IN THE SUPREME COURT OF THE STATE OF FLORIDA

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

EDWARD C. TIETIG

Defendant, Petitioner,

-vs-

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

Plaintiff, Respondent.

_____/

REPLY BRIEF OF PETITIONER EDWARD C. TIETIG

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2/14/92

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REPLY BRIEF

I. Agrument - Basic Law

If this case was decided solely upon the law of child support, it would be simple. The Court would look to:

A) the needs of the children;

B) the available income of Husband; and

C) the available income of Wife.

A. Needs of Children

Despite having only received the reduced payments of $225.00 per week for over one and one-half years, Wife testified (T-135):

"Q. The three boys, Brian, Eric and Kris, do they have any medical problems?

A. No. They are all three very healthy.

Q Are they having any problems in school?

A. They are doing very well in school. I get mad at Brian sometimes, but they are doing well at school.
Mr. Tietig: I can stipulate to that.

Q Are they being deprived of anything as far as food, clothing or shelter?

A. I don't believe so.

Q Are you happy with their growing up?

A. Yes. They are my greatest joy."

Therefore, the children were not in need, nor were they adversely affected by the drop in payments.

B. Available Income of Husband

Husband proved he had gross income of $1,768.00 per month. He was voluntarily paying $967.00, or 55%, as child support. There was no other income available. He was cross-examined (T-97):

"Q. Mr. Tietig, you testified that your income has been X number of dollars. Are you employed by any person or entity that you don't either own or control?

A. No.

> Q As far as sources of your income, is it a fair statement to say that your income is for the most part derived from entities that you either own or control?
>
> A. Yes.
>
> Q Isn't it a fact, then, that you set your own income from any one of those entities?
>
> A. If they had income, I could get it, yes. However, I don't have a single one that is making a profit. I'm supporting them on my own capital."

C. Available Income of Wife

Wife disclosed by affidavit, as increased by admissions during examination (T-132 to 134). a gross income in excess of $5,300.00. Adding the increased support payments brings this to almost $7,000.00 per month.

II. Speculation is Improper

The General Master (and this Court) have been bombarded with hoped-for values of unsold (and 100% mortgage encumbered) real estate. Wife's Answer Brief speculates (RB-14):

> "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."

After 3 1/2 years Husband is still in Chapter 11. The real estate industry is depressed. The Courts must deal with present facts and that is $1,768.00 per month, Gross!

III. Only Available Income or Assets May Be Considered

The Legislation has expressed itself very specifically on this point. Chapter 61.30 F.S. Child Support Guidelines, defines Gross Income [61.30 (2)(a)] and Net Income [61.30 (4)] to reach combined available income [61.30 (6)]. The child support payment table is based upon combined available income.

The Court may consider Total Available Assets [61.30 (10)(h)]. The word "available" is used throughout the section. Its meaning is simple. The Courts cannot be influenced by assets which are encumbered and not available by income therefrom or by sale.

It is hard to defend an attack by inference and innuendo. It is harder when the attacker foregoes obvious remedies to the inferred misdeed, fails or refuses to pursue those remedies; and yet, still persists in the smear.

There is a blunt allegation (RB-9) that the transfers made in April, 1988 were fraudulent transfers in anticipation of a judgment in the Southeastern case. The answer to that charge is:

1. The Southeastern suit was filed September 9, 1985, about 3 years before these transfers. However, no transfers were made in these 3 years other than yearly gifts by Husband to the limit of the annual gift tax exclusion.

2. The gifts of agricultural lands were made just 5 months before they were included in the Dade County Master Plan for residential and commercial uses.

3. The transactions were made as gifts and reported as gifts to IRS. Thus, they could have been attacked and set aside under Chapter 726.105 (1)(b) F.S. at any time.

4. Southeastern, the judgment holder, did not attack the transfers; the U.S. Trustees Office did not; the remaining creditors did not; the Bankruptcy Court did not. Even Respondent did not. She is a creditor. She had the opportunity to examine Husband under oath pursuant to Title 11 Section 341 of the Bankruptcy Code. Perjury by Husband would have been a Federal felony offense as well as cost Husband his licenses to practice law or to be a real estate broker.

5. The gift of the non-income producing agricultural lands had no influence upon the cash flow or available income of Husband.

