Former Husband's divestment of his ownership interest in Leisure Time Coins on August 1, 2015, Former Husband and Beth Charbonneau received a salary of \$35,000 per year each. (T Vol. 1, 40) After Former Husband gave Beth Charbonneau his remaining 51% ownership interest in Leisure Time Coins on August 1, 2015, Beth Charbonneau increased her salary from \$35,000 per year to \$52,000 per year. (T Vol. 1, 89) In 2015, Former Husband and Beth Charbonneau received \$29,750 in property distributions from Leisure Time Coins. (R 846) Following August 1, 2015, Former Husband received no payment or compensation from Leisure Time Coins (T Vol. 1, 89)

According to Beth Charbonneau's testimony, Leisure Time Coins ceased transacting business on July 29, 2016. (T Vol. 1, 38) Thus, in the first seven months of 2016, Beth Charbonneau received \$35,760.21 in salary from Leisure

⁹ After November 15, 2015, Former Husband transacted business out of his home. (T Vol. 1, 70)

Time Coins and \$28,809.91 in property distributions. (R 1370) Although Beth Charbonneau testified that Leisure Time Coins did not compensate Former Husband for any of the work that he performed after August 1, 2015, Leisure Time Coins paid \$33,280 in Former Husband's legal expenses in this proceeding in 2016, which were incorrectly classified as "legal fees" on Leisure Time Coins' 2016 Profit Loss Statement. (T Vol. 1, 83-88; R 1370) In fact, despite the fact that Former Husband had purportedly given up his ownership interest in Leisure Time Coins, he *personally* wrote out and signed a check to his legal counsel in this matter for \$19,280 on August 19, 2016. (T Vol. 1, 85-86) Beth Charbonneau testified that this \$33,280 should have been classified as a property distribution. (T Vol. 1, 88) Therefore, in the first seven months of 2016, Beth Charbonneau received \$97,850.12 from Leisure Time Coins.

In 2012, Former Husband, as President of Leisure Time Coins, voluntarily initiated a lawsuit against Republic Metals. (T Vol. 3, 283) (R 2289-2307) Former Husband testified that he believed that, in 2010-2011, Republic Metal had defrauded Leisure Time Coins, which cost the business around \$700,000 (T Vol. 2, 130) As stated, in the Second Amended Petition, Former Husband divested himself of all interest in Leisure Time Coins on August 1, 2015. (R 392, 1752-1755 E 48)

Leisure Time Coins' case against Republic Metals went to final binding arbitration in December 2015, and Former Husband testified as an expert witness

for Leisure Time Coins in that proceeding. (T Vol. 3, 242) On April 28, 2016, the Final Award in Leisure Time Coins' case against Republic Metals was rendered, and Leisure Time Coins, not only lost on all counts, but was ordered to pay Republic Metals attorneys fees and costs in the amount of \$221,091.34. (R 2320-2341). On May 18, 2016, a Circuit Court in Miami Dade County entered Final Judgment on the Final Arbitration Award in favor of Republic Metals. (R 2320-2341) Rather than paying (or attempting to pay) this final judgment, Beth Charbonneau dissolved Leisure Time Coins effective as of August 24, 2016. (T Vol. 1, 37-38)

In the years since the 2009 Order, Former Husband has driven a Bentley, a Jaguar, and now a Cadillac. Beth Charbonneau currently drives a Mercedes. (T Vol. 3, 282-283) Former Husband is living with his current wife and is moving into a home owned by her family's trust that is currently under renovation. (T Vol. 1, 42-43) As of the date of trial, Former Husband had no balances on his credit card. (T Vol. 2, 128-129) As of Former Husband's latest Discover Card statement, he had a credit score of 850. (R 1879) At the time of trial, the last alimony payment that Former Husband made in this matter was on July 21, 2016. (R 1669)

7. Former Husband's health since 2009

The only evidence in this proceeding related to Former Husband's health was the testimony of Former Husband and his current wife Beth Charbonneau. Former Husband had a heart attack in 2010 and also had double-bypass surgery to correct it in 2010 (T Vol. 2, 210) Although Former Husband takes blood pressure medication; there is no evidence that Former Husband suffered any heart related issues since 2010. (T Vol. 2, 118) As of the date of trial, Former Husband had not seen a cardiologist for many months and did not have a regular cardiologist near his home in Gulfport, FL. (T Vol. 3 241-242)

The Final Judgment states that Former Husband suffers from "memory loss and confusion." (R 802) However, Former Husband has never been diagnosed with Alzheimer's or Dementia. (T Vol. 1, 48; Vol. 2, 122) Likewise, both Former Husband and his current wife, Beth Charbonneau, testified that his memory ***has not gotten any worse since 2010***. (T Vol. 1, 33; T Vol. 2, 122) Former Husband testified that he couldn't work in the precious metals/coin business because he didn't have the money and because Republic ripped him off in 2010-2011. (T. Vol. 2, 204-206)

