O/a 11-7-84

IN THE SUPREME COURT OF FLORIDA

EUGENIA BOWEN, et al.,

Petitioners,

v.

CASE NO. 64,906

FRANKIE L. BOWEN,

Respondent.

_____/

INITIAL BRIEF OF PETITIONERS

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QUESTION PRESENTED

Whether the requirements of Rule 3.840, Florida Rules of Criminal Procedure, are activated when a noncustodial parent is alleged to have purposely or negligently divested himself of the ability to comply with the court's child support order with the intent or purpose to frustrate that order, and incarceration is sought pursuant to Faircloth v. Faircloth, 339 So. 2d 650 (Fla. 1976).

STATEMENT OF THE CASE AND FACTS

This statement of the facts and proceedings is substantially from the Fourth District Court of Appeal's statement of facts as found in the court's Bowen decision. It is from that decision that the present appeal is taken.

The Florida Department of Health and Rehabilitative Services ("HRS") on May 3, 1982, filed an action for child support against Frankie L. Bowen, respondent, a father who was separated from his wife. No dissolution of marriage proceeding had been filed. The HRS action was to establish the amount of child support to be paid by Mr. Bowen to HRS, apparently to reimburse HRS for public assistance payments made to Mrs. Bowen.

HRS obtained a default against Mr. Bowen, and an order of support, signed by Circuit Judge Richard A. Bronson, was filed July 20, 1982. That order directed Mr. Bowen to pay $161.00 plus a $2.00 fee monthly to the HRS Domestic Relations Department.

After Mr. Bowen did not make the court-ordered payments, Circuit Judge Randall G. McDonald, on October 1, 1982, issued an order for Mr. Bowen to appear and show cause why he should not be held in contempt. When Mr. Bowen did not appear as directed, Judge McDonald issued an arrest warrant.

Mr. Bowen was arrested and brought before Circuit Judge Clinton A. Curtis to show cause why he should not be held in

contempt for failure to comply with the July 20, 1982 order. Judge Curtis on December 27, 1982, adjudged Mr. Bowen in contempt of court upon a finding that Mr. Bowen was financially able to make the support payments. Mr. Bowen was ordered to begin paying the Domestic Relations Department $50.00 per week. In the contempt order Judge Curtis excused Mr. Bowen from serving jail time.

After Mr. Bowen's failure to make payments continued, Judge McDonald, on January 20, 1983, issued an order for Mr. Bowen to appear and show cause on February 11, 1983, why he should not be held in contempt. This order admonished Mr. Bowen to bring "all proof you may have such as pay stubs, income tax returns, doctor's statements, receipts, etc. to show why you have not made these payments." The order notified Mr. Bowen that "if you are adjudged in contempt you may be imprisoned and/or assessed a fine and costs."

Mr. Bowen's affidavit filed in the trial court presented various purportedly exculpatory circumstances: Mr. Bowen was laid off from his $95.00 per week job as a painter in May 1982 due to a general cutback in the employer's work force. Although he diligently searched for work and had occasional income from yard work never exceeding $25.00 per week, he was otherwise unemployed to January 1, 1983. After that period of unemployment

he received his first paycheck on January 21, 1983, and tendered to the the Domestic Relations Department $50.00 that same day. However, the department would not accept that payment until after the then scheduled February 11, 1983, hearing.

The February 11, 1983 hearing was without a court reporter, but the parties and Judge McDonald agreed to the statement of evidence and proceedings concerning that hearing which is in the record. That statement reflects that at the five to ten minute hearing Mr. Bowen was told that he could present any evidence or witnesses on his behalf, that Mr. Bowen did ask questions to Mrs. Edie Smith of the Domestic Relations Department, that Mr. Bowen appeared without counsel. Mr. Smith testified that Domestic Relations Department employees are instructed to accept any payment whenever it is tendered. Mr. Bowen was unable to give the court the name or description of the person who allegedly refused to accept his payment. Judge McDonald advised Mr. Bowen that he was then $916.00 in arrears and asked how much Mr. Bowen could pay at that point. Although Mr. Bowen responded that he could pay $200.00, he did not demonstrate that he had that sum in his possession.

On February 11, 1983, Judge McDonald adjudged Mr. Bowen to be in contempt for the failure to make support payments, finding that Mr. Bowen had had the ability to comply with the December 27, 1982, order but had divested himself of the ability to do so through his

his own fault or neglect to frustrate that order. The contempt order sentenced Mr. Bowen to five months and twenty-nine days in jail but provided that Mr. Bowen could purge himself by paying the $916.00.

The record is unclear as to whether Mr. Bowen was then arrested and delivered to the sheriff for incarceration. But Judge McDonald stayed the incarceration pending this appeal and granted Mr. Bowen's motion for determination of indigency for purposes of this appeal.

The Fourth District Court of Appeal affirmed the order of the trial court in an opinion filed January 25, 1984. The court subsequently granted a petition for rehearing and vacated its original order of affirmance. In its reversal of the petitioning parent's conviction and sentence the court held "that the parent under the facts of this case may be imprisoned for contempt but that since such a proceeding takes on criminal contempt characteristics, the parent is entitled to counsel and to the other protections of Florida Rule of Criminal Procedure 3.840."

It is from the above order that this present action is appealed.

