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IN THE
SUPREME COURT OF FLORIDA

CASE NUMBER 71,038

FILED

OCT

OSCAR DAVID GIBSON,
A/K/A JAMES PARKER,
PETITIONER,

By

VS.

PATRICIA GIBSON BENNETT,

RESPONDENT.

BRIEF OF RESPONDENT

Patricia Ann Bennett
PRO SE
7820 Ravenel Court
Springfield, Virginia 22151

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STATEMENT OF THE CASE

This case involves the petitioner's failure to pay child support for his minor children, stemming from a Virginia order for support of the minor children in the amount of $50 per week, order entered in Fairfax County, Virginia on January 15, 1969. (Appendix p. 9; pp. 27–28)

After an absence of sixteen years, petitioner was located in Pasco County, Florida living under the name of James Parker. The child support arrearage was reduced to final judgment in Virginia, and was subsequently registered in Pasco County, Florida. The foreign judgment was entered by the Clerk of the Circuit Court in the amount of $106,073.58. (Appendix pp. 9–16; pp. 20–21)

A Motion to Enforce the Foreign Judgment was filed on August 21, 1986. A hearing was held on the Motion on October 13, 1986 and again on January 8, 1987, at which time the court ruled that the judgment was valid and binding in the State of Florida, but could only be enforced by execution thereon, thereby denying the remedy of contempt for enforcement of the foreign judgment. (Appendix pp. 8–12)

The respondent appealed this ruling to the Second District Court of Appeal, and the order was reversed and remanded to the trial court for further proceedings. The Second District Court of Appeal has certified to the Florida Supreme Court as a question of great public importance, the following question:

> DO THE CIRCUIT COURTS OF THIS STATE HAVE JURISDICTION TO ENFORCE A FOREIGN JUDGMENT FOR ARREARAGES OF ALIMONY OR CHILD SUPPORT BY MEANS OF EQUITABLE REMEDIES INCLUDING CONTEMPT? (Appendix pp. 1–7)

STATEMENT OF THE FACTS

Petioner ("husband") and respondent ("wife") were married in Fairfax County, Virginia on December 26, 1964. There were three children born of this marriage: the first on September 5, 1966, the second on November 8, 1967, and the last on January 20, 1969. On August 28, 1968, the husband abandoned the wife and the two infant children, the wife then being four months pregnant with the third child. The respondent, wife, was forced to receive public assistance for over two years; went back to college; obtained a degree and employment; and has provided the support for the three children for over eighteen years. (Appendix pp. 25-31)

Upon the failure of Mr. Gibson to make any child support payments, he was arrested on January 15, 1969 and ordered by the Virginia Court to pay fifty dollars weekly, as and for support of the minor children, payments to commence on January 20, 1969. *Mr.* Gibson made two payments to the Court and subsequently disappeared. He was last seen by his wife, respondent, in March 1969, after which time he left the State of Virginia and never returned. He disappeared, and began living under the assumed name of James Parker. During this absence, *Mr.* Gibson changed his identity, was even declared dead, and all this was done to thwart the Virginia Court Order ordering him to pay child support. (Appendix p.10; pp. 25-31)

A final Divorce Decree was granted to the respondent on June 20, 1972, from the Circuit Court of Fairfax County, Virginia, on the grounds that the petitioner had willfully deserted and abandoned his wife and infant children. (Appendix p. 9)

The petitioner was subsequently discovered in Pasco County, Florida, in 1984. A Writ of Ne Exeat was issued for his arrest in Hillsborough County, Florida in January 1985. This Writ was subsequently vacated by Judge Vernon Evans. (Appendix pp. 20-22; p. 24; p. 29)

A Rule to Show Cause was issued by the Fairfax County Virginia District Court on June 6, 1985. The petitioner filed an answer and failed to appear at a hearing on the matter on July 11, 1985. The Virginia Court found the petitioner in contempt of court, and reduced the arrearage to final judment in the same order. The order of the Fairfax County Court was entered on November 21, 1985. The judgment covered the child support arrearage due as of July 11, 1985, total amount of the judgment being $106,073.58. Amounts have accrued since July 11, 1985, pursuant to the child support order of January 15, 1969, in the amount of fifty dollars per week. The Virginia judgment for arrearages was not appealed. (Appendix p. 9; pp. 13-16; pp. 27-28)

The foreign judgment was filed with the Clerk of the Pasco County Circuit Court on December 23, 1985. On January 27, 1986, the Clerk of the Circuit Court of Pasco County mailed notice of the recording of the judgment to the husband pursuant to Florida Statute 55.505. The petitioner has never contested the jurisdiction of the Virginia court, nor the validity of the judgment. The respondent, wife, filed a motion seeking to enforce the judgment by invoking the contempt and equitable powers of the Circuit Court of Pasco County, Florida, on August 21, 1986. (Appendix pp. 8-16)

A hearing on the petition to enforce the foreign judgment was held on October 13, 1986, at which time the court asked for direction by

memoranda from counsel on the issue of jurisdiction. Respondent's motion to enforce the judgment was denied by the Pasco County Circuit Court judge during a second hearing on January 8, 1987. The court limited the hearing to arguments solely on the issue of the power of contempt of the court and equitable remedies available to the respondent. An order was entered denying equitable relief to the respondent on the enforcement of the foreign judgment for child support on January 26, 1987. (Appendix p. 8)

The respondent appealed the ruling of the Pasco County Circuit Court to the Second District Court of Appeal. In it's opinion, dated August 14, 1987, the Second District Court of Appeal reversed the lower court's order and remanded the case for further proceedings, and certified as a question of great public importance the following:

> DO THE CIRCUIT COURTS OF THIS STATE HAVE JURISDICTION TO ENFORCE A FOREIGN JUDGMENT FOR ARREARAGES OF ALIMONY OR CHILD SUPPORT BY MEANS OF EQUITABLE REMEDIES INCLUDING CONTEMPT? (Appendix 1-7)

SUMMARY OF ARGUMENT

The Second District Court of Appeal reversed the lower court's ruling that the contempt powers of the court were not available for enforcement of a foreign judgment for child support arrearage. This opinion is based on the express language of the Florida Supreme Court in Sackler v. Sackler, 47 So.2d 292 (1950), Lanigan v. Lanigan, 78 So.2d 92 (1955), and Haas v. Haas, 59 So.2d 640 (1952); and of the District Court of Appeal cases in Grotnes v. Grotnes, 338 So.2d 1122 (1976), West v. West, 301 So.2d 823 (1974), and Miller v. Miller, 105 So.2d 286 (1958). Further, Florida Statute 61.17 (1986 Supplement) does not preclude contempt proceedings for enforcement of arrearages which have been reduced to judgment.

Petitioner argues that the aforementioned Supreme Court of Florida decisions were in error, as they never considered whether or not contempt would be a violation of Article I, Section 11 of the Florida Constitution for enforcement of child support arrearage which has been reduced to judgment. This argument holds little weight when the fact is that the issue has long since been resolved by the Florida courts in numerous cases. Where the responsible parent has the ability to pay, or previously had the ability to pay but refused to do so, then the contempt powers of the court are available for enforcement of alimony or child support obligations, without violating Article I, Section 11 of the Florida Constitution.

The United States Supreme Court has long ago decided that contempt is available for failure to pay alimony or child support, and that imprisonment for contempt is not a violation of the constitutional provision

prohibiting imprisonment for debt. In Wetmore v. Markoe, 196 U.S. 68, 73, 25 S.Ct. 172, 49 L.Ed 390 (1904), United Supreme Court Justice Day states:

> "The liability to pay alimony is not founded upon a contract, but is a penalty imposed for a failure to perform a duty. It is not to be enforced by an action at law in the state where the decree is entered, but is to be enforced by such proceedings as the chancellor may determine and adopt for its enforcement. It may be enforced by imprisonment for contempt, without violating the constitutional provision prohibiting imprisonment for debt."

Petitioner also contends that since the three children have reached the age of majority, the entire issue on appeal is "moot". Petitioner argues that contempt is not available as a remedy in enforcement of child support arrearage, after the children have reached the age of majority.

This issue may be one of first impression for the Supreme Court of Florida. However, other states have held that their courts have jurisdiction in a contempt proceeding to enforce an order to pay child support on unpaid installments accruing before the child reached its majority, where such proceedings were commenced after the child reached majority, reasoning that the jurisdiction of the court was a continuing one, and that the emancipation of the child should not serve to cancel the arrears. Further, it is the failure to obey a court order that is paramount, and the age of majority should have no bearing on the enforcement of a valid court order.

Based on the case law cited herein, there is sufficient precedent for Florida to adopt the judicial reasoning of its sister states, and the several cases cited from the Florida District Courts of Appeal, with regard to the issue of enforcement through the contempt powers of the court, regardless of the age of the children.

ARGUMENT

A. DO THE CIRCUIT COURTS OF THIS STATE HAVE JURISDICTION TO ENFORCE A FOREIGN JUDGMENT FOR ARREARAGES OF ALIMONY OR CHILD SUPPORT BY MEANS OF EQUITABLE REMEDIES INCLUDING CONTEMPT.

