21

SUPREME COURT OF FLORIDA

OSCAR DAVID GIBSON, ETC.

Petitioner,

CASE NO. 71,038

vs.

DCA CASE NO. 87-600

PATRICIA GIBSON BENNETT,

Respondent.

FILED
SID J. WHITE
NOV 30 1987
CLERK, SUPREME COURT
By ____ Deputy Clerk

REPLY BRIEF OF PETITIONER

Mark P. Kelly
Freeman & Lope P.A.
4600 W. Cypress, Suite 410
Tampa, Florida 33607
Fla. Bar #224375
(813) 873-1431

TABLE OF CONTENTS

CITATION OF AUTHORITIES

ARGUMENT

THE CIRCUIT COURTS OF THIS STATE DO NOT HAVE JURISDICTION TO ENFORCE A FOREIGN MONEY JUDGMENT FOR ARREARAGES OF ALIMONY OR CHILD SUPPORT BY MEANS OF EQUITABLE REMEDIES, INCLUDING CONTEMPT, AFTER THE DOMESTICATION OF THE SAME IN FLORIDA.

Despite the Petitioner's contention that this issue has been settled since 1848 when the Supreme Court decided Hiram Barbara v. Huldah Barbara, 21 How 582, 16 L.Ed. 229 (1848) clearly such is not the case. In the first place, the Hiram Barabara v. Huldah Barbara decision simply stands for the proposition that a divorce decree of one state will be accorded full faith and credit in any other state. The Barbara court clearly disclaimed any jurisdiction in the courts of the United States upon the subject of divorce or for the allowance of alimony. Similarly, Petitioner's reliance on Wetmore v. Marko, 196 U.S. 68, 25 S.Ct. 172, 49 L.Ed. 390 (1904) and Audubon v. Shufelt, 181 U.S. 575, 21 S.Ct. 735, 45 L.Ed. 1009 (1900) is misplaced in that neither of these cases entail an attempt to enforce by way of contempt a money judgment predicated upon a determination of support arrears and as such are entirely distinguishable from the case sub judicie. Likewise, the Supreme Court case of Dunbar v. Dunbar, 190 U.S. 340, 47 L.Ed., 1084, 23 Sup. Ct. Rep. 757 (1902) is distinguishable in that it merely stands for the proposition that child support and/or alimony decrees are not dischargeable in bankruptcy. In fact, none of the cases cited by the Petitioner emanating from the United States Supreme Court ever dealt with the enforcement of a money judgment for arrears. In fact, Audubon, Dunbar, and Wetmore concern themselves only with issues relative to the bankruptcy act then in force and effect and whether or not alimony and child support were "provable debts'' that would be subject to discharge. However, the question remains whether or not in Florida in light of McDuffie (1944), Sackler (1950), Haas (1952), and/or Lanigan (1955), when read in light of this Court's subsequent decision in Sokolsky (1981), and Lamm (1982) as argued in Petitioner's initial brief, the Circuit Courts can enforce a foreign judgment for arrearages by means of contempt. Counsel for HRS argues that this question has been previously decided in this Court's decision in Sackler. However, it is urged that when Sackler is properly read in light of the McDuffie decision, it is readily apparent that Sackler improperly gives an overbroad interpretati n to the McDuffie decision which was limited only to a situation involving a bill of complaint being filed in Florida seeking equity jurisdiction to adjudicate amounts due and the entrance of an order requiring an ex-husband to pay the same and to make available "all other equitable remedies.'' Again, McDuffie from the outset never entailed a situation involving enforcement of a foreign money judgment for arrears, but at all times was a complaint seeking an accounting in a proceeding in the nature of contempt ab initio.