SUMMARY OF ARGUMENT

The issues in this case revolve around whether incarceration is available at a civil contempt hearing, where a defaulting parent has purposely divested himself of the ability to comply with the court's support order, and the divestiture was done with the intent to frustrate the court's order. Faircloth v. Faircloth, 339 So. 2d 650 (Fla. 1976), clearly allows for such incarceration. A lower court cannot overrule or modify a principle established by the Supreme Court. Bowen attempts to do so.

Bowen is also contrary to Florida law in that it limits the discretion of the trial court in matters of child support enforcement, and shifts the burden of proof from the defaulting parent to the custodial parent on the question of whether the defaulting parent has the ability to comply with the court's support order. Faircloth, supra; Wright v. Wright, 418 So. 2d 745 (Fla. 4th DCA); Waskin v. Waskin, _So. 2d_(Fla. 3rd DCA 1984)[9 FLW 1381].

Public policy requires that the courts be given the discretion to enforce child support orders. The primary and most effective method of coercion for enforcement is incarceration. Upon the finding by the trial court at a civil contempt hearing that the defaulting parent has purposely divested himself, incarceration must be available to coerce the defaulting parent into compliance. Faircloth clearly allows this. If this Court finds that Faircloth does not so hold, an exception to allow incarceration at civil contempt hearings

after the above finding has been made must be carved out. If not enforcement of child support orders will be so difficult as to be impossible. In order to protect the children relying on support from an absent parent, incarceration as coercion for civil contempt per Faircloth must be retained and strengthened.

ARGUMENT

I

A POINT OF LAW, ONCE ESTABLISHED BY A SUPERIOR COURT, FORMS A PRECEDENT WHICH SHOULD BE ADHERED TO BY LOWER TRIBUNALS.

As a general rule, the law in Florida is that once a judicial decision establishes a particular point of law, that point is precedential. It should comprise the basis for future decisions in similar cases.

> Stare decisis is a fundamental principle of Florida law . . . Where an issue has been decided in the Supreme Court of the State, the lower courts are bound to adhere to the Court's ruling when considering similar issues, even though the court might believe that the law should be otherwise. State v. Dwyer, 332 So. 2d 333 (Fla. 1976).

Petitioner recognizes that the doctrine of stare decisis does not render the law static. The dynamic forces of a changing world require the law to adjust to new situations. However, the Florida Supreme Court has been quite clear on one principle of the doctrine. If a fundamental change is required in a controlling precedent established by the Supreme Court, only the Supreme Court can overrule that precedent. Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973). A District Court of Appeal has no authority to change a basic principle established by the Supreme Court. As this Court so succinctly stated, "To allow a District Court of Appeal to overrule controlling precedent of this Court would be to create chaos and

uncertainty in the judicial forum, particularly at the trial level." Hoffman, at 434.

Petitioner contends that the Bowen decision conflicts with this Court's decision in Faircloth v. Faircloth, 339 So. 2d 650 (Fla. 1976). The conflict is of such a nature that the practical effect of Bowen is the elimination of a Supreme Court established test for determining civil contempt and relative remedial measures in nonsupport cases.

Specifically, the Faircloth Court fashioned what has subsequently become known as the "two-prong test". In order to adjudicate a parent's behavior in failing to comply with a support order as contemptuous, the Court stated there must be a finding that either (1) the parent presently has the ability to comply with the order and wilfully refuses to do so, or (2) that the parent previously had the ability to comply, but divested himself of that ability through his fault or neglect designed to frustrate the intent or purpose of the order. Faircloth, at 651. (Emphasis added)

Once the trial court has satisfied either of the above prongs, the Court states, "And on that finding the chancellor may order the defaulting party to pay or be imprisoned for his contemptuous refusal to do so." Faircloth, at 652. The remedy of incarceration is clearly available upon the rule of law established by the Supreme Court. The importance of the two prong test and the affilliated remedial measures in non-support matters is of such a magnitude that its dimuition

or elimination can only be accomplished by the Supreme Court.

However, the Bowen decision effectively eradicates the second prong of the Faircloth test. The Second District Court recited the factual situation of Bowen as follows: "This case involves a parent who was sentenced to prison upon an express finding that the parent was unable to pay child support because the parent, through his own fault or neglect, was divested of that ability." Bowen v. Bowen and HRS, page 6 of the court's opinion (Fla. 2d DCA 1984). This is a clear statement of the facts which trigger the second prong of the Faircloth test and justify incarceration. Nevertheless, the Second District Court goes on to state, "Although under the language of Faircloth such a finding supports an adjudication of contempt, it would not justify incarceration of the parent for civil contempt." Bowen, at page 6 of the court's decision. Such an edict is in clear contravention with the rule of law established by Faircloth. The Supreme Court has previously ruled that the Faircloth method of contempt and incarceration is civil in nature. Petitioner contends that Bowen's effort to change this is without merit.

The Second District Court's holding clearly modifies or overrules the precedent set forth by the Faircloth Court. Such a departure is a violation of the principles of stare

decisis. The law fashioned by this Court in Faircloth has been good for almost eight years, and memorializes what was believed by many to be the law for at least a decade prior. Faircloth has been a valuable tool in assisting the courts in coercing nonpaying parents to meet their obligations to support their children. The uprooting of this coercive measure by the Bowen decision will severely hamper the ability of custodial parents to feed and clothe their children. The irresponsible, nonpaying parent will now have less incentive to comply with court orders and care for the ones they have brought into the world.

