# Third District Court of Appeal

**State of Florida, July Term, A.D. 2007**

Opinion filed October 17, 2007.
Not final until disposition of timely filed motion for rehearing.

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No. 3D06-1876
Lower Tribunal No. 96-25434

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**Diane D. Ferraro, n/k/a Diane Deighton,**
Appellant,

vs.

**James L. Ferraro,**
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Maynard A. Gross, Judge.

Kohlman Hernandez and Robert F. Kohlman; and Greene Smith & Associates, and Cynthia L. Greene, for appellant.

Dino G. Galardi, for appellee.

Before GERSTEN, C.J., and GREEN, and RAMIREZ, JJ.

PER CURIAM.

Diane D. Ferraro, n/k/a Diane Deighton (the Mother), appeals from an order denying her petition to modify child support. We affirm.

The parties have three children. When their marriage was dissolved, the court ordered James L. Ferraro (the Father) to pay child support. In the parties' most recent child support modification agreement, the Father agreed to pay child support of $12,000 per month directly to the Mother. Thereafter, the Mother petitioned the court for an upward modification of this amount.

The Mother's petition was referred to a general magistrate who held a two-day trial. The general magistrate found that since the previous modification agreement, the Father has consistently and continuously paid the Mother the $12,000 per month in direct child support.

In addition, the Father has paid for medical, health, and dental insurance costs, one half of all medical, health, and dental expenses over $3,000 per year, and all private school tuition, fees, books, and tutoring costs for all three children. The general magistrate also found that the Father is paying all expenses, including tuition, fees, books, room and board, and incidentals for the parties' oldest son who is away at college.

The trial court requested the general magistrate to provide more specific findings. The general magistrate further found that the parties' middle child is currently in a full-time residential facility for which the Father is paying. Additionally, the Father is paying the oldest child's automotive expenses of approximately $1,500 per month, as well as the cell phone bills for all three

children. The Father also pays for all expenses on the former marital residence where the Mother and the youngest child reside.

The general magistrate also recognized that a strict mathematical application of the child support guidelines obligates the Father to approximately $44,680 per month in child support. However, the general magistrate again recommended denial of the Mother's motion to modify the child support.

The trial court carefully considered the evidence in the case and the general magistrate's findings and conclusion. It agreed with the general magistrate's recommendation that the circumstances warranted deviating from the guidelines. See § 61.30(1)(a), Fla. Stat. (2002) (stating that a trier of fact may order child support which varies from the guideline amount where the guideline amount would be unjust or inappropriate); Finley v. Scott, 707 So. 2d 1112, 1116 (Fla. 1998) (affirming that the actual expenditures for the needs of the child should be weighed in determining whether to vary the guideline amount).

In Miller v. Schou, 616 So. 2d 436, 438 (Fla. 1993), the Florida Supreme Court held that an increase in ability to pay is itself sufficient to warrant an increase in child support. However, the Court recognized that "[t]he child is only entitled to share in the good fortune of his parent consistent with an appropriate lifestyle," and "Florida's trial courts are fully capable of making the determination of an appropriate amount of support in these cases." Miller, 616 So. 2d at 439; see

also Taylor v. Taylor, 734 So. 2d 473 (Fla. 4th DCA 1999) (denying modification where the court found that the children, even considering the substantial wealth of their father, lacked nothing).

Here, the general magistrate found that the children's needs were being met by the $12,000 the Father was paying directly to the Mother, as well as the additional indirect payments of at least $16,770. This finding was supported by competent substantial evidence. Where a general magistrate is appointed to make factual determinations, the trial court is bound by such determinations provided they are supported by competent substantial evidence which are not clearly erroneous. Robinson v. Robinson, 928 So. 2d 360, 362 (Fla. 3d DCA 2006).

Accordingly, we affirm the order denying a modification of child support under the overwhelming circumstances in this case.

Affirmed.

GERSTEN, C.J. and GREEN, J., concur.

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RAMIREZ, J. (dissenting).

I respectfully disagree with the majority's affirmance in this case under the authority of Miller v. Schou, 616 So. 2d 436 (Fla. 1993). The Miller case, in fact, would support a reversal.

The mother appealed the trial court's denial of her exceptions to the report and recommendations of the hearing officer because the hearing officer's conclusions were legally erroneous. In particular, she alleges as error the fact that the hearing officer's report stated that "the mother has not met her burden of proof to support an upward modification of child support. The children's needs are being fully met . . . ." As Miller makes clear, the hearing officer is simply wrong as a matter of law. Miller states, "a substantial change in the paying parent's income is itself sufficient to constitute a change in circumstances warranting an increase in child support without a demonstration of increased need." Id. at 437. The mother presented overwhelming evidence that the father's income had increased substantially.

The father had been paying $12,000 per month in child support. The hearing officer found that the presumptive child support amount to be awarded pursuant to the child support guidelines was $23,483 per month for one child; $35,294 for two

children; and $44,680 for three children. Under section 61.30(1)(b), of the Florida Statutes, the guidelines establish a substantial change in circumstances upon which a modification may be granted if the difference between the existing monthly obligation and the amount provided for under the guidelines is at least fifteen percent. Because the father is paying less than twenty-seven percent of the guidelines' presumptive child support, I believe the mother sustained her burden of proving a substantial change.

The evidence presented at the hearing overwhelmingly confirmed a substantial change in the father's income. The parties settled upon an initial amount of child support in a 1995 agreement whereby the father would pay $6,500 per month, an amount not computed in accordance with the guidelines. Thereafter, the parties agreed to increase the child support to $10,000 per month and later, in the year 2000, the parties agreed to a further increase to $12,000 per month. None of these modifications were computed based upon any form of financial disclosure or upon the child support guidelines.

In 2003, the mother petitioned for modification. The hearing officer found that the father's net monthly income was $453,483, yielding a net annual income of $5,441,796. It is undisputed that this was substantially higher than his prior income.

The majority opinion does not address the hearing officer's erroneous legal analysis. Understandably, the amount of child support the mother is receiving does not elicit much sympathy for her cause. Perhaps using the correct legal analysis, the hearing officer would have arrived at the same result, but I believe placing the burden on the mother may have skewed the result. We can review de novo the hearing officer's legal reasoning.

I agree with the majority opinion that factual determinations should be affirmed if supported by competent substantial evidence, but there is nothing on the record to support the finding that the father was paying $12,000 per month when it is undisputed that he has been paying $9,000 per month. Evidently, the hearing officer believed that $12,000 per month met the needs of the parties' two minor children. Neither the circuit judge nor the majority of this panel have addressed this discrepancy. I believe the trial court abused its discretion in not correcting this error and in not ordering the father to pay $12,000 per month retroactively. Nierenberg v. Nierenberg, 758 So. 2d 1179, 1180 (Fla. 4th DCA 2000) (finding that the trial court erred in failing to make child support modification retroactive to date of petition for modification; retroactive award in such cases is the rule rather than the exception). See, e.g., Brock v. Brock, 695 So. 2d 744, 745 (Fla. 1st DCA 1997).

I would reverse.