8. Former Wife's health and finances

At the time of trial, Former Wife was approximately 67 years old. (R 766) Since the 2009 Order, Former Wife has continued to suffer from a number of serious health problems. As noted in the Final Judgment, Former Wife was on a

respirator throughout the trial (T Vol. 3, 295, 296) Former Wife was placed on a respirator after she was hospitalized in October 2016 for a serious upper-lower respiratory tract infection, which required emergency medical treatment. (T Vol. 3, 296) Former Wife is diabetic and takes two different forms of insulin. (T Vol. 3, 296, 297) Former Wife is on a nebulizer and takes medication to remedy water retention in her body. (T. Vol. 3, 296-297) Former Wife's Financial Affidavit reveals that she also requires diapers and testing strips for her diabetes. (R 2360-2368) Former Wife is unable to afford her cholesterol medication (T. Vol. 3, 296-297) Former Wife has not been to a dentist in many years and had to have most of her teeth removed because she could not afford dental treatment. (T Vol. 3, 299)

Due to Former Husband's failure to meet his alimony obligation to Former Wife from August 1, 2015 through the date of trial Former Wife was forced to forgo medical treatment, including treatment for bleeding behind her eyes, removal of her cataracts, treatment for neuropathy, and treatment for her kidneys (which failed in 2015) (T Vol. 3, 299)

Over the years, Former Husband's multiple unsuccessful petitions to modify or terminate alimony and failures to meet his alimony obligations to Former Wife has left her in "dire straits" most of the time. Former Wife testified that she:

Never have enough to get by. And by the time I get something going where I can keep my head above water, I have to go back to court again. And every time I do that I take three steps backwards.

(T Vol. 3, 290)

Furthermore, as a result of Former Husband's numerous alimony delinquencies over the years, Former Wife has multiple judgments entered against her that accrued during the prior delinquent periods: one judgment from Dakota Bluffs (\$10,537) and two from Essentia Health (\$2,793). (T Vol.3, 290; R 2366) Additionally, at the time of trial, Former Wife owed over \$40,000 for legal fees to her legal counsel incurred in this proceeding and an additional \$11,500 owed to family members for monies borrowed for legal fees in this case. (R 2367)

Former Wife relies on her alimony payments from Former Husband to survive. (T Vol. 3, 300) Prior to August 1, 2015, while Former Husband was making his monthly \$2,167, alimony payment on schedule, Former Wife's finances were relatively stable as she had \$3,611.17 in her checking account and credit card debt of only \$78.00. (R 2277) However, after Former Husband stopped making his regular alimony payments to Former Wife, on or about August 1, 2015, Former Wife essentially had to begin living off of her credit card; as demonstrated by the fact that her credit card debt had increased to \$7,451.32 as of late November 2016. (R 2306) Additionally, the lack of funds due to Former Husband's failure to meet his alimony obligations forced Former Wife to forgo the medical treatment described above and prevented her from being able to purchase all of her required medications. Additionally, during the latest delinquent period, Former Wife was

unable to make her monthly rent payments of \$600 per month and thus owed approximately \$2,200 in back rent as of the date of trial. (T 299)

9. The Final Judgment¹⁰

As stated above, on December 19, 2016, the trial court issued its Final Judgment reducing Former Husband's permanent alimony obligation from \$2,167 per month to \$500 per month. (R 802)

The trial court found that Former Husband is sixty-eight and suffered from serious health problems since the last modification, including a heart attack in 2010 and "memory loss and confusion." The trial court's sole basis for reducing Former Husband's alimony obligation was his alleged voluntary retirement at the end of July 2016. The Final Judgment found that Former Husband and his current wife's testimony regarding his alleged retirement on August 1, 2015 was ***not credible*** and that Former Husband continued to be heavily involved in Leisure Time Coins between August 2015 and the end of July 2016.

The Former Husband continued working from August 2015 through the end of July 2016, which increased his current wife's income instead of taking income in his own name.

However, the trial court found that Leisure Time Coins had been dissolved in late July 2016 and Former Husband "does not have any way to continue doing

¹⁰ This is meant to serve merely as a summary of the Final Judgment. Former Wife will refer directly to the text of the Final Judgment in the Argument section of this brief.

business with his former company, or any other company, at this time.” The trial court looked to Former Husband’s Financial Affidavit, which indicates that he has a \$933 per month deficit. The trial court found that Former Husband will be selling his home worth approximately \$100,000 (Whitehall) and will be moving into a house owned by his current wife’s family trust. The trial court also found that Former Husband current wife reduces his monthly living expenses.

The trial court found that Former Wife is in dire need of support and has been unable to pay for her medication (\$500) during Former Husband’s delinquency period; and that Former Wife has a monthly expense deficit of \$1,326. The trial court found that Former Wife is not in a supportive relationship with Thomas Ziebarth and that she currently owes him at least \$2,200 in back rent. Also, the trial court found that Former Wife has debt of \$12,000 for old credit card debts, \$7,000 in current credit card debt, and at least \$40,000 on legal fees for this litigation. The Final Judgment awarded Former Wife “some” of her attorney’s fees incurred in this matter.

The Final Judgment reduced Former Wife’s alimony from \$2,167 per month to \$500 per month, which the trial court identified as the amount that Former Wife requires to pay for her monthly medication.

