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# IN THE SUPREME COURT OF FLORIDA

CASE NO: 78,636

DISTRICT COURT OF APPEAL,
THIRD DISTRICT NO: 91-1025

JUNE MILLER,

Petitioner,

vs.

MICHAEL J. SCHOU,

Respondent.

______________________________/

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# ANSWER BRIEF OF RESPONDENT, MICHAEL J. SCHOU

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# PRELIMINARY STATEMENT

The Petitioner, JUNE MILLER ("Miller") is the former wife in this post-dissolution proceeding for an upward modification of support for the parties' minor child, Dana. The Respondent, former husband, MICHAEL SCHOU, will be referred to as "Schou". The Family Law Section of the Florida Bar ("Amicus") has filed an Amicus Curiae brief.

References to the record will be by the symbol ("R___"). All emphasis is supplied unless otherwise indicated.

# STATEMENT OF THE CASE AND FACTS

Schou hereby adopts Petitioner's Statement of the Case and Facts, with the following clarifications and additions.

The Third District quashed the trial court's order directing Schou to file a financial affidavit, because Schou had admitted his ability to pay any increase in child support which the court would deem to be reasonable.[1] Miller invoked the discretionary review of this Court. After this Court accepted jurisdiction, Schou filed his financial affidavit and thereby provided Miller with the relief she sought on appeal. Although the filing of a financial affidavit is not required in post-dissolution modification proceedings, Schou sent the financial affidavit to his former wife's attorneys in order to obviate the continuation of this appeal, pave the way for a speedy trial and save both parties additional appellate fees.

Contemporaneously with the serving of his financial affidavit, Schou moved to dismiss the appeal on the grounds that it was now moot. (see Respondent's Suggestion of Mootness and Motion to Dismiss Appeal served on May 15, 1992) This motion to dismiss was denied.

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[1]While it is true that Schou's stipulated ability to pay an increase in child support was initially unverified, in deposition, Schou verified the stipulation. See Exhibit "A".

# SUMMARY OF THE ARGUMENT

In post-dissolution proceedings for an increase in child support, the non-custodial parent should be able to limit expensive, intrusive and time consuming discovery of his finances, by admitting his ability to pay any increase in child support which the court determines to be reasonable. Once this threshold issue has been resolved by admission, the finances of the non-custodial parent become irrelevant and no further financial discovery should be permitted. The court can then focus its attention on the needs of the child, from which it can determine the amount of increased child support, if any.

The child's financial needs are not a function of the amount of "good fortune" of the non-custodial parent. The only legitimate concern of the courts is to award financial support sufficient to insure the comfort, safety, health and education of the child. The courts should not be permitted to capriciously award a windfall to the child because this would usurp parental discretion to raise the child with a sense of fiscal responsibility. Child support should not include excess sums to enable the child (and recipient parent) to buy designer clothes, boats, fancy cars and other luxuries simply because the non-custodial parent is affluent. Financial discovery is, therefore, not necessary to determine the amount of "good fortune".

The filing of a financial affidavit in the present case is not required under Rule 1.611, Fla.R.Civ.P. because this Rule does not apply to post-dissolution modification proceedings. The trial court

erroneously ordered the filing of the financial affidavit pursuant to §61.30(12) Fla. Stat. (1991) since this statute is an unconstitutional attempt by the legislature to promulgate a procedural rule. The continued control of the courts over practice and procedure is particularly compelling in family law matters in which the courts are becoming increasingly more concerned with expensive, avoidable litigation.

In matrimonial litigation, the preparation of a financial affidavit, and the process of financial discovery, can be extremely time-consuming for both the parties and their attorneys. Marital attorneys, who often charge $250 per hour or more, have a financial incentive of their own to maximize discovery, especially when the parties are wealthy, and can afford to pay excessive fees. In situations where there is financial disparity between the parents, the more pecunious parent will most likely be required to pay the attorneys' fees of the other, which eliminates any desire of the less pecunious parent to control fees. Unbridled financial discovery funnels money into the pockets of the attorneys, to the detriment of the parents (who will suffer a depletion of their estates) and their children (who will suffer a diminution of their inheritance and college education funds).

The Florida Rules of Civil Procedure are designed to secure the just, speedy and inexpensive determination of every action. The stated intent of these rules would be thwarted if the courts were to

permit burdensome and costly discovery on an issue that has been resolved by stipulation. The courts must continue to take an active role in limiting needless discovery in matrimonial litigation in order to reduce excessive attorneys fees and costs.

# ARGUMENT

## I. IN LIGHT OF SCHOU'S STIPULATION OF ABILITY TO PAY A REASONABLE INCREASE IN CHILD SUPPORT, THE TRIAL COURT ABUSED ITS DISCRETION IN REQUIRING SCHOU TO FILE A FINANCIAL AFFIDAVIT.

