0/a 11-7-84

IN THE SUPREME COURT OF FLORIDA

EUGENIA BOWEN, et al.,

Petitioners,

v.

FRANKIE L. BOWEN,

Respondent.

_____/

CASE NO. 64,906

BRIEF ON BEHALF OF THE EXECUTIVE COUNCIL OF THE FAMILY LAW SECTION OF THE FLORIDA BAR AS AMICUS CURIAE

CHAIRMAN:
BRENDA M. ABRAMS, ESQ.
Penthouse 10, Dadeland Towers
9400 S. Dadeland Boulevard
Miami, FL 33401

CHAIRMAN-ELECT:
JUDGE LEWIS KAPNER
15 Judicial Circuit
County Courthouse
West Palm Beach, FL 33401

SECRETARY/TREASURER:
MIRIAM E. MASON, ESQUIRE
215 Verne, Suite D
Tampa, FL 33606

PREPARED BY:

MIRIAM E. MASON, ESQ.
215 Verne, Suite D
Tampa, FL 33606

and

N. DAVID KORONES
1100 Cleveland St., Suite 1401
Clearwater, FL 33515

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PART I

HISTORY OF FAIRCLOTH

The Faircloth two part test in contempt proceedings, requiring the judge to make an affirmative finding that either (1) the alleged contemnor presently has the ability to comply with the order and willfully refuses to do so, or (2) that the petitioner previously had the ability to comply, but divested himself of that ability through his fault or neglect designed to frustrate the intent and purpose of the order, has a history which can be traced to the first half of this century. In State ex rel. Trezevant v. McLeod, 126 Fla. 229, 170 So. 735 (Fla. 136), the court stated:

> Under the most respectable authority on contempt that we have been able to find, a 'process' contempt commitment for refusing to obey an order of court must be based on an affirmative finding that it is within the power of the defendant to obey the order, and such finding must be made to appear on the face of the commitment, else it is void. Ex parte Cohen, 6 Cal. 318; Rapalje on Contempt, par. 129. (At page 735.)

In 1939, the Florida Supreme Court in Orr v. Orr, 192 So. 466 (Fla. 1936), established that where a husband was in default in court ordered payments pursuant to a divorce decree, the burden was upon him to prove that he was unable to comply with the court's order and that his inability to pay is due to circumstances beyond his control.

Orr was followed in Yandell v. Yandell, 33 So.2d 869, (Fla. 1948), where the Florida Supreme Court held:

> Upon a rule to show cause for non-payment of alimony, the burden of proof and of proceeding rests upon the one who is in default after it has been established that the payments had not been made in conformity with the previous award. (At page 870.)

Therefore, decades before the Faircloth decision, the Florida Supreme Court had two well established principles in domestic relation contempt proceedings. First, a contempt commitment must be based on an affirmative finding that it is within the power of the defendant to obey the order, State ex rel. Trezevant v. McLeod, 126 Fla. 229, 170 So. 735 (Fla. 1936), and second, the burden of proof is upon the party in default, Orr v. Orr, 141 Fla. 112, 192 So. 466 (1939); Yandell v. Yandell, 160 Fla. 164, 33 So.2d 869 (Fla. 1948).

PART II

FAIRCLOTH AND AFTER

Faircloth v. Faircloth, 339 So.2d 650 (Fla. 1976), established clear guidelines for the use of civil contempt in divorce matters. They are as follows:

1. The court decree which originally created the obligation to pay is itself a finding as of the moment of its entry that the party had the ability to make the required payments. (At page 652.)

2. At the contempt hearing the burden is on the party in default to prove both of the following: (a) that he is unable to comply with the court's present order to pay, and (b) that his present inability is not due to his fault or neglect but rather to circumstances beyond his control which intervened since the final decrees ordering him to pay. (At page 652.)

3. If the defaulting party fails to meet his burden as stated in #2 above, the chancellor may find as a fact that he continues to be able to pay, as was originally decreed, or that the disability was self-induced. (At page 652.)

4. The trial court must find that the defaulting party has the present ability to comply with the order of the trial court. This can be done by the trial judge making one of the two following affirmative findings: (a) the defaulting party presently has the ability to comply with the order and willfully refuses to do so, and (b) that the defaulting party previously had the ability to comply, but divested himself of that ability

through his fault or neglect designed to frustrate the intent and purpose of the order. (At page 651.)

