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FILED
SID J. WHITE
SEP 30 1991
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

SUPREME COURT OF FLORIDA

DAVID L. HEILMAN	**	
Petitioner,	**	CASE NO: 78,502
vs.	**	DISTRICT COURT OF APPEAL, 4th DISTRICT- NO: 91-1508
BARBARA ANN HEILMAN,	**	
Respondent.	**	

/

PETITIONER'S OPENING BRIEF ON CERTIFIED QUESTION FROM THE FOURTH DISTRICT COURT OF APPEAL

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REFERENCE TO THE PARTIES

In this Brief, David L. Heilman, will be referred to as petitioner, and Barbara A. Heilman, will be referred to as Respondent.

All references to the record on Appeal will be referred to as Exhibit.

STATEMENT OF FACTS

On June 12, 1989, Chief Judge Daniel T. Hurley invoked **Rule of Civil Procedure 1.491** by Administrative Order 2.002 (attached hereto as **Exhibit A**). Petitioner was held in contempt on May 8, 1991 (attached hereto as **Exhibit B**) based on Respondent's Third Contempt Petition in six months (attached hereto as **Ex C**). On May 3, 1991, prior to the May 6, 1991 hearing Petitioner filed a **detailed objection** to any contempt hearing being held by Court Commissioner Linda Goodwin (attached hereto as **Exhibit D**).

At the hearing on May 6, 1991, Family Hearing Officer Linda Goodwin declined to refrain from hearing the contempt motion claiming that **Rule 1.491** does not require consent on a non-Title IV-D cases since committee notes are not binding on the court. Petitioner David L. Heilman declined to participate in the hearing fearing a "Waiver issue" (**Exhibit E** transcript of hearing). The May 8, 1991 family law Judge John L. Phillips contempt order (attached hereto as Exhibit "B") overruled Petitioner's **objection** to Hearing Officer Linda Goodwin hearing the contempt motion.

Petitioner filed a Writ of Prohibition in the Fourth District Court of Appeal which was denied (**Exhibit F**) but the Appellate Court treated the writ as a non-final appeal and the writ of prohibition was treated a opening brief. Appellee/Respondent Barbara Heilman filed a response brief which cited the case of **Oliveri v. Oliveri**, (Supra). Petitioner filed a reply brief containing the only brief filed in the **"Oliveri"** case as an Exhibit, now **Ex-G**. The Fourth District affirmed the Trial Court because

of the **"Oliveri"** decision but certified the question in this appeal to this Court (**Exhibit H**). This discretionary appeal follows.

SUMMARY OF THE ARGUMENT

The Trial Court erred when it overruled Petitioner's objection to the Hearing Officer presiding on a contempt issue under **Rule 1.491** as the committee note requires consent by the parties. The Chief Judge, Daniel T. Hurley did not adopt Non-Title IV-D cases, in administrative order 2.002 as required by **Rule 1.491(b)** and the committee note subsection (b) of **Rule 1.491.**

CERTIFIED QUESTION ON APPEAL

IS THE CONSENT OF BOTH PARTIES REQUIRED BEFORE A CHILD SUPPORT ENFORCEMENT ISSUE MAY BE REFERRED TO A HEARING OFFICER UNDER RULE 1.491, FLORIDA RULES OF CIVIL PROCEDURE?

ARGUMENT

POINT ONE

Petitioner relies upon the committee note in **Rule 1.491** adopted by the Supreme Court by implication **In Re: Florida Rule of Civil Procedure 1.491** child support enforcement 521 So.2d 118 (Fla 1988). The committee note in **Rule 1.491** subsection (b) states:

> " . . . The expedited process provisions of the applicable federal regulations apply only to matters which fall within the purview of Title IV-D. The committee recognizes, however, that the use of hearing officers could provide a useful case flow management tool in non-Title IV-D support proceedings.
>
> . . . It is contemplated that a circuit could make

> application to the chief justice for expansion of the scope of the rule upon a showing of necessity and good cause. It is the position of the representative of the Family Law Section of the Florida Bar that reference of non-Title IV-D proceedings should require the consent of the parties as is required by RCP 1.490(c)."

