

Mortgage Modification

The Making Homes Affordable Program is government's effort to stabilize the housing market and help struggling homeowners get relief and avoid foreclosure.

The U.S. Bankruptcy Court for the Middle District of Florida, Orlando Division, implemented a program in order to streamline the process of obtaining a mortgage modification. Under this program, there are no more lost documents – the loan package is provided to lender's counsel. The program orders lenders to have a representative with full settlement authority available at mediation.

The success for mortgage modification:

1. Your unsecured debt is reorganized;
2. Borrowers with second mortgages often can strip their second mortgage;
3. Servicers can elect to use bankruptcy schedules to process the modification;
4. Servicers can elect to go straight to permanent modification if the Chapter 13 Trustee is holding, or has disbursed three payments at the same or higher amount than the modified payment.
5. The modifications must be approved by the Bankruptcy Court, thus providing accountability;
6. The parties are ordered to comply and the court continues to have jurisdiction over the parties during the Chapter 13.

Lenders are offering other modifications, but most are made through "Making Homes Affordable Program" (HAMP) – www.MakingHomesAffordable.gov.

If you are interested in applying for a loan modification, please contact your attorney. The Chapter 13 Trustee office supervises this program, but cannot represent you.

UNITED STATES BANKRUPTCY COURT _____ DISTRICT OF _____		PROOF OF CLAIM						
Name of Debtor: _____		Case Number: _____						
<i>NOTE: Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing. You may file a request for payment of an administrative expense according to 11 U.S.C. § 503.</i>								
Name of Creditor (the person or other entity to whom the debtor owes money or property): _____		COURT USE ONLY						
Name and address where notices should be sent: Telephone number: _____ email: _____		<input type="checkbox"/> Check this box if this claim amends a previously filed claim. Court Claim Number: _____ (If known) Filed on: _____						
Name and address where payment should be sent (if different from above): Telephone number: _____ email: _____		<input type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach copy of statement giving particulars.						
1. Amount of Claim as of Date Case Filed: \$ _____ If all or part of the claim is secured, complete item 4. If all or part of the claim is entitled to priority, complete item 5. <input type="checkbox"/> Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.								
2. Basis for Claim: _____ (See instruction #2)								
3. Last four digits of any number by which creditor identifies debtor: ____ _	3a. Debtor may have scheduled account as: _____ (See instruction #3a)	3b. Uniform Claim Identifier (optional): _____ (See instruction #3b)						
4. Secured Claim (See instruction #4) Check the appropriate box if the claim is secured by a lien on property or a right of setoff, attach required redacted documents, and provide the requested information. Nature of property or right of setoff: <input type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other Describe: _____ Value of Property: \$ _____ Annual Interest Rate _____ % <input type="checkbox"/> Fixed or <input type="checkbox"/> Variable (when case was filed)		Amount of arrearage and other charges, as of the time case was filed, included in secured claim, if any: \$ _____ Basis for perfection: _____ Amount of Secured Claim: \$ _____ Amount Unsecured: \$ _____						
5. Amount of Claim Entitled to Priority under 11 U.S.C. § 507 (a). If any part of the claim falls into one of the following categories, check the box specifying the priority and state the amount. <table style="width:100%; border: none;"> <tr> <td style="width: 33%; vertical-align: top;"> <input type="checkbox"/> Domestic support obligations under 11 U.S.C. § 507 (a)(1)(A) or (a)(1)(B). </td> <td style="width: 33%; vertical-align: top;"> <input type="checkbox"/> Wages, salaries, or commissions (up to \$11,725*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier – 11 U.S.C. § 507 (a)(4). </td> <td style="width: 33%; vertical-align: top;"> <input type="checkbox"/> Contributions to an employee benefit plan – 11 U.S.C. § 507 (a)(5). </td> </tr> <tr> <td style="vertical-align: top;"> <input type="checkbox"/> Up to \$2,600* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. § 507 (a)(7). </td> <td style="vertical-align: top;"> <input type="checkbox"/> Taxes or penalties owed to governmental units – 11 U.S.C. § 507 (a)(8). </td> <td style="vertical-align: top;"> <input type="checkbox"/> Other – Specify applicable paragraph of 11 U.S.C. § 507 (a)(____). </td> </tr> </table> <p style="text-align: right;">Amount entitled to priority: \$ _____</p>			<input type="checkbox"/> Domestic support obligations under 11 U.S.C. § 507 (a)(1)(A) or (a)(1)(B).	<input type="checkbox"/> Wages, salaries, or commissions (up to \$11,725*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier – 11 U.S.C. § 507 (a)(4).	<input type="checkbox"/> Contributions to an employee benefit plan – 11 U.S.C. § 507 (a)(5).	<input type="checkbox"/> Up to \$2,600* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. § 507 (a)(7).	<input type="checkbox"/> Taxes or penalties owed to governmental units – 11 U.S.C. § 507 (a)(8).	<input type="checkbox"/> Other – Specify applicable paragraph of 11 U.S.C. § 507 (a)(____).
<input type="checkbox"/> Domestic support obligations under 11 U.S.C. § 507 (a)(1)(A) or (a)(1)(B).	<input type="checkbox"/> Wages, salaries, or commissions (up to \$11,725*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier – 11 U.S.C. § 507 (a)(4).	<input type="checkbox"/> Contributions to an employee benefit plan – 11 U.S.C. § 507 (a)(5).						
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*Amounts are subject to adjustment on 4/1/13 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.								
6. Credits. The amount of all payments on this claim has been credited for the purpose of making this proof of claim. (See instruction #6)								