5. The chancellor's findings must be made explicit. (At page 652.)

6. Once the chancellor makes the finding as stated in #4, he may order the defaulting party to pay or be imprisoned for his contemptuous refusal to do so. (At page 652.)

7. The defaulting party has no right to an appointment of counsel as an indigent when he is charged with civil contempt. (At pages 651 and 652).

There is no doubt that the facts in Faircloth, supra, support the conclusion that the defaulting party divested himself of the ability to pay. Twenty-two months after the final judgement of divorce, the defaulting party had: paid none of the ordered lump sum alimony; paid none of the ordered contribution toward the mortgage, taxes, assessment or maintenance of the marital home; had paid nothing toward the ordered attorney's fees; and was $930 in arrears in child support. The defaulting party had conveyed his undivided one-half interest in the marital home to a third party, putting it beyond reach for satisfying his obligations under the final judgment.

Pugliese v. Pugliese, 347 So.2d 422 (Fla. 1977), restated the law on civil and criminal contempt. Specifically, the law is as follows:

1. Civil contempt is for the purpose of coercing action or non-action by a party. It is instituted by one of the parties to the litigation. The order is for the private benefit of the

offended party. The order may impose a jail sentence, but must provide for termination of the contemnor's sentence upon purging himself of the contempt. The sentence is usually indefinite and not for a fixed term.

2. Criminial contempt is to vindicate the authority of the court or to punish for conduct offensive to the public which is in violation of the court's order. If the conduct is obstinate, criminal contempt would be the appropriate remedy. If criminal contempt is used, the procedural due process safeguards of Florida Rules of Criminal Procedure 3.830 and 3.840 must be complied with. If the conduct is committed in the immediate presence of the court, it is direct contempt; if the conduct is committed outside the presence of the court, it is indirect contempt.

This decision did not address the specific two-prong test of ability to pay as was stated in Faircloth, supra. The facts before the Pugliese court were a husband who had failed to move from the marital home as ordered in the final judgment. Therefore, ability to pay and the intentional divestiture of ability was not an issue before the court.

In Lamm v. Chapman, 413 So.2d 749 (Fla. 1982), the Supreme Court stated that the facts before the trial court were as follows: the husband was a fishing boat captain whose income tax return for the previous year showed his gross salary to be approximately $4,379. Since the former divorce, he had remarried and his second wife was seven months pregnant. The only other fact provided was that the arrearage was $8,135 because he had

not made any payments to his ex-wife for child support. The trial court had confined the husband to jail for ninety days with the provision that he could purge himself upon payment of the arrearage. This Court, in reversing the trial court, stated that the record did not support the trial court's determination that the husband had the ability to pay the child support. There was no discussion about the two-prong test in Faircloth. There was no discussion about the small amount of gross income this boat captain was earning or why his income was limited to such a small amount. While the trial court's order allowed the ex-husband's release upon payment and thus purging, the Supreme Court stated that the record did not support that he had the ability to pay the child support.

Andrews v. Walton, 428 So.2d 663 (Fla. 1983), addresssed the issue of the right to counsel for a prospective contemnor in a civil contempt proceeding for failure to pay child support. Both the comments by the Supreme Court and the facts themselves clearly show that the trial judge was very careful in his findings of fact and his order. Those findings and that order were upheld by this Court. This Court further noted that the trial court correctly applied the requirements of Faircloth, supra, in determining that the husband had the ability to pay child support and willfully refused to pay. The trial court found that the former husband had the ability to pay the court ordered $15 a week in child support since he was earning take-home pay of $230 every two weeks. He had willfully refused to pay, and the court ordered that he could purge himself by

paying $300 of the $544 arrearage. The court additionally found that he had the ability to pay the purge amount, and even allowed him to use his next paycheck to purge himself of the contempt. Citing Faircloth, supra, as authority, Andrews, supra, stated that:

> ... to satisfy due process, a person cannot be adjudicated guilty of failing to pay alimony or child support and sentenced to imprisonment conditional upon payment unless the trial court finds that the person (1) has the ability to pay the payments; and (2) willfully refuses to pay. (At page 666.)

