11/19/91

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DEC 4 1991
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 78,013
DCA-3 90-02157

EDWARD C. TIETIG

Petitioner,

-vs-

COLLEEN H. TIETIG,
k/n/a Colleen H. Boggs

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND THE FACTS

Introduction

This is a Petition to invoke the discretionary jurisdiction of this Court under Rule 9.030 (a) (2) (iv), Florida Rules of Appellate Procedure. It seeks to review an Opinion of the Third District Court of Appeal filed April 30, 1991. That Opinion denied Petitioner, Husband's Appeal of Amended Order on Report of General Master; entered in the Dade County Circuit Court, Judge Philip Bloom, which denied Husband's Petition for Modification of Child Support. It also seeks review of the award of attorney's fees to Wife.

The Petitioner, Edward C. Tietig will be referred to here in "TIETIG" or "HUSBAND". The Respondent is Colleen H. Tietig (Boggs) and will be referred to herein as "BOGGS" or "WIFE".

The following symbols will be utilized:

"R" - - - - Record-on-Appeal;

"RS" - - - - Supplemented Record-on-Appeal

"T" - - - - Transcript of trial proceedings.

All emphasis is supplied by counsel unless otherwise indicated.

Case and Facts

Husband and Wife were married in 1965. They separated in February, 1982 and were divorced in March, 1982. They executed a written Property Settlement Agreement on January 28, 1982 (R 6). The Agreement provided (Paragraph 4) for payment by Husband to Wife of $200.00 per week child support for each of the 3 children of the marriage, each of whom was then in private school; such payments to continue until each child reached age 18. Wife was also granted the right to claim all 3 children as dependents on her IRS returns. Alimony was waived as were attorney's fees for other than enforcement actions (Paragraph 4). The Agreement was made a part of the Final Decree, entered March 17, 1982 (R 4).

Payments of these stipulated amounts were faithfully made by Husband from February, 1982 until August 22, 1988 (T 33); a total amount of over $205,000.00 for the six and one-half year period.

In late August, 1988, Husband had a $2,345,000 judgment entered against him (T 38). At the same time, 2 blanket mortgages covering most of his land-development and agricultural assets were declared in default (T 38-39). Eventually, claims against Husband would total over $13,500,000.00.

Husband and one of his related entities filed Chapter 11 bankruptcy in September, 1988. Husband disclosed these problems to Wife and, failing an agreed reduction (T 37), unilaterally reduced the payments after August 22, 1988, to $75.00 per week per child for a total of $225.00 per week. These payments were made through the trial date.

This legal action commenced on September 20, 1988, by Husband filing his Motion To Modify these child support obligations with the Dade County Circuit Court under the original divorce action (R 204-216).

Over 1 year later, October 17, 1989, Wife filed in the Circuit Court her Motion to Enforce Final Judgment (R 221-224). On October 25, 1989, Wife petitioned the Bankruptcy Court for a lift of stay. Husband stipulated to its lifting and an Order was entered October 10, 1989 (RS 1-2) providing for an immediate termination of stay. However it was replaced on October 25, 1989, with an Amended Order which granted the lifting of the stay only for the "limited purpose" of determining the amount of the child support and medical expense claims and prohibiting all enforcement without further order of the Bankruptcy Court (RS 3-4).

After the Amended Order was issued by the Bankruptcy Court, Wife then filed a Motion in the Circuit Court for attorney's fees (R 225-226). However, no request for fees was made to the Bankruptcy Court nor was there a request to the Bankruptcy Court to supplement its Order lifting stay to include this request. Husband moved to strike this Motion (RS 5-6) as not asked of, nor granted by, the Bankruptcy Court and as being outside the limited scope granted by the Amended Order lifting stay (T 22-28).

Trial of these issues was referred to the General Masters' Office. At trial, in response to query by Husband, the General Master, Carol Gersten, responded (T 199),

> "It is the rule of law that I follow, Sir. There is a much heavier burden in trying to modify an agreement that was mutually entered into by the parties than there is to modify a Final Judgment of Dissolution of Marriage resolved by trial. I believe that is black-letter law. There is a substantial burden."