V. SUMMARY OF THE ARGUMENT

Former Wife is appealing the trial court's reduction of her permanent periodic alimony from \$2,167 per month to \$500 per month. Former Wife's appeal can be broken down into three distinct categories. Firstly, the trial court erred in finding that Former Husband *voluntarily retired* as of *late July 2016*, since Former Husband never pled voluntary retirement and Former Husband's Second Amended Petition specifically pled that he involuntarily retired on August 1, 2015. Second, assuming *arguendo* that Former Husband properly pled voluntary retirement, the trial court erred since it failed to perform the requisite legal analysis for voluntary retirement under Pimm v. Pimm, 601 So. 2d 534 (Fla. 1992). Third, the trial court erred and this matter should be reversed since the trial court abused its discretion in reducing Former Wife's Alimony since: (a) the record clearly establishes that Former Husband's alleged voluntary retirement is "unreasonable" pursuant to the standard set forth in Pimm, and Former Wife will be placed in peril of poverty if Former Husband is permitted to voluntarily retire; (b) there is no competent and substantial credible evidence to support the trial court's findings that Former Husband has retired and that his alleged retirement is permanent; and (c) Finally, the trial court erred in not imputing income and assets to Former Husband.

VI. ARGUMENT

A. The Final Judgment grants relief beyond the scope of the Second Amended Petition and is therefore void.

Standard of Review de novo Sanchez v. Fernandez, 915 So. 2d 192 (Fla. 4th DCA 2005), Voorhees v. Voorhees, 204 So. 3d 75, 77 (Fla. 4th DCA 2016), Todaro v. Todaro, 704 So. 2d 138, 139 (Fla. 4th DCA 1997)

The Final Judgment states Former Husband *voluntarily* retired and placed the date of his voluntary retirement “at the end of July 2016.” (R 805, 806) However, in the Second Amended Petition, Former Husband clearly alleged that he involuntarily retired, due to health reasons, on August 1, 2015. (R 393-395) In fact, the Second Amended Petition stated, in emphatic terms, that Former Husband cannot work at anytime in the future, as it would jeopardize his health.

There is no likelihood that the Former Husband will be able to work as the stress could jeopardize his health.

(R 394)

Thus, it is clear that Former Husband did not allege in the Second Amended Petition that he “voluntarily retired” at the “end of July 2016” as the Final Judgment ruled. Likewise, during trial, Former Husband never argued or testified that he voluntarily retired at the end of July 2016. The entire premise of Former Husband’s case was that he was incapable of working due to health reasons, and, thus, he involuntarily retired as of August 1, 2015. Additionally, as stated above, Former Husband and his current wife, Beth Charbonneau, repeatedly and emphatically testified that he involuntarily retired on August 1, 2015 and that he

performed no work in the year 2016. Thus, the trial court granted relief that was neither pled nor argued at trial.

It is axiomatic that a judgment that grants relief wholly outside the scope of the pleadings is void. Mullne v. Sea-Tech Const. Inc., 84 So. 3d 1247 (Fla. 4th DCA 2012) “A judgment which grants relief wholly outside the pleadings is void.” Bank of New York Mellon v. Reyes, 126 So.3d 304, 309 (Fla. 3d DCA 2013). Further, granting relief that was neither requested by appropriate pleadings, nor tried by consent, is a violation of due process. Wachovia Mortg. Corp. v. Posti, 166 So. 3d 944 (Fla. 4th DCA 2015).

This analysis is often applied to cases in the family law context. Under Florida law, a trial court is without jurisdiction to “hear and determine matters which are not the subject of appropriate pleadings and notice.” Defreitas v. Defreitas, 398 So.2d 991, 992 (Fla. 4th DCA 1981); *see* Johnson v. Johnson, 546 So.2d 97, 98 (Fla. 4th DCA 1989); Cooper v. Cooper, 406 So.2d 1223, 1224 (Fla. 4th DCA 1981). However, when issues not raised by the pleadings are tried by implied consent, they are to be treated as if they had been raised in the pleadings. Fla. R. Civ. P. 1.190(b); *see* Hemraj v. Hemraj, 620 So.2d 1300, 1301 (Fla. 4th DCA 1993). Todaro v. Todaro, 704 So. 2d 138, 139 (Fla. 4th DCA 1997)

In Florida, involuntary retirement and voluntary retirement are two wholly distinct bases for the modification or termination of alimony. “Obviously, an

involuntary retirement may not always be considered the equivalent of a voluntary retirement because different factors and considerations may result in an involuntary retirement, and the effect of such factors and considerations upon the ability to pay alimony may have to be weighed differently.” Wiedman v. Wiedman, 610 So. 2d 681, 683 (Fla. 5th DCA 1992). *See also* Lopez v. Lopez, 970 So. 2d 388, 392 (Fla. 3d DCA 2007) (Footnote 2)

The traditional framework for modification or termination of alimony proceedings is a three-part analysis. First, there must be a substantial change in circumstances. *Chastain v. Chastain*, 73 So.2d 66 (Fla.1954); § 61.14(1), Fla.Stat. (Supp.1988). Second, the change was not contemplated at the time of final judgment of dissolution. *Withers v. Withers*, 390 So.2d 453 (Fla. 2d DCA 1980), *review denied*, 399 So.2d 1147 (Fla.1981). Third, the change is sufficient, material, involuntary, and permanent in nature. *Servies v. Servies*, 524 So.2d 678 (Fla. 1st DCA 1988). Pimm v. Pimm, 601 So. 2d 534, 536 (Fla. 1992). In cases of involuntary retirement, the payor spouse must likewise present evidence that he/she is incapable of working in any capacity whatsoever (not just their previous position). Cleary v. Cleary, 743 So. 2d 1163, 1165 (Fla. 5th DCA 1999)