Counsel for HRS argues that Petitioner factually miscontrues Haas by contending that Haas does not even address the issue of enforcement of a foreign money judgment for support arrears by equitable remedies in Florida. Petitioner has made no such contention and has recognized on page 7 of Petitioner's initial brief that the Haas case reveals that an ex-wife reduced alimony arrears to a mon y judgment in New York nd filed a petition to invoke equitable process of the Orange County Circuit Court for the enforcement of the same. Petitioner does maintain in its initial brief and in the instant reply brief that Haas does not ever address the issue of the application and effect of Article I, Section 11 of the Florida Constitution. Petitioner submits that the resolution of this issue is the meat of the coconut in the appeal sub judicie and that the meat is particularly tough given that an undetermined portion of the money judgment in the instant case is attributable to support arrears for children that had become emancipated by reaching the age of majority prior to the institution of any proceedings in the State of Florida, and the remaining child's having reached the age of majority subsequent to the Respondent's domestication of the Virginia judgment, but prior to the trial court's order of January 26, 1987 denying contempt for enforcement of a foreign money judgment for support arrears.

HRS contends that Lamm did not determine that a money judgment for support arrears is a "debt," and thus unenforceable by contempt. HRS ignores, however, that the Lamm decision clearly states,

> ". . . that the contempt power of the Court is no longer available to enforce the child support obligation for those arrearages which have been reduced to a judgment debt for which execution may issue, regardless of whether the judgment was obtained by the department OK the custodial parent." Lamm, supra p.753.

Respondent and counsel for the HRS argue that the above-cited language from the Lamm decision is dicta and that the

Second District Court of Appeals was correct in holding that Lamm was inapplicable as it did not involve an attempt to enforce a judgment for child support arrearages by contempt proceedings. To the contrary, Lamm was an enforcement proceeding and this Court did discuss at length enforcement rights and remedies. Specifically, the Court in Lamm held that HRS can constitutionally assert the custodial parent's rights to enforce a child support obligation through civil contempt proceedings brought pursuant to Chapter **409** (Aid to Families with Dependent Children). In analyzing the express legislative intent of Chapter **409**, the Lamm court concluded that the term "debt" in Florida Statutes 409.2561(1) did not preclude imprisonment for the type of debt proscribed by Article I, Section 11 of the Florida Constitution. In further articulating the remedies available against a responsible parent, the Court expressly went on to hold that they construed Section 409.2561(3)(c) to authorize the state's use of the identical remedies against the responsible parent as are available to the child's custody, including, but not limited to, the use of civil contempt. The Court stated that although contempt may be the most generally used means of enforcing the child support obligation that it was not the only remedy available to the state or to the child's custodian. In defining the remedies available against a responsible parent, which was the meat of the coconut in the Lamm appeal, the Court went on to state that a money judgment for arrears of child support could be obtained; however, in the event this remedy was utilized, the contempt power of the Court would no longer be available to enforce the child support obligation for those arrearages reduced to a judgment debt for which execution may issue, regardless of whether the judgment was obtained by the HRS or by the custodial parent. As such, it is submitted that the above-cited language in Lamm is not a purely gratuitous observation that would relegate it to the lower caste of orbitor dictum. To the contrary, central to the decision and/or opinion in Lamm was the question of the remedies available against a responsible parent for child support and the Court's reasoning and decision as quoted above is germane to the resolution of the central issue on appeal in the Lamm litigation. The key to the Lamm court's rationale that support arrears reduced to judgment were not enforceable by way of contempt is found in the Court's expressly categorizing such judgments as judgment "debts." Throughout the Lamm decision, the Court labored with the Article I, Section 11 Florida Constitution ramifications of the use of the word "debt" and how such categorization would effect a party's ability to proceed by way of contempt proceedings for support arrears. Lamm is the logical progression of this Court's pronouncement in Sokolsky v. Kuhn, 405 S.2d 975 (Fla. 1981) that a final money judgment entered by a trial court for support arrears is not an order of the Court of this state for alimony, suit money, or child support.