The question is whether or not a final judgment for child support rendered by a foreign state court can be enforced by and through the courts of equity in the state of Florida, or whether such a foreign judgment for child support can be enforced only by execution as a judgment at law. The question of enforceability of a foreign judgment for child support under the "full faith and credit" provision of the Federal Constitution is not at issue, as the subject foreign judgment, having been reduced to a Florida judgment, is enforceable in an action at law, by the recovery of a money judgment through execution thereon. The question which is the subject of this appeal is whether the foreign judgment is also enforceable by equitable remedies, including contempt.

The issue of equitable relief versus an action at law with regard to child support and alimony enforcement is not new, and it will continue to be a judicial issue as long as fathers continue to evade the obligation imposed to support their wife and children. It is a matter of public policy that fathers are required to support their children, so that their children's support does not become the responsibility of the state welfare system, and, indirectly, the responsibility of the taxpayers. A father should not be permitted to avoid this obligation merely by crossing state lines from where the decree was originally entered, and receive the protection from criminal prosecution or from the power of contempt as a means of enforcement.

The mere fact that an unpaid obligation for child support arising from an order for payment of same has been reduced to a final judgment should have no bearing on the methods of enforcement. The power of contempt lies with the court that has been contemned, and by Order of the Juvenile and Domestic Relations District Court for the County of Fairfax Virginia, entered on November 21, 1985, Oscar David Gibson, a/k/a James Parker, was held in contempt of said court, having reduced the child support arrearage to final judgment in the same Order. (Appendix pp. 13-16) The respondent understands that the Florida Courts could not find the petitioner, Oscar David Gibson, a/k/a James Parker, in contempt of the Virginia Court, as that power only rests with Virginia in its authority to adjudicate the matter. However, the respondent also understands that, by precedent of the Florida Supreme Court cases cited herein, the Courts of Florida have the authority to order the petitioner to pay the child support arrearage that has been reduced to a Florida judgment, and that his failure to do so would place him in contempt of said Florida Court, as this would be the Court contemned once the order to pay is entered and the petitioner fails to obey the Order.

One only need to consider the reasoning behind the petitioner's objections to the equitable remedies sought by the respondent to understand the intention, which is the continuation of avoidance and evasion of the child support obligation. It is no wonder that this issue surfaces again and again in the judicial system by the very fathers who, from the onset, fail to support their children

and fail to adhere not only to the moral obligation of a father to care and provide for his offspring, but also the legal obligation to obey a Court Order. The duty to support one's children is a moral one which most parents take for granted, hence, it is inconceivable that it should require an Order of the Court to require that a parent adheres to this duty. Even with such an order requiring support, absent effective enforcement remedies, these children often become dependents of the state welfare system. It must be understood that, for some parents, this Court Order is necessary in order for the child to receive the support to which he or she is entitled. Even with such an order for support of the minor children, there is no guarantee that the order will be obeyed, hence, the continual necessity of litigating the issue, using the child's own support money in the expense of litigation.

Even petitioner's Counsel recognizes the frustration in trying to collect the child support by execution. Reference is made to the October 13, 1986 transcript of hearing:

> MR. RANKIN: ....."They apparently are frustrated in their efforts to force the Respondent to pay monies by those means and now they're attempting to ask this Court, sitting as a Court of equity, to do something it has no jurisdiction to do." (Appendix p. 24, lines 16-20)

In reference to the above excerpt from the transcript, the words "force the Respondent to pay" are interesting. How does one go about "forcing" a parent to pay child support for his own minor children, except through the threat of imprisonment. And, when such a father goes to such extremes as to change his identity to avoid his obligations,

and is successful at it for over eighteen years, then is it reasonable to assume that this father will honor those obligations without the contempt powers of the court, including the possibility of imprisonment? And, is it also reasonable to assume that, in view of the past history of avoidance, that this father will not divest himself of assets so as to make execution of the foreign judgment meaningless. That the Courts have recognized the power of contempt as necessary to "force" a father to pay support, regardless if it has been reduced to judgment by a sister-state, is evidenced by the cases and discussion that follow.

We need only to look to the historical precedential United States Supreme Court decision of Hiram Barbara v. Huldah Barber, 21 How. 582, 16 L.Ed. 229 (1848), to see that the issue is an ancient one, one that continues to surface, just as fathers continue to avoid paying alimony and child support. In this case the husband failed to pay alimony pursuant to a New York decree and subsequently moved to Wisconsin. The wife brought a suit in equity in the Federal District Court to recover the overdue alimony. The suit culminated in a decree in her favor. The cause then made its way to the United States Supreme Court where the decree was affirmed. The United States Supreme Court said in it's decision:

> "There is, too, another ground of jurisdiction in equity, just as certainly established as that is of which we have just spoken. It comprehends the case before us. It is, that courts of equity will interfere to compel the payment of alimony which has been decreed to a wife by the ecclesiastical court in England."
> "Such a jurisdiction is ancient there, and the principal reason for its exercise is equally applicable to the courts of equity in the United States. It is, that when a court

> of competent jurisdiction over the subject matter and the parties decrees a divorce, and alimony to the wife as its incident, and is unable of itself to enforce the decree summarily upon the husband, that courts of equity will interfere to prevent the decree from being defeated by fraud. The interference, however, is limited to cases in which alimony has been decreed; then only to the extent of what is due, and always to cases in which no appeal is pending from the decree for the divorce or for alimony.* * * "
>
> "The parties to a cause for a divorce and for alimony are as much bound by a decree for both, which has been given by one of our State courts having jurisdiction of the subject-matter and over the parties, as the same parties would be if the decree had been given in the ecclesiastical court of England. The decree in both is a judgment of record, and will be received as such by other courts. And such a judgment or decree, rendered in any State of the United States, the court having jurisdiction, will be carried into judgment in any other State, to have there the same binding force that it has in the State in which it was originally given. For such a purpose, both the equity courts of the United States and the same courts of the States have jurisdiction.* * * "

Notwithstanding that this case is over 100 years old, the United States Supreme Court has never reversed their decision, it has been referenced in a multitude of State, Federal and United States Supreme Court cases, and is firmly embedded in our jurisprudence.

"Equity" is defined in Blacks Law Dictionary, Fifth Edition, as:

"Justice administered according to fairness as contrasted with the strictly formulated rules of common law. It is based on a system of rules and principles which originated in England as an alternative to the harsh rules of common law and which were based on what was fair in a particular situation. One sought relief under the system in courts of equity rather than in courts of law. The term "equity" denotes the spirit and habit of fairness, justice, and right dealing which would regulate the intercourse of men with men....."

Although, procedurally, the courts of equity and law are now administered in the same court, the principles underlying equitable remedies as opposed to an action at law remain, where an action at law would not afford an effective administration of justice. In the instant case on appeal, to deny the equitable relief sought by the respondent would be also to deny justice and fairness. That the aforementioned Supreme Court decision of Barber v. Barber, supra, is old does not necessarily mean it is antiquated. As will be argued further, the principles upon which this case rest, going back to the Ecclesiastical Courts in England, are morality, fairness, justice and equity. These values are the very values that our jurisprudence is based on and to say that these principles are antiquated, would be paramount to denying the principles upon which this country and our Constitution were founded.

In the instant case, the lower Court considers this child support obligation as "a classical judgment debt", and refers to it at the January 8, 1987 hearing, as follows: "We just have a judgment. And that judgment isn't any different than if it was in an automobile accident or a prommissory note action, as it stands now." (Appendix p. 32, lines 12-14) To compare a child support judgment to an automobile accident or a prommisory note action is an aberration of justice. One needs only to look at the state statutes to see that failure to pay child support carries criminal penalties, where failure to pay on a promissory note does not. It is this moral duty of a father to support and provide for his children, coupled with the criminal penalties for wilful failure to do so, that sets it apart from an ordinary debt.

That the United States Supreme Court continued to recognize the principles in the Barber v. Barber case of 1848 is evidenced from the following cases, which affirmed the prior historic precedential decision of Barber:

In an action to discharge alimony in bankrupcy in the United States Supreme Court case of Audubon v. Shufelt, 181 U.S. 575, 579-50, 21 S.Ct 735, 737, 45 L.Ed. 1009 (1900), *Mr.* Justice Gray quoted from the Barber v. Barber (1848) case in delivering his opinion to the Court:

> "Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. Generally speaking, alimony may be altered by that court at any time, as the circumstances of the parties may require. The decree of a court of one state, indeed, for the present payment of a definite sum of money as alimony, is a record which is entitled to full faith and credit in another state. ....."But its obligation in that respect does not affect its nature. In other respects, alimony cannot ordinarily be enforced by action at law, but only by application to the court which granted it, and subject to the discretion of that court. Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled, than as strictly a debt..."