Conversely, voluntary retirement is an exception to the general rule in alimony modification proceedings that the change in circumstances must be “involuntary” and is governed by the reasonableness test as set forth in Pimm;

whereby the “court *must* consider the payor's age, health, and motivation for retirement, as well as the type of work the payor performs and the age at which others engaged in that line of work normally retire. (emphasis added) Pimm at 537. Additionally, “even at the age of sixty-five or later, a payor spouse should not be permitted to unilaterally choose voluntary retirement if this choice places the receiving spouse in peril of poverty.” Id.

As demonstrated above, in the Second Amended Complaint, Former Husband alleged involuntary retirement as of August 1, 2015. The trial court thus had no jurisdiction to grant Former Husband relief based on an alleged voluntary retirement as of late July 2016.

Additionally, the issue of voluntary retirement as of “late July 2016” was not tried by consent. Indeed, in addition to the fact, Former Husband never pled voluntary retirement “at the end of July 2016,” the entire premise of his case was predicated on the allegation that he involuntarily retired as of August 1, 2015. Neither Former Husband nor his current wife Beth Charbonneau ever changed their assertion that Former Husband was unable to work and thus involuntarily retired on August 1, 2015. Therefore, the trial court was without jurisdiction to decree *sua sponte* that Former Husband had voluntarily retired as of the end of July 2016. Yampol v. Turnberry Isle S. Condo. Ass'n, Inc., 143 So. 3d 1144 (Fla. 3d Dist. App. 2014)

B. Assuming *arguendo* that Former Husband properly pled voluntary retirement, the trial court erred in that it failed to perform the correct legal standard for voluntary retirement as set forth in Pimm.

Standard of review, de novo Medco Data, LLC v. Bailey, 152 So. 3d 105 (Fla. 2d DCA 2014); Bistline v. Rogers, 4D16-4012, 2017 WL 1174768 (Fla. 4th DCA. Mar. 29, 2017)

As stated above, Pimm sets forth the framework upon which a voluntary retirement is analyzed for “reasonableness”

The trial court ***must consider*** the payor's age, health, and motivation for retirement, as well as the type of work the payor performs and the age at which others engaged in that line of work normally retire. Even at the age of sixty-five or later, a payor spouse should not be permitted to unilaterally choose voluntary retirement if this choice places the receiving spouse in peril of poverty. (emphasis added)

Anderson v. Durham, 162 So. 3d 65, 66 (Fla. 1st DCA. 2014)

As an initial matter, the Final Judgment does not analyze, mention, or discuss the “reasonableness” of Former Husband’s retirement. Rather, the trial court simply applied a need vs. ability to pay analysis (as of the date of the final hearing) based on the supposition that Former Husband was retired without determining the reasonableness of the retirement as mandated by Pimm.

It is also clear that the Final Judgment makes no reference to Pimm and does not address the framework that it established to determine reasonableness of voluntary retirement. Furthermore, the record clearly establishes that Former Husband adduced no evidence at trial regarding the age at which precious

metals/coin dealers normally retire. It is also clear that the trial court made no reference to the age at which coin dealers normally retire in its Final Judgment. This is a critical element for establishing the “reasonableness” of retirement, particularly for a sedentary occupation such as a coin dealer. While sixty-five (65) is the presumptive age of retirement under Pimm, the fact that Former Husband was over the age of sixty-five at the time of trial is not dispositive on this issue. As stated in Pimm, the trial court ***must*** consider “the type of work the payor performs and the age at which others engaged in that line of work normally retire.” This necessity of this analysis was demonstrated in Suarez v. Sanchez, 43 So. 3d 118, 122 (Fla. 3d DCA 2010), where the Former Husband, aged eighty-one (81), voluntarily retired from his position as a mechanic. The trial court in Suarez examined the non-sedentary nature of this profession when determining the reasonableness of purported retirement. It is clear that in the present matter, the trial court simply ignored this critical component of the Pimm analysis and, therefore, failed to provide the correct legal standard to a voluntary retirement case.

Additionally, the trial court did not consider whether Former Husband’s voluntary retirement would place Former Wife in “peril of poverty.” The Final Judgment does not mention the word “poverty” nor does it conduct any substantive analysis in this regard. While the trial court did not mention the word “poverty,”

the trial court did state that Former Wife is in “dire need of support to pay for her medication.” Pimm clearly states that “a payor spouse should ***not be permitted to unilaterally choose voluntary retirement*** if this choice places the receiving spouse in peril of poverty.” While the Final Judgment found Former Wife’s situation dire, the trial court simply did not conduct the requisite analysis to determine if Former Wife would be in peril of poverty should Former Husband retire.

Therefore, the trial court committed reversible error in not applying the Pimm test to Former Husband’s purported voluntary retirement.