Despite this unfair handicap, despite friction between the General Master and Husband (which appears throughout the transcript) and without an attorney because of lack of funds, Husband was able to supply solid evidence prepared under penalty of Federal Felony law. Because of the Bankruptcy proceedings, Husband had been required to file a sworn affidavit each month from September, 1988, listing all income and all expenses. These were entered into evidence (T 61) and were uncontroverted. They showed Husband had an average monthly income from September, 1988, through February 23, 1990, the hearing date, of only $1,768.00 GROSS. He was voluntarily making payments of $967.50 per month, or 55% of all his income, not just available income.

Husband offered uncontroverted proof that at the time the Agreement was signed, he had very substantial income from a law practice, a real estate sales practice, a tree nursery and the sale and operation of two large apartment complexes. His debt, in good standing, was approximately $4,500,000.

Compared to that date, the claims remaining in the bankruptcy at the date of trial still exceeded $11,000,000.00; all sales were controlled by the Court, the Court had denied his request for extra income from sales commission, and there was no ability to get extra

income or to free an asset for sale free of prior claims upon the proceeds.

Wife's attorney was allowed to present evidence of value of real estate assets of Husband, which were admittedly substantial; however, it was shown that these assets and the cash flow therefrom were all subject to mortgage liens of creditors and were not available to Husband. Only the $1,768.00 per month came to him T 98).

Husband also alleged that the original support figure was based upon an understanding that the children would remain in private school through the 12th grade. Inasmuch as the children had been sent to public schools by Wife after the 6th grade, the expenses and the basis for the higher amount had been eliminated.

Wife disclosed a monthly income in excess of $5,300.00 from her ownership of 2 businesses, a bank directorship, a Farm Bureau presidency, 3 first mortgages receivable and a Florida State board position. This figure included child support at the reduced level. If it had been at the figure she demanded, income would have been almost $7,000 per month. (In fact, this is just what the lower Court has ordered.) Her expenses included $594.26 per month for family tennis lessons and $526.00 per month for family vacations (R 234-236).

Despite this very, very substantial budget of "necessities" she agreed at trial that the 3 boys were healthy, happy, doing well in school and athletics and <u>had no adverse affect from the reduced payments over the prior 19 months</u> (T 135).

The General Master held that Husband had not overcome the heavier burden of proof, was not entitled to relief, and that Wife was entitled to the original support figure plus attorney's fees.

Exceptions to the General Master's findings were filed by Husband (R 241-242) but were rejected by the Circuit Court which issued its Order R 259) and its Amended Order (R 264-266).

An appeal was taken to the Third District Court of Appeals which was denied by Opinion entered April 30, 1991. Subsequently, the Circuit Court awarded $10,000 attorney's fees to wife for the trial and the appeal.

Appellate Jurisdiction based upon conflicting opinions of the District Courts of Appeal (Rule 9.030 (2) (iv) F.R.A.P.) was filed on July 5, 1991. This Court granted Appellate Jurisdiction on October 18, 1991.

Still pending, and not a part of this proceeding, is Husband's subsequent second petition for modification, filed at age 62, showing his continued inability to pay; the award of his social security pension benefits of $613.00 per month and those social security benefits accruing directly to Wife as Guardian of the minor children of over $820.00 per month and requesting appropriate modifications and credits.

POINTS INVOLVED ON APPEAL

Point I

THE GENERAL MASTER AND THE COURTS ERRED IN APPLYING THE RULE OF LAW THAT THERE IS A MUCH HEAVIER BURDEN UPON A PETITIONER TO MODIFY A WRITTEN AGREEMENT FOR CHILD SUPPORT ENTERED INTO BY THE PARTIES OVER THAT OF AN ORDER ENTERED BY THE TRIAL COURT IN A DISSOLUTION PROCEEDING.

Point II

EVEN USING THE HEAVIER BURDEN RULE THE FINDINGS OF THE GENERAL MASTER AND ADOPTED BY THE CIRCUIT COURT ARE CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

Point III

THE GENERAL MASTER AND THE CIRCUIT COURT ERRED IN BASING THEIR DECISION UPON TOTAL ASSETS SHOWN, WHILE DISREGARDING SECURED DEBT THEREON, PRIOR ASSIGNMENT OF PROCEEDS AND INABILITY TO LIQUIDATE AND USE, RATHER THAN THE PROPER CRITERIA OF AVAILABLE CASH INCOME.

Point IV

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

BY AWARDING ATTORNEY'S FEES 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.

Point VI

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

Point VII

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

Point VIII

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.