7. Documents: Attached are **redacted** copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. If the claim is secured, box 4 has been completed, and **redacted** copies of documents providing evidence of perfection of a security interest are attached. (See instruction #7, and the definition of “**redacted**”.)

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

8. Signature: (See instruction #8)

Check the appropriate box.

- I am the creditor. I am the creditor’s authorized agent. I am the trustee, or the debtor, or their authorized agent. I am a guarantor, surety, indorser, or other codebtor. (Attach copy of power of attorney, if any.) (See Bankruptcy Rule 3004.) (See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: _____

Title: _____

Company: _____

Address and telephone number (if different from notice address above): _____

(Signature)

(Date)

Telephone number: _____ email: _____

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, exceptions to these general rules may apply.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:

Fill in the federal judicial district in which the bankruptcy case was filed (for example, Central District of California), the debtor’s full name, and the case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is at the top of the notice.

Creditor’s Name and Address:

Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. The creditor has a continuing obligation to keep the court informed of its current address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. Amount of Claim as of Date Case Filed:

State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:

State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if an interested party objects to the claim.

3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:

State only the last four digits of the debtor’s account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:

Report a change in the creditor’s name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

3b. Uniform Claim Identifier:

If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

4. Secured Claim:

Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions.) If the claim is secured, check the box for the nature and value of property that secures the claim, attach copies of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate (and whether it is fixed or variable), and the amount past due on the claim.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. § 507 (a).

If any portion of the claim falls into any category shown, check the appropriate box(es) and state the amount entitled to priority. (See Definitions.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. Credits:

An authorized signature on this proof of claim serves as an acknowledgment that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. Documents:

Attach redacted copies of any documents that show the debt exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest. You may also attach a summary in addition to the documents themselves. FRBP 3001(c) and (d). If the claim is based on delivering health care goods or services, limit disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.

8. Date and Signature:

The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. Print the name and title, if any, of the creditor or other person authorized to file this claim. State the filer’s address and telephone number if it differs from the address given on the top of the form for purposes of receiving notices. If the claim is filed by an authorized agent, attach a complete copy of any power of attorney, and provide both the name of the individual filing the claim and the name of the agent. If the authorized agent is a servicer, identify the corporate servicer as the company. Criminal penalties apply for making a false statement on a proof of claim.

DEFINITIONS**INFORMATION****Debtor**

A debtor is the person, corporation, or other entity that has filed a bankruptcy case.

Creditor

A creditor is a person, corporation, or other entity to whom debtor owes a debt that was incurred before the date of the bankruptcy filing. See 11 U.S.C. §101 (10).

Claim

A claim is the creditor's right to receive payment for a debt owed by the debtor on the date of the bankruptcy filing. See 11 U.S.C. §101 (5). A claim may be secured or unsecured.