C. Assuming *arguendo* that the trial court correctly applied the legal standard for voluntary retirement as set forth in Pimm, the trial court abused its discretion in reducing Former Wife’s alimony.

Standard of review, abuse of discretion. Johnson v. Johnson, 386 So. 2d 610, 611 (Fla. 4th DCA 1980), “The test for such a determination is whether there was a change in circumstances...and if so, whether that change is legally sufficient to support the terms of the subject order.”

1. Pursuant to Pimm and its progeny, Former Husband’s purported voluntary retirement was not reasonable under the circumstances.

While Former Wife respectfully submits that the trial court did not follow the correct legal standard for voluntary retirement as set forth in Pimm, if this Court decides otherwise, Former Wife submits that the trial court committed error in finding Former Husband’s retirement “reasonable” and thereby modifying his alimony obligation to Former Wife.

As stated above, the Pimm analysis contains two parts to determine the “reasonableness” of a party’s voluntary retirement; the first relates to the reasonableness of the retirement from the payor’s perspective and the second analysis examines how the payor spouse’s retirement will effect the recipient spouse. The initial part of the Pimm analysis has four components: (1) the payor’s age, (2) the payor’s health, (3) the payor’s motivation for retiring, and (4) the type of work the payor performs and the age at which others engaged in that line of work normally retire.

With the exception of Former Husband’s age (68 at the time of trial), the record clearly demonstrates that Former Husband failed to adduce any competent and substantial evidence regarding the other three portions of this analysis. Additionally, the trial court did not take into account the fact that reducing Former Wife’s monthly alimony from \$2,167 per month to \$500 per month places Former Wife in poverty.

a. Former Husband’s motivation for retirement

There is no competent and substantial evidence to support the trial court’s finding of fact that Former Husband “did not retire so as to avoid paying alimony.”

Page four of the Final Judgment states:

The evidence supports the Former Husband's testimony that he did not retire so as to avoid paying alimony.

In fact, not only does all of the record evidence point to the contrary, but the trial court's other findings within the Final Judgment as well as its findings and conclusions in the December 19, 2016 Contempt Order completely contradicts this conclusion.

It is important to stress at the outset that Former Husband's testimony was the only evidence upon which the trial court relied in coming to this conclusion. However, as demonstrated throughout this brief, Former Husband never alleged or testified that he retired at the end of July 2016, as the Final Judgment states. The only testimony that Former Husband presented was with regard to his purported motivation with respect to his alleged involuntary retirement on August 1, 2015.

This case presents a very unique situation in that the trial court found Former Husband in contempt of court (R 810) on the same day (December 19, 2016) that it issued the Final Judgment reducing Former Husband's alimony obligation. (R 802) In its Contempt Order, the trial court ruled that Former Husband's purported involuntary retirement and divestment of his interest in Leisure Time Coins on August 1, 2015, which was pled and on which Former Husband and his current wife offered sworn testimony at trial, was nothing more than an effort to divert his income to his current wife in order to avoid his alimony obligation to Former Wife. This is precisely why the trial court found Former Husband in contempt of court on December 19, 2016:

Additionally, the Former Husband transferred all of his business interest in Leisure Time Coins to his current wife, the Former Husband stopped taking distributions from his company, however, he continued working in the company to allow his current wife to continue taking distributions, and she increased her distributions from the company at that time. Essentially, the Former Husband divested himself of his income which started going to his current wife, therefore, this Court finds that the Former Husband continued to have the ability to make his monthly payments of \$2,167.00 per month, until July 2016

(R 810)

As the record clearly demonstrates, there was an incredible amount of evidence to support the trial court's conclusion in this regard. Likewise, if Former Husband "did not retire so as to avoid paying alimony," then, clearly, the trial court would not have found him in contempt. Additionally, the evidence clearly established that Former Husband had been found in contempt of court on multiple occasions since the Parties divorced in 1993, which indicates a pattern of willfully refusing to pay his alimony to Former Wife.

Therefore, since it was not based competent and substantial evidence, the trial court abused its discretion in finding of fact that Former Husband "did not retire so as to avoid paying alimony."

b. Former Husband's health

The Final Judgment makes only passing references to Former Husband's health (on page three, four, and five). The Final Judgment merely referenced that

Former Husband suffered a heart attack in 2010 and suffered from memory loss and confusion. However, there was no competent and substantial evidence presented at trial regarding the current status of Former Husband's health so as to mitigate in favor of finding his retirement "reasonable" under Pimm.

The only evidence that Former Husband presented at trial regarding his health was his and his current wife's testimony. The evidence revealed that Former Husband had a heart attack and double bypass surgery in 2010, six years prior to the trial in this matter. The evidence revealed that Former Husband generated millions of dollars in revenue after the date of his heart attack and both he and his current wife extracted nearly \$2 million from Leisure Time Coins since the date of the last modification. Former Husband did not present any evidence regarding the health of his heart since 2010. In fact, Former Husband testified that he had not seen a cardiologist for many months and did not have a cardiologist near his new home in Gulfport, FL.