If the principles established as precedent in Faircloth are to be modified or overruled, stare decisis prohibits the District Courts from doing so. The Second District Court, through its Bowen decision, has violated the above principle. The time is now for either reestablishing and restrengthening Faircloth, or officially dismantling its well thoughtout and useful pronouncements. Whatever the result, only the Florida Supreme Court can make this crucial decision.

ARGUMENT

II

BOWEN'S SHIFTING OF THE CONTEMPT PROCEEDINGS FROM CIVIL TO CRIMINAL WILL SERIOUSLY HAMPER, IF NOT ELIMINATE, THE ENFORCEMENT OF CHILD SUPPORT ORDERS.

The Bowen court, in eradicating the second prong of Faircloth, substitutes criminal contempt in the place of civil contempt as a means of enforcing support obligations. According to Bowen, the defaulting parent has a right to all the procedural mechanisms afforded by Rule 3.840, Florida Rules of Criminal Procedure. This rule enumerates the procedures which must be followed under a charge of indirect criminal contempt. These procedures are specifically listed later in this brief.

Criminal contempt, however, is a means of vindicating the authority of the court and punishing for noncompliance with the court's support orders. Pugliese v. Pugliese, 347 So. 2d 422, 424 (Fla. 1977). The criminal contempt remedy of incarceration for a set time and without the right to purge and go free does nothing more than ensure that the nonpaying parent will continue not to pay for a specified period of time. When support of the child is the primary goal, such a result obviously defeats the purposes for bringing the neglectful parent before judicial authority.

As a practical matter, requiring the custodial parent to seek criminal contempt sanctions against a defaulting parent will lead to nonenforcement of support orders. The protections afforded by Rule 3.840 if made applicable to support enfocement matters will function to shield the irresponsible parent from having to meet his obligations.

Since the defaulting parent in the criminal proceeding cannot be compelled to testify, it will be improbable that purposeful or negligent divestiture will ever be demonstrated. For all intents and purposes, Bowen expunges a major means of coercing compliance with court support orders. With the machinery of coercion dismantled, there is no method to create the incentive in the irresponsible parent to support his child.

ARGUMENT

III

THE BOWEN DECISION IS PRIMARILY GROUNDED ON QUESTIONABLE LAW.

The Bowen decision relies primarily upon Ponder v. Ponder, 438 So. 2d 541 (Fla. 1st DCA 1983). A discussion of Ponder will demonstrate that Bowen is grounded on questionable law. It will also show that the holdings of Bowen and Ponder emasculate the use of the Faircloth tests in civil contempt proceedings as a means of coercing parents who fail to meet their support obligation.

Ponder, in a most significant move, is the first case construing the Faircloth two-prong test to, in effect, shift the burden of demonstrating ability to pay court ordered child support payments from the defaulting parent to the party seeking payment. As previously discussed, this burden legally and rightfully rests with the defaulting parent. Yandell, at 870; Faircloth, at 652; Waskin, at [9FLW 1381].

Ponder's primary point is that a nonpaying parent cannot be incarcerated for civil contempt without a showing that he possesses the present ability to pay the purge amount at the time of incarceration. Ponder, at 543. An affirmative finding based upon evidence in the record is necessary in order to demonstrate present ability. Yandell and Faircloth settled the question of who must demonstrate the defaulting parent's ability to pay. The presumption of ability to pay exists when the non-paying parent comes before the court to explain why he is in derogation of his moral and legal obligation to pay child support. Faircloth, at 652. In Ponder, the parent failed to demonstrate a lack of present ability to pay the court ordered child support. He made no affirmative showing sufficient to rebut the presumption that he had the ability to pay the previously ordered child support and the purge amount.

Since Mr. Ponder did not demonstrate a lack of ability to pay, as Faircloth requires, it is apparent that the First District

Court set a new and divergent burden upon Mrs. Ponder to affirmatively show that Mr. Ponder has the required funds in hand. Such a shifting of the burden of proof is contrary to Florida law. Yandell, supra; Faircloth, supra; Waskin, supra; Wright v. Wright, 418 So. 2d 745 (Fla. 4th DCA 1982).

In addition, Ponder further clouds the age old question fo what "ability to pay" means. Does it mean having the cash on hand, the ability of a person to obtain employment if he is so attempted, or possibly the ability to borrow the necessary sums?

Bowen has adopted the Ponder rule of law regarding which party in a contempt hearing has the burden of proof. Ponder applies its rule to the first prong of the Faircloth test requiring the custodial parent to prove that the defaulting parent has the present and immediate ability to pay. Bowen has incorporated the Ponder rule in terms of Faircloth's second prong.

ARGUMENT

IV

BOWEN SHIFTS THE BURDEN OF PROOF FROM REQUIRING THE NONPAYING PARENT TO DEMONSTRATE INABILITY TO PAY TO REQUIRING THE PARTY SEEKING PAYMENT TO SHOW THE NONPAYING PARENT'S ABILITY TO PAY.

In a civil contempt proceeding for nonpayment of child support, the defaulting parent carries the burden of proving inability to comply with the court's order. Yandell v. Yandell, supra; Faircloth v. Faircloth, supra; Wright v. Wright, supra; Waskin v. Waskin, supra. The presumption is that the defaulting parent has the ability to pay, pursuant to the original court order requiring the payment of support. Faircloth, at 652.