And, in Wetmore v. Markoe, 196 U.S. 68, 73, 25 S.Ct. 172, 49 L.Ed 390 (1904), United States Supreme Court Justice Day quoted the same passage from Barber v. Barber (1848), supra, as the above in Audubon v. Shufelt but, in his opinion, further adds:

> "The liability to pay alimony is not founded upon a contract, but is a penalty imposed for a failure to perform a duty. It is not to be enforced by an action at law in the state where the decree is entered, but is to be enforced by such proceedings as the chancellor may determine and adopt for its enforcement. It may be enforced by imprisonment for contempt, without violating the constitutional provision prohibiting imprisonment for debt."

And, further, quoting from Dunbar v. Dunbar, 190 U.S. 340, 47 L.Ed. 1084, 23 Sup. Ct. Rep. 757 (1902), Justice Day states:

> "At common law, a father is bound to support his legitimate children, and the obligation continues during their minority. We may assume this obligation to exist in all the states.....It is true his promise is to pay to the mother; but on this branch of the contract it is for the purpose of supporting his two minor children, and he simply makes her his agent for that purpose.
>
> We think this language is equally applicable to the present case in that aspect of the decree which provides for the support of the minor children. The obligation continues after the discharge in bankruptcy as well as before, and is no more than the duty devolved by the law upon the husband to support his children, and is not a debt in any just sense."

The Barber decision of 1848 was extensively discussed and affirmed in the United States Supreme Court decision of Sistare v. Sistare, 218 US1, 54 L.Ed. 905, 30 S Ct 682, 28 LRA (NS) 1068, 20 AnnCas 1061 (1909), concerning a foreign decree for alimony. In discussing the 1848 Barber v. Barber case, the Supreme Court Justice in Sistare said:

> "....and the case was then brought to this court and the questions arising were disposed of in a careful and elaborate opinion. The decree was affirmed. In the course of the opinion it was declared, among other things, that courts of equity possessed jurisdiction to interfere to prevent the decree of another state from being defeated by fraud, and reference was made to English decisions asserting the power of chancery to compel the payment of overdue alimony."

The Sistare case was distinguished and the 1848 Barber case was also referenced in the United States Supreme Court case of Stella Barber v. George Barber, 323 US 77-88, 89 L.Ed. 83 (1944).

The question of whether or not a decree rendered by a foreign state court can be enforced by and through courts of equity in the sister state or whether such a decree granted in another state can be enforced only by

execution as a judgment at law was also considered in 1927 by the Supreme Court of Mississippi in Frachier v. Gammill, 148 Miss. 723, 114 So. 813 (1927), using the 1848 Barber v. Barber, supra, decision as authority. This case is considered to be the leading case in the country and has been cited in numerous decisions in Florida, as well as other states. The facts and issues of this case, as well as cases emanating from it, are the same issues as are before this court in the present appeal. In the Florida Supreme Court case, McDuffie v. McDuffie, 155 Fla. 62, 19 So.2d 511 (1944), the Court quoted from Frachier v. Gammill as follows:

> "....a judgment for alimony rests largely on public policy in that the husband should be required to support his wife and children, that they not become derelicts and a charge on the public, that a judgment in equity is more efficacious than a judgment at law in that it may be enforced by attachment or contempt, that a court of equity has sole jurisdiction in matters of divorce and alimony and that to hold that a foreign judgment for alimony can be enforced only by execution at law would amount to depriving it of its inherent power of enforcement by attachment and contempt. On account of the difference in character between a judgment for money or property and that for alimony the one for alimony is entitled to more effective means of enforcement. If the special power of enforcement of a decree for alimony is not observed and enforced in the most efficacious manner, then the husband for all practical purposes becomes immune from a decree for alimony."

The Florida Supreme Court in McDuffie, further states:

> "On thorough review of the cases touching both sides of the questions, we are convinced that the doctrine of Franchier v. Gammill accords with justice and fair play and should be the rule in this State."

The principles of Frachier v. Gammill, supra, have been repeatedly and consistently adopted by Florida as well as most other states. Under this view, the courts have enforced the foreign support decree or a local decree based thereon by the same equitable remedies as local decrees for support,

such as contempt, sequestration, receivership, injunction, or imposition of an equitable lien. The decided theory is that a decree for support represents more than a debt, that it is based on the natural and moral obligation of the husband to support his wife and children and that it is a matter of public concern whether the obligation is declared in a sister state or locally, that the urgency for effective enforcement is equally as great in one state as in the other and, therefore, it should be enforced by the same remedies as are available to local decrees for support.

The principal that equitable remedies are available to a nonresident wife who seeks to enforce past due and unpaid installments of support which have been reduced to judgment in another state is longstanding, in that the decisions have withstood the test of time and are firmly embedded in our jurisprudence, and have been followed consistently and repeatedly throughout the United States.

In considering what the Courts of other jurisdictions have done with regard to this issue, the language in several cases is worthy of mention in that it will provide insight into the judicial reasoning for their Supreme Court decisions.

In Bruton v. Tearle 7 Cal 2d 48, 59 P2d 953, 106 ALR 580 (1936), the Supreme Court of California states:

> "a judgment or decree for alimony carries with it a special power and right of enforcement not given in judgments at law. There is a difference between a judgment for money or property and that of a decree for alimony; and the decree for alimony, because of such difference in the character of the obligation, may be enforced by more efficient and effective means than those given to the enforcement of judgments at law."

In Shibley v. Shibley 181 Wash 166, 42 P2d 446, 97 ALR 1191 (1935), the Supreme Court of Washington said:

> "Plaintiff is entitled to recover in this case for the amount already accrued and due according to the allegations of her complaint, the judgment to provide for its enforcement as a judgment or decree in equity. We adopt this procedure, not on account of the rule of comity enjoined by the full faith and credit clause of the Federal Constitution but because, as a matter of public concern and equitable power, the enforcement in this state of such decrees for alimony and support money should not depend solely upon ordinary execution, but that the common practice in this state with respect to all the remedies for the enforcement of such decrees as if originally entered here should be followed and enforced."

The Supreme Court of Oregon comments on Frachier v. Gammill, Bruton v. Tearle, and Shibley v. Shibley, in their opinion in Cousineau v. Cousineau, 155 Or 184, 63 P2d 897, 109 ALR 643 (1936), as follows:

> "We are impressed with the reasoning of the Mississippi, California, and Washington decisions. The public of this state has no sympathy for those who seek to shirk the duty imposed by decrees directing the payment of support money ..... While the statutes concerning divorce may legally free parties to such proceedings from any financial or other obligation to each other, the duty of a father to support and care for his helpless minor offspring is a moral duty that inheres in the law of nature, and is enjoined by the law of God. The defendant's duty was not diminished in any manner when he chose to come to our state .... we ought not to make our state a safe haven for those who seek to evade duties imposed upon them by the decrees of our neighboring states unless there is no escape from such an unhappy task. Fortunately our neighbors, as well as Mississippi, have shown the way."

The Supreme Court of South Carolina in its decision in the case Johnson v. Johnson, 194 SC 115, 8 SE.2d 351 (1940), said:

> "Transplantation of the parties from one state to another has not reduced the obligation to the ordinary category of 'a debt of record.' The Courts of equity of this state have ample power to grant the relief sought by the plaintiff in this cause. To conclude that because a wife was awarded

> alimony in another state, the Courts of this state will not aid her in its collection, when if the award had been made regularly in this state they would do so, would have little to commend it. Such a view disregards the whole purpose of awarding alimony or support money to a wife and child. The need is not affected by the place of award. The assertion of the right in a different state cannot change the nature and basis of the obligation."

The Supreme Court of Tennessee, in its decision in Thones v. Thones, 185 Tenn. 124, 203 SW.2d 597 (1947), to enforce an alimony judgment of a sister state by the equitable remedy of contempt, held:

> "The policy of our state as declared by statute is that we shall enforce alimony decrees in such manner as "shall seem meet and agreeable to equity and good conscience." Equity and good conscience require the application of the equitable remedy of contempt to prevent a willful and obstinate violation of "society's law made for society's subsistence" and as a matter of justice to the wife and who was without fault and to whom this legal and moral duty is owed."

And the United States Court of Appeals, Fifth Circuit, in a more recent case, Dorey v. Dorey, USCA, 609 F.2d 1128 (1980), states that:

> "Equitable powers will be used by Alabama courts in enforcing a foreign support judgment, and even contempt of court that may result in imprisonment is available."

And finally, the Supreme Court of Georgia in its decision in Baker v. Baker, 256 S.E.2d 370 (Ga. 1979), held that a father could be held in contempt for failure to abide by a Florida judgment for child support arrearage and further stated:

> "Appellant (father) contends contempt cannot lie where there is no contempt of the domesticating court at the time the petition was filed and further, that a defendant cannot be held in contempt for failure to abide by the judgment of a foreign court until after the same has been domesticated and then only for acts or failures to act which took place after the date of domestication. These contentions are without merit. See also White v. White, 233 GA. 289, 210 SE.2d 817 (1974). Enforcement by contempt

> sought in Georgia is authorized under our law and under the laws of the state where the original judgment was granted. McDuffie v. McDuffie, 155 Fla. 63, 19 So.2d 511 (1944); Sackler v. Sackler, 47 So.2d 292 (Fla. 1950)."

