

Retroactive Alimony Gets the Pluto Treatment

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Pluto was discovered on February 18, 1930. The existence of a new, unknown planet made international news, and “Pluto Day” has been celebrated on February 18th ever since. Decades later, on August 24,

2006, the International

Astronomical Union voted to declassify Pluto, destroying the fiction of a ninth planet. However, only five percent of the world's astronomers voted, sparking a controversy that persists to this day.

A retroactive alimony order is simply an order which awards alimony, but then fixes the starting date for payments back in time to the date of the filing of the petition. Florida courts have been making alimony awards retroactive to the date of the filing of petitions for dissolution of marriage since at least 1982. Then on December 22, 2022, the First District Court of Appeal rejected the legality of retroactive alimony. However, only two of three judges of the appellate panel voted in favor of the issue, creating a controversy that persists today.

A Star is Born

Four billion years ago, the solar system was a cloud of dust and gas. With the formation of the sun, materials clumped together into large particles. Solar winds swept away lighter elements, leaving heavy materials to create planets.

Forty years ago, in *Wright v. Wright*, 411 So. 2d 1334 (Fla. 4th DCA 1982) a Nevada judgment dissolved a couple's marriage but left unresolved alimony and other financial issues. After the Wrights moved to

Florida, a Florida court addressed the unresolved financial matters, awarded Ms. Wright alimony, and made the award retroactive to the date suit was filed. Mr. Wright appealed, arguing in part, there was no Florida authority for a court to make an alimony award retroactive to the date the divorce was filed.

The Fourth District Court of Appeal, acknowledging the lack of statutory authority in Florida to make a retroactive alimony award, approved the award, reasoning: “there is no Florida authority prohibiting such an award.” The *Wright* Court also noted other states have approved alimony awards made retroactive to the date suit is filed.

The *Wright* Court then held that on balance: “we can see no reason not to allow a court in an appropriate case to make an award of alimony and child support retroactive. The failure to obtain a temporary award pendente lite may constitute a waiver or create an estoppel because of circumstances that transpire in the interim. However, absent such reasons we believe the trial court has that power.”

The same day *Wright v. Wright* was issued, the Fifth District Court of Appeal issued a slightly different opinion in *Blais v. Blais*, 410 So. 2d 1365 (Fla. 5th DCA 1982). In *Blais*, the husband appealed from his final judgment of dissolution because, among other things, the trial court ordered his permanent alimony payments to start June 1, 1980, even though the final judgment was not reduced to writing and filed until July 1980.

In affirming the retroactive alimony award, the Fifth District found it was not reversible error to make the husband's permanent alimony obligation start before the filing of the written final judgment of dissolution.

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The opinion noted that the alimony modification statute, Florida Statute §61.14, has an express provision authorizing retroactive alimony awards and the alimony statute, Florida Statute §61.08, does not. While the *Blais* Court declined to extend the modification statute to initial alimony awards, it reasoned that courts have the inherent power to render its judgment *nunc pro tunc* as of the time the case was submitted to it for determination.

New Horizons

Interest in Pluto was reignited after NASA's New Horizons space probe was launched from Florida. New Horizons made a close flyby of Pluto showing Pluto's surface contained mountains that reach as high as 11,000 feet. Scientists suspect the mountains are formed on a bedrock of water ice.

Interest in retroactive alimony in Florida was reignited after an opinion was filed in *Iarussi v. Iarussi*, 47 Fla. L. Weekly D2079 (Fla. 1st DCA Oct. 12, 2022). In *Iarussi*, the Former Wife was forced out of the marital company after the parties separated. While both parties had significant resources, the Former Husband earned several times more than the Former Wife did once she was no longer employed by the company.

The petition for dissolution was filed on April 13, 2018, and before the final hearing, the parties settled all their claims against each other except for the marital company, retroactive and prospective alimony, and attorneys' fees and costs.

The trial court awarded Former Wife durational and retroactive alimony in the amount of \$4,983 each month for six years. Additionally, the Former Husband was ordered to pay a lump sum of retroactive alimony from the date of the petition on April 13, 2018, to the date of final judgment – almost three years later – on January 15, 2021.

While the Former Husband appealed, his arguments relating to alimony were focused on Wife's need during both the retroactive and potential prospective periods based upon, among

other arguments, the imputation of investment income. The Former Husband never asserted the trial court lacked inherent authority to award retroactive alimony in the first place, or otherwise questioned the legality of awarding retroactive alimony.

A majority of the First District Court of Appeal panel reversed the retroactive alimony award for failure to impute income. The Court remanded the case to allow the parties to present evidence as to the rate-of-return that should be applied to Former Wife's investments.