Proof of Claim

A proof of claim is a form used by the creditor to indicate the amount of the debt owed by the debtor on the date of the bankruptcy filing. The creditor must file the form with the clerk of the same bankruptcy court in which the bankruptcy case was filed.

Secured Claim Under 11 U.S.C. § 506 (a)

A secured claim is one backed by a lien on property of the debtor. The claim is secured so long as the creditor has the right to be paid from the property prior to other creditors. The amount of the secured claim cannot exceed the value of the property. Any amount owed to the creditor in excess of the value of the property is an unsecured claim. Examples of liens on property include a mortgage on real estate or a security interest in a car. A lien may be voluntarily granted by a debtor or may be obtained through a court proceeding. In some states, a court judgment is a lien.

A claim also may be secured if the creditor owes the debtor money (has a right to setoff).

Unsecured Claim

An unsecured claim is one that does not meet the requirements of a secured claim. A claim may be partly unsecured if the amount of the claim exceeds the value of the property on which the creditor has a lien.

Claim Entitled to Priority Under 11 U.S.C. § 507 (a)

Priority claims are certain categories of unsecured claims that are paid from the available money or property in a bankruptcy case before other unsecured claims.

Redacted

A document has been redacted when the person filing it has masked, edited out, or otherwise deleted, certain information. A creditor must show only the last four digits of any social-security, individual's tax-identification, or financial-account number, only the initials of a minor's name, and only the year of any person's date of birth. If the claim is based on the delivery of health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information.

Evidence of Perfection

Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, or other document showing that the lien has been filed or recorded.

Acknowledgment of Filing of Claim

To receive acknowledgment of your filing, you may either enclose a stamped self-addressed envelope and a copy of this proof of claim or you may access the court's PACER system (www.pacer.psc.uscourts.gov) for a small fee to view your filed proof of claim.

Offers to Purchase a Claim

Certain entities are in the business of purchasing claims for an amount less than the face value of the claims. One or more of these entities may contact the creditor and offer to purchase the claim. Some of the written communications from these entities may easily be confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. The creditor has no obligation to sell its claim. However, if the creditor decides to sell its claim, any transfer of such claim is subject to FRBP 3001(e), any applicable provisions of the Bankruptcy Code (11 U.S.C. § 101 *et seq.*), and any applicable orders of the bankruptcy court.

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

IN RE:

JOHN DOE,

CASE NO.:

Chapter 7

Debtor. _____ /

MOTION FOR RELIEF FROM STAY

**NOTICE OF OPPORTUNITY TO
OBJECT AND FOR HEARING**

Pursuant to Local Rule 2002-4, the Court will consider this objection without further notice or hearing unless a party in interest files a response within twenty-one (21) days from the date of service of this paper. If you object to the relief requested in this paper, you must file your objection with the Clerk of the Court at 135 West Central Boulevard, Suite 950, Orlando, Florida 32801, and serve a copy on the movant's attorney, Attorney Name, Firm, and Address.

If you file and serve a response within the time permitted, the Court will schedule a hearing and you will notified. If you do not file an objection within the time permitted, the Court will consider that you do not oppose the granting of the relief requested in the paper, will proceed to consider the paper without further notice of hearing, and may grant the relief requested.

CREDITOR (the "Creditor"), by and through its undersigned Attorney and files this Motion for Relief From Stay, pursuant to 11 U.S.C. §362(d)(1) and (2) of the Bankruptcy Code, hereby moves this Court for entry of an order granting relief from stay as to the bankruptcy estate and as to the Debtor, and states as follows:

1. The Creditor is the Former Spouse of the Debtor.
2. In the Debtor's Final Judgment of Dissolution of Marriage, the Debtor was ordered to pay child support of \$_____ per month to the Creditor.

3. The Debtor failed to timely pay his child support and the Honorable Judge X in the Ninth Circuit of Orange County, Florida, found there is an arrearage in child support of \$_____.

4. In addition, Debtor was ordered to pay Creditor's attorney fees of \$_____ incurred in connection with the establishment and collection of Creditor's child support.