If the nonpaying parent rebuts the presumption by demonstrating an inability to comply with the court's support order, then it is obvious that he has somehow been divested of the ability to comply with the order. The inquiry then shifts to a determination of whether the divestiture occurred through no fault of the parent, or whether it resulted through "his fault or neglect designed to frustrate the intent and purpose of the order." Faircloth, at 651.

Just as the burden to demonstrate the inability to comply is placed on the defaulting parent, so too does the defaulting parent have the burden of establishing that the divestiture occurred as a result of circumstances beyond his control. Waskin v. Waskin, supra. The failure to show lack of fault results in incarceration. Faircloth, at 652. Incarceration operates to coerce the parent to comply with the court's support order.

The thrust of Bowen is to shift this burden and insulate the nonpaying parent from having to comply with the court's support order. According to Bowen, if the trial court in the civil contempt hearing finds that the parent has purposely divested himself, criminal procedure rules are triggered and new proceedings must be instituted. In effect, the trial court's civil contempt finding becomes a nullity. Clothed with the aura of innocence, regardless of the previous finding, the nonpaying parent now forces the custodial parent at her expense to affirmatively prove fault or neglect on the part of the nonpaying parent as the reason why divestiture occurred. For all practical pruposes, the nonpaying parent will never be required to show the reasons why divestiture occurred.

ARGUMENT

V

BOWEN, THROUGH ITS RELIANCE ON PONDER SEVERELY LIMITS THE DISCRETION OF THE TRIAL JUDGE IN THE ENFORCEMENT OF CHILD SUPPORT ORDERS.

Bowen also follows Ponder in limiting the discretion of the trial court in nonsupport civil contempt hearings. Generally, if the defaulting parent's showing of his financial circumstances is based soley upon his testimony, the trial judge, as the trier of fact, is within his discretion to listen and weigh this testimony. The trial judge has broad discretion to evaluate the testimony as to its conclusiveness on the factual issue of the

parent's ability to pay. This discretion also includes the judge's assessment of the demanor and credibility of the parent. Milton v. Cochran, 147 So. 2d 137 (Fla. 1962); Mese v. Dade Tire Company, 95 So. 2d 587 (Fla. 1957). The appellate courts "cannot question the trial court's judging of the credibility of the witnesses. . ." Mese at 588, nor "overrule their determination unless error is shown." Milton, at 140.

Based upon the weighing of all these factors, the trial judge determines whether the parent has supported his naked assertion of inability to pay. If not, incarceration is available as a means of coercion to enforce compliance, since the presumption that the parent has the ability to pay has not been satisfactorily refuted. Faircloth, at 652; Wright, at 476.

Ponder severely restricts, if not totally eliminates, the trial court's discretion in determining if a sufficient showing has been made by the defaulting parent as to his ability to pay. By requiring the court or custodial parent to carry the burden of affirmatively showing the contemnor's ability to pay, the discretion to weigh the contemnor's testimony and demeanor is effectively eliminated. If the contemnor states that he cannot pay, or if he stands silent, the court has no choice, under Ponder, but to accept the contemnor's statement, or lack thereof, as proof of his inability to pay, unless the custodial parent has performed an independent investigation of the defaulting parent's financial condition.

This is not to imply that all nonpaying parents will perjure themselves on the question of their ability to pay; although, their disdain for the judicial system, as illustrated by their refusal to comply with the court's support order, often carries over into their attitude concerning their oath to testify truthfully. However, the trial court's discretion in weighing their testimony is certainly restricted if it or the custodial is required to establish the defaulting parent's ability to pay.

Through Bowen's reliance upon Ponder, discretion is also removed in regard to the second prong of Faircloth. When the trial judge at the civil contempt hearing finds that the defaulting parent has purposely divested himself of the ability to pay, Bowen requires a criminal contempt hearing and the application of criminal rules of procedure before the same finding of purposeful divestiture can be made again. No discretion is left the trial judge to act upon his finding that the defaulting parent purposely divested himself of the ability to comply with the court's support order. No longer may a judge find civil contempt for a parent who "just has not done enough."

The new tests set forth in Bowen and Ponder may be effective if very broad discretion is allowed by the trial judge. However, it is clear that such discretion is not available under Bowen and Ponder.

ARGUMENT

VI

BOWEN'S AND PONDER'S SHIFTING OF THE BURDEN OF PROOF AND THE ELIMINATION OF DISCRETION ARE IN DIRECT CONFLICT WITH THE DECISIONS OF OTHER DISTRICT COURTS OF APPEAL.

The Fourth District Court of Appeal followed the Faircloth principle that the burden of proof in regard to the ability to pay the child support or the purge amount is on the defaulting party. Wright v. Wright, 418 So. 2d 475 (Fla. 4th DCA 1982).

The defendant in Wright was held in civil contempt for failing to make court ordered child support and alimony payments. On appeal, the nonpaying parent contended that the finding of an ability to pay was unsupported by the record because there was no evidence presented on the issue of his ability to pay. The only evidence was the former wife's testimony as to the fact and amount of arrearage, with the husband electing not to attend the contempt hearing. The Fourth District Court did not agree with the defaulting parent. The court relied on Faircloth when it held that the defaulting parent, not the custodial parent, must demonstrate his lack of ability to pay. Wright, at 476. Since he failed to attend the hearing, he failed to present evidence of any financial disability.