The case of Baker v. Baker, referenced above, goes one step further in that the Georgia Supreme Court not only recognizes the Florida laws concerning contempt, but also does not require that the foreign judgment be domesticated to hold the father in contempt. In other words, Georgia could hold the father in contempt in its Courts for the contempt against the Florida Court.

See also: Rule v. Rule, 313 Ill App 108, 39 NE.2d 379 (1942); Glanton v. Renner, 285 Ky 808, 149 SW2d 748 (1941); Howard v. Jennings, (CA 8 Mo) 146 F.2d 332 (1944); McKeel v. McKeel 185 Va 108, 37 SE.2d 746 (1946); McCabe v. McCabe, 210 Md 308, 123 A.2d 447 (1956); Bahr v. Bahr, 85 S.Dak 240, 180 N.W.2d 465 (1970); Bennett v. Bennett, 260 S.C. 605, 198 SE.2d 114 (1973); Parker v. Parker, 211 SE.2d 729 (Ga. 1975); and White v. White, 210 SE.2d 817 (Ga. 1974).

This issue is well settled in the United States as well as in Florida. The Florida Supreme Court has resolved the question of equitable remedies versus an action at law with regard to support obligations in numerous cases which granted equitable relief, such as: McDuffie v. McDuffie 155 Fla. 63, 19 So.2d 511 (1944); Sackler v. Sackler 47 So.2d 292 (Fla. 1950); Haas v. Haas 59 So.2d 640 (Fla. 1952); and Lanigan v. Lanigan 78 So.2d 92 (Fla. 1955).

The aforementioned Florida Supreme Court decisions were the basis upon which Grotnes v. Grotnes, 338 So.2d 1122 (Fla. 1976), was upheld by the Fourth District Court of Appeal of Florida. The Grotnes decision

was submitted through Memorandum to the lower court, Pasco County Circuit Court, for consideration and application in the present case which is now brought before this Court on appeal. (Appendix pp. 17-19)

The same issues were raised on appeal in the case of Grotnes v. Grotnes, supra, as are before this Court in the present case. In Grotnes the divorced wife established a Georgia judgment for arrearages against the husband as a Florida judgment. The lower Court entered a money judgment against the husband for past due alimony, child support and attorney's fees, as well as additional monies accruing from the date of the Florida judgment. The Court adjudicated the husband in contempt and awarded equitable remedies for enforcement of alimony and child support arrearages.

In the Grotnes case, the husband contended that the wife's Complaint was merely an attempt to collect on a Foreign judgment and, therefore, not subject to the equitable remedies for enforcement. The Court stated in Grotnes:

> When the Complaint and Amendment thereto are read together they are sufficient to advise the appellant of the nature of the action and invoke the equitable jurisdiction of the trial court."

The second issue raised in Grotnes is that once the Court has jurisdiction over the parties and subject matter what power does it have to enforce the Foreign Judgment. In Grotnes, the Court set aside the prior holding of Clark v. Muldrew, 308 So 2d 136, and held that:

> "...the courts of Florida have repeatedly and consistently held that a nonresident wife who seeks to enforce past due and unpaid installments of alimony and support which have been reduced to iudsment in another state is entitled to the equitable processes of our courts in the enforcement

> thereof. "....."If foreign money judgment for past due alimony and support may be enforced by those equitable remedies customary in the enforcement of our local decrees for alimony and support money, there is no logical or legal reason why a domestic money judgment for past due alimony and support money may not also be enforced in a like manner."

The principle upon which Grotnes rests is stated in the earlier cases of McDuffie v. McDuffie; Sackler v. Sackler; Haas v. Haas, Lanigan v. Lanigan; Miller v. Miller, 105 So.2d 386 (Fla 1st DCA 1958); and West v. West, 301 So.2d 823 (Fla 2nd DCA 1974).

Again, the facts and issues presented in the case, Sackler v. Sackler 47 So.2d 292 (Fla. 1950), are the same as in the present case brought before this Court on appeal. In Sackler, a wife obtained in a New York court a decree awarding her a weekly sum for herself and for the children's support and subsequently a judgment for past-due and unpaid installments. The Supreme Court of Florida said that the past-due and unpaid installments which had been reduced to judgment in New York could be enforced in Florida by the same equitable remedies, including contempt proceedings, as are applicable to the enforcement of a local decree, and that the lower court erred in denying to the former wife such equitable remedies and in merely awarding her a money judgment for the amount of such arrearages as had been reduced to judgment in New York, and in denying all further relief. The Supreme Court of Florida in Sackler states:

> "The mere transformation of an obligation to support into more specific form such as a decree to pay, does not make it an ordinary debt but a continuing obligation. This, the courts of Florida should have the same vital interest in enforcing as the courts of the state where such obligation was originally assumed. This is particularly true in view of the fact that this state, with its climatic and other well-known advantages, should seem to offer an especial appeal to one seeking to find a new home or a temporary refuge, and we have no desire to make this state a haven for fugitive husbands."

In the case of Haas v. Haas, 59 So.2d 640 (Fla. 1952) the Florida Supreme Court relied on the decision of Sackler, supra, and the cases cited therein. In its decision, the Supreme Court states:

> "It is established in the jurisprudence of this state that our equity courts are open to nonresident wives for the enforcement by equitable processes of final decrees for alimony for the wife and support money for the children awarded by the courts of other states.....A nonresident wife who seeks to enforce in the courts of this state a final alimony decree or money judgment based thereon entered by a court in another state may do so in a court of law by a common-law action to secure a money judgment for the delinquent alimony, or she may ask our equity court to exert its equitable remedies in the enforcement of such decree.....We say only that an equity court of this state, when called upon to enforce by equitable processes an alimony decree of another state, may entertain equitable defenses here recognizable in such matters in order to determine the extent to which the court equitably should go in enforcing the foreign judgment."

In the case brought before the Supreme Court of Florida, Lanigan v. Lanigan, 78 So.2d 92 (Fla. 1955) the Court again quotes from Sackler:

> "....it is established that our equity courts are open to nonresident wives for the enforcement by equitable processes of final decrees for alimony for the wife and support money for the children awarded by the courts of other states"

And, the First District Court of Appeal of Florida, in Miller v. Miller, 105 So.2d 386 (Fla 1st DCA 1958) following the cases Sackler v. Sackler; Haas v. Haas; and McDuffie v. McDuffie states:

> "Considering the allegations of the complaint and the proofs submitted in support of the motion for summary decree, coupled with the well-established principles of law set forth above and applied by the chancellor, it would be a strained and narrow construction indeed to hold that this was a suit for debt cognizable only at common law rather than one to procure and enforce by equitable processes a decree for accrued alimony and support for the former wife or defendant."

The Third District Court of Appeal of Florida, in the case Ginsberg v. Ginsberg, 123 So.2d 57 (Fla. 1960), considers the issue concerned with this appeal, and states:

> "A court of equity has many methods at its disposal to enforce its decrees, and nowhere have we been able to find where the use of these methods was required to be in the alternative. It is the satisfaction of the decree and not the method pursued that is paramount. There may be more than one remedy of enforcing a judgment or decree, but there can be only one satisfaction."

See also: Fugassi v. Fugassi, 332 So.2d 695 (Fla. 1976).

From a reading of the foregoing cases, it is very clear and settled that the Florida courts have the authority to invoke the equitable remedies at their disposal to enforce the payment of this child support obligation, which has been reduced to a Florida judgment, including the power of contempt and imprisonment for failing to obey an order to pay the arrearage by the Florida courts.

All criteria has been met with regard to the registration and recording of the Virginia Judgment in the present case brought before this Court on appeal, so as to make it a valid and binding judgment in the state of Florida, as was ruled by the lower Court in the Circuit Court of Pasco County Florida. By virtue of this judgment being reduced to a Florida judgment, and not being subject to modification by a Virginia Court, that the power and authority remains with the State of Florida as to the enforcement of the child support obligation in their courts of equity.

These issues have been previously considered by the Second District Court of Appeal of Florida in the case West v. West, 301 So.2d 823 (Fla. 2nd DCA 1974). The court said in regard to the issue of equity:

> "As to the other provisions the question is whether they are entitled to full faith and credit. Initially, we suggest that it may be helpful to keep in mind in these cases that we are considering them as they stand in the enforcement posture. Florida law on the subject was crystallized and well articulated by Mr. Justice Roberts in Sackler v. Sackler, which stands as the polestar in this state. As we read that case, and the authorities cited therein, we note first that a final decree and/or judgment of a sister state is entitled to "full faith and credit" only insofar as it adjudicates, finally, a past due and payable obligation or establishes a presently required performance. If it is the equivalent of an ordinary judgment at law it is enforceable by fieri facias. If it is a decree relating to alimony or finally establishes a presently required performance, it is enforceable by either such execution at law or by such appropriate remedies as might be available through equitable processes."