It is obvious that Faircloth, supra, did not use the identical words as Andrews, supra, quoted it for. Faircloth, supra, did clearly state that the chancellor's findings must be explicit. Andrews, supra, failed to restate in its opinion was the elements of the burden upon the party in default. Faircloth, supra, stated that upon the alleged contemnor's failure to discharge his burden of proving that he was unable to pay by reason of intervening factors not due to his own neglect or fault, then the chancellor could find as a fact that he continued to be able to pay. The facts before the Andrews court did not involve a person who was unable to pay for any reason. It was obvious his finances well provided him the means to pay the amount of child support which had been ordered. Therefore, a reiteration of the element of the burden on the defaulting party was not necessary to the court's decision.

The Andrews court did proceed on to respond to the issue raised in the appeal and stated that a parent who is unable to acquire the funds necessary to purge himself will not be subject

to imprisonment for civil contempt; therefore, fundamental fairness would be satisfied and due process would not give rise to the right to appointed counsel, i.e.:

> ... we find that there are no circumstances in which a parent is entitled to court appointed counsel in a civil contempt proceeding for failure to pay child support because if the parent has the ability to pay, there is no indigency, and if the parent is indigent, there is no threat of imprisonment. (At page 666.)

Do the above conclusions on court appointed counsel apply both to alleged contemnors who, through no fault or neglect, do not have the ability, and to those who, by their own fault and neglect, have no ability?

The district courts have relied on their interpretations of Andrews, supra, and conflict with numerous district court opinions which based their rulings on Faircloth, supra. Others have been reversed because the trial court obviously did not comply with either Faircloth, supra, or Andrews, supra.

Robbins v. Robbins, 429 So.2d 424 (Fla. 3rd DCA 1983), reversed the contempt orders adjudging approximately thirty-eight fathers in contempt. The appellate court noted that the trial court had failed to specify the contemnors' earnings and their periods of employment, and therefore the appellate court was unable to verify the accuracy of the court's computations. The trial court sentenced some fathers who were unemployed at the time of the hearing to jail for failure to pay child support in the past. There were no specific findings by the trial court upon facts in the record that these fathers had intentionally rid

themselves of the ability to pay. Neither Andrews, supra, or Faircloth, supra, were complied with.

In Smith v. Smith, 430 So.2d 521 (Fla. 2nd DCA 1983), the particular contempt order failed to make a finding as to ability to pay. Since it did not, it was void.

Finally, in Ponder v. Ponder, 438 So.2d 541 (Fla. 1st DCA 1983), a district court looked at the difference between Faircloth, supra, and Andrews, supra, and distinguished them. The facts before the Ponder court are scanty. There was a child support arrearage of $750. The only evidence in the record concerning the husband's financial status was that at the time of the sentencing, he had no money or property except for a $100 paycheck due shortly. The husband was sentenced to jail for six months with the option of purging his contempt by paying the $750 arrearage. The First District noted that Faircloth, supra, originally required the trial judge to make one of the two affirmative findings previously cited. This, of course, included as an alternative that the alleged contemnor previously had the ability to comply, but divested himself of that ability through his fault or neglect designed to frustrate the intent and purpose of the order. The First District then noted that Andrews, supra, restated Faircloth, supra, and held that to satisfy due process, the court must make two findings jointly, and not in the alternative. Specifically, the court must find: (1) the contemnor has the ability to make the payments, and (2) he willfully refused to pay. They have interpreted the restatement to mean that the alleged contemnor "... cannot be committed to

jail for civil contempt unless there is also an affirmative finding based upon evidence in the record that at the time of the incarceration the contemnor has the ability to make payment of the purge amount." (At page 543.) Otherwise, the civil contempt would turn into criminal contempt, and accordingly the Rules of Criminal Procedure must be complied with.

Effectively, Ponder, supra, stated that Faircloth, supra, has been reversed and/or modified by Andrews, supra. Since there were no facts explicitly found by the trial court which met the two-prong test of Faircloth, supra, this conclusion was not necessary for reversal of the trial court's contempt order.