### A. Where the Non-Custodial Parent in Child Support Modification Proceedings Admits Ability to Pay Increased Child Support, it is an Abuse of Discretion to Require the Filing of a Financial Affidavit and Compel that Parent to Comply with Financial Discovery.

The gravamen of this appeal is whether this Court should require the filing of a financial affidavit in post-dissolution litigation where the paying spouse has stipulated as to his ability to pay any increase in child support which the court deems reasonable. Ironically, this issue, as it affects the litigants here, is moot, since Schou subsequently filed the requested financial affidavit, despite his admission of ability to pay. Nevertheless, the Petitioner, supported by the Family Law Section of the Florida Bar, still seeks, as a matter of public policy, a ruling of this Court subjecting the estate of every paying spouse to an expensive financial audit comparable to an IRS criminal investigation.[1]

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[1]Miller and Amicus have raised two distinct issues in their briefs: 1) whether a financial affidavit should be filed by the father where he has stipulated his ability to pay; and 2) whether a parent can insulate himself from financial discovery under these circumstances. The second issue is not properly before this Court. In the order which is the subject of appeal, the trial court required Schou to file a financial affidavit, but deferred ruling

Of course, such routine audits would redound to the economic benefit of the members of the Family Law Section of the Bar since financial discovery generates enormous fees.

This court should not make it a routine practice, in every modification proceeding, to feed the coffers of matrimonial lawyers and forensic accountants by requiring each party *ipso facto* to file a financial affidavit and engage in unnecessary financial discovery, especially when the paying spouse stipulates his ability to pay any amount of a proven increase of need for alimony or child support. The court should retain the right, under such circumstances, to deny costly and invasive scrutiny of the financial estate of the paying spouse. The courts should protect the interests of the litigants and their children, not those of special interest lawyers and accountants.

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on Miller's Motion to Compel other Document Production (R.12). The Third District quashed this order insofar as it required the filing of the financial affidavit. *Schou* v. Miller, 583 So.2d 805 (Fla. 3rd DCA 1991). There has been no ruling by the trial court or the Third District as to whether Schou must respond to interrogatories and requests for production relating to his income and finances. An appellate court will not review those portions of an order on which the trial court reserved ruling. *City of Miami Beach v. State ex rel Gerstein*, 242 So.2d 170 (Fla. 3rd DCA 1970) *cert. denied*, 246 So.2d 573 (Fla. 1971). Therefore, the only issue properly before this Court is that relating to the financial affidavit. Nevertheless, Schou recognizes that once the Supreme Court has jurisdiction, it may, at its discretion, consider any issue affecting the case. *Cantor* v. Davis, 489 So. 2d 18 (Fla. 1986). Both issues are therefore addressed herein.

**1. A Stipulation of Ability to Pay Increased Child Support is Designed to Narrow the Issues, Limit Intrusive Financial Discovery, and Sharply Reduce Attorneys Fees and Expenses.**

The following hypothetical scenario may culminate in the filing of **a** stipulation of ability to pay increased child support by a divorced father:

Several years after the marriage is dissolved, the father is served with a petition for modification of child support. He confers with his own attorney who advises him: "My fees will be $250 per hour, plus expenses.' Since you have a higher income than your ex-wife, you will most likely pay her attorneys fees and suit money as well. You will receive interrogatories and requests for production for financial information, which you will find outrageous in scope.[4] We will file objections, and my opponent and I will fight for hours in court over those objections. Since your financial records are undoubtedly voluminous and convoluted, it will take you and your accountant hours, if not days, gathering, organizing, and reviewing your financial records, and preparing a financial affidavit. I will then spend

[3]$250 per hour is a fee customarily charged by matrimonial attorneys in the South Florida area. *See e.g. Schubot* v. Schubot, 523 So.2d 661 (Fla. 4th DCA 1988); *Browne* v. Costales, 579 So.2d 161 (Fla. 3d DCA 1991) *rev. den.*, 593 So.2d 1051 (Fla. 1991). This is not necessarily the fee charged by the attorneys in the present case.

[4]The request for production which was propounded by Miller to Schou (R21-24) is a good example of oppressive, burdensome discovery, (See Exhibit "B").

several hours reviewing the information for accuracy and completeness and putting it in a form responsive to the discovery requests.

"After we produce the financial information, your ex-wife's attorney, knowing that you will most likely pay all of his fees, will spend countless hours poring over the financial records in minute detail, looking for indications of hidden assets and evidence that the financial affidavit contains inaccuracies. He will then take several hours preparing for your deposition, and will question you at length over every apparent discrepancy, no matter how inconsequential, between your financial affidavit and documents. Your deposition will be long and unpleasant, and it will undoubtedly take place during working hours, which will cause you problems at work. I might instruct you not to answer certain questions, which will lead to another trip to the courthouse, and perhaps a continuation of your deposition.