Again, we go back to the principles established in Sackler, supra, which is the leading case in Florida with regard to the equitable remedies sought by the petitioner in this present appeal. The West case, emanating from the Second District, follows Sackler in establishing that the decree relating to alimony and/or support in enforceable by either execution at law or by equitable processes. The passage above indicates that the key word is finally, in that the foreign decree must establish and determine past-due arrearages. In the present case on appeal, the Fairfax County Order dated November 21, 1985, determines past-due arrearages and this is a Final Order, not subject to modification. A reading of other cases seems to indicate that this finality, that this decree or order cannot be subject to modification by the sister state, in this case, the sister state of Virginia, is the element that determines the enforceable remedies at equity or law. We have previously mentioned that the Virginia Order is a final order, not subject to modification. This Virginia Order has been

accepted as final, in that the lower court in Pasco County in its opinion and Order, dated January 26, 1987, states "....that said foreign judgment has been reduced to judgment and filed with the Clerk of Pasco County, Florida, per Florida Statutes Section 55.505, ...in that the same is a classical judgment debt and the other traditional remedies of execution, attachment and/or liens are available to the petitioner in her effort to satisfy the same." (Appendix p. 8)

That the petitioner has never contested this judgment is further evidenced from testimony by his Counsel during the October 13, 1986 hearing. In regard to the foreign judgment Counsel states:

> MR. RANKIN: "Your Honor, if Mr. de la Grana--if all they are trying to do is establish the Virginia Judgment as a Florida Judgment, prccedurally I don't think there's any obligation that I can raise. I'm not sure exactly what beyond that he's trying to get the Court to do. I think if all he's trying to do is have this Court enter an Order which recognizes the Virginia Judgment as a Florida Judgment, I don't have any argument on that." (Appendix p. 22, lines 12-21)

As has been stated previously in this appeal, the question of "full faith and credit" provision of the Federal Constitution is not at issue, as the subject foreign judgment for child support, having been reduced to a Florida judgment, is enforceable in an action at law, by the recovery of a money judgment through execution thereon. The question, which has been answered by the preceding authorities and cases, is whether the foreign judgment is also enforceable by equitable remedies, including contempt. The respondent believes that this question is not only answered by the cases cited herein, but is well settled and leaves this Court with the correct answer to apply in this appeal.

The primary focus of petitioner's argument is that Article I, Section 11 of the Florida Constitution, prohibiting imprisonment for debt, has not heretofore been considered by this Supreme Court of Florida regarding child support or alimony arrears that have been reduced to judgment. Petitioner maintains that all the Florida cases on which the theory of equitable remedies rest have not addressed the issue of imprisonment for debt and, therefore, are in error. Petitioner's argument holds little weight when the fact is that the issue has long since been resolved in numerous cases, both at the District Court of Appeal level and at the Florida Supreme Court level. Where the responsible parent has the ability to pay, or previously had the ability to pay but refused to do so, then the contempt powers of the Courts are to be used for enforcement of the alimony or child support obligation.

The ability to pay is determinative in the use of the contempt powers of the Court. Absent such ability to pay, contempt would amount to imprisonment for debt. Further, where equitable remedies are available, equitable defenses are available as well; including the equitable defense of inability to pay.

In Lamm v. Chapman, Fla. 413 So.2d 749 (Fla. 1982), the Florida Supreme Court considered whether the Department of Health and Rehabilitative Services could, on its own petition, authorize the court to invoke its contempt authority to enforce the payment to HRS of past due support obligations which have been paid by HRS. The record did not support the

determination that the respondent had the ability to pay the child support, and the trial court reversed the contempt order. On this issue the Court states:

> "We agree with the decision of the Second District Court of Appeal in Andrews v. Walton that the assignment of the child support obligation to state, under section 409.2561(3), does not change the nature of the obligation, nor does it limit the means by which the obligation may be enforced. Of course, the requirements of Faircloth, that the responsible parent have the ability to pay but willfully refuse to do so, apply to any contempt order obtained by this state."

There must exist the ability to pay and the willful refusal to do so which enables the Courts to exercise their contempt powers. To quote again from Haas v. Haas, supra, on the issue of equitable defenses:

> "...but public policy also forbids our exercising equitable jurisdiction in such matters without at the same time extending equitable relief to a husband who, through no fault of his own, finds himself unable to meet the alimony and support money demands theretofore place upon him by a court of another state". ...."This is but another application of the familiar maxim that he who seeks equity must do equity."

In Haas, although the Florida Supreme Court recognizes the equitable defense of inability to pay, it allows subsequent efforts to determine the extent to which the Court should go in enforcing the foreign judgment, the Court states:

> "We say only that an equity court of this state, when called upon to enforce by equitable processes an alimony decree of another state, may entertain equitable defenses here recognizable in such matters in order to determine the extent to which the court equitably should go in enforcing the foreign judgment. The pleadings as made up form a basis upon which the Chancellor, after the taking of testimony, can enter an enforcement decree commensurate with the equitable principles prevailing in this state."

While Haas recognizes the principles of Sackler, supra, in regard to public policy for equitable remedies for alimony and child support, the key element in this case is, arguably, the inability to pay.

Numerous other cases apply the same principles. In the case of Faircloth v. Faircloth, 339 So.2d 650 (Fla. 1976), referred to in Lamm, supra, the Supreme Court of Florida states:

> "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."

and further:

> "We do not imprison for debt. Art. I, Section 11, Fla. Const. Therefore, a finding that the debtor ordered to pay is able to pay and willfully refuses to do so is the touchstone of the proceeding: The essential fact. found to be a fact, which validates the process. Without that finding aberrant judicial power might-soon punish for debt alone..."

The Second District Court of Appeal in its decision in Andrews v. Walton, 400 So.2d 791 (Fla. 1981) refers to this issue:

> "Imprisonment for debt is prohibited by the Florida Constitution. Ar. I, Section 11, Fla. Const. Imprisonment for failure to obey a court order of child support payment is not imprisonment for debt."

On the definition of "civil contempt" the Supreme Court of Florida, in Demetree v. State, 89 So.2d 498 (Fla. 1956) said:

> "In its broadest aspects a civil contempt order is sought by a party to the cause and entered by the court for the private benefit of the offended party. While imprisonment may be adjudged in a civil contempt proceeding, it is coercive rather than punitive in nature. Customarily when imprisonment is ordered for a civil contempt its continuance is made contingent upon compliance with the order of the court and when the condemner has so complied he is released

> from prison. The sentence is usually therefore indefinite and not for a fixed term. It is for this reason that in civil contempt it has been said that the contemnor "carries the key of his prison in his own pocket."...He can end the sentence and discharge himself at any moment by doing what he had previously refused to do."

The same theory is stated in the Florida Supreme Court case of Pugliese v. Pugliese, 347 So.2d 422 (Fla. 1977), where the Court says that the contemnor "carries the key to his cell in his own pocket." See also: Garo v. Garo, 347 So.2d 419 (Fla. 1977), and Acosta v. Acosta 409 So.2d 197 (Fla. 1982).

In Naster v. Naster, 163 So.2d 264, (Fla. 1964), the Supreme Court of Florida states:

> "While inability to pay is a valid defense at the time the final decreed is entered, it will not necessarily stand as a defense against recovery of an accumulation of delinquent payments under a decree which has become final. After an award of alimony becomes final the chancellor has the power to enforce it in a contempt proceeding. The issue then presents the question whether the husband has willfully failed to comply. The requirement of a willful default implies that the husband has the capacity and financial ability to pay and that he has willfully and intentionally disregarded his obligation. At this point, the chancellor is endowed with a sound judicial discretion to determine whether the circumstances reveal a willful failure.....In a contempt proceeding when the failure to pay has been established the husband has the burden of providing that his failure has not been willful. In exercising his judicial discretion in the contempt proceeding the chancellor may take into consideration the husband's inability to pay, together with other elements such as his failure to apply to the Court for relief when the inability arises, as well as the fact that the husband has intentionally brought about his financial incapacity."
>
> ".....However, by the amended order the chancellor obviously found that the husband was unable to meet the accumulated obligation in its entirety. Nevertheless, he found that the husband did have the ability to pay the total delinquency on an installment basis. It was the failure to pay the installments,

> which the chancellor concluded he was able to pay, that resulted in the alternative 60-day contempt sentence. The chancellor, as revealed by the decision of the District Court, took notice of the husband's inability to pay the full delinquency in lump sum but found that he could pay it in installments and ordered him to do so or else suffer the pain of the contempt order. There is no indication that the chancellor abused his discretion."

And finally, in Bowen v. Bowen, 471 So.2d 1274 (Fla. 1985), the Supreme Court of Florida affirms previous cases, as already referenced: Pugliese v. Pugliese; Demetree v. State; Faircloth v. Faircloth; etc. and states:

> "As this Court has previously stated, the purpose of a civil contempt proceeding is to obtain compliance on the part of a person subject to an order of the court. Because incarceration is utilized solely to obtain compliance, it must be used only when the condemner has the ability to comply. This ability to comply is the condemner's 'key to his cell'."

