IN THE SUPREME COURT

OF THE STATE OF FLORIDA

EUGENIA BOWEN,
and the State of Florida
Department of Health and
Rehabilitative Services,

Appellants,

vs. CASE NO.

FRANKIE L. BOWEN,

Appellees.
_____/

JURISDICTIONAL BRIEF FOR DISCRETIONARY REVIEW BY THE SUPREME COURT OF FLORIDA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

This cause of action originated in the Circuit Court of the Tenth Judicial Circuit in and for Polk County. The Florida Department of Health and Rehabilitative Services filed an action against Frankie L. Bowen, the appellee, to establish the amount of child support to be paid by him to HRS on behalf of Eugenia Bowen. Such payments were to reimburse HRS for payments made by it to Mrs. Bowen. An order was obtained in Circuit Court requiring Mr. Bowen to make monthly payments to HRS.

Mr. Bowen failed to make the ordered payments and was ordered to show cause why he should not be held in contempt. Mr. Bowen filed an affidavit with the court presenting various purportedly exculpatory circumstances. The trial court found Mr. Bowen to be in contempt for failure to make the required support payments. The court found that Mr. Bowen had had the ability to comply with the court ordered payments but had divested himself of the ability to do so through his own fault or neglect to frustrate that order. Mr. Bowen was sentenced to five months and twenty-nine days in jail with a purge amount of $916.00.

Notice of Appeal was timely filed with the Second District Court of Appeal, and the incarceration order was stayed pending the appeal.

The District Court affirmed the trial court. However, upon rehearing the District Court vacated that affirmance. The Court found that Mr. Bowen's jail sentence for civil contempt was improper because he did not have the present ability to pay. In view of his inability to pay, the Court found that the jail sentence was equivalent to punishment for criminal contempt. The District Court stated that before a person could be subject to jail for disobeying the court's order to pay by divesting himself of the ability to comply, counsel must first be appointed.

The District Court's opinion was filed on January 25, 1984. Eugenia Bowen and the Department of Health and Rehabilitative Services timely filed a Notice to Invoke Discretionary Jurisdiction.

JURISDICTIONAL ISSUE

MAY THE SUPREME COURT OF FLORIDA REVIEW AN OPINION OF A DISTRICT COURT OF APPEAL WHICH CONSTRUES A SUPREME COURT DECISION ON THE QUESTION OF WHETHER A CIVIL CONTEMNOR CAN BE INCARCERATED FOR FAILURE TO PAY COURT ORDERED CHILD SUPPORT PAYMENTS DUE TO THE CONTEMNOR'S SELF INDUCED DIVESTITURE OF HIS ABILITY TO PAY WHERE THE DISTRICT COURT'S DECISION IS IN DIRECT AND EXPRESS CONFLICT WITH THE SUPREME COURT'S DECISION ON THE SAME QUESTION OF LAW.

Chapter 409, Florida Statutes, requires the Department of Health and Rehabilitative Services to pursue civil and criminal enforcement of child support obligations. Section 409.2561(3)(c), Florida Statutes (1979). The most useful methods of enforcing child support orders have been through the use of civil contempt as authorized by Chapter 409 Florida Statutes and subsequent incarceration for failure to pay as set forth by Faircloth v. Faircloth, 339 So. 2d 650 (Fla. 1976).

The decision of the Second District Court of Appeal in Bowen v. Bowen & HRS, No. 83-446 (Fla. 2nd DCA January 25, 1984), will modify the enforcement aspect of Faircloth now relied upon by HRS. Such modification will greatly impede the ability of HRS to enforce child support orders in the Second District against those who fail to meet their obligations.

Even after the Bowen decision civil contempt and the Faircloth guidelines are still being used by HRS and the trial courts of most other districts. The Appellant respectfully urges this Court to review the decision in Bowen so that this Court's decision in Faircloth will be construed and applied consistently throughout the state.