The Second District in Bowen v. Bowen, 9 F.L.W. 294 (Fla. 2nd DCA 1984), reached the final question of " ... whether a parent may be imprisoned for contempt of court on a finding that he wrongfully divested himself of the ability to make court ordered child support payments and, if so, whether the parent is entitled to counsel at the contempt hearing." (At page 294.) The trial judge made an express finding that the contemnor was unable to pay child support because the parent, through his own fault or neglect, was divested of that ability. The specific facts were that the ex-husband was laid-off in May of 1982 due to his testimony of a general cutback in the employer's work force. He had occasional yard work, never exceeding $25 per week and otherwise remained unemployed until January 1, 1983. The trial judge adjudged him in contempt, sentenced him to five months and twenty-nine days in jail, and provided that he could purge himself by paying $916. The appellate court found that the

contemnor's jail sentence for civil contempt was improper because he did not have the present ability to pay. The Second District, in interpreting Faircloth, supra, and Andrews, supra, found that Andrews, supra, did not specifically address the situation before the court, i.e., a parent, through his own fault or neglect, divesting himself of the ability to pay. Therefore, they proceeded to recede from Faircloth, supra. The appellate court stated that in view of the contemnor's present inability to pay, the court's sentence was equivalent to punishment for criminal contempt. Therefore, the alleged contemnor was entitled to the due process requirements of the Florida Rules of Criminal Procedure and the right of counsel.

The Second District did state that once you provide the alleged contemnor with the right to appointed counsel and comply with the Florida Rules of Criminal Procedure, the indigent contemnor could be subject to jail if he had disdained the authority of the court by divesting himself of his ability to comply with the child support order.

The First District took the issue one step further than Bowen, supra, in Smith v. Miller, 9 F.L.W. 1272 (Fla. 1st DCA, June 15, 1984), wherein the alleged contemnor did have counsel, but was not afforded any of the other protection afforded by the rule of criminal procedure. The appellate court held that, based upon the evidence presented and the statement by the trial court, the trial court based its civil contempt order upon a finding that the alleged contemnor had the ability to comply with the court order but divested himself of that ability through his own

fault or neglect designed to frustrate the intent and purpose of the support order. The husband did not have the ability to pay the amount of arrearage required to avoid going to jail in the contempt order. Therefore, the appellate court reversed the civil contempt order. The court found that absent a finding of present ability to pay to secure release from custody, the proceeding is transformed from civil to criminal contempt, and there must be full compliance with the Florida Rules of Criminal Procedure.

Let's suppose that a man conspires to murder his wife, is arrested for that conspiracy, and because of heavy expenses incurred in defending himself against the criminal charges, he claims that he is unable to meet his support obligations. At first glance, one might say this is an extreme factual situation dreamed up by the undersigned. That assumption is in error. These were the exact facts before the Third District Court of Appeal in Waskin v. Waskin, 9 F.L.W. 1381 (3rd DCA, June 19, 1984), decided after Andrews, supra, Ponder, supra, and Bowen, supra, Waskin, supra, citing Faircloth, supra, stated:

> In a contempt proceeding for failure to comply with the support order, the party in default has the burden of proving both (1) that he is unable to comply with the court's order to pay, and (2) that his inability to pay is not due to his fault or neglect but instead to circumstances beyond his control. (At page 1381.)

In Waskin, supra, the defaulting party asserted his Fifth Amendment privilege and refused to respond to the wife's attorney's questions. The court ruled that this was his prerogative, but also found that to satisfy his burden in the

case, he was required to dispel the inference that he was in willful non-compliance with the support order by showing that he did not conspire to kill his wife.

It is obvious that the Waskins court considered Faircloth, supra, to be good law and not to have been restated.

The entire question centers around the intention of this Court in its restatement of Faircloth, supra, as contained in Andrews, supra. The facts before the Andrews court did not contain an alleged contemnor who had divested himself of the ability to pay. The contemnor before the Andrews court clearly had the ability to pay. Therefore, the question is "Was the Supreme Court in Andrews, supra, intending to restate Faircloth, supra, and limit its application, or were they restating Faircloth, supra, just for the purposes of the facts before the court?" Based upon the DCA's interpretation of the ruling in Andrews, supra, if the parent who is required to make payments, intentionally and by his own fault and neglect rids himself of the ability to pay, the trial court would be required to proceed through indirect criminal contempt. This will require an order to show cause, service of that order upon the parent, the appointment of counsel for the parent, and full compliance with Florida Rules of Criminal Procedure 3.830 and 3.840.

The law in Florida has come full circle. From Faircloth, supra, and the two-prong test, we have come to Bowen, supra, to there being only one test. With Bowen, supra, it is absolutely irrelevant why a person does not have the ability to pay and what his immediate ability is to remedy or reverse that inability. He

can intentionally dispose of all of his assets as Mr. Faircloth did, or even attempt to kill the person he is to make the court ordered payments to, and thus expend all of his money on counsel for those criminal charges, and civil contempt cannot be used.

