IN THE SUPREME COURT OF FLORIDA

EDWARD C. TIETIG,

Petitioner,

vs.

COLLEEN H. BOGGS,
f/k/a Colleen H. Tietig,

Respondent.

CASE NO.: 78,013

3d DCA CASE NO.: 90-02157
L.T. CASE NO.: 90-01257

(On Review from the District Court of Appeal, Third District, State of Florida)

ANSWER BRIEF OF RESPONDENT, COLLEEN H. BOGGS, f/k/a COLLEEN H. TIETIG

Respectfully Submitted,

WILLIAM M. TUTTLE, II
STEPHEN J. KOLSKI, JR.
CATLIN, SAXON, TUTTLE, & EVANS, P.A.
Attorneys for Appellee
169 East Flagler Street
Suite 1700
Miami, Florida 33131
Telephone: (305) 371-9575

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CATLIN, SAXON, TUTTLE AND EVANS, P.A. 1700 ALFRED I. duPONT BUILDING, 169 EAST FLAGLER STREET, MIAMI, FLORIDA 33131 · (305) 371-9575

Statutes

STATEMENT OF CASE AND FACTS

a. INTRODUCTION

Appellant, EDWARD C. TIETIG, shall hereafter be referred to as "TIETIG" or "Husband". Appellee, COLLEEN H. BOGGS, f/k/a Colleen H. Tietig, who is the former Wife of TIETIG, shall hereafter be referred to as "BOGGS" or "Wife".

References to the record on Appeal shall be designated by ("R-_____"). Trial exhibits shall be designated by ("Ex. ___"). The page of the transcript of the trial proceedings shall be referred to and designated as ("T-_____").

b. FACTS AND CASE

On September 20, 1988, Husband filed a motion to modify his child support obligations (R. 204-216) ("Husband's Motion"). Husband's child support obligations for his three minor children are as set forth in an agreement, and an addendum thereto, each made a part of a Final Judgment of Dissolution of Marriage A Vinculo ("Judgment") entered March 17, 1982 (R. 4-5). Husband waited well over a year to notice Husband's Motion for hearing. On October 17, 1988, Husband filed a "Financial Affidavit" in support of Husband's Motion (R. 218-219) which was later determined by the trier of fact (General Master Carol Gersten) to be "extremely insufficient" (T.53). On December 5, 1988, a Suggestion of Bankruptcy was filed by Husband in the proceedings below (R. 220), indicating Husband had filed Chapter 11 Bankruptcy.

At all times after September 21, 1988, Husband unilaterally paid roughly the equivalent of $225.00 total per week to Wife as child support, rather than the judgment-required $600.00 per week ($200.00 per week for each of the parties' three children) (T.31). On October 17, 1988, although Wife was stayed by the automatic bankruptcy stay afforded to Husband and she could not proceed to trial at that time to enforce the Judgment, Wife filed a Notice of Deficiency which indicated non-compliance by Husband in the filing of Husband's motion (T.269). Thereafter, Wife petitioned Husband's Bankruptcy Court

for relief from stay to permit her to determine her entitlement to, and amount of, child support arrearages, which petition resulted, finally, in the Bankruptcy Court's Amended Order Granting Relief From Stay (R. 223-224). After relief from stay was entered, on October 18, 1989, Wife filed a Motion to Enforce Final Judgment of Dissolution of Marriage A Vinculo (R. 221-224), wherein she alleged arrearages of both child support and non-payment of Husband's one-half contributions towards extraordinary medical expenses for the parties' three children. On December 8, 1989, Wife filed her Motion for Reasonable Attorney's Fees, seeking to recover costs and fees incurred in Wife's enforcement proceedings (R. 225-226).

Substantial discovery, including document production, interrogatories and depositions, was subsequently had by both parties. After Order of Referral, a three day trial was held before General Master Carol R. Gersten (now Circuit Court Judge) upon Wife's motions for enforcement and attorney's fees, and Husband's motion to modify, on February 23, February 26 and March 7, 1990.

Evidence before General Master Gersten considered in denying Husband's motion, and granting Wife's motion for enforcement, and motion for fees, includes but is not limited to:

a. The admitted $20,503,935.00 assets, $7,832,679.00 liabilities, and $12,671,256.00 net worth of TIETIG and/or his business group as of the May 15, 1988 Financial Statement of TIETIG (R. 204-216) (T.75-76);

b. Just prior to May 15, 1988, TIETIG gifted by deed to his son from another marriage, Mark Tietig, a parcel of realty consisting of a 33 acre fee valued by TIETIG in his bankruptcy at $8,083,000.00 (T. 79-80);

c. That prior to May 15, 1988, on March 23, 1988, TIETIG conveyed to his son from another marriage, Mark Tietig, under a land trust agreement, 100 vacant lots valued by TIETIG at $350,000.00 (T.90-91);

d. TIETIG's Disclosure Statement, filed in his Chapter 11 Bankruptcy dated May 25, 1989, disclosed realty assets, after disposition of and not including assets described in sub-paragraphs b and c, above, of $5,475,000.00, plus additional realty, stocks, securities and other equitable interests (valued at $9,923,012.45), plus tangible personalty of approximately $6,000.00, plus "cash and other advances" to his various companies of $1,712,964.14, for a total aggregate asset value of $17,116,976.59, as compared to liabilities disclosed therein of approximately $8,828,232.69 (Ex. C) (T. 88-89);

e. TIETIG's First Amendment to Disclosure Statement (Ex. D) discloses, in pertinent part, tremendous projected gross sales income of $19,346.000.00, as compared to administrative expenses of $630,000.00 and sales expenses of $1,515,000.00;

f. A damage judgment in the amount of $2,350,000.00 entered against TIETIG in approximately August, 1988 was reversed, just prior to the trial below, and remanded by the Third District Court of Appeal to the trial court for entry of judgment in favor of TIETIG, thereby vacating the same, through the Third District Court of Appeal's February 6, 1990 opinion (Ex. M) (T. 92, 42);

g. TIETIG's Financial Affidavit effective September 15, 1988 (R.256-258), which General Master Gersten required TIETIG to file at the trial below because of the inadequacy of and deficiencies in his previously-filed affidavit, disclosed assets of $20,503,935.00 (not including assets identified in Sub-Paragraphs b and c, above with a combined value of $5,475,000.00), compared to total liability (including the $2,350,000.00 damage judgment identified in sub-paragraph f, above--which has been reversed) in the sum of $10,182,679.00;

h. TIETIG's Consolidated Plan of Reorganization effective January 2, 1990, which showed assets of $18,586,313.00 (excluding $8,083,000.00 Eureka property previously given away); and

i. TIETIG's Financial Affidavit (Ex. "H"), dated as of February 21, 1990, which identified TIETIG's assets of $9,646,405.96 (excluding $8,083,000.00 Eureka property previously given away) which TIETIG described as "net" assets (T. 95).

After the three (3) day trial, and after considering the evidence, including exhibits introduced therein, on June 20, 1990, General Master Gersten entered a Report and Recommendations of the General Master (R. 243-245), which found "TIETIG has not met his burden to show a substantial change of financial circumstances", and ". . . there has not been an adverse substantial change of circumstances in the financial condition of TIETIG since the entry of the Final Judgment of Dissolution of Marriage." (R. 243-245). Further, General Master Gersten found " . . . by TIETIG's admission, TIETIG has unilaterally reduced child support payments made to BOGGS since the week of August 29, 1988 . . . which has resulted in substantial arrearages in child support payments due from TIETIG to BOGGS, and BOGGS is in need of such support arrearages." (R. 243-245). General Master Gersten further found that "TIETIG is in arrears in child support payments and is indebted to BOGGS in the aggregate amount of $29,025.00 . . . and $1,664.00 representing one-half contribution of Wife's total extraordinary medical expense . . .", and, " . . . in addition, BOGGS has incurred $10,597.00 in reasonable attorney's fees expense in these enforcement proceedings, plus $84.00 in Court costs, and the General Master finds that fees and costs expenses are an integral part of BOGGS' claim for child support arrearages and medical expenses . . .". (R. 243-245). General Master Gersten's report recommended BOGGS be awarded $29,025.00 for child support arrearages, $1,664.00 for one-half extraordinary medical expenses, and $10,681.00 for costs and reasonable attorney's fees, all due through the week ending February 23, 1990, which bears interest thereafter at 12% per annum (R. 243-245). The report further recommended that TIETIG be required to comply with child support obligations at all times after the week ending February 23, 1990, by paying a total of $600.00 per week in child support (R. 243-245).