SUMMARY OF ARGUMENT

Point I

THE GENERAL MASTER AND THE COURTS ERRED IN APPLYING THE RULE OF LAW THAT THERE IS A MUCH HEAVIER BURDEN UPON A PETITIONER TO MODIFY A WRITTEN AGREEMENT FOR CHILD SUPPORT ENTERED INTO BY THE PARTIES OVER THAT OF AN ORDER ENTERED BY THE TRIAL COURT IN A DISSOLUTION PROCEEDING.

The General Master held, (T 199),

"It is the rule of the law that I follow, Sir. There is a much heavier burden in trying to modify an agreement that was mutually entered into by the parties than there is to modify a Final Judgment of Dissolution of Marriage resolved by trial. I believe that is black-letter law. There is a substantial burden".

That "black-letter" law had been specifically overruled in Bernstein v Bernstein, 498 So 2d 1270 (Fla App 4 Dist 1986). That Court held that in child support modification cases such as this, there is no different burden that the same preponderance of evidence rule existing in civil law cases. The reasoning in that case should be adopted by this Court.

Point II

EVEN USING THE HEAVIER BURDEN RULE THE FINDINGS OF THE GENERAL MASTER AND ADOPTED BY THE CIRCUIT COURT ARE CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

The evidence and testimony introduced at trial showed an involuntary, substantial, material and permanent reversal of circumstances by Petitioner/Husband. He was in bankruptcy and all of his assets were frozen by judgment and mortgage liens. His income was supervised and controlled by the Bankruptcy Court and the U.S. Trustee. To the contrary, Wife had an income of over $5,300 per month not counting the requested child support. There had been no adverse affect upon the children during the 19 months of reduced payments. The award of child support of about 150% of Petitioner's verified $1,768.00 monthly income, thereby giving Wife an income of $7,000.00 monthly, was clearly an economic impossibility and constituted gross abuse of discretion.

Point III

THE GENERAL MASTER AND THE CIRCUIT COURT ERRED IN BASING THEIR DECISION UPON TOTAL ASSETS SHOWN, WHILE DISREGARDING SECURED DEBT THEREON, PRIOR ASSIGNMENT OF PROCEEDINGS AND INABILITY TO LIQUIDATE AND USE, RATHER THAN THE PROPER CRITERIA OF AVAILABLE CASH INCOME.

The ability to pay child support is not determined by gross assets if the evidence shows that the use of said assets or the income therefrom has been previously pledged to another party. The ability to pay must be determined by available net income and those assets which are free to convert into cash. This is spelled out clearly in Chapter 61 Florida Statutes. The amount awarded is far greater than that allowed by the guidelines.

Point IV

AN ORDER REQUIRING HUSBAND ABILITY 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 General Master, as confirmed by the Circuit Court, reached the ridiculous conclusion that since the burden of proof had not been met by Petitioner, he must pay almost 150% of his gross income per month in child support plus an additional two-thirds of his yearly income for attorney's fees. At the same time, Wife's income, which would now reach almost $7,000.00 per month, was disregarded There is no "harmless error". This has deprived Petitioner of his right of due process.

Point V

BY AWARDING ATTORNEY'S FEES 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.

The Bankruptcy Court had jurisdiction over Husband's assets. The limited order of the bankruptcy court allowed these proceedings only to determine the amount of the Respondent/Wife's claim. It did not relinquish jurisdiction as to any other aspect and, especially, the determination of attorney's fees. Wife did not ask the

Bankruptcy Court for fees. The Petition to Award Attorney's Fees was filed after that order was entered and then not in the Bankruptcy Court but only in the Circuit Court. The General Master and the Trial Court were without jurisdiction to hear or determine this matter.

Point VI

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

The Settlement Agreement prohibited the award of attorney's fees except for enforcement actions (R 6 Paragraph 5). The record shows that all issues of the petition for enforcement were admitted by Petitioner. All of the Appellee's attorney's time was spent in defending the modification action; which fees were, by contract, not recoverable.

Point VII

THE ATTORNEY'S FEES AWARD WERE EXCESSIVE AS TO WORK PERFORMED SOLELY AS TO THE ENFORCEMENT OF THE SETTLEMENT AGREEMENT.

All of the issues involved in the enforcement petition were admitted by Appellant. The time claimed by the attorney was in fact, rendered for the defense of the modification petition.

