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.
_____/

PETITIONERS' REPLY BRIEF

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PRELIMINARY STATEMENT

Throughout Respondent's Answer Brief there are references to footnotes. Several of these footnotes are objectionable and should not be considered by this Honorable Court. There are several bases for not considering these footnotes.

Footnote two of Respondent's brief attempts to place before the Court "evidence" which has not been made part of the record on appeal. As such, the Court should not consider this footnote in its review of the issues on appeal.

Appellee's attorney also makes scandalous statements directed at fellow members of the bar. His vitriolic accusations question the integrity of HRS Child Support Enforcement Program attorneys. Statements claiming that Program attorneys "desire" to act in an unlawful manner clearly call the character of those attorneys into disrepute. Not only are such accusations shameful and unprofessional, but they do not address the issues before the Court, which is the singular purpose of appellate briefs. Appellee's attorney has done no more than cloud the issues and attempted to distract the Court from the important questions on appeal. Footnote two should not be considered in the Court's review of the pertinent issues.

Footnote five also casts aspersions at the Program attorneys' character. This footnote asserts that Petitioner's attorney at the trial level "insults the creativity of Florida's trial judges." Such a disparaging remark has no place in an appellate brief, and should not be considered by this Court in reaching a decision on the merits.

ARGUMENT

I

THE SUPREME COURT'S DECISION IN FAIRCLOTH CLEARLY DISCUSSES THE COERCIVE REMEDY OF INCARCERATION AS A SANCTION FOR CIVIL CONTEMPT.

The authority for the coercive incarceration of a nonpaying parent is derived from Faircloth v. Faircloth, 339 So. 2d 650 (Fla. 1976). Respondent has claimed that Faircloth addresses only the initial finding of civil contempt. (Respondent's Answer Brief, Page 7)

Petitioner asserts that Faircloth directly discussed the issue of the availability of incarceration. The Supreme Court established the following tests in order to adjudicate a parent's behavior in failing to comply with a support order as contemptuous.

> We hold a trial judge must make an affirmative finding 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. It is the "second prong" of the above test which is in question in the present appeal.

The Faircloth Court went on to directly address the coercive remedial measures which are available to the trial court upon the satisfaction of either prong of the Faircloth test.

> Upon the affected party's failure to discharge his burden of proving that he is disabled to pay by reason of intervening factors not due to his own neglect or fault, the chancellor may find as a fact that he 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.

Faircloth, at 652. (Emphasis supplied). The above language is taken from Judge Smith's dissent of the holding and opinion of the First District Court of Appeal in the Faircloth case. The Supreme Court cited this language with approval.

A clearer statement that incarceration is available as a coercive remedy in nonsupport cases cannot be found. The rule of law established by the Faircloth Court speaks directly to the incarceration question and supports the position asserted by Petitioner.

The Third District Court of Appeal recognized that incarceration for civil contempt is justified upon the finding that the nonpaying parent had purposely or neglectfully divested himself of the ability to pay.

Adams v. Adams, 357 So. 2d 265 (Fla. 3rd DCA 1978). In Adams the District Court held that a commitment order which failed to include a finding that either prong of the Faircloth test had been satisfied is defective. This holding evidences that the District Court viewed Faircloth as allowing for coercive incarceration upon the finding that the nonpaying parent "previously had the ability to comply, but divested himself of that ability to frustrate the intent and purpose of the order." Adams, at 265.

The Third District Court of Appeal again affirmed that Faircloth allows the incarceration of a nonpaying parent under the second Faircloth prong in Hammond v. Sandstrom, 376 So. 2d 466 (Fla. 3rd DCA 1979). In Hammond the District Court made clear that incarceration for contempt may be sustained when there is the finding that the nonpaying parent "had previously been able to comply with the judgment, but had divested himself of the ability to do so . . . through his fault or neglect designed to frustrate the intent and purpose of the order." Hammond, at 467. The District Court obviously relied upon Faircloth in reaching this conclusion.

Petitioners contend that Faircloth addressed two issues. One involves the initial determination of civil contempt under either of the two prongs established by the court.

There is no apparent disagreement between Respondent and Petitioners on this question. The second issue involves the authority of the trial court to subsequently incarcerate the nonpaying parent after either of the prongs have been satisfied and contempt established. This is the area where the parties to the present appeal disagree.