That the husband/father holds the "key to his own cell" refers to his ability to purge himself of the support obligation. The primary and determinative element in the above cited cases is "the ability to pay". Absent that ability, the husband/father does not have the "key to his cell", for without the ability to purge himself, he must remain in prison. It is for this reason, that the Courts draw the distinction with regard to the ability to pay. This is determinative.

It is true that Florida law prohibits imprisonment for debt, however, failure to obey a court order for child support is not imprisonment for debt, where the husband/father has the ability to pay, or had the ability to pay but refused to do so.

The only determinative factor standing in the way of using the contempt powers of the court for enforcement of a foreign judgment for alimony or child support arrearage is the inability to pay. Absent the

ability to pay, the contempt powers would not be available. This ability to pay sets apart the decisions of the court that allowed the contempt authority and those that did not. Those decisions that did not allow the contempt powers of the court are those wherein the defendant raised the defense and provided evidence that he did not have the ability to pay.

The petitioner cites the case of Sokolsky v. Kuhn, 405 So.2d 975 (Fla. 1981) in support of his position, and states that this case also involves the same question of arrearages, money judgments and the availability of contempt as an equitable remedy for enforcement. This case deals with garnishment proceedings where the former wife failed to file a sworn denial of her ex-husband's affidavit claiming head of the family status. Former wife was required to file this controverting affidavit when former husband moved to dissolve the garnishment and filed affidavit of exemption alleging that he was head of family. This case, in no way, even resembles the issues at hand. This case does not support petitioner's argument that equitable remedies are not available for enforcement of a foreign judgment for alimony or child support.

And lastly, Florida Statute 61.17 (1986 Supplement to Florida Statutes 1985) entitled "Alimony and child support; additional method for enforcing orders and jugments; costs, expenses" very specifically states in subsection (3) that:

> "The entry of a judgment for arrearages for child support, alimony, or attorney's fees and costs ~~does not~~ preclude a subsequent contempt proceeding or certification of a IV-D case for intercept, by the United States Internal Revenue Service, for failure of an obligor to pay the child support, alimony, attorney's fees, or costs for which the judgment was entered."

B. DO THE CIRCUIT COURTS OF THIS STATE HAVE JURISDICTION TO ENFORCE ARREARAGES OF CHILD SUPPORT BY MEANS OF EQUITABLE REMEDIES, INCLUDING CONTEMPT, AFTER THE CHILDREN HAVE ATTAINED THE AGE OF MAJORITY, WHEN PROCEEDINGS WERE INITIATED PRIOR TO THE ATTAINMENT OF MAJORITY?

Petitioner contends that since the three children have reached the age of majority, that the entire issue of equitable remedies, including contempt, is moot.

Proceedings concerning the child support arrearage were initiated while the children were still minors. In fact, the three children's ages were, respectively, 17, 16, and 15 at the time a petition was filed in the Virginia Court in 1984. A Writ of Ne Exeat was ordered in Hillsborough County, Florida in January 1985, based on the filing of the Virginia petition and warrant of arrest. However, this Writ of Ne Exeat was vacated by Judge Vernon Evans two days later. (Appendix p. 20-22; p. 24; p. 29) Subsequent to these events, a Rule to Show Cause was issued by the Fairfax County Virginia District Court on June 6, 1985. At the time of the hearing on the Rule to Show Cause, July 11, 1985, two children were minors, their ages being 17 and 16. At this hearing the petitioner was found to be in contempt of the Virginia Court, and the arrearage as of July 11, 1985 was reduced to final judgment. (Appendix p. 9; pp. 13-16; pp. 27-28) The respondent filed her motion to enforce the foreign judgment on August 21, 1986, and at that time the youngest child was 17 years old. (Appendix pp. 6-9) The final ruling that equitable remedies were not available to respondent in enforcing the foreign judgment occured just prior to the youngest child reaching the age of majority.

After three years of litigation in trying to enforce the child support arrearage, respondent finds herself in the position that her three children are all over the age of majority. Respondent believes that since the proceedings were initiated prior to the youngest child's attainment of age 18, that the enforcement of the foreign judgment should be placed in the same posture as when the initial determination could have been made on the petition to enforce the foreign judgment, as the Circuit Court judge could have ordered payment at that time, subject to contempt.

Further, the petitioner has failed to comply with the child support order for amounts due and owing after July 11, 1985, the date of the judgment for arrearages. The petitioner has been well aware of his obligations to provide support in the amount of fifty dollars weekly, but has failed to do so. The petitioner's deliberate refusal to obey a court order for in excess of nineteen years should not be wiped out simply because the children have attained majority. In effect, to do so would be to reward the petitioner for being so clever as to remain hidden for so many years, and for changing his identity to avoid the child support obligation.

Florida Statute 61.17 does not preclude contempt proceedings for arrearages which have been reduced to judgment, however, is silent on the issue of the age of majority. Nowhere can respondent find in the Florida Statutes that contempt is not available after the attainment of majority.

Respondent has diligently researched this issue to arrive at the proper answer to apply to the circumstances at hand. In her research, respondent has found that there is little case law on the subject.

Although there are several Florida cases dealing with pre-1973 child support orders and the effect of the change in age of majority, it may be that this issue, as it stands, is one of first impression for this Supreme Court. Nonetheless, the issue has been considered by the District Courts of Appeal in but a few cases.

The First District Court of Appeal considered the issue at hand in it's decision in Catches v. Catches, 409 So.2d 1199 (Fla. 1982). This case involved the father's failure to pay child support, alimony and attorney's fees, stemming from a dissolution in 1977. Mother moved for an adjudication of contempt on three separate occasions. The Court entered three orders of contempt, and for each father was sentenced to a period of incarceration. Arrest warrants were issued but were returned unserved because father had successfully secreted himself from service. Child support and alimony arrearages were reduced to final judgment on January 9, 1979; mother remarried on May 19, 1979; and the minor child attained the age of majority on April 27, 1980. Susequently, the wife/mother filed another motion for contempt. The Court ordered the prior Orders of Contempt set aside on the finding that the child had reached the age of majority and the wife had remarried. Wife appealed and the Order was reversed and remanded with direction. The Court states:

> "The issue now presented concerns the authority of the trial judge to preserve the effect of its past contempt orders for the purpose of protecting the dignity and force of such orders which were proper at the time entered. We find no decisions prohibiting the exercise of such authority in these circumstances."....."Vindication of the Court's authority respecting its past orders, lawfully entered upon the facts then existing, therefore appears to be a valid purpose for the exercise of contempt authority.''

The petitioner was found in contempt of the Virginia Court and such is referenced in the foreign judgment order as filed and registered in the Circuit Court of Pasco County. Although the petitioner has not yet been found in contempt of the Florida Court, the trial court could have ordered him to pay the arrearage, subject to contempt, at the time of the hearing on the petition for enforcement. At that time, there was one child who had not attained the age of majority, however, the ruling of the court, that contempt was not available, precluded any remedy for the respondent. Respondent believes that the case should be returned to the same posture she would have been in at the time of the lower court's ruling, when the child was still a minor.

In support of respondent's position that the date of initiation of the proceedings is controlling, she offers two Florida District Court of Appeal opinions.

First, the issue at hand was addressed in the case of State of Florida, ex rel. Sipe v. Sipe, 492 So.2d 679 (Fla. 1986). Although this case involved an action under the Uniform Reciprocal Enforcement of Support Act, and the facts of the case are somewhat different, the language of the First District Court of Appeal regarding the commencement date of proceedings is especially appropriate to the issue at hand. This case involved an arrearage in which the URESA petition was filed after the two children had reached majority. The First District Court of Appeal ruled that the date of commencement of the URESA proceeding in the initiating state will determine whether the child has reached majority

and whether an action can therefore be maintained. In its opinion, the Court states:

> "Finally, we would add that the date of commencement of the URESA proceeding in the initiating state will determine whether, for purposes of the application of our holding, the child has reached majority."

And, a footnote (n.5) referenced in relation to the above:

> "We rely, in part, upon the well recognized rule that an action is commenced by the filing of a complaint, Fla R.Civ.P. 1.050 and 35 Fla. Jur. 2nd Limitations of Actions, the consequences of which include the tolling of the applicable limitations period....."

Secondly, the Third District Court of Appeal also considered the issue at hand in its opinion in Newman v. Newman, 459 So.2d 1129 (Fla. 1984), and states:

> "The question presented for review is whether the appellant, as former custodial parent of a now-emancipated child, is entitled to seek enforcement of the claimed arrearages in child support which accrued before the child reached age eighteen. We believe she is, and accordingly, reverse the order of the trial court."