TIETIG, in response, on June 28, 1990, filed his "Exceptions" to the findings and report of the General Master (R. 241-242), and therein disputed all of the factual findings of General Master Gersten. After hearing August 17, 1990 on TIETIG's Exceptions before Circuit Court Judge Philip I. Bloom, an Amended Order on Report of General Master was entered August 22, 1990 (R. 264-266), wherein Judge Bloom held that the factual findings of the General Master "are supported by substantial competent evidence . . . " and "[t]he General Master has not misconceived the legal affect of the evidence" (R. 241-242). Further, Judge Bloom ruled that "the General Master's findings and recommendations cannot be deemed by this Court to have been clearly erroneous." (R. 241-242). Dealing with Husband's contention in his exceptions that General Master Gersten utilized a "heavier burden" upon TIETIG because the parties' 1982 agreements were incorporated into the Judgment, Judge Bloom held as a matter of law that under the totality of the circumstances, TIETIG had not, in the record below, shown a substantial change of circumstances in one or both parties, irrespective of what degree of "burden" was utilized by General Master Gersten. Based on the foregoing, Judge Bloom confirmed the recommendations of General Master Gersten in their totality, and incorporated the same into an Order of his Court (R. 241-242).

From this adverse ruling, TIETIG filed a Notice of Appeal to the Third District Court of Appeal on September 12, 1990 (R. 262).

On April 30, 1991, the Third District Court of Appeal, in a *per curium* opinion, affirmed Judge Bloom's order (a) denying TIETIG's motion to modify his child support obligations required under the final judgment, and granting BOGG's motion to enforce the final judgment as to child support arrearages including BOGGS' attorney's fees. *See Tietig v. Boggs,* 578 So.2d 838 (Fla. 3d DCA, 1991) (R. 267-269).

From this adverse opinion, TIETIG served a Notice to Invoke Discretionary Jurisdiction of this Court on May 24, 1991. This Court accepted jurisdiction by order dated October 18, 1991.

POINTS INVOLVED ON APPEAL*

Point I

WHETHER THE GENERAL MASTER AND THE CIRCUIT COURT ERRED IN APPLYING THE RULE OF LAW THAT THERE IS A MUCH HEAVIER BURDEN ON PETITIONER TO MODIFY A WRITTEN AGREEMENT ENTERED INTO BY THE PARTIES OVER THAT OF AN ORDER ENTERED BY THE COURT IN A DISSOLUTION PROCEEDING.

Point II

WHETHER THE FINDINGS OF THE GENERAL MASTER AND THE CIRCUIT COURT ARE CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

Point III

WHETHER THE GENERAL MASTER AND THE CIRCUIT COURT BASED THEIR DECISION ON TOTAL ASSETS SHOWN, REGARDLESS OF ABILITY TO LIQUIDATE AND USE, RATHER THAN AS TO AVAILABLE CASH IN DETERMINING APPELLANT'S ABILITY TO PAY.

Point IV

WHETHER AN ORDER REQUIRING HUSBAND TO PAY THE AWARD OF CHILD SUPPORT WHICH EXCEEDS HIS TOTAL MONTHLY GROSS INCOME WHILE AT THE SAME TIME DISREGARDING WIFE'S SUBSTANTIAL INCOME VIOLATES THE PRINCIPLES OF SECTION 61.30 FLORIDA STATUTES AND CONSTITUTES JUDICIAL ABUSE AND REVERSIBLE ERROR.

Point V

WHETHER THE GENERAL MASTER AND THE CIRCUIT COURT EXCEEDED THE PERMITTED AREA OF ACTIVITY PURSUANT TO THE RESTRICTIONS CONTAINED IN THE BANKRUPTCY COURT'S LIMITED ORDER LIFTING STAY BY AWARDING ATTORNEY'S FEES.

Point VI

WHETHER THE GENERAL MASTER AND THE TRIAL COURT ERRONEOUSLY AWARDED ATTORNEY'S FEES FOR DEFENSE OF THE MODIFICATION ACTION WHEN SUCH AWARD WAS PROHIBITED BY THE SETTLEMENT AGREEMENT.

Point VII

WHETHER THE ATTORNEY'S FEES AWARDED WERE EXCESSIVE IN LIGHT OF THE WORK PERFORMED SOLELY AS TO THE ENFORCEMENT OF THE SETTLEMENT AGREEMENT.

Point VIII

WHETHER THE AWARD OF ATTORNEY'S FEES TO WIFE WAS IMPROPER IN LIGHT OF THE WIFE'S ABILITY TO PAY AND HUSBAND'S INABILITY TO PAY.

*These are Husband's "points involved on appeal", and Wife will respond to each in the order that Husband has presented them, respectively.

SUMMARY OF ARGUMENT

Point I

WHETHER THE GENERAL MASTER AND THE CIRCUIT COURT ERRED IN APPLYING THE RULE OF LAW THAT THERE IS A MUCH HEAVIER BURDEN ON PETITIONER TO MODIFY A WRITTEN AGREEMENT ENTERED INTO BY THE PARTIES OVER THAT OF AN ORDER ENTERED BY THE COURT IN A DISSOLUTION PROCEEDING.

General Master Gersten applied the proper burden to a movant who is attempting to modify downward an agreement to pay child support obligations which was mutually and voluntarily entered into by the parties. General Master Gersten--not even addressing the "burden" issue--found TIETIG failed to show an adverse substantial change of circumstances. Circuit Court Judge Bloom, while sitting as the appellate court, held that based on his review of the entire record and upon the totality of the circumstances, TIETIG failed, as a matter of law, to prove a substantial change of circumstances including financial circumstances which would entitle him to the relief sought. Judge Bloom specifically held this is true irrespective of the level of burden utilized by the General Master. Further, Judge Bloom held even if General Master Gersten utilized a "heavier" burden where such burden would not apply, then it would have been harmless error, under these circumstances.

Point II

WHETHER THE FINDINGS OF THE GENERAL MASTER AND THE CIRCUIT COURT ARE CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

The findings of the General Master carry the weight of a jury verdict. Judge Bloom's Amended Order on Report of General Master (R.264-266), which overruled Husband's Exceptions, confirmed as a matter of law that, based upon a totality of the circumstances, the factual findings of the General Master are supported by "substantial competent evidence" (R. 264-266).

Point III

WHETHER THE GENERAL MASTER AND THE CIRCUIT COURT BASED THEIR DECISION ON TOTAL ASSETS SHOWN, REGARDLESS OF ABILITY TO LIQUIDATE AND USE, RATHER THAN AS TO AVAILABLE CASH IN DETERMINING APPELLANT'S ABILITY TO PAY.

The record below is replete with evidence indicating Husband's substantial net worth, liquidity, Husband's ability to pay, and Wife's need for $600.00 per week child support. The fact that TIETIG took steps to divest himself of substantial assets thereby limiting his ability to restructive debt-- in anticipation of a possible judgment in a suit pending against him-- does not excuse his paying child support.

Point IV

WHETHER AN ORDER REQUIRING HUSBAND TO PAY THE AWARD OF CHILD SUPPORT WHICH EXCEEDS HIS TOTAL MONTHLY GROSS INCOME WHILE AT THE SAME TIME DISREGARDING WIFE'S SUBSTANTIAL INCOME VIOLATES THE PRINCIPLES OF SECTION 61.30 FLORIDA STATUTES AND CONSTITUTES JUDICIAL ABUSE AND REVERSIBLE ERROR.