The Third District Court of Appeal also recognizes that the burden of proof is on the defaulting party. Waskin v. Waskin, _So. 2d _ (Fla. 3d DCA 1984) [9 FLW 1381].

> In a contempt proceeding for failure to comply with a 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. Faircloth v. Faircloth, 339 So. 2d 650 (Fla. 1976); Yandell v. Yandell, 160 Fla. 164, 33 So. 2d 869 (1948); Orr v. Orr, 141 Fla. 112, 192 So. 466 (1939).

Waskin, at 1381.

The Ponder decision no longer requires the defaulting parent to illustrate a lack of ability to pay. Under Ponder, the nonpaying parent can literally stand silent and require the court or the custodial parent to show that the defaulting parent has the ability to pay the court ordered child support or the purge amount.

By relying on Ponder, the Bowen decision creates the same situation. Not only does Bowen shift the burden of demonstrating that the parent has purposely divested himself of the ability to pay, but by triggering criminal procedure rules the burden of proof is made even more difficult. The ability of the custodial parent to prove fault on the part of the divested parent will be nearly impossible.

It is also clear that the Wright and Waskin decisions give the trial court broad discretion in civil contempt hearings. The trial court is allowed to act on the basis of the evidence presented to it. If the trial court does not find that the defaulting parent has rebutted the presumption of his ability

to pay, incarceration is available to the trial judge as a means of coercing payment. Under Bowen and Ponder, such discretion is not available since the presumption has been eliminated and the burden of proof shifted.

Bowen and Ponder are clearly in direct conflict with the Fourth and Third District Courts on the issues of burden of proof and the trial court's discretion.

ARGUMENT

VII

THE BOWEN AND PONDER DECISIONS HAVE ALREADY HAD A MAJOR IMPACT ON THE ABILITY OF THE TRIAL COURTS TO ENFORCE CHILD SUPPORT ORDERS.

Bowen's reliance upon Ponder, and its misconstruction of Faircloth, has already had its initial detrimental effect. Bowen and Ponder are relied upon as authority in Roma Smith v. Mary Louise Miller and the Department of Health and Rehabilitative Services, _So. 2d_(Fla. 1st DCA 1984) [9 FLW 1272]. Smith v. Miller, is presently pending before the First District Court of Appeal on a motion for rehearing.

The implicit rationale behind Ponder's and Bowen's shifting the burden of proof appears to be that a parent accused of contemptuous behavior should not have to face the court's contempt machinery without the assistance of counsel. Apparently, Ponder and Bowen hold that with the presence of counsel, the nonpaying parent would be able to more effectively confront the Faircloth presumption that he has the ability to pay.

Important in Smith v. Miller, supra, therefore, is the presence of counsel for the defendant throughout the proceedings. However, even though the parent was represented by counsel in Smith v. Miller, the burden of proof required by Faircloth was still shifted to the custodial parent.

The issue is, therefore, not just whether the defaulting parent is represented by counsel at the civil contempt hearing. The issues which demand addressing are those involving the burden of proof and the discretion of the trial judge. By its reliance on Bowen and Ponder, Smith v. Miller eliminates the trial judge's discretion and places the burden of demonstrating the defaulting parent's ability to pay the custodial parent. This will occur according to Smith v. Miller, even when the nonpaying parent is assisted by counsel.

ARGUMENT

VIII

BOWEN AND PONDER WILL SEVERELY RESTRICT THE TRIAL COURT'S AUTHORITY TO ENFORCE CHILD SUPPORT ORDERS.

The impact of the abandonment of Faircloth will be felt heavily at the trial level. The trial courts will not be able to effectively utilize the first prong of the Faircloth test relating to present ability to pay. Since discretion has been eliminated and the burden of proof switched, ability to pay cannot be established absent an investigation of the defaulting

parent's finances by the custodial parent. This will obviously entail considerable expense and time, at no small professional fee to the custodial parent. Since contingent fees in family matters of this nature are unethical, the legal fees of extensive discovery may further impede the custodial parent from pursuing an already difficult journey.

The trial court may now be required to accept the defaulting parent's statements of inability to pay as conclusive on that issue. The presumption of ability to pay described in Faircloth is now easily rebutted by the defaulting parent. In fact, by restricting discretion and changing the burden of proof, a parent can rebut the Faircloth presumption simply by remaining silent. If there is nothing in the record to establish ability to pay the child support or the purge amount, then that ability cannot be found to exist. By remaining silent, the parent ensures that such information will not come from him. The only way a defaulting parent will face incarceration is if he talks himself into it.

The second prong of Faircloth is also no longer effective with the arrival of Bowen. If the court finds that the defaulting parent previously had the ability to comply with the court order to pay child support, but divested himself of that ability through his own fault or neglect to frustrate that order, the parent can no longer be incarcerated pursuant to Faircloth. Instead, counsel

must first be appointed and separate proceedings instituted in order to make the same finding of divestiture. This is true even if the defaulting parent was represented by counsel at the civil contempt hearing. The effect of Bowen is readily seen in Smith v. Miller, supra. Unfortunately, the District Court fails to see the coercive forest for looking at the criminal contempt trees.