In the instant case, such a conclusion is more compelling by virtue of the fact that, as is evidenced on page 4 of the transcript of the oral argument before the Second District Court of Appeals (see Appendix 1), prior to seeking domestication of the Virginia judgment under Chapter 55 of the Florida Statutes, the Petitioner was aware of the availability of enforcement proceedings under URESA and chose to reject the same and hire a private attorney so as to obtain a money judgment in Virginia and try to collect the same by domesticating it in the State of Florida. By virtue of domesticating the Virginia judgment pursuant to Florida Statutes Annotated Section 55.503, it is undisputed that the Virginia judgment in this case has become entitled to equal dignity with any judgment that would have been entered by a Florida court. In so establishing the judgment, the Respondent acquired rights and remedies not previously available to her and the Petitioner became subject to the continuing prospective effect of the lien occasioned by the recording of said judgment as well as all other liabilities inherent in recordation of a judgment that he was not previously subject to. Based upon this Court's holding in Lamm and Sokolsky, supra, by electing to reduce the arrears to a money judgment, Petitioner elected a remedy that was repugnant and inconsistent with her ability to seek enforcement by way of civil contempt. Thus, in keeping with this Court's prior holdings in Williams v. Duggan, 153 S.2d 726 (Fla. 1963) to the effect that,

> "Generally, an election of remedies matures only when the rights of the parties have been materially effected to the advantage of one or the disadvantage of the other."

and in Encore, Inc. v. Olivetti Corporation of America, 326 S.2d 161 (1976) that,

> "Election of remedy doctrine is founded on the premises that parties should not, in course of litigation, be permitted to occupy inconsistent positions, and thus where several inconsistent remedies are available, choice of one necessarily infers election not to pursue other."

the trial court was correct in finding that it did not have the ability to invoke contempt powers to enforce the money judgment "debt." That the Respondent was unsuccessful in connection with efforts to collect the money judgment is irrelevant given that the law in Florida as best embodied in the decision of Coronet Kitchens, Inc. v. The Mortgage Mart, Inc. of St. Petersburg, 146 S.2d 768 (2nd DCA 1962) is to the effect that,

> "Where a party with knowledge of the facts selects to adopt one of several inconsistent remedies, either of which are open to him, he cannot afterwards go back and elect again and pursue the other remedy, or either of them, even though he failed in the remedy elected and used."

Both the Petitioner and counsel for HRS seek to avoid the Article I, Section 11 ramifications of Petitioner's electing her remedies by reducing support arrears to a money judgment by alluding to Florida Section 61.17(3). However, it is important to note that neither the Petitioner nor counsel for HRS draw the Court's attention to the fact that Florida Statutes Annotated 61.17(3) bears an effective date of October 1, 1986. It is submitted that given the effective date of this statute, it cannot be applied retroactively absent an expressed legislative intent for such application. [See Larson v. Independent Life and Accident Insurance Company, 29 S.2d 448 (Fla. 1947) and Young v. Altenhaus, 472 S.2d 1152 (Fla. 1985).] Further, it is submitted that even if there was a clear expression of retroactivity in Florida Statutes Annotated 61.17(3), it would not be applicable in that prior to the effective date of 61.17(3) the law in Florida as stated in Lamm was to the effect that,

> ". . . that the contempt power of the Court is no longer available to enforce the child support obligation

> for those arrearages which have been reduced to a judgment debt for which execution may issue, regardless of whether the judgment was obtained by the Department or the custodial parent." Lamm, supra, p. 753.

