

**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA** **CIVIL ACTION**

**M. M.,
Petitioner and wife,**

**vs.
A. A.,
Respondent and husband,**

Case No. 0 DR XXXX N

**ORDER DISAPPROVING
MAGISTRATE'S REPORT AND RECOMMENDATION**

This matter having come before the court on the "Report and Recommendations of the Magistrate" dated 4/13/2011, it is ordered:

1. Findings

This action began on 4/23/2010 when the wife filed a petition for dissolution of marriage. The parties married on 8/13/1972 and they separated on 12/12/2009. They do not have any minor children.

On 9/7/2010 the husband filed a *pro se* financial affidavit, in which he showed total gross income of \$1,849 per month. On 9/16/2010 the parties signed a temporary agreement for the payment of alimony to the wife. The agreement was reached at a case management conference held with the case manager. The husband was unrepresented at the case management conference. The temporary agreement provided:

"The Husband shall pay \$200 a week beginning Tuesday September 14, 2010. This is a temporary alimony/ support payment to be paid on a weekly basis by check. This is without prejudice."

The case manager sent the temporary agreement to the court and the agreement was adopted as the order of the court.

On 1/24/2011 through counsel the husband filed a sworn motion to "set aside" the temporary agreement and to "recalculate the temporary award based on his actual net income and adjust his arrearages accordingly." Along with that motion the husband filed an amended financial affidavit that showed his total gross income was \$754 per month.

The husband's motion explained that he is an independent contractor who drives a truck and he must pay business expenses from his gross income in order to earn a net disposable income. It further explained that when he completed his *pro se* financial affidavit he stated his total gross income from his truck driving business, rather than his net "business income," that is,

his “gross receipts minus his ordinary and necessary expenses required to produce income.” §61.30(2)(a)3.

The husband’s motion was referred to the magistrate and the magistrate held a hearing on 4/12/2011. The magistrate’s report reflects that wife’s counsel argued that Fla. R. Civ. P. 1.540(b) sets the standard that must be applied to temporary orders. Her counsel argued that the temporary order could be modified only for “fraud, duress or overreaching” by the wife.

The report says the husband’s counsel argued that the husband “made a certain amount of money as a dirt hauler [which had] to be reduced by his expenses as he is self-employed.”

No evidence was taken at the hearing. The magistrate decided the matter “[b]ased on the pleadings ... and the argument of Counsel” and found “there is no basis to set aside or modify” the temporary agreement of the parties. The magistrate noted, in particular, that the temporary agreement was “adopted by Order.”

So, the magistrate accepted the argument of wife’s counsel that Fla. R. Civ. P. 1.540(b) set the standard for modification of a temporary order. The magistrate recommended denial of the husband’s motion as a matter of law. No exception was filed to the magistrate’s order.

2. Ruling

Pursuant to Rule 12.490(f) the court hereby takes “appropriate action on the report.” The report is not approved because it is contrary to law. Fla. R. Civ. P. 1.540(b) does not apply to temporary orders.

The husband’s motion is remanded to the magistrate for an evidentiary hearing, findings of fact based on substantial evidence at the hearing, and a recommended order that complies with law.

F.S. §61.14(11) provides:

“(a) A court may, upon good cause shown, and without a showing of a substantial change of circumstances, modify, vacate, or set aside a temporary support order before or upon entering a final order in a proceeding.

(b) The modification of the temporary support order may be retroactive to the date of the initial entry of the temporary support order; *to the date of filing of the initial petition for dissolution of marriage*, initial petition for support, initial petition determining paternity, or supplemental petition for modification, or to a date prescribed in paragraph (1)(a) or s. 61.30(11)(c) or (17), as applicable.” (*Emphasis supplied.*)

This is the law because, as the court held in *Dent v. Dent*, 851 So.2d 819, 821 (Fla. 2d DCA 2003):

“A temporary support order is often required at the beginning of the dissolution action, before the parties have had an opportunity to complete discovery. Given the urgency of

some of these matters, the order is often based upon an abbreviated hearing and limited evidence.”

Likewise, many temporary agreements are reached on incomplete or mistaken information. The fact that a temporary agreement is adopted by the court does not make it subject to Fla. R. Civ. P.

1.540(b) or make the order adopting a temporary agreement anything other than a temporary order that is modifiable at any time and from time to time at later temporary hearings or at trial.

In *Ghay v. Ghay*, 954 So.2d 1186, 1190 (Fla. 2d DCA 2007) the second district held:

“...[T]emporary support orders are, obviously, temporary. They *do not create vested rights, and they can be modified or vacated at any time by the circuit court while the litigation proceeds ...*” (*Emphasis supplied.*)

Therefore, Fla. R. Civ. P. 1.540(b) has no application to temporary orders. That rule is concerned with setting aside *final* judgments or orders that are the concluding orders in a case, such as an order dismissing an action with prejudice. A party has a vested right in a *final* order. By statute and case law, that is, §61.14(11) and *Ghay*, temporary orders do not create vested rights and they are modifiable retroactively, even to the date of the initial petition, if warranted by the evidence at a later temporary hearing or at trial.

Here, if the magistrate finds that the husband overstated his “business income” in his *pro se* financial affidavit, as he swore he did in the subject motion, then the evidence may justify a finding of a good cause to modify the temporary agreement, even to the date of the filing of the initial petition.

Further, there is no question whatsoever that the agreement in this case was temporary and not an agreement intended to be final and permanent. It said it was an agreement for a “*temporary alimony/ support payment*” and that it was made “*without prejudice.*” Some agreements reached in the course of litigation are intended to be permanent and intended to be adopted in the final judgment, but this agreement was plainly and unmistakably temporary and not permanent or final.

For the foregoing reasons, the husband’s sworn motion filed 1/24/2011 is remanded to the magistrate for an evidentiary hearing, findings of fact based on substantial evidence at the hearing, and a recommended order that complies with law.

Done and ordered in Fort Myers, Lee County, Florida, this _____

R. Thomas Corbin, Circuit Judge

Copies provided to:
Magistrate
Case manager
, Esq.
, Esq.