With regard to Former Husband's memory, Former Husband testified that he has not been diagnosed with either Alzheimer's or Dementia. Additionally, both Former Husband (T 122) and Beth Charbonneau (T 33) testified that Former Husband's memory has not gotten any worse since 2010. Additionally, Former Husband testified as an expert witness on Leisure Time Coins' behalf at the final hearing in its arbitration against Republic Metals. (T 242) Clearly, Beth

Charbonneau would not have had Former Husband testify as an expert witness in her case against Republic Metals had his cognitive functions been substantially impaired.

Furthermore, the evidence presented at trial made it abundantly clear that Former Husband's health was not an impediment to his ability to work in the coin business after his alleged involuntary retirement on August 1, 2015. In fact, the trial court stated this emphatically in its December 19, 2016 Order of Contempt, as well as in the Final Judgment:

The evidence showed that the Former Husband continued to be heavily involved in the business by negotiating purchases and sales for the business on a regular basis until the business closed at the end of July 2016.

Additionally, Greg Bowling testified that Former Husband had dropped off precious metals at Elemetal's refinery in 2016 (on his own) and Larry Demerer testified that Former Husband sold him a single coin worth \$10,500 that Former Husband and transported to NCII (on his own). If Former Husband's alleged cognitive issues had a basis in fact, he would not have been permitted to transport bullion and valuable rare coins.

The evidence also demonstrates that Leisure Time Coins continued to be very profitable in 2016 as a result of Former Husband's efforts. Beth Charbonneau extracted nearly \$100,000 from Leisure Time Coins in the first seven months of 2016 alone.

Therefore, there is no competent and substantial evidence to support the position that Former Husband's health played any role in his purported retirement in late July 2016.

c. The type of work the Former Husband performed and the age at which others engaged in that line of work normally retire.

As previously stated, the Former Husband adduced no evidence regarding the age at which coin dealers normally retire. In fact, the only evidence presented at trial remotely related to this issue was the testimony of Larry Demerer, who testified that he has been a numismatist for forty years and continues to work in that industry.

Additionally, the evidence clearly establishes that Former Husband's age is no impediment to his continued work in the rare coin industry. The business consists mostly of making phone calls and dropping off precious metals and coins. Former Husband testified that he "possibly" could continue to function as a coin dealer, but the evidence showed that he clearly could. The Mathers/Zink transaction is clear evidence of the ease with which Former Husband can make income given his expertise in the coin business.

d. The Final Judgment reduces Former Wife to poverty

Notwithstanding the four factors listed above, in Florida under Pimm, "even at the age of sixty-five or later, a payor spouse should not be permitted to unilaterally choose voluntary retirement if this choice places the receiving spouse

in peril of poverty.” Pimm at 537 In the present matter, the evidence clearly establishes that Former Husband’s retirement will not only place Former Wife “in peril of poverty,” it will unequivocally put her in poverty.

As previously stated, the Final Judgment does not contain the word “poverty” nor does it specifically address the issue of whether Former Wife will be placed in “peril of poverty” if Former Husband was permitted to voluntarily retire. While Former Wife submits that this fact militates in favor of her argument that the trial court did not apply the correct legal standard as required by Pimm, the Final Judgment does contain explicit findings of fact that establish that Former Wife will be placed into poverty if Former Husband is permitted to retire.

The Final Judgment explicitly states that Former Wife is in “dire need” of support. In the Final Judgment, the trial court acknowledged that Former Wife had foregone purchasing medicine and medical supplies during Former Husband’s delinquent period after August 1, 2015. Former Wife testified that she couldn’t afford her cholesterol medication because the copay is \$500 per month. The trial court addressed Former Wife’s inability to purchase this medication in the Final Judgment and modified Former Wife’s alimony to \$500.

However, the Final Judgment makes no mention of the fact that, in addition to being unable to purchase medicine during Former Husband’s delinquency, Former Wife likewise forewent medical treatment during this time period as well.

Former Wife testified that she has bleeding behind the eye, which may be caused by her diabetes, that she cannot have tested due to lack of funds. Former Wife also testified that she was supposed to have cataracts removed but could not because of lack of funds. Finally, Former Wife testified that she has neuropathy, which causes extreme pain in her legs and feet for which she would like to have received treatment, but could not due to lack of funds.

The reduction of Former Wife's alimony from \$2,167 per month to \$500 per month leaves Former Wife with a significant monthly deficit that will render her unable to pay for her basic human needs. In alimony cases, trial courts abuse their discretion when a receiving spouse is awarded an amount of alimony that leaves them "substantially unable to meet their basic needs." Kelley v. Kelley, 967 So. 2d 924, 926 (Fla. 2d DCA 2006) See also Martinez v. Martinez, 2D15-5154, 2017 WL 1277736, at *2 (Fla. 2d DCA Apr. 5, 2017), trial court abused its discretion in only awarding \$600 in alimony, which was not sufficient to meet Wife's basic needs; Melton v. Melton, 79 So. 3d 154, 157 (Fla. 2d DCA 2012) trial court abused its discretion when alimony award "left the wife substantially unable to meet her basic needs." McCants v. McCants, 984 So. 2d 678, 683 (Fla. 2d Dist. App. 2008) "a permanent alimony award of only \$400 per month would leave the Wife substantially unable to meet her basic needs.