6. The gift of the 100 lots had no effect upon Husband's income until (as to 1/3 each) each of the 3 children of the parties reached 17. At the time of making the gift, the oldest of the 3 still had over 3 years to go. Even when they reached 17, the funds being taken from Husband went to each child and would still be available for support, during the 1 year hiatus before the obligation ceased, see Chapter 61.30 (10)(b) and (h) F.S.

7. Husband had borne a heavy burden, $600.00 per week from January, 1982 until August, 1988. Over 6 years and over $200,000, without complaint and without request for modification. Even when Wife remarried some 6 months after the divorce no relief was requested.

The time of change, August of 1988, was when the $2,345,000 Southeastern judgment was entered against him. It is also the time 2 large mortgages were declared in default. September, 1988, 1 month later, is when he sought bankruptcy. This was no "maneuvering ploy" in a divorce action. Husband continued payments of $225.00 even after that. He did not try to hide behind the bankruptcy shield. He paid her almost 60% of his available income. This is documented by sworn monthly accountings to the Bankruptcy Court; again, under penalty of a felony.

Wife also states (RB-14) that Husband:

". . . can regain any loss of financial position which he brought upon himself from his remaining assets."

This is the only place the parties agree. God willing, Husband will regain his economic stability. Husband <u>does</u> have assets remaining; which, <u>when</u> freed of the mortgage debt will give him substantial net available income. When that time comes, when that income is not pledged, the Circuit Court can again examine the position of each party and make an equitable adjustment

IV. No Other Assets Available

The Trial Court set aside no transfers. The Trial Court found no hidden assets. The Trial Court found no available assets other than those contained in the monthly report to the U.S. Trustee. The Trial Court found no bad effect, lack of care or need of the children. Yet now, Husband is faced with payments far greater than his gross income. He is faced with jail for contempt if he cannot pay. He is to be imprisoned for debt for misfortunes not his fault, for not paying extra funds not needed by the children and to thereby jeopardize his ability to pay the $225.00 per week he has been paying. The children will be deprived of one parent to satisfy the vendetta of the other. Not for their benefit, for hers.

V. Need for Uniform Standards

That basic law: Need of children and available income of each parent, has become submerged in the artificial tests and hurdles that spring forth if the parties had entered into a prior written agreement. Why? All other areas of the law encourage negotiation and settlement. Even this Agreement acknowledged it could not take away the inherent power of the Court to change if circumstances so dictated (R-6 Paragraph 4). If the parties acknowledge this then why does the Court make it tougher on them than upon parties who cannot agree and must litigate?

There is already a rule of law which sets a high threshold for relief. The change must be: 1) substantial; 2) significant; 3) material; 4) permanent; and 5) involuntary.

Why should there now be an additional and very subjective hurdle -- "a much heavier burden of proof"?

How do you measure that burden -- 10% more? 20%? 50%? Beyond a reasonable doubt?

Under what circumstances? No prior agreement? A prior agreement not included in the Decree? A prior agreement included in the Decree? The Wife's Petition? The Husband's Petition? Child support raised? Child support lowered?

Read very carefully Wife's Answer Brief, pages 15 and 16. That is just what is advocated. It wishes this Court to perpetuate inequality of relief. It seeks to put into jeopardy the incentive to enter into a prior written agreement

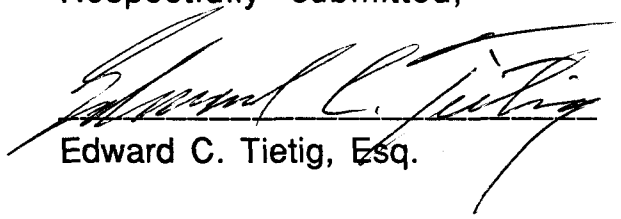
CONCLUSION

The Courts must have equality of justice. They must have equality of access to justice. This Court must always be diligent to maintain this uniformity. Parties must not be fearful that by working together and agreeing, without litigation, to a written agreement, that such a socially desirable step can be their downfall in a later proceeding.

This Court must promote uniformity. It cannot condone different burdens. There should be no "price of entry" to get to the heart of the matter -- the needs of the children and the available income of each parent.

Even without this argument, Husband proved his case beyond a reasonable doubt. This matter should be reversed and Husband's petition granted, without prejudice to Wife to petition for an increase should he regain his economic feet.

Respectfully submitted,



Edward C. Tietig, Esq.

Lit:ECTvBoggsSC.1

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed this 14th day of February, 1992, 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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