And the Court further quotes a passage from Massey v. Massey, 443 So.2d 294 (Fla. 3d DCA 1983):

> "The fact that a child attains eighteen years should not make the child support obligation unenforceable by the former spouse, whether it is a post 1973 dissolution judgment or not. The fact that an ostensibly third party beneficiary (the child) can, if it chooses, enforce an agreement incorporated in a judgment, should not deprive one of the parties in privity (the wife in this case) of the right to enforce the provisions of that same agreement or judgment." Cronebaugh v. Van Dyke, 415 So.2d at 745 (Sharp, J., dissenting). "Furthermore, we find that this result is dictated by the nature of the wife/former custodial parent's right to payment of child support in arrears. It is a vested property right which the court is required to adjudicate.....Nor should this parent be deprived of the right to seek enforcement of her vested property right

> in the readily available forum of the dissolution proceeding because the child also ostensibly has standing to sue for enforcement of his court-ordered support obligation. See Massey v. Massey, 443 So.2d at 295, n.2 (noting the evanescent nature of the supposed alternative remedy...an action by the (adult) children themselves.. ..")

A child support obligation is not a debt in any just sense. The case law cited herein draws a distinction between an ordinary debt and the obligation to support one's children. We have already pointed out that the use of contempt is available for enforcement of the child support obligation and does not violate Article I Section 11 of the Florida Constitution, prohibiting imprisonment for debt. The decided theory is that failure to obey a court order for child support is not imprisonment for debt, because of the nature of the continuing obligation to support the children. The foregoing theory being established, it would be a conflict in law to then hold that the instant a child reaches majority, contempt is no longer available, and the obligation suddenly becomes an ordinary debt.

The nature of the obligation has not changed, it is still child support and not an ordinary debt. The failure to obey a court order has not changed, the failure to obey still exists, even though the child has reached age 18. Further, contempt is available in numerous other instances with respect to failure to obey a court order, which have nothing to do with child support, or the age of majority. It is the persistent failure to obey the Court Order that is paramount. It is established that contempt is the only means to collect child support from persistent child support evaders. To deny enforcement by contempt is to deny all remedies to the custodial parent. In the instant case, we are not talking about someone

who missed a few payments; we are talking about someone who failed to pay child support of only fifty dollars a week for the entire minority of three children; we are talking about a continuing willful and deliberate disobedience of a Court Order for over nineteen years. The fact that this Court Order was not obeyed has not changed, irrespective of the age of the children. The respondent does not believe that the statutes enacted for enforcement of child support were intended to also wipe out the necessity of obeying a Court Order, the instant a child reaches majority.

Since this issue may be one of first impression for this Supreme Court of Florida, respondent respectfully submits case law from other states in support of her position, so that their judicial reasoning may enlighten this Court in reaching its decision concerning the issue at hand.

Other states have held that their courts have jurisdiction in a contempt proceeding to enforce an order to pay child support on unpaid installments accruing before the child reached its majority, where such proceedings were commenced after the child reached majority, reasoning that the jurisdiction of the court was a continuing one, and that the emancipation of the child should not serve to cancel the arrears. The following states have adopted the foregoing rule: Arizona, Oregon, Texas, Kentucky, Maryland, Georgia, Michigan, Connecticut, Illinois, North Carolina, Arkansas, New York, and the District of Columbia.

The Supreme Court of Arizona, in the case Tande v. Bongiovanni, 688 P2d 1012 (1984), held that contempt was available as a remedy to enforce a support order under **URESA**, even though the children were no longer minors. In its opinion, the Supreme Court of Arizona stated:

> "We consider only one question on review and that is, may a judgment for arrearages in child support payments under the Revised Uniform Reciprocal Ehforcement of Support Act, A.R.S. Section 12-1651, et seq., be enforced by contempt of court after the child reaches the age of majority?"
>
> "We think the minority view is the better one. We believe the trial court should be able to use the remedy of contempt to discourage attempts to stall payments until the children involved reach majority and thereby possibly avoid support obligations. We therefore vacate that part of the Court of Appeals opinion which states contempt may not be used. The use of contempt in support proceedings is appropriate even if the children have reached majority."

The Supreme Court of Oregon, in the case of State ex rel. Casey v. Casey, 153 P.2d 700 (1944), held that the lower court did not err in adjudging father in contempt after children had attained majority. To this issue the Court stated:

> "Inasmuch as the defendant has failed to establish that his disregard of the courts' order during the minority of his children was not wilful, the circuit court did not err in adjudging him in contempt. Had his failure to comply with the order of the court before the children attained majority been caused by his inability to pay, a different question would arise as to the right of the court now, after the children have reached majority, to coerce him through contempt proceedings to obey its order."

The Supreme Court of Texas, in the case of Ex parte Hooks, Relator., 415 S.W.2d 166 (1967), held that contempt was available for accrued child support that was rendered before the children became 18 years of age, even though children had since reached their 18th birthday. In this case, the father made monthly payments on the arrearage until the youngest child reached eighteen years of age. He then refused to comply with the judgment. Contempt proceedings were instituted. The father's sole contention was that the district court was powerless to enforce its order at the instant the child reached eighteen. The Supreme Court of Texas, in its opinion stated:

"....It would mean that a contemnor who is in jail by an order entered before a child reaches eighteen, must be discharged when the child becomes eighteen despite his continued contumacious conduct. It would mean that a delinquent parent, as a practical matter, could always escape the final payment of child support."
"....Since the only means for enforcement is by contempt proceedings and since the Legislature expressly stated that the court has "full power and authority to enforce said judgments by civil contempt proceedings," we conclude that it intended that this full power should not be shortened by narrowly construing its intent. The legislative purpose was to provide a means to enforce judgments for the support of children beneath the age of eighteen, not to wipe them out."

The Court of Appeals of Kentucky, in the case Goodman v. Goodman, 695 S.W.2d 865 (1985) considers the issue at hand and held that the court had authority to enforce an order for payment of arrearages by contempt, even after the child had reached majority. In considering both sides of the issue, the Court stated:

"The question we are asked to decide is whether Leslie (husband) may be repeatedly incarcerated pursuant to the trial court's contempt powers for his failure to honor the terms of an agreed order regarding delinquent child support payments for a child which is no longer in its minority. As the parties point out, no reported Kentucky judicial opinions have yet had occasion to address this exact issue.. ..."

"This dilemma has been nicely summarized by one of the leading scholars in the field of remedies. He comments,

> The distinction between obligations classed as "debts" and obligations not so classed sometimes leads to difficult problems not necessarily capable of rational solution. For instance, there is the problem of the consent decree, in which the parties agree that a court shall enter such and such an order for, say, alimony. Is this a contract with the result that the obligation under it is a debt and not collectible through contempt proceedings? Or is it an obligation imposed by law, with the result that the obligation is something other than debt and fully collectible in contempt proceedings? Even judges who would not argue about how many angels can dwell on the point of a needle will argue about such things. It will surprise no one to learn that the cases are not harmonious. D. Dobbs, Remedies, Section 2.9 at 99 (1973)...."

"After due consideration, we conclude that Leslie's obligation under the agreed order of November 3, 1982, is one imposed by law, and thus is something other than a simple contractual

> debt ....Therefore, it is the order of the Hardin Circuit Court and not simply the parties' agreement which is the significant element in determining the extent of the trial court's contempt powers. Those powers have repeatedly been held to encompass punishment for "failure to do something ordered to be done by a court in a civil action for benefit of an opposing party therein.". ...Indeed, they are often described as "an essential element of judicial authority". ...By his most recent refusal to make payments, Leslie violated not only the terms of his agreement.. .but the court order affecting his conditional release. Given Leslie's primary duty to obey that order,....the circuit court was well within its authority in ordering Leslie's arrest, and would continue to be so assuming Leslie continues to refuse to obey the 1982 order."

The Court of Special Appeals of Maryland, in the case of Green v. Green, 407 A.2d 1178 (1979), held that the court was not without jurisdiction to enforce payment of child support arrearage through its power to cite and punish for contempt, even though the children were no longer legally dependent. In its very lengthy, but well reasoned opinion, the Court stated:

> "....in the absence of some statutory provision to the contrary disobedience of a court order to pay child support remains as contumacious after the child loses his dependence as before. The affront to the court is the same.....The mother had to expend her own money to maintain the children, and in all fairness.. .should not be denied the use of contempt proceedings as an effective means to enforce her husband's duty to support his children."
>
> "Yet another consideration, which may be especially germane in this case, is that if the custodial parent loses the remedy of contempt once the child becomes emancipated or of age, and is left only with the ability to execute judgment on the obligor's property, he or she may be left with no effective remedy at all. An obligor who has little or no property subject to attachment and who is crafty or simply fortunate enough to elude the law's grasp until his children are 18 or on their own may escape his legal and parental obligation entirely. The effect of this, of course, is to impose upon the custodial spouse, or, as in this case, largely upon society, the financial burden that is rightfully and lawfully his without any practical means of redress."

> "....We would not consider it sound judicial policy to encourage in any way the evasion of one's legal duty to support his or her minor children; and thus we believe the less restrictive view to be the better one."