The record below is replete with evidence indicating Husband's substantial net worth, liquidity, Husband's ability to pay, and Wife's need for $600.00 per week child support. TIETIG's income was and is only a factor of how much his companies--owned and controlled by TIETIG--desired to pay him at any point and time.

Point V

WHETHER THE GENERAL MASTER AND THE CIRCUIT COURT EXCEEDED THE PERMITTED AREA OF ACTIVITY PURSUANT TO THE RESTRICTIONS CONTAINED IN THE BANKRUPTCY COURT'S LIMITED ORDER LIFTING STAY BY AWARDING ATTORNEY'S FEES.

The Amended Order of the Bankruptcy Court granting stay relief to Wife gave her authority to proceed with the trial below to determine her entitlement to, and extent of child support arrearages of Husband, including unpaid extraordinary medical expenses. In making this determination at the trial, General Master Gersten awarded Wife her costs and reasonable attorney's fees expense (aggregate of $10,681.00) as "an integral part of BOGGS' claim for child support arrearages and medical expenses", and, the General Master found "TIETIG has a far superior ability to pay such expenses compared to

BOGGS' lesser ability to pay same" (R. 243-345). Judge Bloom affirmed, citing competent evidence in the record, and confirmed the award was "an integral part of BOGGS' claim for child support arrearages and medical expenses", and held under the totality of the circumstances "that TIETIG has a far superior ability to pay such expenses compared to BOGGS' lesser ability to pay same . . ." (R. 264-266). Award of fees and costs in enforcement proceedings is clearly within the Court's discretion. F.S. 61.16 (1989).

Point VI

WHETHER THE GENERAL MASTER AND THE TRIAL COURT ERRONEOUSLY AWARDED ATTORNEY'S FEES FOR DEFENSE OF THE MODIFICATION ACTION WHEN SUCH AWARD WAS PROHIBITED BY THE SETTLEMENT AGREEMENT.

All of BOGGS' legal efforts, which cost her thousands of dollars in Court costs and reasonable attorney's fees expense, were incurred by wife in the prosecution of her motion to enforce child support payments, which was granted below. Additional fees and costs of Wife, related solely to defending Husband's motion to modify, were not at issue below, were not presented below, and were not awarded below. The fact that TIETIG's Motion to Modify was heard at the same time is inconsequential. The issues presented under both Wife's motion and Husband's motion were identical anyway; Husband's defenses to Wife's motion to enforce child support arrearages were Husband's alleged substantial change of circumstances, including financial circumstances--which the Court below refused to find. Award of fees and costs in enforcement proceedings is clearly within the Court's discretion. F.S. 61.16 (1989).

Point VII

WHETHER THE ATTORNEY'S FEES AWARDED WERE EXCESSIVE IN LIGHT OF THE WORK PERFORMED SOLELY AS TO THE ENFORCEMENT OF THE SETTLEMENT AGREEMENT.

As indicated in the record below, substantial discovery was required by Wife in order to prosecute her motion to enforce child support arrearages, despite Husband's assertions to the contrary. The trial transcript and record below are replete with

evidence of Husband's non-compliance with the Rules of Civil Procedure (T. 52-53, 56-57, 106-108), and non-compliance with discovery requests of Wife and discovery orders of the court (T. 5-15, 17-21). The trial court below (General Master Carol Gersten) displayed extreme patience with TIETIG's non-compliance and gave TIETIG every opportunity he was entitled to (T. 14-21). If TIETIG had continued to pay full child support rather than unilaterally substantially reducing child support--without court permission--during the pendency of Husband's motion to modify child support obligations, Wife would not have been required to file a motion to enforce and incur related fees and costs. Additional fees and costs of Wife, related solely to defending Husband's motion to modify were not at issue below, were not presented below, and were not awarded below.

Point VIII

WHETHER THE AWARD OF ATTORNEY'S FEES TO WIFE WAS IMPROPER IN LIGHT OF WIFE'S ABILITY TO PAY AND HUSBAND'S INABILITY TO PAY.

The record is replete with evidence demonstrating the superior financial position of TIETIG. Moreover, the award was proper because it avoided diminution of Wife's child support arrearage award, which preserves the best interest of the children.

ARGUMENT

Point I

WHETHER THE GENERAL MASTER AND THE CIRCUIT COURT ERRED IN APPLYING THE RULE OF LAW THAT THERE IS A MUCH HEAVIER BURDEN ON PETITIONER TO MODIFY A WRITTEN AGREEMENT ENTERED INTO BY THE PARTIES OVER THAT OF AN ORDER ENTERED BY THE COURT IN A DISSOLUTION PROCEEDING.

The trial Court below, General Master Gersten, found as a matter of fact, after considering the totality of the circumstances, that "there has not been a adverse substantial change of circumstances in the financial condition of TIETIG since entry of the final judgment of dissolution of marriage . . .". (R.243). The General Master further found that "TIETIG has not met his burden to show a substantial change of financial circumstances . . .". (R.243). These findings of fact are based upon competent evidence at trial as to TIETIG's financial condition, Wife's financial condition, and the uncontroverted testimony regarding the increase in the three minor childrens' necessary expenses.

First, TIETIG argues that General Master Gersten utilized an improper "heavier burden" in determining whether or not BOGGS' enforcement proceedings should prevail in light of TIETIG's motion for a downward modification of child support. Although General Master Gersten said at the time of trial that there was a heavier burden imposed upon one who attempts to modify a judgment which incorporates the parties' agreement than the burden applicable to attempting to modify a judgment decided by a Court after a trial, in the Report and Recommendations of the General Master, entered over three months after the trial, the General Master set forth the proper standard, and determined TIETIG failed to meet that standard. Specifically, the Report and Recommendation stated, as a matter of a factual finding, that there had not been an adverse substantial change of circumstances in the financial condition of TIETIG since entry of the final judgment. Irrespective of the "burden", whether it be "regular" or "heavy", if TIETIG failed to meet the requirement that there be a substantial change of circumstances, TIETIG cannot prevail on his attempts for a downward modification of his child support obligations.

Over three months passed between the time of the trial and when the Report and Recommendations of the General Master was entered. It is axiomatic that where the verbal statement of a Court at the time of the hearing is not incorporated into the written order or judgment of the Court, it is not to be considered. *Dalton v. Dalton*, 412 So.2d 928 (Fla. 1st DCA 1982); *Barry v. Robinson,* 65 So.2d 739 (Fla. 1953); *Anders v. Anders*, 376 So.2d 439 (Fla. 1st DCA 1979).

Irrespective of whether the General Master utilized a "heavier burden", the Third District Court of Appeal properly pointed out that, irrespective of the burden utilized, TIETIG failed to prove his case:

> Contrary to the former husband's argument, the findings of the General Master were based on substantial competent evidence. The former husband failed to show a substantial change in his financial circumstances to warrant a downward modification of his child support obligations; and the trial court properly enforced the child support obligations of the Final Judgment of Marriage of Dissolution. (Citations omitted).

Tietig v. Bogg, 578 So.2d 838 (Fla. 3d DCA 1991) (on appeal).

Thus, since the factual finding of the General Master was that "there has not been a adverse substantial change of circumstances in the financial condition of TIETIG since entry of the Final Judgment of Dissolution of Marriage . . ." (R. 243), and since Circuit Court Judge Philip I. Bloom and the Third District Court of Appeal each determined that these findings of fact are supported by competent evidence at trial (R. 264-266, and opinion of Third District Court of Appeal), application of a "heavier burden", if erroneous, would have been harmless error. *In Re: Yohn's Estate*, 238 So.2d 290 (Fla. 1970); *Green v. First American Bank and Trust*, 511 So.2d 569 (Fla. 4th DCA 1987); *Poller v. First Virginia Mortgage and Real Estate Investment Trust,* 471 So.2d 104 (Fla. 3d DCA 1985); *Wassil v. Gilmour*, 465 So.2d 566 (Fla. 3d DCA 1985); and Florida Statute, § 59.041) 1989).