What has ultimately transpired is that several of the District Courts of Appeal have misconstrued Faircloth v. Faircloth, supra; Lamm v. Chapman, 413 So. 2d 749 (Fla. 1982; and Andrews v. Walton, 428 So. 2d 633 (Fla. 1983). The practical result of their error is that the civil contempt remedy of incarceration is no longer effectively available as a means of coercing payment from parents who do not meet their child support obligations. Through the Bowen, Ponder and Smith v. Miller line of cases, both prongs of the Faircloth test for establishing civil contempt have had their practical utility eliminated. Such is not and should not be the law of Florida.

ARGUMENT

IX

BOWEN'S REQUIREMENT THAT CRIMINAL CONTEMPT PROCEEDINGS MUST BE INSTITUTED IF THE DEFAULTING PARENT HAS PURPOSELY DIVESTED HIMSELF OF THE ABILITY TO PAY AND INCARCERATION IS CONTEMPLATED WILL SEVERELY RESTRICT THE ABILITY OF PRIVATE PARTIES NOT JUST H.R.S. TO COERCE COMPLIANCE WITH COURT ORDERS.

An important point must be emphasized. The State of Florida, Department of Health and Rehabilitative Services, although heavily involved in this appeal, is not the primary party which seeks en-

forcement of support orders through utilization of the coercive aspects of civil contempt. Private parties also make use of the same judicial machinery, through court depositories with lay staff, and the use of private attorneys. So often the private party is a marginally impoverished woman who heavily depends upon the support check to feed and clothe her child.

Civil contempt proceedings, with the coercive tool of incarceration, are the quickest and most efficient methods of enforcing compliance for these private parties while still maintaining fundamental due process for the absent parent. In most instances, prompt relief is necessary to ensure that the child does not go hungry. However, as a result of the Bowen decision, the following scenario is not beyond belief.

There will be the young custodial mother who spends fifty hours per week at a minimum wage job performing menial labor. She knows she has no future to look forward to other than the type of life she presently leads. However, she understands the responsibility of caring for her child. Therefore, she works and depends on the absent parent for child support. Except the absent parent has divested himself of the ability to pay. He could have been paying all of these weeks. However, he knows if the custodial parent cannot prove he has the ability to pay, he cannot be incarcerated for his contemptuous behavior without a hearing pursuant to the Florida Rules of Criminal Procedure for indirect criminal contempt.

Rule 3.840, Florida Rules of Criminal Procedure, requires the following in a hearing for indirect criminal contempt: 1) the defaulting parent has the right to counsel (although there currently are few, if any, public defenders who represent criminal contempt defendants in support matters); 2) notice must be given to the parent of the charges, and a reasonable opportunity to respond to the charges; 3) a right to a hearing, for which the defaulting parent must be given time to prepare, and which includes the right to call witnesses; 4) the defaulting parent cannot be compelled to testify against himself; 5) the parent is presumed innocent until proven guilty beyond a reasonable doubt; and 6) the right to a trial by jury if the sentence is for six or more months of incarceration if found guilty.

The nonpaying parent's knowledge that the above procedures must be followed before incarceration is allowed for his purposeful disvesiture, will, unfortunately, be used by many defaulting parents to further frustrate the court's support orders.

It will be difficult to prove beyond a reasonable doubt that a healthy man is lying when he says he has not had a job in six or seven years despite his best efforts. The inability to compel the parent to testify will mean that the court or the custodial parent bears an extremely heavy burden of proof. It is highly unlikely that the trial court or the movant will take on the added time and monetary expense of rigourously investigating

the defaulting parent's financial condition. As a practical matter, the trial courts simply do not have the resources necessary to do so. Therefore, the burden of investigating the defaulting parent's financial condition falls on the custodial parent.

With meager resources herself, the custodial parent is highly unlikely to be able to afford the cost of proving beyond a reasonable doubt that the nonpaying parent has purposely divested himself of the ability to pay. Without the funds to feed her children, the custodial parent is surely without the means to pay for legal or investigative work. The result most likely to be seen with increasing frequency will be the defaulting parent not only avoiding the coercive effect of civil contempt, but also escaping any punishment which criminal contempt may afford.

This result will occur as a result of Bowen, even though the defaulting parent was already found at the civil contempt hearing to have purposely divested himself of the ability to comply with the court's support order. It is clear that the implementation of Bowen will fail to redress the wrong suffered by the children and the custodial parent, as a result of the nonpaying parent's divestiture of the ability to pay child support.

ARGUMENT

X

THE FINANCIAL BURDEN OF THE DEFAULTING PARTY'S CONTEMPTUOUS BEHAVIOR WILL BE BORNE BY THE PUBLIC AS A RESULT OF BOWEN.

Extensive state resources will be expended if Bowen becomes the rule. The defaulting parent will initially be brought before the court in a civil contempt hearing. If he is found to have purposely divested himself as a means of frustrating the court's order, Bowen prohibits incarceration. Instead, a criminal contempt hearing must be held to make the same determination, in regard to the parent's divestiture, as was made at the civil contempt hearing, before incarceration is allowed. What Bowen would cause, therefore, is nothing less than a repetitious effort to reach the same conclusion.

However, there will not be just a doubling of time and money expended. Criminal contempt proceedings will likely involve more of the court's time than civil contempt. As the time involved increases, along with the complexity of the proceeding, more costs are involved. These costs are not just measured by counting the monies which will go toward bringing the parent before the court twice. Also to be considered is the use of valuable court time. With the backlog of cases already existing it is self evident what will occur if literally hundreds of more cases are added to the criminal dockets of the courts every month.