As such since 61.17(3), effective October 1, 1986, attempts to create a new right or take away the vested right recognized in Haas to be free from imprisonment for "debt" it can hardly be said that it is a procedural/remedial statute for which retroactive application would be permissible. Insofar as Florida Statutes Annotated Section 61.17(3), effective October 1, 1986, is not applicable given that the record reflects that on December 23, 1985 Petitioner filed the Virginia final judgment in Pasco County for domestication and thereafter proceeded on August 21, 1986 to file the Motion to Enforce Final Judgment that was heard before the trial Court on October 13, 1986, and again on January 8, 1987 giving rise to the order of January 26, 1987 which forms the basis of the instant appeal, the efforts of Petitioner and counsel for HRS to call into question the constitutionality of Florida Statutes Annotated Section 61.17(3) is nothing more than an effort to drag a red herring over the issues properly before this Court. Likewise, the reliance of the Petitioner and counsel for HRS upon Chapter 88 is of no assistance in resolving the issue before this Court because, first of all, this is not a proceeding under URESA; and secondly, the 1986 legislative amendment to Section 88.012, to the effect that it is the legislative intent that the revised Uniform Reciprocal Enforcement of Support Act is an appropriate statute under which to collect child support arrears after a child is no longer a dependent, was not effective until July 1 **1987.** The fact that **URESA** sets forth methods for enforcing payment of arrearages and provides that,

> "all duties of support, including the duty to pay arrearages, are enforceable by a proceeding under this act, including a proceeding for civil contempt." Section **88.101,** Florida Statutes **(1985)**,

is irrelevant in that it does not address the issue on this appeal, which is whether or not once arrearages are reduced to a money judgment, is contempt available as a means of enforcement for the judgment debt in light of the constitutional prohibition for imprisonment of debt proscribed by Article I, Section 11 of the Florida Constitution.

Should this Court determine that despite Article I, Section 11 of the Florida Constitution and this Court's decision in Lamm that contempt is available to enforce a money judgment for support arrears, it must be determined whether or not this remedy would be available in those cases where the contempt proceedings were initiated after emancipation of the child for whom the support was payable.

Petitioner and counsel for HRS both concede that whenever any of the District Courts in Florida have been called upon to determine whether or not contempt is available as a method of enforcing the payment of child support arrearages once a child has attained the age of majority, that the District Courts in Florida have uniformly all held that contempt is not available if the children were emancipated at the time of the initiation of the contempt proceeding. [See example Wilkes v. Revel, **245** S.2d **896** (Fla. 1st DCA **1970)**; Gersten v. Gersten, **281** S.2d **607** (Fla. 3rd DCA

1973); Cronebaugh v. Van Dyke, 415 S.2d 738 (Fla. 5th DCA 1982); Schwarz v. Waddell, 422 S.2d 61 (Fla. 4th DCA 1982); Newman v. Newman, 459 S.2d 1129 (Fla. 3rd DCA 1984).] This rationale is particularly compelling in the case sub judicie because as in the Schwarz, supra, case, the child support arrearages in question have been reduced to a money judgment and as stated in Schwarz,

> "Generally, contempt is not available as means of enforcing money judgments due to constitutional prohibition against the judgment for debt."