Based upon the clear reading of Faircloth and subsequent interpretation of Faircloth by other District Courts of Appeal, Respondent's argument that Faircloth does not discuss the issue of incarceration is without merit. Faircloth did more than take a mere glimpse "in passing" at the incarceration issue. Faircloth states unequivocably that incarceration is available as a remedy upon the satisfaction of either of the tests established in Faircloth.

Respondent cites several opinions in support of his contention that Faircloth only permits incarceration in regard to the first prong of the Faircloth test. Garo v. Garo, 347 So. 2d 418 (Fla. 1977); Crutchfield v. Crutchfield, 342 So. 2d 831 (Fla. 1st DCA 1977). Neither of these two cases stand for the proposition that coercive incarceration is unavailable when a nonpaying parent is found to have purposely divested himself of the ability to pay court ordered child support. In fact, both cases list both prongs of the Faircloth test in their opinions, thereby

illustrating the recognition of the second prong's validity. It is interesting to note that Garo was decided by the Florida Supreme Court. At no place in that opinion did the Court recede from its earlier holding that incarceration is available for civil contempt if either of the Faircloth prongs are satisfied.

Respondent's attempt to eliminate incarceration as a coercive remedy under the second prong of Faircloth is not supported by law.

II

PRESENT ABILITY TO PAY DOES NOT AND CANNOT MEAN HAVING THE CASH TO PURGE IN HAND.

The phrase "present ability to pay" is widely used and closely intertwined with the issues involved in child support matters. The various courts of Florida have never clearly defined what present ability to pay entails. Respondent attempts to create such a definition.

Respondent defines ability to pay as "present, liquid ability to pay." (Respondent's Answer Brief, Page 16). Respondent is clearly claiming that the finding of present ability to pay is based upon the money that the nonpaying parent has in his possession. This is evidenced by the following statement made by Respondent.

> If the defendant owns a truck, he can be ordered to sign it over to the petitioner or he can be ordered to sell it, but its cash value cannot form the basis of the finding of ability to pay; the defendant simply does not have the money that the court is attributing him.

(Respondent's Answer Brief, Page 17). This "cash in hand equals ability to pay" argument has never been the law in Florida.

If Respondent's definition of ability to pay was the law, its unmanageability would become apparent. The court could find that a nonpaying parent has assets valued in the millions of dollars. Since Respondent claims the value of assets cannot form the basis of ability to pay, the court would not be able find that the nonpaying parent had the ability to pay. Instead, the parent would have to be ordered to sell his assets. Once an asset or several assets are sold and the parent has the cash proceeds in hand, only then could the court find the nonpaying parent has the ability to pay, and set a purge amount.

The result of the above scenario is obvious. It allows the nonpaying parent to control the amount of the purge. If ordered to sell an asset, the nonpaying parent could sell it for an amount far below its actual value. He would then come into court with only a small amount of cash. On the basis of the cash the parent has in hand, the court would make a

determination of ability to pay and set the purge amount. This amount would likely be far below the amount owed by the nonpaying parent. It is clear that Respondent's approach not only allows the contemptuous parent to set the purge amount, it also encourages purposeful divestiture through the underselling of one's assets.

There are, of course, several responses which could be made to the above scenario, neither of which Petitioners view as valid. It could be argued that the nonpaying parent could be ordered to continue selling his assets until a specific amount has been received from the sales, or the court could set a reasonable value on the asset to be sold and order the nonpaying parent not to sell it for any less, or else he faces contempt charges.

The waste of judicial time involved in both of these responses is evident. Respondent's approach would require numerous court appearances before a sufficient ability to pay could be found based upon the nonpaying parent's cash in hand, and upon which a sufficient purge amount could be set. Respondent's approach is also, for all practical purposes, really based upon the finding of the <u>cash value</u> of an asset as the basis for determining ability to pay. In order to prevent purposeful divesitute through the under selling of an asset, or to prevent the nonpaying parent from setting the

purge amount, the court would have to determine the value of that asset before it is sold. The court would clearly be making a determination of the parent's ability to pay based upon the value of the asset. This would have to occur, regardless of Respondent's contrary claim.

What Respondent seeks is to require several court appearances before a finding of ability to pay is allowed. Respondent's approach puts an unnecessary burden on the courts. An efficient and fair approach would be the one presently followed by the courts. That is, a finding of ability to pay based upon the assets of the nonpaying parent. If a parent has assets, he had and has the ability to comply with the court's support order. A finding otherwise, is unrealistic and impractical.

If cash in hand is the condition precedent to incarceration, such a requirement rewards the contemptuous parent who engages in subterfuge. The only persons who would be going to jail for civil contemmpt are those who talk themselves into it.