The Administrative Order 2.002 of June 12, 1989 adopted by Chief Judge Daniel T.K. Hurley(Exhibit A) is silent as to non-Title IV-D cases such as this case but assuming arguendo that this Administrative Order did encompass non-Title IV-D support cases, both the Hearing Officers and the Family Law Judges would be bound by the Committee Notes, since the local rules cannot circumvent the rules of procedure set forth by the Florida Supreme Court. In **Berkheimer v. Berkheimer** 466 So.2d 1219 (Fla 4th DCA 1985) the Court stated:

> "We recognize that the press of business has led to a different practice. Immediate implementation followed by later review has become standard operating procedure in some circuits. But the courts of this state are not empowered to develop local rules which contravene those promulgated by the Supreme Court. **State v. Darnell**, 335 So.2d 638 (Fla 4th DCA 1976). Nor may courts devise practices which skirt the requirements of duly promulgated rules."

This issue is of utmost importance as the Committee Notes in **Rule 1.491** are being ignored by all of the Hearing Officers and Family Law Judges in Palm Beach County and presumably other counties, who have adopted **Rule 1.491**. **A full analysis is necessary to resolve this issue.**

When this Court adopted the former Rules of Civil Procedure in 187 So.2d 596(Fla. 1966) of which **Rule 1.491** is not included, the committee noted that the comments which help explain the rules are supplementary only and are **not part of**

the rules. They are intended to show the sources of the rules amendments made to them and the reasons for their adoption. It has been stated that the notes are not binding but are a valuable aid in understanding (criminal) rules. **Putt v. State** 527 So.2d 914(Fla. 3rd DCA 1988).

The Committee Notes in the 1981 amendment of the Florida Rules of Civil Procedure (which does not include **Rule 1.491** were not adopted by the Supreme Court, in re **Rules of Civil Procedure** 391 So.2d 165, 166 (Fla. 1980) and the extensive opinion in **Lingelbach's Bavarian Restaurant Inc. v. Bello** 467 So.2d 476(Fla.2nd DCA 1985) is instructive to this point.

Rule 1.491 is an exception to the above rules and was adopted by the Supreme Court, by implication has its own life, this Court stated the following at 521 So.2d 118, 121:

> " . . . In re Florida Rules of Civil Procedure (Amendment to Rules 1.490 and 1.611), 503 So.2d 894 (Fla. 1987), we rejected proposed rules relating to child support enforcement proceedings. Following this rejection, the chief justice **appointed an ad hoc committee to suggest rules which could be employed,** if necessary, to comply with standards set by the agencies charged with paying indigent parents for child care. **That committees recommendations are now before us.**
>
> . . . In the interim the state trial courts have taken great care to assure that the existing court system is complying with minimum time standards for hearings to enforce child support orders. The existing system is the one of choice and should be utilized. Nevertheless it is appropriate to have an alternate system available to assure compliance with time standards in cases under Title IV-D of the Social Security Act(42 U.S.C. Section 651 et seq.).
>
> . . . With these thoughts in mind, and noting that

> implementation is subject to the decision of the chief justice, we approve the committee's recommended rule and adopt it to be effective at 12:00 a.m., March 1, 1988. **The rule and the ad hoc committee's notes are attached hereto.** (emphasis added)
>
> . . . It is so ordered."

The rule specially referred to the notes and by implication, **added** the Committee notes and by implication, **adopted** the Committee Notes. **Rule 1.491** and **Rule 1.490(c)** must be read together because the Committee Notes specifically references and clearly requires the consent of the parties.

The Fourth District Court of Appeals has rendered opinions in **Slattery v. Slattery** 528 So.2d 1377 (Fla. 4th DCA 1988) and **Rosenberg v. Rosenberg** 566 So.2d 950 (Fla. 4th DCA 1990) involving a reference to a Special Master under Rule 1.490(c) which states:

> "(c)**Reference**. No reference shall be to a master, either general or special, without the consent of the parties. When a reference is made to a master either party may set the action for hearing before him."

The adoption of **Rule 1.491** by Administrative Order 2.002(Exhibit "A") could not take precedence over a Court rule. A "Local Rule" or reliance upon previous statements by the Florida Supreme Court regarding "Committee Notes" have allowed totally **inconsistent** rulings regarding consent in an non-Title IV contempt action. An extensive opinion in **Bathurst v. Turner** 533 So.2d 939 (Fla. 3rd DCA 1988) regarding **Rule 1.490** will be helpful in resolving this issue and footnote (4) regarding Florida Rule of Judicial Administration 2.020(b).

It is submitted by this writer that no difference exists between **Rule 1.490(c)**

and **Rule 1.491** where a reference is made to a Special master or Hearing Officer under Rule 1.491 - **both rules require the consent of the parties.**

POINT TWO

Appellee had offered the Fourth District Court of Appeal the case of **Oliveri v. Oliveri**, 541 So.2d 174 (Fla 4th DCA 1989) from **Broward County** for the proposition that under rule 1.491 a hearing officer over the objection of one of the parties could hear and decide issues of child support, but could not decide issues of attorney fees. (The panel consisted of Judges Letts, Gunther and Warner). This case is distinguishable on the facts and Petitioner had suggested an en-banc Fourth District Court opinion resolve an inter-circuit conflict.