5. The Creditor seeks to collect her child support and attorney fees from post-petition, non-estate assets of the Debtor.

WHEREFORE, Creditor requests that the Court enter an order modifying or terminating the automatic stay as to the Debtor and to the estate to permit Creditor to enforce her remedies against the Debtor's post-petition income/assets for the reasons set forth above.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Application for Order Authorizing Employment of Special Counsel with Affidavit has been furnished electronically or by U.S. Mail this _____ day of _____, 2012, to:

Debtor: John Doe, _____
Debtor's Attorney: _____
Trustee: Laurie K. Weatherford, PO Box 3450, Winter Park, FL 32790-3450; and
U.S. Trustee, 135 W. Central Blvd, Suite 600, Orlando, FL 32801.

Attorney
Florida Bar No.:
Law Firm
Street Address
City, State Zip Code
Telephone:
Facsimile:
E-Mail:
Attorney for Debtor

Third District Court of Appeal

State of Florida, January Term, A.D. 2012

Opinion filed March 21, 2012.

No. 3D10-2323
Lower Tribunal No. 09-23857

Ava G. Byrne,
Appellant/Cross-Appellee.

vs.

Daniel R. Byrne,
Appellee/Cross-Appellant.

An Appeal from the Circuit Court for Miami-Dade County. Paul Siegel,
Judge.

Marks & West, P.A., and Evan R. Marks and Carolyn W. West, for
appellant/cross-appellee.

Ferdie and Lones, Chartered, and Stuart A. Lones, for appellee/cross-
appellant.

On Motion for Rehearing and/or Clarification

Before CORTIÑAS, ROTHENBERG and LAGOA, JJ.

ROTHENBERG, J.

We grant appellee/cross-appellant's motion for rehearing, withdraw our opinion filed on January 18, 2012, and substitute the following opinion in its stead.

Ava G. Byrne ("Ava") appeals from a final judgment of dissolution of marriage and order denying her post-trial motions. Daniel R. Byrne ("Dan") cross-appeals. Both parties challenge specific aspects of the trial court's equitable distribution and award of permanent alimony. We reverse and remand for proceedings consistent with this opinion.

EQUITABLE DISTRIBUTION

The trial court erred by distributing the entirety of the negative value of the marital residence solely to Ava.

Ava and Dan purchased a condominium which is now underwater by approximately \$76,000.¹ The trial court classified the condominium as marital property. In its equitable distribution, the trial court assigned the marital residence and the negative value associated with it entirely to Ava, and awarded Dan half of the remaining valuable marital assets. Ava argues that by assigning to her the entirety of the condominium's negative value without offsetting it in the remainder of the equitable distribution, the trial court fashioned an unequal distribution without sufficient legal justification. We agree.

Section 61.075(1), Florida Statutes (2010), states, in pertinent part: "[I]n

¹ The deed and note were titled solely in Ava's name due to Dan's ongoing litigation with his ex-wife at the time of purchase.

distributing the marital assets and liabilities between the parties, the court must begin with the premise that the distribution should be equal, unless there is a justification for an unequal distribution based on all relevant factors” Any justification for fashioning an unequal distribution must be “legally sufficient.” Foley v. Foley, 19 So. 3d 1031, 1032 (Fla. 5th DCA 2009). Relying on the “equity” factor articulated in section 61.075(1)(j), the trial court justified its decision not to assign half of the condominium’s debt to Dan by stating that, although Ava wished to preserve her reputation by preventing foreclosure, “most homeowners in the circumstances of the parties would simply abandon the residence and/or return the keys to the banks holding the indebtedness.” The trial court therefore concluded that it would be inequitable to require Dan to pay half of the condominium’s negative value solely because Ava desired to protect her own reputation.