In deciding this aspect of the case, Petitioner submits that it is critical to remember that at no time has the Petitioner ever been held in contempt of any Florida Court's order and that this case is before this Court in the posture of a foreign money judgment for accumulated support arrears, having been domesticated and established as a Florida money judgment. Thus, it is submitted based upon the holdings in the various District Courts of Florida, as cited hereinabove, that contempt does not lie as a matter of law for enforcement of any monies represented in the domesticated Virginia judgment as and for support of the two minor children that were admittedly emancipated when the Virginia judgment was entered on November 21, 1985. As to the third remaining child, even though Respondent filed a motion to enforce the foreign money judgment for support arrears on August 21, 1986, at a time when her youngest child had not attained the age of majority, it is submitted that insofar as said judgment is a "debt" as contemplated in Article I, Section 11 of the Florida Constitution, it is unenforceable by contempt for the reasons previously argued herein, Respondents have attempted to persuade this Court to disregard the District Court of Appeal's holdings in Wilkes, Gersten, Cronebaugh, Schwarz, and Newman, and adopt a rule that would permit retention of jurisdiction necessary to enforce child support arrears by contempt after the age of majority by citing other jurisdictions. While 9 jurisdictions have adopted such a rule, 13 other jurisdictions have adopted the rationale presently existing in the District Courts of Florida as best exemplified in the Wilkes, et al. cases previously cited. California, Illinois, Indiana, Maryland, Minnesota, Mississippi, New Mexico, Ohio, Oklahoma, Rhode Island, Washington, Wisconsin, and Wyoming all hold that support is no longer enforceable by way of contempt after emancipation. [See: Sheldon v. Superior Court, 17 Misc.2d 712, 184 N.Y.S.2d 399 (N.Y. Sup. Ct. 1959); Fox v. Fox, 371 N.E.2d 1254 (Ill. App. Ct. 1978); Corbridge v. Corbridge, 102 N.E.2d 764 (Ind. 1952); Green v. Green, 415 A.2d 1131 (Md. 1980); Hampton v. Hampton, 229 N.W.2d 139 (Minn. 1975); Sides v. Pittman, 150 So. 211 (Miss. 1933); Phelps v. Phelps, 509 P.2d 254 (N.M. 1973); Thompson v. Albers, 439 N.E.2d 955 (Ohio Ct. App. 1981); Bouchard v. Bouchard, 382 A.2d 810 (R.I. 1978); Dawson v. Dawson, 426 P.2d 614 (Wash. 1967); Halmu v. Halmu, 19 N.W. 2d 317 (Wis. 1945); and Salmeri v. Salmeri, 554 P.2d 1244 (Wyo. 1976).]

In fact, of the 13 jurisdictions adopting the position that prohibits contempt subsequent to emancipation were three states erroneously cited by the Respondents as indicative of jurisdiction permitting contempt subsequent to emancipation.

Both Respondent and HRS have cited Green v. Green, 407 A.2d 1178 (Md. Ct. Spec. App. 1979) as controlling in Maryland, however, this case was reversed in 1980 by the Maryland Supreme Court which held that contempt was not available beyond one year after the children's obtaining the age of majority, [See Green v. Green, 415 A.2d 1131 (Md. 1980).] Similarly, Respondent and HRS have cited the 1936 case of Kaifer v. Kaifer, 3 N.E.2d 886 (Ill. 1936) as controlling in Illinois and for the proposition that contempt would lie subsequent to emancipation. However, in Fox v. Fox, 371 N.E.2d 1254 (Ill. App. Ct. 1978), it was decided to the contrary that contempt was not available as a remedy for enforcement after majority. Lastly, HRS has cited Lowry v. Lowry, 118 P.2d 1015 (Okla. 1941) as controlling in Oklahoma. However, in 1980 the Oklahoma Supreme Court held that contempt was not available after majority to enforce an order of arrearages in the case of Potter v. Wilson, 609 P.2d 1278 (Okla. 1980).

Respondents have also cited the jurisdictions or Arkansas, New York, North Carolina, Oregon, Texas and Utah as states adopting the rule allowing contempt, While the cases cited in support may have allowed contempt *to* lie, such holdings were a result of the particular facts in each case. However, they are erroneously cited as cases supporting the broad notion that the rule has been adopted in that jurisdiction. In fact, these jurisdictions remain equivocal or undecided on the issue, as do 23 others. Petitioner asks the Court to refrain from viewing these cases as persuasive in Respondent's favor.

For example, respondent cites, as controlling in the state of Arkansas, Allison v. Binkley, 259 S.W.2d 511 (Ark. 1953). This case actually dealt with a parent's duty to support a child beyond the age of majority. The court held that the emancipation of the child did not relieve the father of his duty to support because the evidence showed that this particular child was not capable of supporting herself. The court did not discuss the use of contempt after emancipation as a general rule.