Ruling in the spirit of the International Astronomical Union, Judge Robert Long threw down the gauntlet on retroactive alimony, stating, "retroactive alimony is a fiction of the courts." Judge Long's concurrence noted that since *Wright v. Wright*, 411 So. 2d 1334 (Fla. 4th DCA 1982 and *Blais v. Blais*, 410 So. 2d 1365 (Fla. 5th DCA 1982), no Florida court has actually analyzed the legality of awarding retroactive alimony. Moreover, the Florida Supreme Court has never mentioned or approved of an award of retroactive alimony in an initial alimony determination.

Relying on Article II, section 3 of the Florida Constitution, Judge Long concluded that since there is no authority in Florida law for retroactive alimony, courts were not free to craft new bases for alimony not authorized by law. To do so, the concurrence argued, constituted a violation of the Constitution's separations of powers doctrine.

Additionally, the concurrence reasoned, it is inappropriate, even as persuasive authority, to look to other state's decisions discussing retroactive alimony because Florida alimony is a unique creature of Florida state law.

Two months later, the First District Court of Appeal decided a second retroactive alimony case. In *Guimbellot v. Guimbellot*, 1D20-2444 (Fla. 1st DCA Dec. 22, 2022) the former husband appealed a trial court's equitable distribution and awards of alimony, retroactive alimony, and attorney's fees.

The majority opinion noted that the *Iarussi v. Iarussi* concurrence had recently found

"[r]etroactive alimony is a creation of the courts" and was therefore prohibited under the separation of powers doctrine. The *Guimbellot* Court then reversed the retroactive alimony award arguing the concurring opinion in *Iarussi* had become the court's precedent because it was concurred in by a majority of the court.

Pluto Strikes Back

Removing Pluto from the ranks of planets has always been a controversial decision. In 2014, the Harvard-Smithsonian Center for Astrophysics jumped into the debate. Experts argued over the definition of a planet and allowed the audience to vote. Not surprisingly they voted that Pluto is a planet.

Retroactive alimony is not giving up without a fight either. Judge Scott Makar, in his dissent in *Guimbellot v. Guimbellot*, noted that retroactive alimony has been an accepted part of Florida's marital dissolution jurisprudence for forty years.

Relying on *Wright v. Wright*, the dissent compared an award of retroactive alimony to a nunc pro tunc award, a type of order recognized in American and English courts for centuries: The power of the court to enter judgments nunc pro tunc is universally conceded. It is one which has been recognized and exercised from ancient times and as a part of the court's common-law jurisdiction.

Judge Makar also disagreed that the three judges joining in a concurring opinion made it binding precedent, pointing out the "opinion of the Court" is the per curiam opinion, not the concurrence. Moreover, spontaneously issuing an opinion on an unraised and unbriefed issue was improper, as it imposed additional costs on the parties who had no disagreement with existing law.

Pluto in Retrograde

Pluto's orbit is radically different from other planets. For one thing, there are the actual and apparent retrograde motions. Pluto exhibits a retrograde rotation spinning on its axis from east to west like Venus and Uranus. Even more strange, Pluto sometimes appears to be moving backwards

in its orbit, a curiosity known as "Pluto retrograde."

Similarly, a nunc pro tunc order is different from other orders. Nunc pro tunc is a Latin phrase meaning "now for then." Usually, court orders are prospective, taking effect on the date of entry. Nunc pro tunc orders are unique, in that they allow a court to go backwards in time and actually alter history.

Florida has had a long-standing rule on nunc pro tunc orders announced in *Taylor v. Chapman*, 173 So. 143 (Fla. 1937). Nunc pro tunc orders allow a court to do now what the court intended to do at the time the matter was originally acted upon but was inadvertently omitted at that time.

Nunc pro tunc orders help to correct clerical errors and omissions of inadvertence. Nunc pro tunc orders cannot be used to exceed the scope of the proper purpose for which a nunc pro tunc order can be issued. Moreover, a nunc pro tunc order cannot be used to change the substance of a prior order or judgment and cannot cure jurisdictional defects.

Maintaining Orbit

Pluto's orbit is different from the other eight planets for another reason. Pluto's trajectory encroaches into other planets' orbits which sometimes brings Pluto closer to the Sun than Neptune. A rule of astrophysics is that no two planets can share the same orbit because eventually they will collide.

Awarding retroactive alimony without statutory authority raises the issue of separation of powers. The judicial branch may have encroached into the legislative branch when courts award alimony nunc pro tunc to the filing date without statutory authority to make an alimony award retroactive.