The trial court’s justification was not “legally sufficient” because it erroneously assumed that the negative value associated with the condominium would simply vanish if the parties were to “abandon the residence” or “return the keys to the banks holding the indebtedness.” It is well settled Florida law that, absent contractual agreement, debtors remain liable for the portion of their debt not satisfied in a foreclosure sale. See Webber v. Blanc, 22 So. 655, 656 (Fla. 1897) (“The fact that a mortgage was taken to secure the note did not deprive the holder

thereof of the legal remedy to collect it, nor is there any legal obstacle in the way of his suing at law for the balance due on the note after the sale under the foreclosure decree in equity, if no judgment for the deficiency was entered in such proceedings.”); see also Clements v. Leonard, 70 So. 2d 840, 844 (Fla. 1954). Consequently, even if Ava and Dan agreed to surrender the property to the bank, absent a contractual release, the \$76,000 outstanding debt on the property would survive. Thus, the sole justification provided by the trial court in fashioning an unequal distribution was without merit, and, consequently, the trial court erred in failing to add the condominium’s negative value to the marital liabilities.

ALIMONY

We next turn to the trial court’s alimony award. The trial court awarded Dan \$1,500 per month as permanent periodic alimony based on the following factors: Dan and Ava’s marriage lasted “nine” years, and therefore was of moderate duration; Dan became disabled from working during the course of the marriage; Ava earns approximately “\$10,000” per month; and Dan, based on his Sprint and Social Security disability income, earns approximately \$44,000 per year, and does not have sufficient money to pay for his living or medical expenses. The trial court, in its order regarding Ava’s post-trial motions, awarded Dan an additional \$18,000 in retroactive alimony. Ava challenges various aspects of the trial court’s alimony award on the basis of section 61.08, Florida Statutes (2010), which governs

alimony awards.

We reverse the trial court's award of \$1,500 per month in permanent periodic alimony, and \$18,000 in retroactive alimony, as we conclude that the trial court's financial analysis was tainted by its failure to properly consider all of the relevant factors pursuant to section 61.08. Specifically, the trial court did not properly consider: each spouse's pre-dissolution debts; the income Dan receives from his Fidelity Magellan Retirement account; and the \$7,000 reduction to Ava's annual salary.

Section 61.08(2) provides:

2) In determining whether to award alimony or maintenance, the court shall first make a specific factual determination as to whether either party has an actual need for alimony or maintenance and whether either party has the ability to pay alimony or maintenance. If the court finds that a party has a need for alimony or maintenance and that the other party has the ability to pay alimony or maintenance, then in determining the proper type and amount of alimony or maintenance, the court shall consider all relevant factors, including, but not limited to:

- (a) The standard of living established during the marriage.
- (b) The duration of the marriage.
- (c) The age and the physical and emotional condition of each party.
- (d) The financial resources of each party, including the nonmarital and the marital assets and liabilities distributed to each.
- (e) The earning capacities, educational levels, vocational skills, and employability of the parties and, when applicable, the time necessary for either party to acquire sufficient education or training to enable such party to find appropriate employment.
- (f) The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education, and career building of the other party.

(g) The responsibilities each party will have with regard to any minor children they have in common.

(h) The tax treatment and consequences to both parties of any alimony award, including the designation of all or a portion of the payment as a nontaxable, nondeductible payment.

(i) All sources of income available to either party, including income available to either party through investments of any asset held by that party.

(j) Any other factor necessary to do equity and justice between the parties.

Failure to consider each spouse's pre-dissolution debts.

Section 61.08(2)(d) provides that in determining the proper type and amount of alimony, a trial court "shall" consider, among other things, "the financial resources of each party, including the non-marital and marital assets and liabilities distributed to each." Despite this provision's clear mandate, the trial court did not make any findings regarding Ava's or Dan's pre-dissolution liabilities, and, therefore, erred. We note that, based on a review of the record, Ava's total debt was approximately \$54,076, which she was paying off at a rate of \$2,233 per month, while Dan's total debt was approximately \$39,319, which he was paying off at a rate of \$1,203 per month.

Failure to consider the income Dan receives from his Fidelity Magellan Retirement account.

The trial court additionally erred in failing to consider Dan's Fidelity Magellan Retirement account, a non-marital asset valued at \$65,000, but encumbered by a \$36,553 loan. Dan's Fidelity Magellan Retirement account was a

“financial resource” meant to be drawn on during retirement. The trial court, therefore, erred in determining that Dan’s only income was the \$44,000 per year he received from Sprint and Social Security Disability payments, and this error necessarily affected the trial court’s determination regarding whether Dan had a “need” for alimony.