In dealing with child support, as opposed to alimony, the Court must pay particular attention to the best interests of the minor children. The Courts of this state have a duty to insure that the best interests of the children are preserved in either judicial determinations of child support after trial, or incorporating the litigants' agreement into a judgment.

In the situation, as here, where an agreement between the parties which includes a child support provision is incorporated into a judicial decree, it is incumbent upon the Court to scrutinize the agreement to insure that the children's welfare is preserved. Implicit in the judgment, therefore, is the fact that the Court has done so. It follows that, when an agreement regarding child support is incorporated into a judgment, a presumption arises that the child support provisions are adequate and in the best interests of the children. Where one party later challenges the award, for either an upward or downward modification, he/she bears a burden of proof to show a substantial change in circumstances, including financial circumstances, of one or both of the parties which change must be significant, material, involuntary and permanent in nature. *Leone v. Weed*,

474 So.2d 401, 404 (Fla. 4th DCA 1985); *Burdack v. Burdack,* 371 So.2d 528 (Fla. 2d DCA 1979). *See also, Brown v. Brown*, 315 So.2d 15 (Fla. 3d DCA 1975); *In Re: Marriage of Johnson*, 352 So.2d 140 (Fla. 1st DCA 1977); *Meltzner v. Meltzner,* 356 So.2d 1263 (Fla. 3d DCA 1978); and *Scott v. Scott*, 285 So.2d 423 (Fla. 2d DCA 1973).

In the instant case, TIETIG failed to meet this burden. TIETIG admitted that he gave away greater than $8.5 million in realty - - within six months of unilaterally reducing his Court-ordered child support payments to his wife from $600.00 to $225.00 per week. Moreover, there is every indication in the record that TIETIG can regain any loss of financial position which he brought upon himself, from his remaining assets.

TIETIG attempts to utilize the decision of *Bernstein v. Bernstein*, 498 So.2d 1270 (Fla. 4th DCA 1986) (*reh. den.* Jan. 16, 1987) to support his argument that he was not fairly treated by the trial court below in application of the burden he was required to meet in order to justify his request for a downward modification of child support. A careful reading of *Bernstein* reveals that the actual holding of *Bernstein* is that where parties have contractually agreed to specific child support, and the contract limits the amount of child support to less than that which would be in the children's best interest, the rights of the children must prevail. Specifically, in *Bernstein*, the child's mother petitioned for an *upward* modification of child support and the father resisted, attempting to enforce the contract. In the instant case, it is the father (TIETIG) who is attempting a *downward* modification of his child support obligations which he earlier agreed to pay. It is obvious that the best interest of the children must be considered paramount in the first instance, especially where the children's expenses have increased and the Wife's ability to bear this increase alone is not proved. In the second instance, the court must also carefully scrutinize the father's request for downward modification - - again, to protect the paramount interest of the children. Thus, when the non-custodial parent requests a downward modification, there should be imposed a "heavier burden", but the same standard should not be applicable to the custodial parent's attempt to be awarded an increase of child support earlier agreed to. Thus, in the situation presented in *Bernstein*, the Court properly did not impose a "heavier burden" upon the child's custodial parent, who is in effect the child's representative litigant, in seeking an increase in child support commensurate with the child's needs. In *Bernstein*, the Court stated:

> "The best interest of the children are paramount in proceedings dealing with custody and child support. The statements in the cases are legion that these paramount interests will be protected by the state and by the Courts, *ex mero motu*, should they be overlooked or adversely affected by actions of the parties . . . ".

Bernstein, 498 So.2d at 1272.

An examination of the holding in another decision, *Essex v. Ayres*, 503 So.2d 1365 (Fla. 3d DCA 1987), is instructed. In *Essex*, parents entered into a contract providing for child support payments to the custodial parent. However, the agreement was not reviewed by a Court until the custodial parent (mother) commenced an action to increase the amount of child support called for by the agreement. In *Essex*, the Third District Court of Appeal agreed with the Fourth District Court of Appeal's holding in *Bernstein, supra*, and stated:

> "We agree entirely with the Fourth District that parties who have agreed on the amount of child support should not be saddled with a heavier burden to modify the amount than parties who have had the amount determined by a Court. But, unlike the Fourth District, we believe that merely equalizing the burden of parties seeking modification does not adequately solve the problem of remedying an agreement to support which is not, *ab initio*, in the best interest of the child or children. We conclude, therefore, that a party seeking a change in the amount of child support provided in an agreement which has not previously been reviewed and approved by a Court should not be required to prove a substantial change in circumstances - - that is, a change from the time and the amount of child support was agreed upon to the time modification is sought - - and need prove only (in addition to ability to pay) that the amount agreed upon between the parties is not in the best interest of the child." (Emphasis supplied).

Essex, 503 So.2d at 1366.

The distinction in *Essex* is that no Court ever reviewed the parties' contract. The *Essex* holding stands for the proposition that where no Court had reviewed and approved a contract providing for child support, a litigant seeking a modification upward does not even have a burden to show a substantial change of circumstances (in addition to ability to pay), but rather, only needs to show that increased child support is in the best interest of the children. On the other hand, a Court-approved agreement is presumed to be in the best interest of the children, and any party seeking to modify the payments downward has a heavier burden because, although this presumption is rebuttable, it exists - - for the protection of the children.

A contract dealing with child support will be given effect only to the extent that it is in the best interest of the child. *Warrick v. Hender*, 198 So.2d 348 (Fla. 4th DCA 1967). *See also, Bernstein, supra.*

Another fundamental principle applicable to a situation where, as here, parties enter into a contract providing for child support, and one party later attempts a downward

modification; that is: the power of parties to voluntarily enter into contracts, and be bound by the terms thereof. Presumptively, TIETIG knew his financial condition when entering into the agreement, and appreciated the duration of his child support obligations undertaken. There was mutual assent between the parties. Under the agreement incorporated into the judgment of dissolution, TIETIG, a lawyer, knew the sums he was required to pay, and implicitly knew or believed he could continue to make such payments. The recipient, BOGGS, limited herself by agreement to the child support provided, but the Courts are clear that the enforcement of such an agreement against BOGGS is only permitted to the extent that the best interest of the children are preserved. BOGGS relied upon TIETIG's agreement to pay designated child support in consenting to the overall agreement of the parties, and waived other claims. *See Vance v. Vance*, 197 So. 128 (Fla. 1940).

A "heavier burden" should, therefore, be applicable to a situation where parties enter into a contract, and one party later attempts to modify that contract downward, which presumptively adversely affects the childrens' welfare. This "heavier burden" should especially be applied to the factor of the non-custodial parent's "ability to pay". As in *Bernstein*, a "heavier burden" should not be applied in attempts to obtain an upward modification of child support provided in an agreement incorporated into a judgment, and a "heavier burden" should not be applied in a situation such as in *Essex*, where an upward modification was attempted to change the provisions of a contract which had not been previously reviewed and approved by a Court.

Irrespective of the burden to be applied at trial, TIETIG failed to show or provide any evidence whatsoever with respect to his then-existing financial condition as of March, 1982, when the Final Judgment was entered, which therefore means that, irrespective of his financial condition at the time of the filing of his motion to modify (September, 1988), or at the time of the trial (February, 1990), he was unable in the trial below to show any "substantial change of circumstances". Wife's evidence below confirmed her dire need for the child support arrearages, and reimbursement of one-half extraordinary medical expenses, and, in fact, Wife testified she had to borrow money from her company ($21,000.00) in order to support her children in the absence of her husband's required support (T.162-163).