The Florida constitution expressly codifies the separation of powers doctrine and prohibits one branch from exercising the powers of the other two branches. The Florida Supreme Court has traditionally applied a strict separation of powers doctrine, and has explained that the doctrine encompasses two fundamental prohibitions. The

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first is that no branch may encroach upon the powers of another. The second is that no branch may delegate its constitutionally assigned power to another branch.

However, courts have certain inherent or implied powers. The inherent powers doctrine establishes the implicit right of the judiciary to accomplish all objectives naturally within its realm, thereby making it possible for courts to carry out their constitutional responsibilities as an independent branch of government.

Whether awarding retroactive alimony is an authorized nunc pro tunc ruling, or judicially created substantive law violating the separation of powers doctrine, has never been decided by the Florida Supreme Court. For the High Court's answers, we will have to "keep looking up."

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Endnotes

- ¹ See Jennifer Latson, *Why Pluto Matters: A Short History of a Small (Non-) Planet*, Time, (February 18, 2015).
- ² See International Astronomical Union Resolution 6A, Press Release IAU 2006 General Assembly: Result of the IAU Resolution Votes, available <https://www.iau.org/news/pressreleases/detail/iau0603/>
- ³ See *Pluto is Demoted*, History, A&E Television Networks (June 30, 2022) available at <https://www.history.com/this-day-in-history/pluto-demoted-dwarf-planet>
- ⁴ *Wright v. Wright*, 411 So. 2d 1334 (Fla. 4th DCA 1982).
- ⁵ See Nola Tylor Tillman, *How Was Pluto Formed?*, Space.com (February 19, 2016). Available at <https://www.space.com/18561-how-was-pluto-formed.html>
- ⁶ *Id.* at 1336.
- ⁷ See §61.14, Fla. Stat. (2022) (Except as otherwise provided in s. 61.30(1)(c), the court may modify an order of support, maintenance, or alimony by increasing or decreasing the support, maintenance, or alimony retroactively to the date of the filing of the action or supplemental action for modification as equity requires, giving due regard to the

changed circumstances or the financial ability of the parties or the child.)

⁸ *Blais v. Blais*, 410 So. 2d 1365, 1367 (Fla. 5th DCA 1982) (finding trial court has inherent power to render its judgment nunc pro tunc as of the time the case was submitted to it for determination.)

⁹ See Charles Q. Choi, Scott Dutfield, *Pluto: Everything you need to know about the dwarf planet*, Space.com (July 28, 2022). Available at <https://www.space.com/43-pluto-the-ninth-planet-that-was-a-dwarf.html>

¹⁰ *Iarussi v. Iarussi*, 47 Fla. L. Weekly D2079 (Fla. 1st DCA Oct. 12, 2022).

¹¹ *Id.*

¹² See *Greene v. Massey*, 384 So. 2d 24 (Fla. 1980).

¹³ See Doug Criss, *Pluto is most definitely a planet – and should never have been downgraded*, say some scientists, CNN (September 10, 2018) available at <https://www.cnn.com/2018/09/10/world/pluto-planet-status-trnd/index.html>

¹⁴ See NASA, *Solar System Exploration* (last updated August 6, 2021). Available at <https://solarsystem.nasa.gov/planets/dwarf-planets/pluto/in-depth/>.

¹⁵ *Berkenfield v. Jacobs*, 83 So. 2d 265, 268 (Fla. 1955) (finding final judgment of dissolution became effective when entered, despite husband's death on same day.)

¹⁶ *Mitchell v. Overman*, 103 U.S. 62,64-65 (1880) ("Translated as 'now for then,' it is an ancient tool of equity designed to give retroactive effect to the order of a court.")

¹⁷ *D.M. v. State*, 580 So. 2d 634, 635 (Fla. 1st DCA 1991).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See Matt Williams, *Pluto's orbit is surprisingly unstable*, Universe Today (April 21, 2022) available at <https://www.universetoday.com/155433/plutos-orbit-is-surprisingly-unstable/>

²¹ See Robert M. Hazen, *The Story of Earth*, Penguin Group (2012).

²² Art. II, § 3, Fla. Const. ("The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.")

²³ *Id.*

²⁴ *Bush v. Schiavo*, 885 So.2d 321, 329 (Fla. 2004).

²⁵ See Roger Silver, *The Inherent Power of the Florida Courts*, 39 Univ. Miami L. Rev. 2.

²⁶ See *Jack Horkheimer: Star Gazers*, WPBT South Florida PBS broadcast (1976-present). See also The Associated Press, "Distant, tiny Pluto stripped of its planetary status", *The Gainesville Sun*, August 24, 2006 ("It's like an amicable divorce" - said Jack Horkheimer, director of the Miami Space Transit Planetarium and host of the PBS show "Star Gazer." The legal status has changed but the person really hasn't. It's just single again.")

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