Failure to reopen the evidence to consider a \$7,000 salary reduction in Ava’s salary.

Ava contends that the trial court erred in denying her unopposed motion to reopen the evidence to take into consideration a \$7,000 reduction in salary that she incurred after the close of evidence but prior to dissolution. We agree. To begin with, we note that the trial court based its initial alimony calculations on the premise that Ava earned “\$10,000” per month. As shown in Ava’s financial affidavit, however, she earned only \$9,059 per month. The trial court recognized its error, and, in its order on Ava’s post-trial motions, noted that she earned “\$9,000 instead of \$10,000” per month.

Ava’s annual salary was subsequently reduced on July 27, 2010 by \$7,000, and the trial court entered its final judgment of dissolution of marriage on August 11, 2010. On August 23, 2010, Ava, pursuant to Florida Rule of Civil Procedure 1.530(a), filed a motion to reopen the proceedings to consider the reduction in her salary, arguing that her post-trial salary reduction directly impacts her ability to pay the trial court’s permanent alimony award.

Florida Rule of Civil Procedure 1.530(a) enables a trial court to evaluate matters that it did not consider prior to judgment, and to correct any error if the trial court becomes convinced that it has erred. Carollo v. Carollo, 920 So. 2d 16, 20 (Fla. 3d DCA 2005). Although rule 1.530(a) is permissive, the statute governing alimony awards, section 61.08(2), contains various mandatory considerations a trial court **must** make when awarding alimony.

“In determining whether to award alimony . . . , the trial court **shall** first make a specific factual determination as to whether either party has an actual need for alimony or maintenance and whether either party has the **ability to pay** alimony or maintenance.” § 61.08 (emphasis added). Ava’s substantial salary reduction, when viewed in conjunction with the marital debt for which she is responsible, is indispensable to the trial court’s determination of whether she has the ability to pay alimony.

Although we reverse the trial court’s award of \$1,500 a month in permanent periodic alimony and \$18,000 in retroactive alimony based on the trial court’s flawed financial analysis, we briefly address the principles that must be applied when considering whether permanent periodic alimony is appropriate, and if so, in what amount.

We recognize that “the nature and amount of an award of alimony is a matter committed to the sound discretion of the trial court.” Lule v. Lule, 60 So. 3d

567, 569 (Fla. 4th DCA 2011) (quoting Mondello v. Torres, 47 So. 3d 389, 396 (Fla. 4th DCA 2010)). However, the trial court's discretion is circumscribed by the parameters set forth in section 61.08(8). Section 61.08(8) provides that, "[p]ermanent alimony may be awarded following a marriage of . . . moderate duration if such an award is appropriate upon consideration of the factors set forth in subsection (2)" It follows that, to properly exercise its discretion in awarding alimony, the trial court must accurately consider all of the evidence relevant to the factors set forth in subsection (2). We note that while factors (c) and (e) of subsection (2) unequivocally lend some support to Dan's award of permanent alimony, they are the only factors that do so. More importantly, as has been established above, the trial court did not properly consider all of the financial evidence relevant to the factors set forth in subsection (2).

In determining the proper amount of alimony to award, "the court **shall** consider all relevant factors, including, but not limited to: [t]he standard of living established during the marriage[,] . . . the financial resources of each party[,] . . . the earning capacities . . . of the parties[,] and all sources of income available to either party" § 61.08(2) (emphasis added). The trial court's failure to consider Ava's reduction in salary caused the trial court to award an excessive amount of alimony.

Generally, the rubric for determining the **amount** of an alimony award is the

standard of living established during the marriage. Griffin v. Griffin, 906 So. 2d 386, 389 (Fla. 2d DCA 2005) (“In determining the amount of alimony, the trial court should ensure that each party’s standard of living comes as close as possible to the prior lifestyle, given the available financial resources.”) (quoting Laz v. Laz, 727 So. 2d 966, 967 (Fla. 2d DCA 1998)). However, it is well settled that a spouse “cannot be required to maintain the [other spouse’s] standard of living when this maintenance stretches beyond his [or her] financial capacity.” Pirino v. Pirino, 549 So. 2d 219, 220 (Fla. 5th DCA 1989).