POINT VIII

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.

All testimony proved that Husband had no ability to pay for even his own attorney while Wife had substantial income and assets and had the ability to pay her own fees. The result of the Court's order is that Husband cannot pay all of the child support ordered much less attorney's fees.

ARGUMENT

POINT I

THE GENERAL MASTER AND THE COURTS ERRED IN APPLYING THE RULE OF LAW THAT THERE IS A MUCH HEAVIER BURDEN UPON A PETITIONER TO MODIFY A WRITTEN AGREEMENT FOR CHILD SUPPORT ENTERED INTO BY THE PARTIES OVER THAT OF AN ORDER ENTERED BY THE TRIAL COURT IN A DISSOLUTION PROCEEDING.

The rationale of the "heavier burden" doctrine as applied to property and alimony agreements; and, thereafter, spread to include child support seems to be:

> "The parties themselves made up the agreement. They knew what they were doing. They had the opportunity to negotiate at arms length so the Court should not substitute its judgment unless something new is shown beyond a doubt."

Hog wash! Spouses at the time of a martial break-up are subject to the most extreme pressures and emotional traumas of their entire lives. To say that spouses cooly, calmly and objectively agree as to each issue as a Trial Court would do, is the ultimate unreality.

Why should a contract made under the heaviest of pressures be given greater sanctity than the preponderance of evidence rule applied in the rest of Civil Law, especially where children are involved?

Bernstein v Bernstein, supra, has not one but two masterful discussions as to the origin of this rule and the public policy which rejects it. This case was decided En Banc; 9 Appellate judges approved its rationale. These Judges specifically receded from the old law of heavier burden. These Judges certified direct conflict. The message is loud and clear -- they want the law changed.

The Legislature has never specified such a heavier burden rule. In fact, Bill 91-246 just enacted shows clearly the Legislature's intent that all assets and liabilities be clearly identified (61.075 F.S.); that all sources of income, and all resources and liabilities be considered (61.08 F.S.) and set standard guidelines for equality of child support be set by an allocation between the parties based upon net income [61.30 (6) F.S.].

The Executive branch of our government has also spoken. As quoted in Bernstein v Bernstein, supra, (P 1275-6), the Florida Governor's Commission On Child Support endorsed standard guidelines based upon the criteria of "basic subsistence for all persons involved", "allocation of income to meet these needs" and "remaining income equitably distributed among children and parents".

Based upon these Guidelines, Husband's net income would have to be almost $12,000 per month to justify the level of payment ordered.

If all of Husband's actual present income were considered net income and if Wife's income were excluded entirely, his burden only would be only approximately $750.00 per month or 78% of what he now pays voluntarily.

The record shows the grossest form of inequality. The Appellate Courts, the Legislature and the Executive have spoken for equality. The Heavier Burden rule stands in its way. Heed Bernstein v Bernstein, supra, and abolish it.

POINT II

EVEN USING THE HEAVIER BURDEN RULE THE FINDINGS OF THE GENERAL MASTER AND ADOPTED BY THE CIRCUIT COURT ARE CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE.

The proof necessary for Petitioner to be entitled to relief is, per Bernstein v Bernstein, supra, and, consistently in all cases, is to prove (P 1273)

> ". . . a substantial change in circumstance, which change is significant, material, involuntary and permanent in nature." (emphasis supplied)

Let us see where the parties were.

At the time of the signing of the Agreement in January, 1982.

	Husband	Wife
EDUCATION	College and Graduate School	College - some graduate school (T 118)
SCHOLASTIC HONORS	None	Phi Beta Kappa, Summa Cum Laude, Best Athlete 1960 (T 118)
BUSINESS LEVEL	President-Several companies	President-Several companies
PROFESSIONAL STATUS	Member several associations	State President 1 association
ASSETS	Very substantial land holdings	Substantial land, home and nursery holdings
LIABILITIES	$4,500,000 in good standing	None (T 4)
STANDARD OF LIVING	Very Good	Very Good

INCOME SOURCES	1. Law Practice 2. Apartment Complex Melbourne (T 35) 3. Apartment Complex Cocoa (T 35) 4. Tree Nursery (T 35) 5. Air Layer Nursery 6. Lime grove 7. Land Development Company 8. Lot Sales Company (T 35)	1. Nursery
EXTRAORDINARY CHILDREN EXPENSES	None	Private School
PROSPECTS FOR FUTURE	Good	Good

Husband made payments of $600 per week from January, 1982 until August 22, 1988 (T 32) (T 34), some $205,000.