After hearing on August 17, 1990, Circuit Court Judge Philip Bloom entered his Amended Order on Report of General Master August 22, 1990, which denied TIETIG's Exceptions to the Report and Recommendations of the General Master. The Amended Order confirmed the General Master's findings of fact and incorporated the recommendations as the order of the Circuit Court. Specifically, Judge Bloom ruled, after

"review of the entire record and after consideration of factors and the totality of the circumstances . . .", that "the factual findings of the General Master are supported by substantial competent evidence" (R.264). Judge Bloom further held that "[t]he General Master has not misconceived the legal effect of the evidence" (R.264-265). Dealing specifically with TIETIG's argument (also made to Judge Bloom) that the General Master utilized an improper "heavier" burden in determining whether to grant TIETIG's motion, Judge Bloom, after review of the entire record, held that it would not matter, and it would have been harmless error, if the General Master had utilized a "heavier" burden in light of the fact that "Husband clearly has not met" his burden of showing of a substantial change of circumstances, including financial circumstances, of one or both parties (R. 265). In summary, Judge Bloom held that "the General Master's findings and recommendations cannot be deemed by this Court to have been clearly erroneous" (R. 265).

Judge Bloom confirmed the arrearages as of February 23, 1990, and directed TIETIG to pay child support to Wife commencing as of February 23, 1990 in the total sum of $600.00 per week, leaving the original March, 1982 award of child support unchanged. Additionally, Judge Bloom recognized that enforcement of the Amended Order was subject to the United States Bankruptcy Court of the middle district of Florida--where TIETIG's Chapter 11 proceedings are pending.

POINTS II, III AND IV SHALL BE ARGUED TOGETHER BECAUSE OF SIMILARITY OF FACTS AND APPLICABLE LAW

Point II

WHETHER THE FINDINGS OF THE GENERAL MASTER AND THE CIRCUIT COURT ARE CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

Point III

WHETHER THE GENERAL MASTER AND THE CIRCUIT COURT BASED THEIR DECISION ON TOTAL ASSETS SHOWN, REGARDLESS OF ABILITY TO LIQUIDATE AND USE, RATHER THAN AS TO AVAILABLE CASH IN DETERMINING APPELLANT'S ABILITY TO PAY.

Point IV

WHETHER AN ORDER REQUIRING HUSBAND TO PAY THE AWARD OF CHILD SUPPORT WHICH EXCEEDS HIS TOTAL MONTHLY GROSS INCOME WHILE AT THE SAME TIME DISREGARDING WIFE'S SUBSTANTIAL INCOME VIOLATES THE PRINCIPLES OF SECTION 61.30 FLORIDA STATUTES AND CONSTITUTES JUDICIAL ABUSE AND REVERSIBLE ERROR.

TIETIG lost all credibility in the trial below regarding his financial circumstances. Specifically, TIETIG was presented with the problem that, commencing in September, 1988, he filed disclosure statements and financial information in his Chapter 11 Bankruptcy proceedings--with the objective of trying to convince creditors that he had sufficient assets and income producing ability to meet his proposed plan of reorganization--while at the same time he attempted to plead *poverty* in the Circuit Court below in attempting to modify his child support obligations and resist enforcement proceedings.

As an example, TIETIG, while testifying at trial, referred to his gross monthly income as $1,768.00 (T. 41) and monthly estimated expenses of $6,544.00 (T. 41). Later, on cross examination, he was required to concede that his "income" is merely a factor of how much his companies--all wholly owned or controlled by TIETIG--desire to pay him from time to time (T. 97-98).

TIETIG argues that his child support obligations affirmed below greatly exceed his gross income. It is incongruous for a man as wealthy as TIETIG, declaring assets in excess of $15,000,000.00 at any point in time between 1987 and the present, with admitted net income during the same period of time between $7,000,000.00 and $17,000,000.00, to complain about having to pay child support payments--which payments he made from March, 1982 to September, 1988, according to Appellee's uncontroverted testimony at trial. TIETIG's wealth at the time of the trial below was three times that which it was in March, 1982. The child support arrearages are vested in favor of Wife, and the Court below found TIETIG has the ability to pay, and the Wife (and children) has/have the need for, such arrearages.

TIETIG's financial affidavit originally filed with his motion to modify his child support obligations in September, 1988 was ruled to be "not only insufficient but extremely insufficient" by General Master Gersten, because it did not comply in any form or circumstance to the rule in that it left most asset and liability items listed as unknown (T. 53). A second financial affidavit of TIETIG, filed late - - during the second day of trial (T. 115-117) - - indicated his September, 1988 assets at $20,503,935.00, compared to total liabilities of $10,183,679.00 (R. 256-258). However, as of the effective date of September 15, 1988, TIETIG testified that he had just previously given his son from another marriage, Mark Tietig, TIETIG's $8,083,000.00 Eureka Field nursery property in April, 1988. In addition, TIETIG admitted he had previously conveyed 100 lots valued at $350,000.00 in April, 1988 to Mark Tietig (T. 91). Further, 38 additional lots were given to his children, also prior to May 15, 1988, which assets are not reflected upon his financial statement on or after that date (T. 90). These conveyances were obviously an effort by TIETIG to divest himself of his most valuable assets (Eureka Field Nursery and

other unencumbered lots) in anticipation of the up-coming trial upon the Southeast Regional Construction law suit pending against TIETIG in Dade County, Florida Circuit Court in or about April, 1988 (T. 88). This case resulted in a judgment against TIETIG for $2,350,000.00 in the fall of 1988, which was later reversed by the Third District Court of Appeal just prior to the trial below.

TIETIG'S May 15, 1988 financial statement shows TIETIG's assets at $20,503,935.00, and liabilities at $7,832,679.00, leaving a net worth of $12,671,256.00. However, if one added back into the asset total the $8,083,000.00 Eureka Field Nursery property gifted to his son one month earlier, TIETIG's true assets would have been $28,586,935.00; with the same liabilities, or $7,832,679.00, his true net worth would have been $20,754,256.00, not including the value of the other 138 lots he gave away ($350,000.00+).

Using TIETIG's bankruptcy Disclosure Statement (Ex. C), which valued TIETIG's assets and liabilities as of May 25, 1989, TIETIG had assets of $15,398,000.00 and liabilities of $8,264,000.00, leaving a net worth of $7,134,000.00. However, adding back to TIETIG's asset total the $8,083,000.00 Eureka Field Nursery property, TIETIG's true asset valuation of $23,481,000.00. Deducting the disclosed liabilities, or $8,264,000.00, TIETIG's actual net worth is $15,217,000.00. However, TIETIG's liability figure as of that date, or $8,264,000.00, *includes* the Southeast Regional Construction judgment of $2,350,000.00, which was reversed prior to the trial below; deducting this amount from the total liability figure, $8,264,000.00, TIETIG's true liabilities are $5,914,000.00. Utilizing TIETIG's true asset value, or $23,481,000.00, and TIETIG's true liability figure, or $5,914,000.00, TIETIG's true net worth as of May 25, 1989 was $17,567,000.00. None of this considers the 100 lots given by TIETIG to his son Mark Tietig in April, 1988, valued at $350,000.00, or the 38 lots given to his children prior to May, 1988, or the $3,000.00 to $10,000.00 annual gifts also given by TIETIG to his four children since 1982 (Ex. A, P. 30-31).

TIETIG argues on page 23 of Petitioner's brief on the merits that the General Master was swayed by the values of land owned by TIETIG. TIETIG's brief, page 23, further argues "[h]owever, there's an old saying 'You can't eat dirt'." TIETIG's conveyances in April, 1988, which left him with only substantially encumbered realty assets, did not help his three minor children insofar as their light bills, phone bills, grocery bills, or help keep a roof over their heads. Only his Court-Ordered child support payments could help in this regard. The situation TIETIG found himself in at the time of the trial below is his own fault.

The fact that TIETIG gifted realty to one or more of his children, one child being from a prior marriage, does not relieve TIETIG of his obligation to pay Wife child support. TIETIG's conveyances of realty to or for the benefit of his children do not operate as a "credit" against payments due Wife for child support. As argued by Wife's counsel in closing argument at the trial below,

> "Although commendable, and it is wonderful the father wants to take care of his children and set them up for the rest of their lives, it doesn't pay the light bills, utility bills, real property taxes, and the other expenses borne by the custodial parent, Colleen" (T. 195).