The Final Judgment's reduction of alimony leaves Former Wife without the ability to get the medical treatment (described above) that she desperately needs.¹¹ Furthermore, as this reduction leaves Former Wife with a significant monthly deficit, Former Wife will be ***forced to choose between purchasing her medication and purchasing other necessities of life, such as food and clothing.*** Pimm established the rule that "a payor spouse should not be permitted to unilaterally choose voluntary retirement if this choice places the receiving spouse in peril of poverty" for situations precisely like the present matter.

e. Assuming arguendo that that Final Judgment held that Former Husband's voluntary retirement was reasonable, the trial court erred.

As stated above, Former Wife respectfully submits that the trial court did not apply the Pimm analysis to this proceeding and therefore did not consider the "reasonableness" of Former Husband's retirement. However, if this Court determines that the trial court did perform the Pimm analysis, Former Wife submits that the trial court abused its discretion in determining that Former Husband's retirement was reasonable for purposes of modification. Former Husband has a history of being held in contempt in this proceeding, and his behavior has directly contributed to Former Wife's abysmal financial condition and has had serious negative impact on Former Wife's health. In the present iteration of this case, the

¹¹ These necessary medical treatments were rightfully not listed on Former Wife's financial affidavit because she has yet to incur them.

trial court found that Former Husband had willfully stopped taking income in order to avoid his alimony obligation to Former Wife. This behavior has, once again, had a drastic impact on Former Wife.

Likewise, there is no competent and substantial evidence that Former Husband's health played any role in his alleged retirement. The only evidence presented at trial regarding Former Husband's health was the self-serving testimony of Former Husband and Beth Charbonneau, which the trial court found to be false with regard to Former Husband's alleged retirement on August 1, 2015. Their testimony is thus, not competent and substantial evidence in this regard.

Thus, based on the foregoing, the trial court abused its discretion in finding Former Husband's retirement to be reasonable.

2. There is no competent and substantial evidence that Former Husband is retired or that his alleged retirement is permanent.

Although Pimm is the exception to the general rule that a change must be "involuntary" in order to justify a modification or termination of alimony, the moving party must still demonstrate that the change is substantial, sufficient, material, permanent, Wilson v. Wilson, 37 So. 3d 877, 881 (Fla. 2d DCA 2010). As demonstrated throughout this brief, Former Husband pled that he involuntarily retired due to health reasons on August 1, 2015. Likewise, Former Husband and his current wife, Beth Charbonneau, repeatedly testified that Former Husband retired on August 1, 2015 and performed no work in 2016. The evidence

completely belied this testimony and it was proven that Former Husband continued to be extensively involved in the coin business in 2016. In fact, the trial court explicitly found that Former Husband and Beth Charbonneau's testimony in this regard was "not credible." While it is undisputed that Leisure Time Coins dissolved in August 2016, this date has no significance with regard to Former Husband because he had already completely divested himself of his ownership interest in Leisure Time Coins as of August 1, 2015. Former Husband and Beth Charbonneau's self-serving testimony that Former Husband had involuntarily retired on August 1, 2015 was the only evidence presented at trial to support the conclusion that Former Husband was retired. The trial court rejected this testimony. Thus, the trial court's *sua sponte* selection of "the end of July 2016" as Former Husband's date of voluntary retirement was not supported by competent and substantial evidence.

Additionally, the trial court abused its discretion in determining that Former Husband's purported retirement is permanent. The trial court held that Former Husband had worked and been heavily involved in the coin business for twelve of the sixteen months after his alleged retirement on August 1, 2015. The fact that trial court found that Former Husband had not worked in the three-four months prior to trial is not a long enough time to constitute a permanent change under Pimm's progeny.

There may be no period of time that is conclusively “permanent” for this purpose, but the Fourth District has held that a severe reduction in income for “nearly a year, with no end in sight,” established permanency in *Perez v. Perez*, 973 So.2d 1227, 1232 (Fla. 4th DCA 2008).

Jarrard v. Jarrard, 157 So. 3d 332, 339 (Fla. 2d DCA 2015)

In the present matter, the trial court found that Former Husband had not worked since the end of July 2016; the date at which Leisure Time Coins was dissolved. However, the trial court also found that Former Husband had worked heavily in the coin business for a year passed the date of his alleged retirement. Although it presented the mirror scenario to the present matter, the case of Perez v. Perez, 973 So. 2d 1227, 1232 (Fla. 4th DCA 2008) is instructive.

In Perez, the payor spouse had experienced a severe reduction in income for nearly a year but had shown financial improvement in the two months before trial. The trial court refused to reduce or terminate his alimony obligation citing the recent improvement in the two months before trial. This Court reversed the trial court finding that the “increase in income during the two months leading up to the hearing as evidence of his return to financial health and thus the year long “severe financial loss” was found to be a permanent change and thus a basis for modification. Id. at 1232 In the present matter, Former Husband worked in the coin business continuously since 1969. Additionally, despite Former Husband’s sworn testimony that he didn’t work at all in the year 2016, the trial found his

testimony to be false. Thus, given the totality of the circumstances, the trial court abused its discretion in finding that Former Husband's purported retirement was permanent based solely on the three-four month period prior to trial

3. The trial court erred in not imputing income and assets to Former Husband.

Standard of Review, *de novo* Lafferty v. Lafferty, 134 So.3d 1142 (Fla. 2d DCA 2014); Koscher v. Koscher, 201 So. 3d 736 (Fla. 4th DCA 2016) “The framework the court uses to determine whether imputation is necessary and, if so, how to calculate an amount is an issue of law we review *de novo*.”