Changes: Substantial, Significant, Material, Involuntary, Permanent.

By August 1, 1987, a condominium project ate up all Husband's cash reserves (T 36).

By August, 1987, Husband was halted by blanket mortgages from making sales of his lands in Dade County (T 37) and lots in Osceola County (T 37).

By August, 1987, over $125,000 in mechanic liens had been filed in the Osceola County condominium project.

By August, 1987, the condominium construction lender, who also held a blanket land loan, refused to make draws (T 37) or to release lots for house construction.

In August, 1988, two foreclosure suits were filed against Husband by the Farm Credit Bank (T 37).

Since 1984, the law practice had been discontinued (T 40).

By August, 1988, cash reserves had gone from between $400,000 - $500,000 down to a $32,000 working capital and payment account (T 39-40) for all of the businesses. This was used up by costs and fees of the bankruptcy and to keep the last active business office open.

On August 28, 1988, a $2,345,000 judgment was rendered against Husband (T 38). This was immediately recorded in each county where Husband's lands were located.

Almost all sources of income had vanished or were taken by creditors. Wife contributed to this lack of income by stealing Husband's tree nursery manager only 2 weeks after the Agreement was signed (T 44), casuing an income drop of some $21,000.00 per month.

September, 1988, a Chapter 11 bankruptcy proceeding had been filed. Over $13,500,000 in liabilities would be listed or claimed including over $3,000,000 by Wife.

Because of the prohibition as to sales of lands by the mortgagees who had prior liens and the disallowance by the Bankruptcy Court and the U.S. Trustee's Office of any commission income because of "insider" status, Petitioner's income from the date of filing through the date of trial dropped to an average of $1,768.00 per month GROSS (T 40) versus monthly expenditures (or at least accruing bills) of $6,544.00, a monthly deficit of $4,755.00 (T 41).

Total defaulted debt was in excess of $9,000,000 (T 42). It was not deliberate or voluntary (T 42).

Meanwhile, the two oldest boys had gone from private to public schools and the third was one year away (T 37), thereby eliminating Wife's tuition expenses.

So, at trial date, the positions of the parties had changed as follows:

	Husband	Wife
EDUCATION	Unchanged	Unchanged
SCHOLASTIC HONORS	Unchanged	Unchanged
BUSINESS LEVEL	Several companies out of business Only one making money	President - 1 more nursery (T 24) 2 nurseries making money
PROFESSIONAL STATUS	Unchanged	President-Dade Farm Bureau (T 124) Director-Community Bank of Homestead (T 122), Chairman State Geology Board (T 122)
INCOME SOURCES	1. Law Practice - Gone 2. Apartment Complex Melbourne - Gone 3. Apartment Complex Cocoa - Gone 4. Tree Nursery - operating at loss - in foreclosure 5. Air Layer Nursery - operating at loss - in foreclosure 6. Lime grove - not operating - in foreclosure 7. Land Development Company - not operating - in foreclosure 8. Lot Sales Company - still operating.	1. 2 Nurseries 2. Bank Director 3. Farm Bureau 4. Geology Board 5. 3 mortgages receivables

Husband had seven out of eight businesses gone or operating at a loss.

Wife had acquired another nursery and had increased income sources by five.

Husband had a gross monthly income of $1,768.00.

Wife had a gross monthly income of $5,294.00 [$3,536.00 from financial affidavit, $968.00 from reduced child support at $225.00 per week, $250.00 from Community Bank (T 132), $100.00 from the Farm Bureau (T 134), and three mortgage receivables $215.00.]. With full support as ordered, her income would exceed $6,906.00 per month.

Children's Expenses: Tuition down 67%

Children's Status: Healthy, doing well in school, not deprived of food, clothing or shelter despite 19 months of reduced payments (T 135).

Special Needs: Wife: $526.00 per month for vacations, $594.00 per month for tennis (T 161-162), a total of $1,120.00, about 63% of Husband's Gross Income.