Such gifts, and even payments, to or for the benefit of children do not relieve the payor non-custodial parent of his/her legal obligation to pay money to the custodial parent for the care and support of the children. *Onley v. Onley,* 540 So.2d 880 (Fla. 3rd DCA 1989); and *Friend v. Friend*, 543 So.2d 408 (Fla. 4th DCA 1989).

In *Onley*, the non-custodial father neither had authorization nor right to modify the simple terms of a Court Order that he periodically pay his ex-wife a designated sum of money for his children's support. Regarding the father's making direct payments to or for the benefit of his children, the Court held that such payments were mere gratuities, which do not otherwise reduce the father's court-ordered obligation to pay child support to his ex-wife. *Id.* 540 at 881.

It is appropriate for the trial Court to consider all evidence as to the assets of the parties. *See Tash v. Oesterle,* 380 So.2d 1316 (Fla. 3d DCA 1980). TIETIG admitted at trial "[t]he testimony shows I do have assets. Yes. I have substantial assets" (T. 186). Also, the fact that TIETIG gifted certain (albeit, substantial) real property assets to his children--and by doing so voluntarily handicapped his ability to manage his assets and debts--is analogous to the situation were a non-custodial spouse has the ability to earn income and does not attempt in good faith to do so. In this situation, where the non-custodial spouse has not made a reasonable effort to find employment commensurate with his ability, or has otherwise taken voluntary steps to handicap his ability to make child support payments, the Court should not grant such parties' request to reduce child support obligations. *See Conklin v. Conklin*, 551 So.2d 1279 (Fla. 4th DCA 1989). Such decrease in income, or lesser ability to restructure debt, is not "involuntary" or "permanent" in nature, which is <u>required</u> in order to afford such party relief in lowering child support obligations. *See Conklin, supra*, 551 So.2d at 1279.

As of January 2, 1990, TIETIG disclosed in his Consolidated Plan of Reorganization filed in his bankruptcy proceedings (Ex. F, P.18) that he had total assets of

$18,586,313.00, which, again, does not include the $8,083,000.00 Eureka Field property. Including Eureka Field, his asset total is $26,669,313.00. In fact, TIETIG has such vast assets and such an optimistic outlook for his financial future that he represented to his creditors in his Consolidated Plan of Reorganization that he had "real estate assets which are far in excess of liabilities even if the appeal of the Southeast Regional Construction Corp. failed." (Ex. F, P. 18). Of course, TIETIG's appeal of that adverse judgment was successful.

The uncontroverted evidence at trial also is that the parties' three minor childrens' expenses between March, 1982, when the original award of child support was made, and the time of trial had "more than doubled" (T. 158-159). Further, the children's expenses had "substantially increased", according to the uncontroverted testimony of Wife (T. 158-169). Also, the uncontroverted testimony of Wife was that the value of her realty had decreased due to the fact that 22 and 1/2 acres of the land upon which she and the children reside was placed in a preservation district by Dade County. (T. 163).

Wife's counsel at the conclusion of the trial below argued that TIETIG failed, in his defense of Wife's motion to enforce payment of child support arrearages, to establish the financial condition he was in at the time of the dissolution of the parties' marriage in March, 1982. In fact, the only evidence adduced at the hearing below relative to TIETIG's financial condition in 1982 came from Wife's testimony, when she testified that she had personal knowledge as to TIETIG's assets and net worth as of the date of the dissolution (T. 168). Wife testified that she participated with TIETIG in filing joint financial statements at two different financial institutions, and therefore she had personal knowledge as to TIETIG's then assets, liabilities and net worth (T. 168). Wife further testified that, as of March, 1982, TIETIG had total gross assets of approximately $7.5 million, gross liabilities of approximately $4 million, and therefore a net worth of approximately $3.5 million (T. 168-169). This was the combined value of the assets, liabilities and net worth of TIETIG, Wife and TIETIG's companies (T. 168).

Despite the disparity in TIETIG's valuations of his assets and liabilities and TIETIG's net worth at different times between May 15, 1988 and January, 1990 (as set forth above), one thing is clear: TIETIG's *assets have more than doubled* between 1982 and the present and *his net worth has tripled*, even using the most conservative figures--which do not include his April, 1988 conveyance of the $8,083,000.00 Eureka Field property. Regarding TIETIG's conveyance of the Eureka Field property to Mark Tietig, it is important to note that the mortgage liability upon the property is retained by TIETIG and is scheduled to be paid through his bankruptcy proceedings. (T. 79).

It is hard to believe that TIETIG has abandoned his three (3) minor children insofar as his child support obligations are concerned. Query: since TIETIG's net worth in 1982--when he agreed to pay $600.00 per week child support--was $3.5 million dollars, and his net worth in September, 1988 was admittedly $10,321,256.00 (which included at that time the Southeast Regional Construction judgment liability of $2,350,000.00--which has since been reversed), how can TIETIG in good faith complain about paying his child support obligations?

At best, TIETIG's argument could be that he has no liquidity to pay child support obligations. However, this is not a sufficient ground to grant a request for modification. TIETIG argues in his brief that he has no liquidity in order to pay his child support obligations. However, Wife introduced into evidence all of TIETIG's bank statements, and/or the bank statements of TIETIG's companies, for either December, 1989 of January, 1990, just prior to the trial below, and the aggregate balance within the numerous bank accounts totaled $89,855.06 (statement ending balances) (Ex. X, T. 100-101). In response, TIETIG testified/argued that the funds were "escrow" funds (T. 100). However, when questioned by the Court (General Master Gersten) as to how much of this sum was actually being held in trust, TIETIG admitted that "I have like a total of either $1,200.00 or $2,300.00" (T. 102).

Further, what is readily apparent is that TIETIG, in or about April, 1988, was planning for the possibility that the Southeast Regional Construction suit, then pending against him, could result in a substantial judgment. In April, 1988 TIETIG voluntarily conveyed the Eureka Field property ($8,083,000.00) and 100 lots ($350,000.00) to his children in trust. These events substantially impaired his ability to restructure his debts. When the Southeast Regional Construction suit resulted in a judgment in August, 1988, and the judgment was recorded in the various counties where TIETIG still held vast real estate assets, this increased TIETIG's inability to restructure his debts.

TIETIG would like the Court to believe that he is in bankruptcy because of this child support obligations. This is ludicrous. TIETIG's resort to the bankruptcy court is a direct result of his inability or unwillingness to post a bond to appeal the $2,350,000.00 Southeast Regional Construction judgment rendered against him in August, 1988 (T. 39). Incredibly, TIETIG denies that his conveyance of the Eureka Field property and the lots to Mark Tietig in or about April, 1988, with a combined value of approximately $8.5 million, had anything to do with his having to file bankruptcy (T. 104).

TIETIG argues in his brief that "[t]he children had not been affected in the least; and, in fact, with their mother they are living a luxurious lifestyle . . ." in the absence of his support payments. (Appellant's brief, page 22). Wife explained at trial, however, that the

children had to vote on whether to take a family ski trip or stay home and receive presents during Christmas of 1989 because of lack of funds. Moreover, substantially all of TIETIG's factual arguments contained within his appellant's initial brief, between pages 17 and 22, and between pages 23 and 26, are not supported by any evidence in the record below.

Even more problematic, TIETIG failed to explain at trial or in his brief is why he conveyed $8.5 million in realty in April, 1988 retaining the mortgage obligation, which conveyance was voluntary, and substantially handicapped TIETIG's ability to refinance his debts. The conveyances of the realty were obviously in anticipation of the possibility that an adverse judgment may be rendered against TIETIG in the Southeast Regional Construction suit then pending against him.

The law in Florida is clear that the Court must consider the totality of the circumstances, including the respective parties' financial circumstances, and how the financial circumstances of the parties has changed, in determining whether to increase or decrease awards of child support. *Scott v. Scott,* 285 So.2d 423 (Fla. 2d DCA 1973), *reh. den.* (1973).