Bowen, supra, and Ponder, supra, do not talk about the equitable principles of clean hands and fairness which have been the driving force behind the existence of the equitable court which determine dissolution of marriage actions.

The Second District, after stating that the principles of law relating to the particular points on appeal were well settled, in Sokol v. Sokol, 441 So.2d 682 (Fla. 2nd DCA 1983), (citing Faircloth, supra) stated: "Finally, a contempt order in a domestic relations case must include a finding of the obligated party's ability to pay the amount due or show that the court found that the party had voluntarily divested such ability." (At pages 684 and 685.) They went forward and said: "The evidence at the hearing reveals that the husband did not have the ability to pay financial awards to the extent ordered by the court. The trial court may nevertheless impute an income to a spouse where the evidence indicates that failure to exert oneself to meet family obligations." (At page 685.)

The cases often cite the maxim that one seeking equity must do equity. This has been used to support the well settled law in Florida that a party seeking relief in a dissolution of marriage action cannot refuse to answer relevant questions by asserting their Fifth Amendment privilege, and at the same time seek relief from the court. Stockham v. Stockham, 168 So.2d 320 (Fla. 1964).

How can it be equitable for a person to refuse to make every effort to be employed and support his family and ask the court not to punish him? Then he is appointed counsel and can refuse to testify and prevent the court from determining that he has the ability to pay.

Indirect criminal contempt can be easily used when the violation charged is violation of a restraining order by violence toward a person, or failure to comply with provisions which affect the custodial and visitation arrangements for children. It is a completely different reality when the issue is the payment of support. The Fifth Amendment right against self-incrimination seriously limits a party's ability to prove that the alleged contemnor continues to have the ability to pay.

PART III

PROBLEMS RESULTING FROM BOWEN V. BOWEN

As practitioners attempting to enforce support orders, we have determined that if the court accepts Bowen, supra, the following would be some of the problems it engenders:

1. The presumption of ability to pay, which arose from the original judgment, is eliminated.

2. The burden of proof shifts from the alleged contemnor to the spouse who was to receive the payments.

3. Every civil contempt proceeding becomes ab initio a criminal contempt proceeding:

a. The quantum of proof changes from a preponderance of the evidence to proving guilt beyond to the exclusion of all reasonable doubt.

b. The alleged contemnor will be able to refuse to testify and be examined, claiming his right against self-incrimination.

c. The court will lose their purge ability, i.e., the limited ability of the trial court to modify a criminal sentence.

d. The jails will become more crowded as a result of the courts having no other remedy remaining other than putting the individuals in jail.

e. If as is true in so many incidences, the particular jail facilities in the county wherein the alleged contemnor is found in criminal contempt are already overcrowded, the trial judge will have no option other than to postpone or waive sentence because of the overcrowded nature of the jails.

4. With this transfer from civil to criminal contempt, the court loses its coercive ability, with the only purpose served being to vindicate the authority of the court and punish the individual, without feeding anybody.

5. Circuit court dockets would become congested even beyond the problems which presently exist.

6. The public defender's office and/or some state agency will have to expand their services to represent individuals who are now charged with criminal contempt.

7. Because of the new change in the burden of proof and the quantum of proof, which will be discussed below, support will become increasingly difficult to be enforced, and the welfare roles will increase.

8. The original judgment, as a result in the shifts in burden, becomes a nullity.

In attempting to completely follow the reality of Bowen, supra, to the everyday case, it becomes apparent that civil contempt will lose its effectiveness.

Consider the following:

Final judgment of dissolution of marriage is entered wherein the wife receives residential care of the parties' minor children and the husband is required to pay both alimony and child support. At the time of the judgment the husband is employed and the court considers that employment in the husband's ability to pay in determining the amount of support he must pay. After the final judgment is entered, the husband ceases paying support. The husband has ceased communicating with the wife so she is not aware of his current financial status. The wife in no way wants her former husband to go to jail because she needs the support payments that the court originally ordered. The wife hires an attorney and the attorney files a motion for civil contempt.