	Husband	Wife
PROSPECTS FOR FUTURE		
PERSONAL	Not remarried	Remarried and divorced.
BUSINESS	Still in Bankruptcy	Making money

It is clear Husband had suffered horrendous reversals while Wife had prospered. She was a bank director, he was a bankrupt. He voluntarily paid over 1/2 his gross income for child support. She

had over $4,300 per month without any support, $5,300 with the amended support and wanted over $6,900 plus fees.

The children had not been affected in the least; and, in fact, with their Mother they are living a luxurious lifestyle, diving in the Caymans and Belize, snow skiing in Idaho, Utah and North Carolina, tennis camp at Nick Bollettieri's.

Today, Husband is still in bankruptcy. His income is still restricted. He is still fighting but has lost substantial assets. He is over 62. There is no happy ending in sight.

Husband more than sustained his burden of proof.

The guidelines of Section 61.30 F.S. would require husband to pay over $200.00 per month LESS than his voluntarily readjusted amount, $1,812.00 less than that ordered by the Circuit Court.

The proof in the record is overwhelming. Error was committed.

POINT III

THE GENERAL MASTER AND THE CIRCUIT COURT ERRED IN BASING THEIR DECISION UPON TOTAL ASSETS SHOWN, WHILE DISREGARDING SECURED DEBT THEREON, PRIOR ASSIGNMENT OF PROCEEDS AND INABILITY TO LIQUIDATE AND USE, RATHER THAN THE PROPER CRITERIA OF AVAILABLE CASH INCOME.

The General Master was swayed by the values of land owned by Appellant. However, there's an old saying "You can't eat dirt." The assets provided little or no income that was not pledged to a bank or subject to a judgment lien and unavailable to Husband.

Husband was under penalty of Federal law to report his true income monthly to the U.S. Trustee. The monthly reports were entered as evidence (T 61). The General Master could not disregard this proof.

The testimony referred to above showed that Husband's problems were caused by the refusal of several banks to allow him to sell lots and acreage. It was not voluntary.

Seven out of eight businesses existing when the Agreement was signed were now defunct or operated at a loss. Ninety percent of the income of the sole surviving company was pledged to County National Bank of South Florida.

A great "to-do" was made of a gift in early 1988 of one parcel, the Eureka Field Nursery property, to a land trust for the benefit of the children. What the General Master failed to consider was:

A. The land was gifted for estate tax purposes prior to a re-zoning.

B. The operating company, Eureka Field Nursery, Inc. still controlled by Husband got all of the economic benefit (or burden) of operating the nursery - not the land owner.

C. The nursery operated at a loss.

D. This property and the operation was a liability to Husband and decreased his cash flow both before and after the gift.

E. At the time the modification petition was filed, this nursery was in foreclosure so the point was moot.

The Court also heard the large judgment had just been reversed. This reduced Husband's liabilities down to about $11,000,000 but this had no effect upon Husband's ability to pay. The Court could not use this to predict happier days tomorrow, that is error. Harris v Harris 138 So 2d 2376 (Fla App 3 Dist 1962); Slade v Slade 132 So 2d 917 (Fla 1943); Simmons v Simmons 192 So 2d 235 (Fla App 3 Dist 1966). Husband is still in bankruptcy so that prediction would have been erroneous.

The "bottom line" showed monthly income:

Husband	$1,768.00	1 source
Wife	$5,400.00	6 sources including reduced child support.

Husband paid a heavy amount for 6 1/2 years without complaint. He did not stop these payments altogether even when his economic world collapsed. There was no spite -- there was bankruptcy. The Court ignored the test of "available income" specified in Chapter 61.30 F.S. That was error.

POINT IV

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.

An examination of the Transcript would show that nowhere were the needs of the children put forth by Wife. To the contrary, it shows a person with time to serve as President and Board member of the Florida Nurserymen's and Growers Association, 2-term President of the Dade County Farm Bureau, Board member of the Community Bank of Homestead, and Chairman of the Florida Board of Geologists (T 121). It also shows a person who had enough assets to pay her second husband alimony when that marriage also failed (T 175 - 183).

Most of the time spent in her attorney's attack was to criticize and cast aspersions upon a gift made by Husband to his 4 children -- 3 of them hers; of a parcel of property which not only produced no income but also was a drain upon Husband's other resources. Nowhere was need shown -- to the contrary -- she proudly admitted the kids were fine and unaffected by the lower income. Nowhere was net available income or any other income or saleable asset shown other than as shown by Husband.