The burden is on the party seeking modification to show a substantial change of circumstances, including financial circumstances, of one or both parties, in order to justify modifying child support obligations. *Brown v. Brown*, 315 So.2d 15 (Fla. 3d DCA 1975); and *Leone v. Weed,* 474 So.2d 401 (Fla. 4th DCA 1985).

It is also fundamental that any change in circumstances "must be significant, material, involuntary and permanent in nature". *Leone v. Weed*, 474 So.2d 401, 404; *See also In re: Marriage of Johnson,* 352 So.2d 140 (Fla. 1st DCA 1977).

Finally, the moving party who seeks modification of a child support obligation bears the burden of showing this change in circumstances. *Meltzmer v. Meltzmer*, 356 So.2d 1263 (Fla. 3rd DC 1978); and *Leone, supra*, at 401.

The uncontroverted evidence as to TIETIG's financial condition at the time of the original award of child support, or March, 1982, was that his assets totalled approximately $7.5 million, that his liabilities were approximately $4 million, and that TIETIG had a resulting net worth of approximately $3.5 million. The only change in circumstances since that time has been the tremendous increase in the value of TIETIG's assets and net worth. Even by his own admission, TIETIG's net worth as of September, 1988, when he was seeking the modification of child support, was in excess of $9 million dollars! TIETIG's argument further fails because this net worth *includes* the Southeast Regional Construction judgment of $2,350,000.00, which was reversed just prior to the trial below, and *excludes* the Eureka Field property valued at $8,083,000.00, which he gave to his son in April,

1988. The Southeast Regional Construction judgment was not "permanent in nature" since it was subsequently reversed. Also, TIETIG's gift of the Eureka Field property was not "involuntary".

In summary, TIETIG's change in circumstances has been that his net worth has greater than tripled, he voluntarily gave away approximately $8.5 million in property in April, 1988, and the only "adverse" change, the Southeast Regional Construction judgment, was subsequently reversed and therefore not permanent in nature.

Parenthetically, although TIETIG makes a "big deal" of the fact that at least he wanted the parties' children to attend Palmer Private School, and TIETIG further contends that this was a consideration waived by him in agreeing to child support, TIETIG candidly admits that although he authored the parties' Marital Settlement Agreement and Addendum, its does not contain any provision for the parties' children to attend private school (T. 93). Wife testified that the aggregate tuition for the three (3) children would be approximately $21,000.00 per year in tuition, $2,160.00 for transportation expenses, and $1,500.00 for additional fees and other assessments (T. 160), which Wife clearly cannot afford. (See Wife's financial statements).

The reason why TIETIG failed and refused to make payment of child support is the contempt he obviously holds for his ex-wife. TIETIG has violated other provisions of the parties' agreement, including but not limited to his pledge to give Wife 25% of the equity in the Eureka Field property (see agreements attached to March, 1982 Final Judgment of Dissolution, and Husband's Exhibit 5). Wife testified that TIETIG has denied her claim, and Wife is litigating to assert her right to such interest in TIETIG's bankruptcy proceeding as well as in Dade County Circuit Court. (T. 166-168).

POINTS V, VI, VII and VIII SHALL BE ARGUED TOGETHER BECAUSE OF SIMILARITY OF FACTS AND APPLICABLE LAW.

Point V

WHETHER THE GENERAL MASTER AND THE CIRCUIT COURT EXCEEDED THE PERMITTED AREA OF ACTIVITY PURSUANT TO THE RESTRICTIONS CONTAINED IN THE BANKRUPTCY COURT'S LIMITED ORDER LIFTING STAY BY AWARDING ATTORNEY'S FEES.

Point VI

WHETHER THE GENERAL MASTER AND THE TRIAL COURT ERRONEOUSLY AWARDED ATTORNEY'S FEES FOR DEFENSE OF THE MODIFICATION ACTION WHEN SUCH AWARD WAS PROHIBITED BY THE SETTLEMENT AGREEMENT.

Point VII

WHETHER THE ATTORNEY'S FEES AWARDED WERE EXCESSIVE IN LIGHT OF THE WORK PERFORMED SOLELY AS TO THE ENFORCEMENT OF THE SETTLEMENT AGREEMENT.

Point VIII

WHETHER THE AWARD OF ATTORNEY'S FEES TO WIFE WAS IMPROPER IN LIGHT OF THE WIFE'S ABILITY TO PAY AND HUSBAND'S INABILITY TO PAY.

Florida Statute § 61.16 authorizes the Court to award attorney's fees and Court costs associated with enforcement proceedings. As a part of her enforcement proceedings below, Wife petitioned the Court for an award of reasonable attorney's fees expense and Court costs associated with her enforcement proceedings due to TIETIG's unilateral reduction of child support payments after September, 1988.

The law in Florida is clear that awards of attorney's fees and costs associated with enforcement proceedings for unpaid alimony or child support should be made in appropriate circumstances in order to avoid diminution of awards. This is especially true in cases such as the instant case where the award below was for arrearages in child support obligations--since any other result would unnecessarily adversely effect the rights of the children. *In Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980), the Court held:

> It is not necessary that one spouse be completely unable to pay attorney's fees in order for the trial court to require the other spouse to pay these fees. Given the complexity of the cause and the time necessary to appropriately resolve the issues, the award of attorney's fees in this case was proper to avoid an inequitable diminution of the fiscal sums granted to the Wife in these proceedings.

Canakaris, 382 So.2d at 1205.

One reason for the foregoing policy in awarding attorney's fees is to insure that both parties will have the same opportunity to secure counsel. *Patterson v. Patterson*, 399 So.2d 73 (Fla. 5th DCA 1981); *Deatherage v. Deatherage,* 392 So.2d 1169 (Fla. 5th DCA 1981), and *Mertz v. Mertz*, 287 So.2d 691 (Fla. 2d DCA 1973).

It is especially just, in order to avoid diminution of child support arrearage awards, to award attorney's fees in situations such as this where the refusal of the payor spouse (TIETIG) to comply with his child support obligations required Wife to seek enforcement. *Patterson, supra; Spencer v. Spencer,* 305 So. 2d 256 (Fla. 3d DCA 1974), *cert. denied,* 351 So. 2d 470 (Fla. 1975). TIETIG is a licensed attorney who on occasion represented himself below; Wife is not.

To further amplify the sound reasoning for the rule giving the Court wide discretion to make such awards of fees and costs, Judge McCord, in *Patterson v. Patterson,* 348 So.2d 592 (Fla. 1st DCA 1977), stated:

> This statute vests authority in the trial court to order a party to pay a reasonable amount for attorney's fees for the other party after considering the financial resources of both parties. I do not construe this to mean that the party requesting an award of attorney's fees must be unable to pay the fees in order to secure such an award. This is particularly true where a party has become delinquent in child support payments, and it becomes necessary for the other party to bring a contempt proceeding to require that the Court's order be complied with. A party bringing such a proceeding should not have the burden of showing that he or she cannot pay the fee in order to secure an award of his or her attorney's fees which were necessitated by the other party's non-compliance with the court order. *Id.* at 596-97.

Peculiar to this case is the fact that Wife had to first seek leave of TIETIG's bankruptcy Court for stay relief--incurring fees in the process--in order to proceed with the trial below.

In *Kuse v. Kuse,* 533 So.2d 828 (Fla. 3d DCA 1988), *reh. den.*, the Court held:

> An award of attorney's fees in order to avoid an inequitable diminution of funds is proper. *Canakaras v. Canakaras,* 282 So.2d 1197, 1205 (Fla. 1980). A court may award attorney's fees after consideration of the financial resources of both parties and a finding that one spouse has a superior financial ability to pay the fees. *Bryan v. Bryan,* 442 So.2d 362 (Fla. 1st DCA 1983), *rev. denied,* 450 So.2d 485 (Fla. 1984) (additional citations omitted).