The decision of the Second District Court of Appeal in Bowen v. Bowen & HRS, No. 83-446 (Fla. 2nd DCA January 25, 1984) is in direct conflict with the Florida Supreme Court's decision in Faircloth v. Faircloth, 339 So. 2d 650 (Fla. 1976).

In Faircloth the Supreme Court established a two-prong test for determining contempt. The Court stated that before a person could be held in contempt for failure to pay court ordered child support payments, the trial court must affirmatively find:

> ...that either (1) the petitioner 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. Faircloth at 651.

However, Faircloth went beyond simply stating that one of the above two prongs had to be satisfied before a party can be held in contempt. The Court also dealt with what

remedy is appropriate once a finding of contempt has been entered. The Supreme Court, through its adoption of Judge Smith's dissent from the court below, was clear as to available remedies. The Faircloth Court adopted the following statement:

> ...the chancellor may find as a fact that he (the contemnor) continues to be able to pay, as was originally decreed, or that any disability was self induced. And on that finding the chancellor may order the defaulting party to pay or be imprisoned for his contemptuous refusal to do so. (Emphasis supplied) Faircloth at 652.

This statement is clear as a pronouncement that once the trial judge has determined that either prong of the Faircloth test has been satisfied he may imprison the defaulting party for non-payment. This, of course, includes imprisonment for purposeful or neglectful self-divestiture which results in a person's inability to pay the court ordered child support.

The Second District Court of Appeal in Bowen does follow Faircloth in recognizing that one of the two prongs of the Faircloth test must be satisfied to justify an adjudication of contempt. However, Bowen fails to recognize that Faircloth also deals with what remedy is appropriate once a finding of contempt has been entered. The Bowen Court specifically states that "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 6. The Second District Court instead would require providing the contemnor with counsel before incarcerating him for his violation of Faircloth's second prong. No where does Faircloth require this. Instead, the Court stated in Faircloth that once the trial judge determined that any inability to pay was self induced the judge may order the contemnor's imprisonment. Faircloth at 652.

The primary thrust of the Bowen decision is that the above remedy no longer exists when a party has purposely or neglectfully divested himself of the ability to pay court ordered child support. The requirement of first appointing counsel serves to modify the express language of Faircloth. In light of the above-mentioned quote from Bowen, it is clear that the Second District Court's opinion is in direct and express conflict with the Supreme Court's opinion in Faircloth.

The Second District Court's interpretation of the law is primarily founded upon its approval of Ponder v. Ponder, ___ So.2d ___ (Fla. 1st DCA 1983), 8 FLW 2461 (1983). The Ponder case is presently pending before this Court on substantially the same issues as are involved herein. This

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Court has not yet invoked its discretionary jurisdiction in Ponder.

CONCLUSION

This Court has jurisdiction to review the decision of the Second District Court of Appeal pursuant to Article V, Section 3(b)(3) Florida Constitution (1980).

The Second District Court of Appeal addressed the issue of whether a party found to be in civil contempt for failure to pay court ordered child support as a result of his self induced self divestiture can be incarcerated. In reaching its decision the District Court modified the Florida Supreme Court's decision in Faircloth v. Faircloth, 339 So. 2d 650 (Fla. 1976).

According to the clear language of Faircloth, a civil contemnor can be incarcerated by the trial judge when the court finds that the party has divested himself of the ability to pay in order to frustrate the court's order. However, the District Court expressly stated that the civil contemnor could not be jailed without further proceedings. As a result, the Second District Court's decision directly and expressly conflicts with the Faircloth opinion. Clearly, under the jurisdictional limitations of the Florida Constitution this Court may invoke its discretionary jurisdiction to review this decision.

There is a clear need for the Supreme Court to invoke its jurisdiction in order to resolve the issues raised by

this case, and the obvious conflicts which will arise throughout the state in the area of child support enforcement as a result of the Bowen decision.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to **ROBERT T. CONNOLLY, ESQUIRE,** Florida Rural Legal Services, Inc., 305 N. Jackson Avenue, Post Office Drawer 1499 Bartow, Florida, 33830, this 15th day of February, 1984, by U. S. Mail.

Susan S. Thompson

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