Pursuant to Faircloth, supra, the attorney knows that all his client must do is to testify as to non-payment and then the burden shifts to the husband to testify as to the reasons for non-payment. At the hearing the attorney establishes non-payment, and then the judge turns to the husband for him to meet the burden. If this Court upholds the ruling in Bowen, supra, no matter what this husband has done to divest himself of the ability, if he does not have the ability to pay, the court cannot place him in jail. Should the trial judge at this point advise the husband that any comments he makes may be used against him since the wife may be forced to file for criminal contempt? Additionally, if the husband testifies, the court finds that he does not have the ability, cannot order him in jail for civil contempt, and he does not advise him of his rights, can this statement be used in criminal court in the criminal contempt proceeding? Also, what if when the judge turned to the husband to respond, the husband had chosen not to appear at the hearing. Even though there would have been appropriate service upon the husband, in many cases the wife would not be able, because of the lack of evidence, to prove present ability to pay. Therefore, even though the judge could find that the individual was in contempt of court for non-payment, he could not sentence him to jail for civil contempt.

Let's also now assume that not only do we have the facts as above, but additionally the support for the wife and her children as was originally ordered in the final judgment is her only means of support. She has no wealthy relatives to assist her in

proving her husband's ability to pay, and there are no assets that the parties had acquired during the marriage that she was awarded that she could now sell to hire an attorney and prove the husband's ability to pay. If the husband has the right not to answer the questions on the basis that they may be used against him in criminal contempt, the burden has to shift to the wife to now prove his ability to pay. Additionally, if he doesn't appear at the hearing she will now have that burden. But if she doesn't have the money to prove he has the ability to pay, how is she going to do it? What if the particular court is located in a county wherein there is a court commissioner or other agencies available to assist her as an indigent to attempt to prove the husband's income? If the husband refused to cooperate, i.e., does not testify and thus you cannot determine where he is employed, determine where his bank accounts are, or determine what other assets he has, while you may be able to prove he is in contempt because of non-payment, this is useless because you can't get a court order putting him in jail and thus "really" requiring him to pay.

If this Court upholds the rationale of Bowen v. Bowen, 9 F.L.W. 294 (2nd DCA, Fla., January 25, 1984), Mr. Faircloth (in Faircloth, supra, and Mr. Waskin, (in Waskin, supra) would not have been held in civil contempt.

The problems engendered by this Court adopting the Bowen and Ponder formulations are the result of shifting the burden of proof to the parent to whom payment is owing. Ponder, supra, required the custodial parent to prove that the defaulting parent

has the present and immediate ability to pay. Bowen, supra, adopted the Ponder rule in contravention of existing principles of law. Orr, supra, and Yandell, supra, have long established that the burden of proof is upon the party in default. The contemnor arrives in court with the presumption of the ability to pay cast upon that party by the court's original decree which first created the obligation, Faircloth, supra. To otherwise shift the burden would be to hold that the original decree was a nullity.

If the burden is shifted to the custodial parent, that parent is required to prove fault or neglect of the spouse in default at her peril and expense. If ability to pay cannot be proven, the wife's only alternative is to file a criminal contempt proceeding pursuant to Rule 3.840, Florida Rules of Criminal Procedure. The defendant cannot be compelled to testify against himself and cannot be required to prove any element of the offense. Further, not only is the burden of proof shifted, but the quantum of proof also changes from a preponderance of the evidence to proof beyond a reasonable doubt.

While the impact of the Bowen and Ponder rule will negatively affect custodial parents and dependent children on the individual level, the repercussions of such a rule will affect society. Already crowded circuit court dockets will become even more conjested. Civil contempt proceedings that could be utilized in under an hour would take hours or days to complete under the veil of criminal contempt proceedings and only then after having been triggered by a civil contempt proceeding

determining that the contemnor intentionally or negligently divested himself of the ability to pay. At the first level society faces an inefficient use of the judiciary.

At the second level society will ultimately bear the cost of supporting the children and perhaps the custodial spouse. It will be difficult to prove beyond a reasonable doubt that a man has not been able to secure employment or that he purposely or negligently divested himself of his ability to earn. Because an alleged contemnor cannot be compelled to testify against himself under the safeguards that surround Rule 3.840, F.R.C.P., the reality is that few if any non-paying spouses will be found in contempt or have any incentive to rehabilitate themselves. The needs of spouse and child will not be met by the party who bears the support obligation so the needy will turn to public assistance and society will bear the cost.