In the *Kuse* decision, the Third District Court of Appeal reversed the trial court's failure to award attorney's fees to the Wife therein, because of the "[h]usband's long time record of income production and his earning ability were substantially superior to those of the Wife". *Id.* at 829.

In *Davis v. Davis,* 547 So.2d 309 (Fla. 4th DCA 1989), the trial court's failure to award attorney's fees and costs was held to be an abuse of discretion where the record demonstrated that the Wife's financial position was substantially inferior to the Husband's financial position. The *Davis* Court stated the general rule that:

> . . . on the issue of attorney's fees and costs, such an award depends upon the relative financial circumstances of each party. *See Mandy v. Williams,* 492 So.2d 759 (Fla. 4th DCA 1986).

Davis, 547 So.2d at 310.

Finally, the decision of *Benson v. Benson,* 519 So.2d 1098 (Fla. 3d DCA 1988), held:

> Although the record reveals that the Wife can afford to pay her own attorney's fees, it is plain that the Husband is in a much better financial position that the wife to pay for such fees.

Benson, 519 So.2d at 1098.

Clearly, the award of attorney's fees and costs is in the wide discretion of the trial court. Where there is such a tremendous disparity in assets and net worth of one party compared to the other, and the other is required to enforce child support obligations, it is clearly within the trial Court's discretion to make an award of such expenses against the party necessitating the enforcement proceedings. This is especially true where, as here, the party necessitating the enforcement proceedings has such vast wealth. Such a proposition is axiomatic under Florida law.

The Court below specifically found that:

> BOGGS has incurred $10,597.00 in reasonable attorney's fees expense in these enforcement proceedings, plus $84.00 in Court costs, and the General Master finds that such fees and costs expended are an integral part of BOGGS' claim for child support arrearages and medical expenses, and TIETIG should be required to contribute and pay BOGGS $10,681.00 as his contribution towards BOGGS' fees and costs expense in that the General Master further finds that TIETIG has a far superior ability to pay such expenses compared to BOGGS' lesser ability to pay same. (R. 246)

Circuit Court Judge Bloom confirmed the award of fees and costs in his Amended Order, after considering TIETIG's arguments (same as on appeal) and after consideration of all factors and the totality of the circumstances (R. 264). Judge Bloom's Amended Order held, in pertinent part:

> . . . (3) BOGGS has incurred $10,597.00 in reasonable attorney's fees expense plus Court costs of $84.00 in these enforcement proceedings, and the finding that (4) such fees and costs are/were expended as an integral part of BOGGS' claim for child support arrearages and medical expenses, and the findings that (5) TIETIG should be required to contribute and pay BOGGS $10,681.00 as his contribution towards BOGGS' fees and costs expended in that TIETIG has a far superior ability to pay such expenses compared to BOGGS' lesser ability to pay same . . . (R. 265).

The Bankruptcy Court relinquished jurisdiction to determine Wife's child support arrearages which necessarily include, under Florida Statute 61.16, costs and fees incurred by Wife in enforcement of child support provisions incorporated into the Final Judgment dissolving the parties' marriage. Such awards are in the clear discretion of the

trial Court. Enforcement of the award, in this case, however, is vested in the U.S. Bankruptcy Court, Middle District of Florida, in Tampa. If Wife's fees and costs are not an integral part of her child support award, as was found by both General Master Carol Gersten, Circuit Court Judge Philip Bloom, and the Third District Court of Appeal below, an inequity would result in that there would be substantial diminution of Wife's child support arrearage award - - which directly and adversely effects the rights of the three minor children involved.

Responding to Appellant's Points VI and VII, had TIETIG not defended Wife's enforcement proceedings and/or had TIETIG not attempted to modify his child support obligations, utilizing the same theory that he had suffered an adverse substantial change in financial circumstances, legal efforts in order to obtain entry of an order granting Wife's Motion to Enforce would be far less significant. Further, if TIETIG had not unilaterally reduced child support payments from $600.00 to $225.00 per week during the pendency of his motion to modify, Wife would not have had to prosecute a motion to enforce the judgment providing for such child support. The problem is that TIETIG reduced the payments without Court's permission, vigorously defended Wife's motion to enforce, was dilatory in responding to discovery requests, and was constantly in non-compliance with the Rules of Civil Procedure, the statutes regarding child support obligations, and the orders of the Court thereby requiring Wife to incur considerable legal expenses in the prosecution of her claims.

Wife's attorney's fees expert, Mr. Barry Meadow, Esq. testified regarding TIETIG's defenses to Wife's Motion to Enforce as being the same issues he presented in Husband's Motion to Modify; as such, all fees rendered by Wife's counsel were in fact a part and parcel of the enforcement proceedings (T. 224-225). This testimony is unrefuted Mr. Meadow testified:

> It appeared to me that each one was part and parcel of the other; that the same work that was done to prove that the final judgment should be enforced, it was the exact same work that would have had to have been done in defense of Mr. Tietig's request that the child support be reduced because of financial circumstances.
>
> So when I saw that it was consistent with the billing statements, that's the way it appeared to me. So I looked at it as a whole in terms of the number of hours that were put in and what I thought a reasonable number of hours were and a reasonable rate of compensation for those hours.
>
> And I guess what I'm saying is I didn't see anything that Mr. Tuttle would not have done had he not filed a motion to enforce the final judgment.

THE GENERAL MASTER: I understand your position. Let me ask you this: Was there any substantial amount of work performed by Catlin, Saxon, Tuttle & Evans between the time that Mr. Tietig filed his petition for modification and the time that Mrs. Boggs filed her motion for enforcement?

THE WITNESS: In fact, the records show that Mrs. Boggs was not billed for any hours between the fall of 1988 and October of 1989. The first bill--hourly statement in Mr. Tuttle's file I believe is October something of 1989. They first billed her when they filed the motion to enforce on her behalf. (T. 224-225).

CONCLUSION

In order for TIETIG to have prevailed in the Court below, he would have had to have shown a substantial change in circumstances including financial circumstances as to one or both of the parties, or as to the expenses associated with the children, which would warrant modification. Further, the change in circumstances would have to be significant, material, involuntary and permanent in nature, which changes, if any, were not. TIETIG faced a heavy burden because his request for a downward modification for child support was presumptively not in the minor childrens' best interest. What is clear from the undisputed record below is TIETIG's assets more than doubled, his net worth more than tripled, and his children's expenses during the same period of time doubled. TIETIG is in arrears $29,025.00 child support, plus $1,664.00 extraordinary medical expenses as of February 23, 1990. In addition, because Wife was required to retain her attorneys to enforce the award in light of TIETIG's unilateral reduction of support payments, and refusal to pay extraordinary medical expenses, the Court should affirm the trial Court's discretionary award of $10,597.00 in reasonable attorneys' fees expense and Court costs associated with Wife's enforcement proceedings, which are an integral part of Wife's claims below; if not, it would result in a substantial diminution of child support, to the detriment of Wife and/or the parties' three minor children.*

* In TIETIG's unsuccessful appeal to the Third District Court of Appeal, the appellate court awarded BOGGS reasonable fees associated with the appeal, and remanded the issue for the fixing of the amount. The issue was tried, and the trial court awarded BOGGS $10,000.00 of approximately $12,500.00 incurred - - which judgment TIETIG has not appealed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. Mail to EDWARD C. TIETIG, 1326 Malabar Road, S.E., Suite 1, Palm Bay, Florida 32907, this 7 day of January, 1992.

CATLIN, SAXON, TUTTLE & EVANS, P.A.
Attorneys for Appellee/Wife Boggs
169 East Flagler Street
Suite 1700
Miami, Florida 33131
Telephone: (305) 371-9575

By: William M. Tuttle II
WILLIAM M. TUTTLE, II, ESQ.
Fla. Bar No.: 377627

By: Stephen J. Kolski Jr.
STEPHEN J. KOLSKI, JR.
Fla. Bar No.: 856673