The August 10, 1988 case of **Slattery v. Slattery**, 528 So.2d 1377 (Fla 4th DCA 1988) from **Broward County**, by the panel of Judges Downey, Glickstein and Dell, unequivocally stated that the master could not make any findings when an objection was filed by one of the parties when the case was referred to a general master.

On September 26, 1991, this Court decided **Rosenberg v. Rosenberg**, 566 So.2d 950, also a non-final appeal from **Broward County**, which follows "**Slattery**" and stated the following:

> "Slattery and this case are the same- a reference by the trial court on a motion for contempt and an immediate objection by one of the parties to the reference, satisfying the rule and the trial court's own order. In Slattery, we were compelled by the rule to reverse as we are here and which we hereby do with the hope that trial courts and trial counsel-and we judges here-will follow Slattery so long as it remains the law of the district."

The panel in this case consisted of Judges, Downey, Stone and Glickstein.

The problem in these cases from Broward County appears to be the May 12, 1988 Seventeenth Judicial Circuit Administrative Order of Chief Judge Miette F. Burnstein, 2.03.18 which states:

> "Pursuant to Administrative Order of the Chief Justice dated April 8, 1988, a copy of which is attached hereto, and pursuant to Florida Rules of Civil Procedure 1.491(b), it is
>
> ORDERED that for the purposes of considering proceedings for the establishment, enforcement or modification of support, both in those cases in which the party seeking support is receiving services pursuant to the Title IV-D of the Social Security Act and in those cases in which the party seeking support is not receiving such services, all presently designated General Masters are designated hearing officers"

Petitioner has attached a copy of the appellant's brief in **Oliveri v. Oliveri**, (Supra), **Exhibit E,** as it explains the facts in the case (see page 9 & 10). In Broward County the **hearing officers are the same general masters** and when an appeal is taken on a child support issue, **Rule 1.490(c)** and **Rule 1.491** are intermixed, because the term "Hearing Officer" was incorrectly utilized in "**Oliveri**" and the term "General Master" was used correctly in "**Slattery**" and "**Rosenberg**".

Contrast Chief Judge Daniel T. K. Hurley's administrative order 2.002 - 5/89, **Exhibit A**, which appointed in paragraph 4, Linda Goodwin, Esq., Larry Weaver, Esq. and Joy B. Shearer, Esq., as family hearing officers with all of the authority, responsibility and power conferred by **Rules 1.490** and **1.491 and did not expressly agree to hear non-Title IV-D cases,** as would be required under **Rule 1.491(b)** Scope:

> "This rule shall apply to proceedings for the establishment, enforcement, or modification of support wherein the party seeking support is receiving services pursuant to Title IV-D of the Social Security Act (42 USC 651 et seq.) and to non-Title IV-D proceedings upon administrative order of the chief justice."

Petitioner suggests this Court clarify the certain misapplication of Hearing Officers, General Masters, and the interplay between **Rule 1.491** and **1.490(c).**

There can be but one conclusion to this disorder if twenty (20) Judicial Circuits adopt **Rule 1.491** as promulgated by the Florida Supreme Court at 521 So.2d 118 (Fla 1988) namely- the Chief Judge must state, that by adopting **Rule 1.491, it does or does not include non-Title IV-D cases** and secondly - if no new special hearing officers are appointed (as in Broward County), **Rule 1.491** requires that upon an objection by one of the parties the General Master **(Rule 1.490)** or hearing officer **Rule 1.491** (committee note) may not hear or make any recommendations regarding contempt, child support, or attorney fees.

CONCLUSION

The Trial Court erred when it overruled Petitioner's objection to the Family Hearing Officer presiding in a contempt hearing. The Committee note in **Rule 1.491** (subsection b) was adopted by implication by the Florida Supreme Court and any reference to either a hearing officer or master which is objected to by one of the parties requires that the general master or hearing officer decline to hear the case.

Chief Judge Daniel T. Hurley did not specifically adopt the non-Title IV-D cases, such as was done in Broward County by Chief Judge Miette F. Burnstein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the following Barbara A. Heilman 1147 Rainwood Circle Palm Beach Gardens, FL 33410, Raymond Masciarella 340 U.S.1 Third Floor Law Office, North Palm Beach, FL 33408 this 27th day of September 1991.

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