Presently, there is no practical mechanism for appointing a public defnder to represent a defaulting parent who must be brought before the court on criminal contempt charges under Bowen. However,

if the parent is found to have divested himself then it will likely follow that there will be a finding that he cannot afford counsel. Since the parent has the right to counsel under Rule 3.840, Florida Rules of Criminal Procedure, a method for appointing counsel will have to be developed. The public will also be required to bear the burden of this added cost.

Meanwhile, since the absent parent has failed to meet his support obligation, and coercive enforcement under civil contempt is no longer available, the custodial parent will be without funds to support her child. The custodial parent will quite often turn to the state for economic aid. If eligible the support she receives for her child will be paid for by the taxpayers. The private responsibility of supporting a child one has brought into the world is shifted to the public under Bowen. This occurs even though the nonpaying parent has already been found in a civil proceeding to have purposely divested himself of the ability to comply with the court's support order. The absent parent's irresponsible and contemptuous conduct will have placed a heavy burden on the public. What makes the above so unfair and frustrating to the people of the state is the likelihood that the criminal contempt hearing will not find the absent parent guilty of contemptuous conduct because of the heavy burden of proof required to establish quilt. This same point accounts for the rare use of criminal support statues such as §856, Florida Statutes (1983).

The above described costs will exist even if the defaulting parent is found at the criminal contempt hearing to have purposely divested himself. This is so because the result of the finding of criminal contempt can be punishment. The state would bear the expense of housing and feeding a parent who had the ability to take care of himself and his children. Also, the custodial parent will remain on state assistance. While the absent parent is incarcerated, he will not be able to pay his support. Even if he decides he will meet his obligations, there is no purge in criminal contempt. Therefore, the custodial parent will remain on the rolls of those dependent on the state, at least as long as the defaulting parent remains incarcerated as punishment.

ARGUMENT

XI

A DISTINCTION CAN BE MADE BETWEEN INDIGENCY AND ABILITY TO PAY IN REGARD TO THE ENFORCEMENT OF CHILD SUPPORT ORDERS.

A determination that the defaulting parent is indigent for purposes of appointing counsel or for appeal should not preclude a finding that the parent does possess the ability to pay his child support or a purge amount. Indigency should not mean per se inability to pay. By so ruling, the First District Court has held that an indigent nonpaying parent cannot be incarcerated. Smith v. Miller, supra.

Section 27.52, Florida Statutes, lays out the procedure for determining indigency. The purpose for determining indigency goes to the issue of appointment of counsel.

> (2)(a) A person is indigent for the purposes of this part if he is unable to pay for the services of an attorney, including costs of investigation, without substantial hardship to himself or his family. Section 27.52, Florida Statutes (1983).

The criteria for determining indigency for the purpose of appointing counsel does not rule out the possibility that the defaulting parent has the ability to pay child support or a purge amount. It could be possible to have a defaulting parent, with one dependent child, earning a gross income of $119.00 per week and having cash on hand of $499.00 and be technically indigent according to the above statute. Since he is technically indigent, he does not have the ability to pay or purge, and, therefore, cannot be incarcerated. Smith v. Miller, supra.

The finding of per se inability to pay after a finding of indigency should not necessarily follow. Part of the determination of statutory indigency is based upon the parent having a dependent to support. The statute presumes such support is being actually paid. However, the defaulting parent is in court because such support is not being paid. In effect, the defaulting parent is avoiding incarceration for nonpayment of child support by reliance upon a statute which presumes that he is making those payments. He is basically using the existence of his child as a

means of avoiding coercive incarceration for failing to support that child. Such a result is clearly inequitable.

Under the above scenario, the defaulting parent should have the ability to pay something, yet, he is protected from having to do so because of the per se presumption of inability to pay which follows a determination of indigency. As seen in Smith v. Miller, supra, the court clearly relied upon the determination of indigency for the matter of appeal as evidence of the defaulting parent's inability to pay child support or a purge amount. This obvious inconsistency and abuse of the indigency statute by the nonpaying parent must abate.

ARGUMENT

XII

PUBLIC POLICY DICTATES INCARCERATION OF ABSENT PARENTS WHO PREVIOUSLY HAD THE ABILITY TO COMPLY WITH SUPPORT ORDERS, BUT DIVESTED THEMSELVES OF THAT ABILITY THROUGH THEIR FAULT OR NEGLECT DESIGNED TO FRUSTRATE THE INTENT OR PURPOSE OF THE ORDER IN CIVIL CONTEMPT PROCEEDINGS

There is a stong public policy that children should be supported by their parents and not out of the state coffers. The Supreme Court of Florida recognized this when it stated:

> ... The propogation of children for others to support is an evil that is all too prevalent in our social system and one that threatens its stability...

Lamm v. Chapman, 413 So. 2d 749, 752 (Fla. 1982).

The legislature also recognized this public policy and affirmatively declared so in Section 409.2551, Florida Statutes (1983) stating:

> It is declared to be the public policy of this state that this act be construed and administered to the end that children shall be maintained from the resources of responsible parents, thereby relieving, at least in part, the burden presently borne by the general citizency through public assistance programs.

The method most effective and most often utilized by both private parties and the state to enforce child support payments is through civil contempt proceedings. Civil contempt is also utilized to enforce other aspects of domestic orders. If incarceration for civil contempt is not allowed in domestic matters one can forsee a litany of abuses of the system.