Before a Court can order payments there must be before it a record showing sufficient, competent, substantial evidence of Husband's ability to pay. Nelson v Nelson 491 So 2d 618 (Fla App 1

Dist 1986). Taylor v Taylor 325 So 2d 63 (Fla App 1 Dist 1976). An award of 80% of a husband's net income was an abuse of discretion. DeArmas v DeArmas 471 So 2d 185 (Fla App 3 Dist 1985).

An award, as in the present case, of 146% of gross income plus attorney's fees is not just abusive -- its impossible.

Husband is under the control of 2 courts. One Court says pay child support of $2,580.00 per month. Also pay $10,000.00 in fees.

The second Court has complete authority and power over Husband and all his assets. It says, you are allowed $1,768.00 per month to feed, clothe and shelter yourself and to pay child support.

Eddie Cantor made the song "Makin' Whoopee" famous years ago. "He doesn't make much money, only $5,000 per -- some Judge who thinks he's funny says pay 6 [000] to her".

It is not possible. Florida Courts have stricken awards where there is no finding of ability to pay or where it is obvious from the record Husband will be unable to Pay. DeArmas v DeArmas, supra. Scott v Scott, 285 So 2d 423 (Fla App 2 Dist 1973). Nelson v Nelson, supra.

The abuse is made more flagrant when Wife's ability to contribute is ignored.

Husband proved his case. It was ignored by the General Master.

Need of the children was not shown. Ability of the Husband to pay was not shown. Inability of Wife to pay was not shown. Inadequacy as compared to statutory guidelines was not shown.

Such judicial conduct flys in the fact of Section 61 F.S. and, especially 61.30. It must be reversed.

POINT V

BY AWARDING ATTORNEY'S FEES 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.

The request for attorney's fees was not before the Bankruptcy Court when it issued its order on October 25. That petition was filed only in the Circuit Court and then on December 6, 1989.

The Bankruptcy Court's order specified that it is:

> ". . . modified for the limited purpose of allowing Movant to seek and obtain the appropriate state court relief regarding child support obligations owning by the Debtor."

11 U.S.C.A. Section 105 sets forth the general powers of the Bankruptcy Court. There is no question it supercedes the powers of the Circuit Court. With 100% of its jurisdiction gone, the Circuit Court could only deal with matters specified by the Amended Order Lifting Stay.

11 U.S.C.A. Sections 503 and 506 pertain to the allowance of fees and costs. They provide specifically for notice, hearing and order of the Bankruptcy Court. The power to award fees is solely with the Bankruptcy Court.

The Bankruptcy Court had jurisdiction over everything; especially costs and fees. The Bankruptcy Court did not release this jurisdiction. Wife never asked the Bankruptcy Court to release fee

jurisdiction but filed the attorney's fees motion in the Circuit Court after the Bankruptcy Court order was entered.

This objection was preserved (T 22 and 28). Even Wife's attorney admitted this was a question the Bankruptcy Court had to decide (T 23). Yet the General Master expanded the limited scope of the order. She and the Circuit Court had no jurisdiction. The award of fees is void.

POINT VI

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

The Settlement Agreement (R 4 Paragraph 5):

> "Each party irrevocably waives . . . court costs and attorney's fees, excluding only fees for enforcement proceedings."

How to avoid a clear cut prohibition? Here was Wife's attorney's plans:

1. Don't isolate and present the enforcement proceeding separately.
2. Mix it in with the modification motion.
3. Now say you can't separate one from the other.

Was this plan done: Yes. The Court asks Mr. Tuttle, Wife's attorney (T 21):

> ". . . to proceed first. I'll allow him to present his evidence. When you cross examine, if you have direct testimony which you wish to illicit from the witness based upon your petition for modification, I will allow you that scope. Then I will allow Mr. Tuttle to have the scope to cross examine on his redirect. Do you understand what I'm saying?"

However, Mr. Tuttle objects (T 21):

> "Your Honor, one point of order. Since Mr. Tietig's motion was filed 18 months ago and our motion was filed six months ago, I would prefer that he proceed first on his motion but that the testimony induced can cross over. If I need to redirect Colleen, I'll do that to clarify things.