In this case, the trial court based its decision to award \$1,500 per month in permanent alimony, in part, on its determination that Dan and Ava enjoyed a “comfortable”² standard of living. A careful analysis of the record, however, reveals that, without the alimony award, Ava’s reasonable expenses exceed her income while Dan’s reasonable expenses only slightly exceed his income. Thus, it is clear that the award stretches beyond Ava’s financial capacity.

The trial court erred in retroactively increasing the alimony award by \$18,000.

We also conclude that the trial court erred by awarding Dan an additional \$18,000 in alimony based on the worthlessness of the TD Ameritrade account.

The trial court, in its order on Ava’s post-trial motions, found that since Dan:

² We note that the foundation of Ava and Dan’s arguably “comfortable” lifestyle was a large sum of debt.

is receiving his Ameritrade account at a value of \$50,467.00 when in fact at the time of distribution this account is worth zero dollars or thereabout the court must adjust its alimony finding. The court will make its award of alimony retroactive to the July 2009 separation and debit the Wife an additional \$18,000 in alimony.

In adjusting its award in this way, the trial court essentially penalized Ava for Dan's unauthorized expenditure of her marital portion of the TD Ameritrade account by using the account's lack of value as a justification for retroactively increasing Dan's alimony award by \$18,000. This was error.

CONCLUSION

In sum, the trial court's sole justification for assigning the entirety of the negative value of the marital home to Ava, and thereby creating an unequal distribution, was not legally sufficient. Moreover, the trial court's failure to properly consider each party's liabilities, debts, and sources of income, including Ava's reduction in salary and Dan's Fidelity Magellan Retirement account, distorted the trial court's view of the comparative financial position of each party in favor of Dan and to the detriment of Ava. Finally, the trial court erred in retroactively increasing the alimony award by \$18,000 based on the TD Ameritrade account's worthlessness.

Upon remand, the trial court is directed to re-evaluate Dan's need for alimony, Ava's ability to pay, and all of the relevant factors articulated in section 61.08(8), including the standard of living established during the marriage, the

length of this second marriage (less than nine years), and Dan's minimal contribution to the marriage, in determining whether permanent alimony is appropriate, and if so, in what amount.

Reversed and remanded.



BANKRUPTCY NUGGETS

Attorney Fees

1. In order to continue to represent someone in a divorce and to be paid, you must file a Motion with the Bankruptcy Court to authorize payment of your fees (Chapter 13).
2. There is a 90 day preference period in which the Bankruptcy Trustee may “look back “ at fees received and recoup them from you as a preference. If your client is in trouble financially and you are owed fees, okay to have a third party pay you, but not the client/debtor funneling his/her fees through a third party.

Representation if Your Client or the Opposing Party Files Bankruptcy

3. Lots of information free- procedures etc at the website for the Middle District of Florida, www.flmb.uscourts.gov.
4. To file pleadings in Bankruptcy Court, lawyers must be certified in Electronic Case filing- CM/ECF- not the State Court electronic procedure.
5. But to file a Proof of Claim, no special training - Form provided at the website.
6. Debtors contemplating or mid-divorce may still file bankruptcy jointly—query is there a conflict for the bankruptcy attorney to represent both?
7. If your client files bankruptcy close in time to when a divorce was litigated/settled, the Financial Affidavits filed in the divorce are evidence under oath as to the parties’ assets/debts and income/expenses. They should be consistent with what is being filed in the bankruptcy court.
8. In order to proceed with a divorce action that is not stayed in bankruptcy a Motion for Relief from the Automatic Stay must be filed.
9. Many uncontested matters/motions in bankruptcy court are filed with negative notice and do not require hearings.