III

INCARCERATION FOR CIVIL CONTEMPT UNDER THE SECOND PRONG OF THE FAIRCLOTH TEST IS BASED ON SOUND AND SENSIBLE PRINCIPLES OF FAIRNESS AND PRACTICALITY.

Punitive contempt is based upon past noncompliance with a court order, not present failure to comply. In Bowen , the nonpaying parent was incarcerated for civil contempt for his present noncompliance due to his purposeful divestiture.

A presumption exists that a parent continues to have the ability to comply with a previous support order. Orr v. Orr, 192 So. 2d 466 (Fla. 1939); Yandell v. Yandell, 33 So. 2d 869 (Fla. 1948); Faircloth, supra. The burden is on the nonpaying parent to rebut that presumption. If the presumption is rebutted the focus is on whether the inability to comply resulted from purposeful divestiture. As previously discussed, Faircloth allows for coercive incarceration if purposeful divestiture is found.

Ability means that a person is capable of or has the power or skill to do something. What ability comes down to is control. The nonpaying parent who purposely divests himself clearly has control over that divestiture. Compliance with the court's order is within the nonpaying parent's control. As long as the parent has control, he has the ability to comply.

A parent loses control only when divestiture is faultless. When circumstances which are outside the nonpaying parent's control have resulted in divestiture then his ability to comply does not exist. Lack of control is

equivalent to lack of ability to comply through no fault of one's self.

When a nonpaying parent has created the circumstances which put him in a particular situation, he can not cry unfairness when he is required to comply with an order he has attempted to avoid. A parent cannot willfully divest himself, then come to court claiming he would like to comply but he does not have the cash in hand to do so.

As long as parents under court order to pay support realize that they will be held to their obligations so long as they have control over the events around them, the threat of incarceration will have the coercive effect of ensuring compliance. This is the basic thrust of Faircloth's second prong and the concurrent coercive remedy of incarceration. Otherwise, deliberate divestiture will mean that one can beat the system of civil contempt and coercion even though that person had and has control over the circumstances which bring him before the court.

IV

BOWEN SHIFTS THE BURDEN OF PROVING WHETHER DIVESTITURE WAS FAULTLESS OR PURPOSEFUL.

Respondent misunderstands the argument in regard to the issue of the shifting of the burden of proving purposeful or

faultless divestiture. There is no doubt that the District Court stated in Bowen that the "petitioner did not carry his burden of proof to establish" that his inability to pay was not his own fault. Bowen v. Bowen, __ So. 2d __ (Fla. 2d DCA 1984) [9 FLW at 295]. However, it is what follows which leads to the conclusion that a shift in burden of proof has taken place.

Bowen holds that once purposeful divestiture is found, the nonpaying parent is automatically without the "ability to pay." Therefore, incarceration is only available if the criminal procedure rules for indirect criminal contempt are followed. Since the proceeding has been transformed from civil to criminal, so has the burden. The nonpaying parent is no longer required to show his divestiture was faultless. Instead, the party prosecuting the nonpaying parent must prove beyond all reasonable doubt that the divestiture was willful and deliberate. Rule 3.840, Florida Rules of Criminal Procedure; Demetree v. State, 89 So. 2d 498 (Fla. 1956)

The ability to prove purposeful divestiture, in accordance with the strict burden involved under criminal procedure, will be difficult, if not impossible. Not only will the nonpaying parent avoid coercive incarceration at the

civil contempt hearing, but he will most likely elude punitive incarceration at the criminal contempt proceeding.

CONCLUSION

Faircloth clearly states that a nonpaying parent can be incarcerated pursuant to civil contempt proceedings upon the finding 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 and purpose of the order." Faircloth, at 651. This principle stands until modified or eliminated by a subsequent decision of the Florida Supreme Court. Petitioners contend that the decision of Andrews v. Walton, 428 So. 2d 633 (Fla. 1983), has not modified Faircloth on this issue of incarceration.

Present ability to pay has never been clearly defined by the courts of this State. However, the definition which Respondent imputes to that phrase cannot stand as the statement of the law in this area. Respondent's assertion that present ability to pay means cash on hand leaves open too much room for abuse. Contrary to Respondent's claims, the trial court must be allowed to take into account all of a person's assets in determining their ability to pay.

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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 North Jackson Avenue, Post Office Box 1499, Bartow, Florida 33830, this 24th day of August, 1984, by U. S. Mail.

SUSAN S. THOMPSON