Were things then clarified as Mr. Tuttle represented? No, for on (T 221-222) he now says:

> "Your Honor, it's our contention that statute calls for reasonable fees to be awarded -- 61.16 -- reasonable fee can be awarded in the discretion of the Court in resisting a modification petition as well as in enforcement proceedings. They are an integral part of each other. In other words, he has to pay it all if it's reduced. So the issues are identical. I don't think that we could even break that down. To say how much enforcement, how much modification --"

This was trickery and misrepresentation to the Court to avoid a contractual block to the fees. The contract should be upheld. The Wife's own expert showed how little time the enforcement would take. The fee judgment should be voided.

POINT VII

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

The written agreement prohibited Wife claiming attorney's fees for anything other than enforcement (R 6 Paragraph 4).

To avoid this problem, Wife's attorney rejected the General Master's invitation to present her enforcement motion first (T 16); and, instead, requested that the testimony on Husband's modification and on Wife's enforcement be intermixed (T 21).

Then when the testimony as to fees was presented the 2 aspects of the case were then an "integral part of each other " (T 221-222).

On cross-examination of the fee expert, it was admitted:

1. The Lift of Stay Motion was stipulated by Husband (T 239).
2. A Motion for Enforcement containing the elements of enforcement:
   a) agreement, b) breach, c) amount, d) prayer for relief would take "half hour, 15 minutes to prepare (T 244).
3. If the Agreement were stipulated as well as the amount not paid, the proof was "easy" (T 245 - 247).

"Absent a Trial On the Concurring Issue of Modifying Because of Your Change of Circumstances (T 246)"

That is the testimony of Wife's own expert. It conclusively shows that the great bulk of the time was spent defending the Motion for Modification. The award of these fees is prohibited by contract.

POINT VIII

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.

The relative position of the parties has been fully set forth in the Statement of the Case and Facts and in Point II. Husband was bankrupt and had only $1,768.00 per month gross income. Wife had many sources of income, no debt and with the Court's Order, almost $7,000.00 per month income.

She made no showing of her inability to pay, only that she had to take the money from a corporation of which she owned 100% Child v Child 474 So 2d 299 (Fla App 3 Dist 1985).

She owned 40 acres in Miami, a large home, an operating nursery, 51% of another nursery on 8 acres, uncounted value of inventory, no debt, income over $5,000.00 per month. This is abuse of discretion. Mauldin v Mauldin 493 So 2d 1103 (Fla App 5 Dist 1986).

Husband had no funds. Husband had no attorney. He cannot be hurt doubly by paying Wife's fees. Azzarelli v Pupello 555 So 2d 1276 (Fla App 2 Dist 1989).

In fact she had cash and free assets while Husband did not. Garrett v Garrett 559 So 2d 613 (Fla App 3 Dist 1990) and cases cited therein. See Jackson v Jackson 507 So 2d 1160 (Fla App 2 Dist 1987).

CONCLUSION

The intent of the Legislature, the intent of the Executive and the enlightened findings of the Fourth District bench, en banc, is for equality of access to the court's determination of parental burden based upon net available income and full and fair disclosure of all assets and liabilities, to determine each parent's proper share based upon standard guidelines without artificial rules and hurdles.

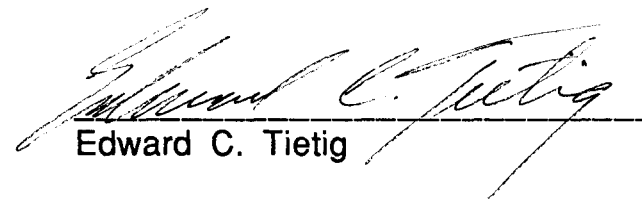
Husband's changes could not have been more dramatic and traumatic. Even with financial disaster he kept up substantial payments. The children did not suffer.

Wife has substantial assets. Wife contracted not to ask for fees. Wife did not gain permission of the Bankruptcy Court to obtain fees.

This Court should adopt Bernstein v Bernstein, supra, and eliminate unequal burdens of proof.

This Court should reverse all judgments and findings made heretofore in this case, make a determination based upon Section 61.30 F.S. Guidelines and deny attorneys fees and costs.

Respectfully Submitted,



Edward C. Tietig

12/2/91

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed this 2nd day of December, 1991 to: William M. Tuttle, II, Catlin, Saxon, Tuttle & Evans, P.A. Attorneys for the Respondent, 169 East Flagler Street, Suite 1700, Miami, Florida 33131.

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