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CLERK, SUPREME COURT

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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: 78,013

EDWARD C. TIETIG,

Petitioner,

vs.

COLLEEN H. BOGGS,
f/k/a COLLEEN H. TIETIG,

Respondent.

RESPONDENT'S REPLY TO PETITIONER'S JURISDICTIONAL BRIEF

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STATEMENT OF CASE AND FACTS

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-_____").

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 Order Granting Relief From Stay (R. 223-224). 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, For Costs and Fees incurred in Wife's enforcement proceedings (R. 225-226).

Substantial discovery including document production, interrogatories and depositions were had by both parties. After Order of Referral, Trial before General Master Carol R. Gersten was held February 23, February 26, and March 7, 1990, Wife's motions for enforcement and attorney's fees, and Husband's motion to modify. Evidence before General Master Gersten considered in denying Husband's motion, and granting Wife's motion to enforce, and motion for fees, includes but is not limited to:

a. The \$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 and 10 leasehold, valued by TIETIG in his bankruptcy at \$8,083,000.00 (T. 79-80);

c. That just prior to May 15, 1988, on March 23, 1988, TIETIG conveyed unto 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 realty, stocks, securities and other equitable interests of \$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 \$_____, 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 his previously-filed affidavit, disclosed assets of \$20,503,935.00 (not including assets identified in Sub-Paragraphs b and c, above), 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 showed assets of \$18,586,313.00 assets (not including \$8,083,000.00 Eureka property given away); and

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

At trial, TIETIG failed to show or provide any evidence whatsoever with respect to his then-existing financial condition existing in 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 (September, 1988) or the trial, he was unable in the trial

below to show any adverse "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 borrowed 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 the three (3) day trial, and after considering evidence including Exhibits introduced therein, on June 20, 1990 General Master Kessler 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 child support arrearages, \$1,664.00 as one-half extraordinary medical expenses, and \$10,681.00 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) which disputed all of the factual findings of General Master Gersten. After hearing August 17, 1990 of TIETIG's exceptions by Circuit Court Philip 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 of one or both parties, irrespective of what degree of "burden" was utilized by General Master Gersten. 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 September 12, 1990 (R. 262).

After complete briefing of the merits, and after oral argument, the Third District Court of Appeal filed its opinion April 30, 1991 whereby the Third District Court of Appeal affirmed, per curiam, the Order of the Circut Court entered below denying TIETIG's motion, and enforcing the child support award.

From this adverse ruling, TIETIG petitions this Court for jurisdiction to consider the merits of this case.

SUMMARY OF ARGUMENT

Although not clear, it appears Petitioner, EDWARD C. TIETIG (TIETIG) petitions this Court's jurisdiction based upon "express and direct" conflict between District Courts; specifically, although not mentioned in TIETIG's brief, Petitioner may be attempting to invoke this Court's jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv). However, as clearly set forth in the opinion of the Third District Court of Appeal below, the instant case should not be the test case regarding alleged conflict between District Courts on the same issue of law ("heavier burden"), because it is the holding of the Third District Court of Appeal below that petitioner "failed to show a substantial change in his financial circumstances to warrant a downward modification of his child support obligations" and the Court further held that "the findings of the General Master were based on substantial competent evidence". In other words, it is irrelevant whether or not a conflict on the burden issue exists. It would have been harmless error since the factual findings (affirmed by the Circuit Court and Third District Court of Appeal) make it impossible for Petitioner to prevail on appeal.

ARGUMENT

This is Petitioner's third attempt to appeal; TIETIG's Motion for Modification was tried before a General Master, then appealed by TIETIG to the Circuit Court, then appealed by TIETIG to the Third District Court of Appeal, and now TIETIG attempts to invoke the jurisdiction of this Court.

Petitioner, in his "Conclusion" within his jurisdictional brief, states that the District Courts in this state are in conflict "as to the rule of evidence to be applied" in actions such as this, wherein Petitioner attempted to obtain a downward modification of child support payments to be made by Petitioner to his former wife for the parties' three minor children.

Most of the authority cited by TIETIG in his jurisdictional brief have nothing to do with the "point of law" which is the standard of proof in child support modification cases, to-wit: a substantial change of circumstances including financial circumstances (as to one or both parties).

Petitioner argues *Bernstein v. Bernstein*, 498 So.2d 1270 (Fla. 4th DCA 1986), conflicts with the opinion of the Third District Court of Appeal below. However, the holding of the Third District Court of Appeal below is the "former Husband failed to show a substantial change in his financial circumstances to warrant a downward modification of his child support obligations". Accordingly, irrespective of what burden was applied, Petitioner failed to show a substantial change in his financial circumstances, which is required before a modification can be granted. The Third District Court of Appeal further held that "the findings of the General Master were based on substantial competent evidence". Thus, in this case, since Petitioner even failed to show a "substantial change" in his financial circumstances, which is the requisite burden, Petitioner failed in his attempt to modify downward his child support obligations.

CONCLUSION

This should not be the test case for determining whether or not a conflict on this point of law exists between Florida's District Courts. In fact, the holding of the Third District Court of Appeal below is that Petitioner failed to show a substantial financial change of circumstances at the trial of his Motion to Modify Child Support Obligations, and the Court below further held that the findings of the General Master was supported by substantial competent evidence. Accordingly, it is respectfully suggested that this Court not invoke its discretionary jurisdiction in the instant case.

Respectfully Submitted,

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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, EDWARD C. TIETIG, c/o Eureka Field Nursery, Attn: Ect. 13901 S.W. 184th Street, Miami, Florida 33177, this 18 day of June, 1991.

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