One example, other than that of nonpayment of child support, is in the area of visitation. Suppose an absent parent is allowed visitation one weekend a month. He drives from Tampa to Tallahassee on Friday to pick up the child. The custodial parent refuses to allow the visitation. The absent parent files a motion for civil contempt and schedules a hearing. When the custodial parent appears, she agrees to allow the visitation so the court finds her in contempt but orders no sanctions. The next month, the custodial parent again refuses the visitation and the absent parent files a motion for civil contempt. Once again she appears in court and agrees to allow the visitation. This scenario could continue for years and as long as the custodial parent agrees to the visitation on the day of the hearing the court could not incarcerate her via civil contempt proceedings. It is obvious that the threat of incarceration would serve to coerce the custodial parent into allowing the visitation.

Incarceration in civil contempt proceedings does not serve as punishment but rather to coerce the absent parent to comply with the court's order in the future. Petitioner suggests that if an absent parent is aware that he may be incarcerated he will meet those obligations when he has the ability to do so. Conversely, if he knows that he cannot be incarcerated so long as he does not have the ability to do so on the day of the hearing, then he has no incentive to meet those obligations during the period of time when he does have the ability to do so.

Should this court determine that the Bowen court is correct, an absent parent can essentially thumb his nose at the court. The court will have no redress except to bring criminal contempt proceedings. This will punish the absent parent for violating the court's order but will be in direct contravention to the stated public policy which is that children should be supported by their parents and not out of the state coffers. Criminal contempt proceedings will serve to punish, as they are intended to do, but will not serve to coerce the absent parent into compliance with the court's order. While a criminal contemnor is serving his sentence, his children are either starving in the street or being supported by the taxpayers of the state. A criminal contemnor could not be released from confinement even if he paid ten million dollars toward the support of his children.

ARGUMENT

XIII

AN EXCEPTION SHOULD BE MADE IN THE ENFORCEMENT OF CHILD SUPPORT PAYMENTS WHICH WOULD ALLOW ABSENT PARENTS WHO PREVIOUSLY HAD THE ABILITY TO COMPLY WITH SUPPORT ORDERS , BUT DIVESTED THEMSELVES OF THAT ABILITY THROUGH THEIR FAULT OR NEGLECT DESIGNED TO FRUSTRATE THE INTENT OR PURPOSE OF THE ORDER, WHICH WOULD ALLOW INCARCERATION OF THE CONTEMNOR WITHOUT THE RIGHT TO COUNSEL OF THE CONTEMNOR AND OTHER ELEMENTS OF RULE 3.840, RULES OF CRIMINAL PROCEDURE.

If this court should determine that the procedure followed by the trial court in the Bowen case is tantamount to criminal contempt, then the Petitioner contends that an exception should be carved out for the civil contempt proceedings which would allow the incarceration of an absent parent who previously had the ability to comply with support orders, but divested himself of that ability through his own fault or neglect designed to frustrate the intent or purpose of the order.

The legislature and the courts have recognized the importance and urgency of enforcing child support orders and have carved out similar exceptions in other areas of the law.

This includes special treatment in matters of garnishment, Sections 409.2574 and 61.12, Florida Statutes (1983), bankruptcy, 11 U.S.C.S. §523, mandatory wage assignments, Section 409.2574, Florida Statutes (1983), and the interception at the federal level of Internal Revenue Service tax refunds, 45 CFR 302 and 26 U.S.C.S. 6402(c), when such action is related to matters of family support. So, too, should an exception be carved in contempt proceedings for

the public policy reasons previously stated. To do otherwise will unduly burden the parent seeking enforcement of support as never before contemplated. Make the defaulting parent carry the day or, if all else fails, point the public enforcer and the private enforcer of support obligations to the resources by which the Bowen decision can be made workable.

CONCLUSION

The Bowen decision holds that when a finding is made at a civil contempt hearing that a noncustodial parent has purposely divested himself of the ability to comply with a court's order with the intent and purpose to frustrate that order, incarceration is not available unless the same finding is again made pursuant to Rule 3.840, Florida Rules of Criminal Procedure. This holding is a direct conflict with the Florida Supreme Court's decision in Faircloth v. Faircloth, 339 So. 2d (Fla. 1976). Faircloth allows incarceration at the civil contempt hearing when the above finding is made.

Public policy requires that the Faircloth tests be left intact. Incarceration, as a coercive tool for enforcing compliance with support orders must be available at civil contempt hearings when either prong of the Faircloth test is satisfied. If Bowen is allowed to stand incarceration will not be available. The costs to the children, custodial parents and the public which would result from Bowen's affirmance would be great. Public policy cannot allow the emasculation of Faircloth to occur.

Wherefore, Bowen should be overturned by this Court and the principles of Faircloth reestablished, or an exception carved out in the area of child support enforcement allowing for the civil contempt incarceration of a defaulting parent who purposely divests himself of the ability to comply with the court's order with the intent to frustrate that order.

Petitioners respectfully requests that this Court reverse the decision of the court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was mailed to ROBERT T. CONNOLLY, ESQUIRE FLORIDA RURAL LEGAL SERVICES, INC., 305 North Jackson Avenue, Post Office Box 1499, Bartow, Florida, 33830, this 5th day of July, 1984.

813-534-1781

JOSEPH R. BOYD, ESQUIRE