Eligibility to File Bankruptcy and Benefits of Filing

10. Arrears in any Domestic Support Order may be spread over the life of a Chapter 13 Bankruptcy.

11. Bankruptcy Relief is available to people who earn over the median income. No need to take the Means Test if the majority of your debt is not consumer debt (examples of non-consumer debt- tax debt, mortgage debt on investment property).
12. There are debt limits on the availability of Chapter 13 bankruptcy—presently \$360,465 in liquidated, non-contingent unsecured debt and \$1,081,400 in non-contingent, liquidated, secured debt.
13. One spouse may file bankruptcy during the marriage and prior to the divorce, but then the non-filing spouse should be listed as a creditor in order to discharge potential liability to that spouse.
14. During a Chapter 13, if the parties divorce, the case may be bifurcated and one spouse may convert to Chapter 7 without the other.
15. The Automatic Stay in the bankruptcy Court does not preclude actions to re-coup post-petition child support , alimony from non-estate property. It does not stay an action to establish paternity, to establish/modify a domestic support obligation, to address child custody or visitation or domestic violence. A divorce action is not stayed except for the division of property. It also doesn't stay a tax refund intercept.
16. File a proof of Claim for a domestic support obligation, as it is the highest priority to be paid.
17. Back taxes, back child support and back mortgage payments can be paid in a Chapter 13 bankruptcy over 3 -5 years usually with little or no interest or penalties .
18. Second mortgages can be stripped off in Chapter 13 bankruptcies if they are wholly unsecured.
19. HOA fees continue to accrue post-petition in a bankruptcy even if the property is surrendered until title changes via a foreclosure, deed in lieu, short sale, etc.

Dischargeability

20. Alimony, Child Support and attorneys fees to collect them are not dischargeable in any Chapter of the Bankruptcy Code.
21. Property Settlement obligations are not dischargeable in a Chapter 7 Bankruptcy but they are dischargeable in a Chapter 13 bankruptcy.
22. To determine if a debt is dischargeable, an adversary proceeding is filed in the Bankruptcy Court.
23. Some taxes are dischargeable in bankruptcy depending on their age, when filed and if an offer in compromise has been filed.

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

IN RE:

JOHN DOE,

CASE NO.:

Debtor.

**APPLICATION FOR ORDER AUTHORIZING
EMPLOYMENT OF SPECIAL COUNSEL**

COMES NOW the Debtor, JOHN DOE, applying for an Order approving the employment of _____ of the law firm of _____ (hereinafter referred to as the "Attorney") to represent and assist the Debtor regarding _____ claim and as grounds would state as follows:

1. INFO leading up to lawsuit????
2. Attorney will render all legal services as may be required in this case.
3. After reviewing the facts and issues in this case, the Debtor has concluded that the assistance of an attorney is necessary to enable the Debtor to defend/pursue his/her Dissolution of Marriage action. The Debtor has selected this Attorney because this Attorney has the ability and experience to render the necessary assistance. The Attorney has further agreed to continue such representation pursuant to the attached contract entered into prior to the Debtor's bankruptcy filing.
4. To the best of the Debtor's knowledge, the Attorney has no other connection with the debtor, creditor, and any parties of interest, their respective attorneys and accountants, the United States Trustee, or any person employed in the office of the United States Trustee.
5. The Debtor therefore prays that the Court will enter an Order approving the employment of counsel in the attached Order.

RESPECTFULLY submitted this _____ day of _____, 2012.

Attorney
Florida Bar No.: _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Application for Order Authorizing Employment of Special Counsel with Affidavit has been furnished electronically or by U.S. Mail this _____ day of _____, 2012, to:

Debtor: John Doe, _____
Debtor's Attorney: _____
Trustee: Laurie K. Weatherford, PO Box 3450, Winter Park, FL 32790-3450; and
U.S. Trustee, 135 W. Central Blvd, Suite 600, Orlando, FL 32801.

Attorney
Florida Bar No.:
Law Firm
Street Address
City, State Zip Code
Telephone:
Facsimile:
E-Mail:
Attorney for Debtor

AFFIDAVIT OF DISINTERESTED PARTY

I, _____, declar under penalties of perjury, that the following statement is true and correct to the best of my knowledge:

I have no connection with the debtor, creditors, or any other parties in interest, their respective attorneys and accountants, the United States Trustee, or any other person employed in the office of the United States Trustee.

Date

Signature

State of Florida
County of _____

Sworn to before me this _____ day of _____, 2012.

Notary Public
Commission Expires:

Affiant ____ Known ____ Produced ID

Type of ID _____