As stated above, Former Wife pled the affirmative defense of Dissipation; alleging that Former Husband gave his current wife substantial assets in order to avoid paying his alimony obligation. As an initial matter, the trial court found that Former Husband did exactly this when he divested himself of his remaining 51% ownership in Leisure Time Coins on August 1, 2015. In the Contempt Order, the trial court held: “Essentially, the Former Husband divested himself of his income which started going to his current wife...” However, the evidence presented at trial clearly demonstrates that Former Husband has been engaged in this practice since at least 2004, when he gave his current wife 49% ownership interest in Leisure Time Coins. The record establishes that Beth Charbonneau received over \$700,000 in property distributions alone from Leisure Time Coins from 2009-2014 and purchased the Flagler property in 2012; which was worth between \$350,000 and \$380,000 at the time of trial. The Flagler property, which at the time of trial

was listed for sale and had no mortgage, should have been imputed to Former Husband in its entirety. In Florida, a current spouse's finances are relevant if:

there is a showing that the husband has transferred significant assets to the wife's name, and as a result has no assets of his own with which to satisfy his support obligations, then the present wife's finances are relevant to the question of the ability of the husband to pay alimony and child support to the former spouse. We cannot condone the voluntary and deliberate divestment of assets by the husband when he is obligated to pay support to his former wife and children. (emphasis added)

Hayden v. Hayden, 662 So. 2d 713 (Fla. 4th DCA 1995), as clarified (Nov. 15, 1995)

Additionally, Former Husband testified that lack of funds is the only real impediment to his ability to continue to transact business in the precious metals/coins industry. Clearly, Former Husband can use the proceeds from the sale of Flagler and Whitehall to continue to engage in the coin business. Therefore, the trial court's assertion that "Former Husband does not have any way to continue doing business with his former company, or any other company, at this time," is without basis in fact.

Furthermore, Former Wife pled the affirmative defense of bad faith alleging that Former Husband's August 1, 2015, "purported retirement and purported divestment in Leisure Time Coins, Inc. is a sham meant only to avoid his alimony obligations to Former Wife" and thus "any income generated by Leisure Time Coins, Inc. must be imputed to Former Husband. Also, any income that Former

Husband could generate but for his attempt to avoid his alimony obligations must be imputed to Former Husband.” Once again, the trial court completely agreed with this assessment in the Contempt Order and it rightfully imputed income to Former Husband for the period August 1, 2015-August 1, 2016. However, based on the analysis detailed above, the trial court erred in failing to impute this income to Former Husband after the dissolution of Leisure Time Coins. Indeed, the fact that Leisure Time Coins was dissolved does not impair Former Husband’s ability to transact business in the precious metals/coins industry. In fact, Leisure Time Coins’ dissolution increases Former Husband’s ability to transact business since he is not fettered by a \$221,091.34 money judgment that was tied to Leisure Time Coins. Additionally, the evidence established that Former Husband has business contacts all over the country, and he is able to make money with ease in the coin business; even working from home in 2016. There was simply no competent and substantial evidence to support the trial court’s conclusion that Former Husband does not have “any way to continue to transact business.” The evidence clearly established that, in addition to the hundreds of thousands of dollars that Former Husband took as property distributions from Leisure Time Coins from 2009-2015, Former Husband also traditionally took an annual salary of \$35,000. Thus, the trial court should have imputed at least \$2,167 in income to Former Husband.

VII. CONCLUSION

As stated, the trial court was without jurisdiction to hold that Former Husband voluntarily retired as of “late July 2016” as it was neither pled nor argued at trial. Therefore, Former Wife respectfully submits that the Final Judgment is void. Alternatively, Former Wife respectfully submits that the trial court did not apply the Pimm standard to Former Husband’s purported retirement. Furthermore, if the trial court had correctly applied the Pimm analysis, it is clear that Former Husband’s purported voluntary retirement was unreasonable under the circumstances and reduces Former Wife to poverty. Therefore, Former Wife respectfully submits that this matter should be reversed and remanded with instructions to reinstate Former Wife’s alimony to \$2,167 per month retroactive to December 19, 2016.

VIII. CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via email on the following recipients this 8th day of June 2017.

Ralph White, Esq.
1001 N. Dixie Hwy.
West Palm Beach, FL 33401
Tel: 561-228-7100
ServiceDocument@SchutzWhite.com

IX. CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of the Florida Rules of Appellate Procedure 9.210(a)(2).

By: s/ John Caserta

John Caserta, Esq.

FL Bar No. 39619

Email: john@casertalaw.com

JOHN CASERTA, P.A.

2025 Lavers Circle, D207

Delray Beach, FL 33444

Telephone: (954) 803-0684

Attorney for Appellant/Petitioner