The Court of Appeals of Georgia, in the case of Johnson v. State, 306 S.E.2d 756 (1983), held that action to collect arrearages which accrued while child was under 18 could be filed even though child on whose behalf action was brought was legally an adult at the time of the action. The Georgia Court stated:

> "....While the parent would not be liable to pay for the support of his child once that child becomes 18 (unless the child is unable to maintain himself and is likely to become a public charge), the parent is responsible for arrearages.. .Thus, an action to collect arrearages which accrued while the child was under 18 could be filed even though the child on whose behalf the action is brought is legally an adult at the time of the action. Furthermore, in order "to assure compliance with its orders," a trial court is empowered under URFSA to "punish the respondent who violates any order of the court to the same extent as provided by law for contempt of the court..."

The Court of Appeals of Michigan, likewise, held that the trial court had jurisdiction although the action was commenced after the children had reached the age of majority. In its opinion, in the case of Wasson v. Wasson, 216 N.W.2d 594 (1974), the Court stated:

> "Therefore, our Court has found that support provisions of a judgment of divorce, entered during the minority of a child, are enforceable by contempt proceedings initiated after that child has reached the age of majority."
>
> "In the instant case, the support order at issue was entered during the minority of the two children. The amount at issue accrued before these children reached the age of majority. The total arrearage was in fact reduced by the trial court, and defendant failed to argue that he does not owe the requested amount. Mrs. Wasson had to expend her own money to maintain her children, without receiving the requested assistance from her husband. In all fairness, Mrs. Wasson should not be denied the use of contempt proceedings as an effective means to enforce

> her husband's duty to support his children. Since Michigan courts have apparaently exercised their jurisdiction in somewhat similar proceedings, and because the statutes cited above regarding the power of the court to punish for contempt those who disobey orders for the payment of child support do not bar the initiation of proceedings such as the one at bar, we hold that the trial court was correct in its finding that it had the jurisdiction to enforce the support order at issue even though the contempt proceeding was initiated after the children had reached the age of majority."

The Superior Court of Connecticut, Judicial District of Litchfield, in the case of Arnold v. Arnold, 407 A.2d 190 (1979), reached the same conclusion as in the foregoing cases, regardless of the fact that action was brought 22 years after the divorce and eight years after the child reached majority. To this issue, the Court stated:

> "This court will hold that it has jurisdiction in a contempt proceeding to enter an order to pay child support on unpaid installments which accrued before the child reached majority, where the proceedings were commenced after the child reached majority. The jurisdiction of the court is a continuing one, and the mere emancipation of the child should not serve to cancel the arrearage."

The Appellate Court of Illinois, Second District, in the case of Kaifer v. Kaifer, 3 N.E.2d 886 (1936), in regard to the issue at hand, stated:

> "Harold became of age in October 1933, and in less than two years thereafter, the instant petition was filed. This decree was a continuing order, and we are unable to say that its enforcement is inequitable or unjust."

The Supreme Court of North Carolina held that a court order, entered with consent of the parties, providing for child support payments beyond the time for which there was a duty on the part of the father to provide support was enforceable by contempt proceedings initiated after the child had reached the age of majority of eighteen years. The Supreme

Court of North Carolina, in its opinion in the case of White v. White, 223 S.E.2d 377 (1976) stated:

> 'We hold that this Order may also be enforced by contempt proceedings. That the order is based on an agreement of the parties makes it no less an order of the court once it is entered....It is likewise no less an order of the court, once entered, notwithstanding that the portion of it here in question could not have been lawfully entered without defendant's consent. His consent made this portion of the order, once entered, lawful. Any person guilty of "wilful disobedience of any.. .order lawfully issued by any court" may be punished for contempt. N.C.Gen.Stat. 5-l(4) (1969).

And finally, the United States District Court of Appeals, District of Columbia Circuit, in Kephart v. Kephart, 193 F.2d 677 (1951) held that divorced husband's remarriage and acquisition of second set of children whom he must support and the attainment of majority by the children of the first marriage did not justify the refusal to hold the husband in contempt for failure to pay monthly installments which the divorce decree required husband to pay for the support of the wife and children of the first marriage. To this issue the Court stated:

> 'Was the court's refusal to hold Kephart in contempt justified by the conditions and circumstances shown by his defensive affidavit? We think not.. .He relied upon the fact that his first set of children had become of age, and the fact that he had acquired a second set which he must support. Neither reliance was sufficient to save him from contempt."....'We think, however, that upon remand Kephart should be cited for contempt and a hearing should be had as to the sufficiency of any defense which he may present."

See also: Allison v. Binkley, 259 S.W.2d 511, Supreme Court of Arkansas (1953); Lockwood v. Lockwood, 160 F.2d 923, U.S. Court of Appeals, District of Columbia (1947); Ovaitt v. Ovaitt, 204 N.W.2d 753, Court of Appeals of Michigan (1972); Goldberg v. Goldberg, 236 App.Div.

258, 258 *NYS* 588 (1932); Gatto v. Gatto, 237 App.Div. 888, 261 *NYS* 454 (1933); and Moskowitz v. Moskowitz, 269 App.Div. 710, 54 *NYS* 2d 67 (1945).

The Code of Virginia (the initiating state) is silent as to the Court's contempt powers after the age of majority, and the issue has not, heretofore, been tested by the Supreme Court of Virginia. However, the Virginia Courts use the statutory child support enforcement provisions as authority to exercise their contempt powers concerning child support arrearages, regardless of whether or not the child has reached the age of majority. It is suspected that many other states follow the same practice as the Virginia Courts.

The respondent recognizes that, although the petitioner has been found in contempt of the Virginia Court while the children were minors, the petitioner has yet to be found in contempt of the Florida Courts. The cases cited above do not preclude the exercise of contempt proceedings after the children have reached majority, and generally, do not make any distinction between contempt proceedings initiated prior to the attainment of majority or after the children reach majority. Contempt is the only effective remedy that respondent has to enforce the child support arrearage, and the age of the children should not preclude this remedy.

To rule that the attainment of majority precludes contempt would be to allow the petitioner to escape his accumulated support obligations altogether. From the respondent's prespective, execution on the judgment is not an adequate remedy. The facts of this case only serve to show the extremes that the petitioner has gone to in order to avoid the obligation

for over nineteen years. Is it not conceivable that the same extreme efforts would be utilized to divest assets in order to make execution meaningless? Further, should a "runaway father" be able to pick and choose which state is most beneficial for him to remain hidden until the children reach majority, rejecting as a residence those states that will enforce payment of support by contempt? And, is it equitable for the custodial parent to be without a remedy simply because the obligor makes the choice to live in a state that precludes contempt after the age of majority, when other states do not?

As has been previously argued, it is the failure to obey the court order that is paramount. The age of majority should have no bearing on the court's enforcement of its orders or the orders of a sister state that have been properly registered in the responding state.

And lastly,

> SHOULD IT BE ACCEPTABLE IN A SOCIETY BASED ON MORALITY AND JUSTICE FOR A FATHER TO REDUCE HIS CHILDREN TO POVERTY, ROB THEM OF OPPORTUNITY, AND COVER THEM WITH LAYERS OF INSECURITY, GUILT, AND FEAR; ONLY TO ESCAPE HIS FAMILIAL OBLIGATIONS ALTOGETHER, SIMPLY BECAUSE THOSE CHILDREN HAVE REACHED MAJORITY?

Although this issue may be one of first impression for this Supreme Court of Florida, the sound judicial reasoning of its sister states, as referenced in the foregoing cases, provides precedent to apply in the instant case on appeal.

CONCLUSION

The Second District Court of Appeal was correct in its opinion of August 14, 1987, in that equitable remedies, including contempt, are available for the enforcement of a foreign judgment for alimony or child support arrearage. The only determinative factor standing in the way of using the contempt powers of the court for enforcement of a foreign judgment for alimony or child support arrearage is the inability to pay. Absent the ability to pay, the contempt powers would not be available. Where the responsible parent has the ability to pay, or previously had the ability to pay but refused to do so, then the contempt powers of the Courts are available for enforcement of the alimony or child support obligation, without violating Article I, Section 11 of the Florida Constitution.

Further, the contempt powers of the Courts of this state are available even after the children reach the age of majority. Based on the case law cited herein, there is sufficient precedent for Florida to adopt the generally accepted practice of its sister states. It is the failure to obey a Court Order that is paramount, and the age of majority should have no bearing on the enforcement of a valid court order. Florida Statute 61.17 does not preclude the use of contempt, nor does it prohibit the use of contempt after the age of majority.

The Respondent, Patricia Gibson Bennett, respectfully requests that this Honorable Supreme Court of Florida affirm the opinion of the Second District Court of Florida, and further, that relief be granted to the respondent in finding that contempt is available, regardless of the age of the children.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: Mark P. Kelly, Esquire, Freeman & Lopez, P.A., 4600 W. Cypress, Suite 410, Tampa, Florida 33607; Bill Branch, Boyd and Branch, 2441 Monticello Drive, Tallahassee, Florida 32303; and Chriss Walker, Department of Health and Rehabilitative Services, 1317 Winewood Drive, Tallahasse, Florida 32301 by U.S. mail, this 22 day of October, 1987.

PATRICIA ANN BENNETT