Worse yet is the situation that occurs if the defaulting party <u>is</u> found in contempt through a criminal contempt proceeding. The contemnor would be incarcerated with little or no opportunity to purge. He would remain in prison throughout the prison sentence at yet greater cost to society for his maintenance in already crowded prisons. Once the sentence was served, the authority of the court would be vindicated but the dependent spouse and children would remain financially dependent on public assistance or forced to live in substandard conditions. Having once experienced the futility of the process, a disappointed spouse or frustrated HRS would be unlikely to pursue enforcement of a court ordered support obligation against that individual

again. The defaulting party would have achieved his purpose and would conceivably be free of his support obligations.

PART IV

SOLUTIONS

The big issue and/or complaint which is validly raised is: Are individuals being put in jail when they do not have the ability to pay because of a situation they cannot control because they cannot get the ability to pay? The respondent argues that Faircloth, supra, and the two-prong test as itemized in Faircloth, supra, has caused this possibility. It is submitted that Faircloth, supra, is not the problem, but instead is the application by the trial judges of the second part of the two-prong test.

Admittedly, there is a jump which must be made between a specific finding of fact to get to the conclusion that the court must make to place someone in jail. Specifically, upon the alleged contemnor failing to meet his burden of inability not due to his fault or neglect, the judge can find as a fact that he continues to have the ability, or that the inability was self-induced, and place him in jail.

The Respondent complains that judges are not making appropriate findings of fact and are using standard forms that are of a fill in the blank nature, with a standard finding of fact already prepared. We have no doubt that this is a more than valid complaint. When the Appellate Courts review the record on appeal in such cases, they cannot find sufficient facts to justify the trial court's findings. It is submitted that if this Court were to rephrase, or make more explicit, the two-prong test in Faircloth, supra, trial judges would then be required to be

more careful in their findings of fact, (which are already required to be made explicit in Faircloth, supra).

There is no doubt that if the court looks at the facts facing the trial court in Bowen, supra, you must come to the conclusion that Mr. Bowen did not have the ability to pay. If in fact, as the respondent alleges in his footnote, that the unemployment rate in the particular area wherein Mr. Bowen resided was 18%, Mr. Bowen may have had a legitimate reason for the non-payment of support. It is that explicit factual finding by the trial court which is so necessary.

According to the stipulated facts which were before the trial court, the husband had filed an affidavit with the trial court which the Petitioner states showed: "Although he diligently searched for work and had occasional income from yard work never exceeding $25 per week, he was otherwise unemployed to January 1, 1983." (At page viii, Initial Brief of Petitioner.) If this was in fact the only evidence before the court, and the trial court, having an opportunity to judge the demeanor of Mr. Bowen, found that there had been a diligent attempt to find employment, Mr. Bowen could not be found in contempt. If the trial court, with the opportunity to view Mr. Bowen's demeanor, found that he had not been diligent in his attempts at employment, or through examination of Mr. Bowen found Mr. Bowen's conclusions of diligence inappropriate, can the trial court find Mr. Bowen in contempt with no other contradictory evidence? Can the appellate court take away from the trial court their ability

to judge the demeanor and truthfulness of the witness presented before them?

Based upon the cold stipulated facts, this Court should uphold the appellate court's findings of fact, i.e., that the trial court erred in determining that Mr. Bowen had the ability to pay or had intentionally caused his inability to pay. This does not mean that this Court should uphold the law as stated in Bowen, supra.

The respondent challenges the trial court to be creative. It is this area that the court should look at in restating the second prong test of Faircloth, supra, and provide to the trial judge more specific guidelines to find intentional divestiture of ability.

Assuming that this Court finds that the trial judge does not have to advise the potential contemnor of their right to remain silent during the civil contempt proceedings, it is recommended that the Supreme Court provide a redefinition of "present ability to pay" to include the potential contemnor's power to obey the court order, taking into account that the power may include future power. If unemployment is the excuse provided to the court for non-payment, and based upon the substance of that excuse the trial court wishes to give the individual (based upon the facts before the court), additional time to show their good faith, seek employment and pay the arrearage, then the trial court should make some explicit findings as to the efforts the individuals have made. Additionally, the trial court should state whether or not the trial court finds those efforts

sufficient in the market place wherein the trial court sits and/or the potential contemnor resides. The order should explicitly state what other assets, if any, the potential contemnor owns which could be used for the payment of support and if any assets have been disposed of.