Likewise, respondent cites three New York cases as controlling: Goldberg v. Goldberg, 236 App.Div. 258, 258 N.Y.S. 588 (1932); Gatto v. Gatto, 237 App.Div. 888, 261 N.Y.S. 454 (1933); Moskowitz v. Moskowitz, 269 App.Div. 710, 54 N.Y.S. 2d 67 (1945). In each case, before contempt could be invoked, a review of the particular facts was required. In Goldberg, and Gatto, contempt was not available without an opportunity for the delinquent parent to apply for modification, and in Moskowitz, upon considering the fact that the child had attained majority, the court reduced the award and fine for contempt.

The case of White v. White, 223 S.E.2d 377 (N.C. 1976) is cited by Respondent as controlling in North Carolina. In White, the court stated that contempt could be used to enforce a support order where the father had agreed, in a prior court order, to support the children beyond majority for college. However, the court does not discuss the use of contempt after majority in the absence of such an agreement, lawfully obligating the parent to support beyond majority.

Similarly, both briefs cite Ex Parte Hooks, Relator, 415 S.W.2d 166 (Tex. 1967) as controlling in Texas. The court permitted contempt to lie, but more recent cases have distinguished the holding in Hooks. In Ex Parte Thomas, **609** S.W.2d 829 (Tex. Civ. App. 1980), the court held that,

> "the authority of courts, to coercively enforce by contempt the violation of the court's order in support cases, ceases when the child reaches the age of **18**; thus, court's contempt order was void." Thomas, at **829.**

This case was later cited in **1985** by the court in In Interest of Brecheisen, **694** S.W.2d **438** (Tex. Civ. App. **1985)** and the court specifically distinguished Hooks by stating:

> "Johnson contends that Ex Parte Hooks (cite omitted), requires us to hold that the trial court retains continuing jurisdiction to enforce court ordered child support obligations which accrued before the child's eighteenth birthday, even when the application for the order is filed after the child attains age eighteen. We disagree and conclude that the holding in Hooks relied on facts which are distinguishable from the instant case. First, the contempt judgment sought to be enforced in Hooks was entered by the trial court while the child was under eighteen years of age." In Interest of Brecheisen, at **440.**

Thus, the scope of Hooks is narrowed to only permit contempt when the judgment sought to be enforced was entered prior to child's attaining the age of majority.

Lastly, the case of Harmon v. Harmon, **491** P.2d 231 (Utah **1971)** is cited by HRS as amicus curiae as controlling in Utah, however, the court does not address the issue of contempt after majority. What the court holds is that the district court retains the jurisdiction necessary to stay the issuance of an execution on judgment for support arrearages. (Harmon, at 233.) This precludes the exclusive characterization of the judgment as a debt, thereby precluding other remedies, such as contempt. Thus, while contempt may be available generally, the case certainly cannot be cited as support for the specific rule that contempt lies after majority.

As illustrated abo e, there is hardly a majority rule throughout the United States governing the issue of the continuing jurisdiction of a court to enforce support arrearages through contempt after the children have attained majority. Therefore, Petitioner asks this Court to reconsider the persuasiveness of Respondents' presentation of other jurisdictions' positions as one of consensus, mandating a similar adoption in Florida, Petitioner submits that for the reasons cited in the opinions of the District Courts of Appeal in Florida as exemplified in Wilkes, et al. that contempt should not lie for enforcement of the money judgment for arrears in the case sub judicie and that Florida does not, as suggested, stand alone n this regard.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail, to Patricia Ann Bennett, 7820 Ravenel Court, Springfield, VA 22151; Chriss Walker, Esquire, Department of Health and Rehabilitative Services, 1317 Winewood Drive, Tallahassee, FL 32301; and William H. Branch, Esquire, Boyd & Branch, P.A., 2441 Monticello Drive, Tallahassee, FL 32303, this 25th day of November 1987.

Mark P. Kelly

MARK P. KELLY
FREEMAN & LOPEZ, P.A.
4600 W. CYPRESS, SUITE 410
TAMPA, FL 33607
(813) 873-1431
FLA BAR #224375
ATTORNEY FOR PETITIONER