Rather than abandoning established case law principles for the Ponder and Bowen formulation, a better way is to view Trezevant, supra, and Yandell, supra, as guidance for a more clearly defined principle of law. Without a doubt, Tresveant, supra, Orr, supra, Yandell, supra, Faircloth, supra, and Andrews, supra, established that a contempt commitment must be based on an affirmative finding that it is within the power of the defendent to obey the order and that the burden of proof is upon the party in default. McLeod, supra, Orr, supra, and Yandell, supra, evolved into Faircloth, supra, which stated:

> The burden is upon the party in default to prove not only that he is unable to comply with the court's present order to pay but also that his present inability is due not to his fault or neglect but rather to circumstances beyond his control which intervened since the final decree ordering him to pay. (At page 652.)

Andrews, supra, is yet another step in the evolution. Andrews, supra, answered the question of right to counsel in civil contempt proceedings. The Andrews court stated:

> There are no circumstances in which a parent is entitled to court-appointed counsel in a civil contempt proceeding for failure to pay child support because if the parent has the ability to pay, there is no indigency, and if the parent is indigent, there is no threat of imprisonment. (emphasis supplied.) (At page 666.)

By defining "ability" and with minor interlineation or evolution, the present dispute can be resolved without throwing the baby, Faircloth, supra, out with the bath water and adopting an entirely new standard with problems foreseen and unforeseen. Faircloth, supra, adds guidance. The second part of Faircloth's two part test requires "that the petitioner previously had the ability to comply, but divested himself of that ability through his fault or neglect designed to frustrate the intent and purpose of the order", (at page 651.) If a finding is made by the trial court that a defaulting party had the ability to pay but divested himself either negligently or intentionally to frustrate the order, then his "ability" remains in the Andrews sense and he is therefore not idigent. The defaulting party merely needs to implement or use that ability to secure employment and meet his support obligations. He should be required to follow equitable maxims or not be able to benefit from them.

The safeguards for the defaulting party are there. His purge mechanism or the key to his prison goes to his cell with him. In Andrews, supra, the court waited a week for Mr. Walton's next paycheck. In the present and future dispute the Court can allow the defaulting party a week or month to secure employment and the coercive rather than punitive aspect of the civil contempt proceeding remains in tact. The desired end is achieved. The additional safeguard is the affirmative finding by the trial court that the defaulting party divested himself of the ability through fault or neglect designed to frustrate the intent and order of the court. A man physically or mentally incapacitated

would not be punished under such a test since he in fact would be indigent and lack the ability to pay and would not be imprisoned. Therefore, Andrews, supra, remains good law and Faircloth, supra, remains good law by defining "ability" as a present ability to seek and secure employment.

In the instant controversy, if the trial court's determination was accurate that Mr. Bowen had the ability to comply with the original court order but had divested himself of the ability to do so through his own fault or neglect to frustrate the order, he still carried the key of his prison cell in his own pocket. But for his own fault or neglect by which he temporarily divested himself of the ability to pay, he still possessed the capability to earn and therefore the ability to pay pursuant to the court order. The key that Mr. Bowen would carry to his jail cell would not be the fruit of his labor with which to pay the support order, but the seed which could be sown to produce the fruits of labor. He has no less access to his liberty than the man who must wait for his next paycheck in order to fully purge his contempt.

PART V

CONCLUSION

This Court should reverse the legal findings and conclusions of Bowen, supra, but should send back to the trial court this cause for the purposes of making additional factual findings which explicitly state why the court found that the husband previously had the ability to comply, but had divested himself of the ability through his fault or neglect designed to frustrate the intent and purpose of the order. Further, this Court should redefine ability to pay and/or provide to the trial court more specific instructions and guidelines to use in determining ability to pay. In so doing, Faircloth, supra, should be affirmed.

Respectfully submitted,

MIRIAM E. MASON

N. DAVID KORONES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct of the above has been furnished by U. S. Mail to: Joseph R. Boyd, Esquire and Susan S. Thompson, Esquire, 2441 Monticello Drive, Tallahassee, FL 32303, Chriss Walker, Esquire, Department of Health and Rehabilitative Services, Child Support Enforcement, 1317 Winewood Boulevard, Tallahassee, FL 32301, and Robert T. Connolly, Esquire, and Michael A. Campbell, Esquire, Florida Rural Legal Services, Inc., P. O. Drawer 1499, Bartow, FL 33830, on this 31st day of August, 1984

MIRIAM E. MASON, ESQUIRE