"Your ex-wife's attorney will take the depositions of your accountant, your current wife, and maybe even your investment broker and employer. Since you are a member of a professional association, its records might be subpoenaed and an appeal might ensue.[5] You will probably be required to pay your ex-wife's attorney's fees on such an

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[5]See e.g. *Pyszka, Kessler, Massey, Weldon, Catri, Holton & Douberley, P.A. v. Mullin,* 17 F.L.W. D111 (Fla. 3rd DCA Dec. 24, 1991)

appeal, even if you are not a party to the appeal and she loses.[6] Furthermore, the records of any company in which you hold a financial interest might be subpoenaed.'

"I will probably devote over 100 hours on discovery of your income, assets, and expenses. Your ex-wife's attorney will spend even more time, since he will bill several hours preparing for each deposition he takes. It might be necessary for both sides to retain expensive forensic accountants. If you want to avoid this financial discovery and over $50,000 in attorney's fees and costs, we can file a stipulation as to your ability to pay any increase in child support which the trial court deems to be reasonable."

Faced with the prospect of paying such staggering **fees** and costs, and the aggravation associated with a discovery process equivalent to an IRS audit, the ex-husband instructs his attorney to file with the court a stipulation that he is able to pay an increase in child support which the court deems reasonable. Several Florida appellate decisions have approved of this method to limit financial discovery in post-dissolution modification litigation. *Alterman v.* ***Alterman,*** 361 So.2d. ***773*** (Fla. 3rd DCA 1378); ***Braverman*** v. *Braverman,* 549 So.2d 750 (Fla. 3rd DCA 1389); ***Granville v. Granville,*** 445 So.2d ***362*** **(Fla.**

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[6]*See e.g.* ***Pyszka,*** *Kessler,* ***Massey, Weldon, Catri,*** *Holton & Douberley, P.A. v.* ***Mullin,*** 17 F.L.W. D1703 (Fla. 3rd DCA July 14, 1992).

[7]*See e.g.* **Palmer** v. Servis, ***393*** So.2d ***653*** (Fla. 5th DCA 1981).

1st DCA 1984). The filing of such a stipulation is designed to streamline the litigation and allow the court and the parties to focus on the most important issue - the financial needs of the children.

The Petitioner and Amicus rely on Orlowitz v. *Orlowitz*, 199 So.2d 97 (Fla. 1967) and *Parker* v. *Parker*, 182 So.2d 498 (Fla. 4th DCA 1966) in support of their contention that the former husband in a post-dissolution modification proceeding cannot insulate himself from financial discovery. Neither of these cases is controlling, since each simply established that in an initial, full proceeding for dissolution of marriage, financial discovery is necessary to determine equitable distribution, alimony and support. Schou does not suggest that the parties should be deprived of financial discovery in an initial dissolution action. However, in post-dissolution litigation such as this, where the Court must decide only the amount of increased child support, the Court should limit costly and unnecessary financial discovery when the father admits an increased ability to pay. As the Supreme Court in *Orlowitz* recognized "[t]here are no doubt many instances in which a court should exercise its power to protect a party against an unwarranted disclosure of the details of his financial holdings." Id. at 98.

Miller and Amicus also rely on two First District decisions, *Eyster* v. Eyster, 503 So.2d 340 (Fla. 1st DCA 1987), *rev. denied* 513 So.2d 1061 (Fla. 1987) (which pertains to an alimony modification petition) and *Walton* v. *Walton,* 537 So.2d 658 (Fla. 1st DCA 1989)

(which pertains to both alimony and child support modification). Both cases are factually distinguishable because in neither is it apparent from the opinion that the wife was seeking a specific sum of money as alimony or child support with the father admitting the ability to pay that sum. In the present case, Miller's financial affidavit dated May 29, 1990 (Exhibit "C") (R.17-20) reveals the upper limit to the increased child support was $2,831.33 (the child's one-third share of anticipated living expenses, plus expenses attributable solely to the child) and Schou has admitted an ability to pay up to $3,000 per month if that is what the trial court deems reasonable (R.25-6). Furthermore, ***Eyster*** and *Walton* failed to take into consideration the exorbitant costs and fees associated with financial discovery, and they are inconsistent with an earlier First District decision, ***Granville*** v. Granville, 445 So.2d 362 (Fla. 1st DCA 1984).

In Granville, which involved post-dissolution child support modification, the court held:

> In view of the unique circumstances regarding husband's reputation and career as a market forecaster; the fact that he has stipulated to his financial ability and willingness to pay a reasonable increase in child support; the almost oppressive interrogatories requested by the wife, as well as her failure to specify any dollar amounts of the modifications requested, we find that the trial court erred in denying husband's motion for protective order in that such denial would, in our opinion, result in irreparable harm that could not be cured on direct appeal.

Id. at 365.

The mere fact that Mr. Granville is a we 1 known market forecaster is insufficient to distinguish this case from ***Eyster*** and

*Walton.* Mr. Granville's privacy could have been easily secured with a confidentiality order if the court had determined that financial discovery was necessary. Therefore, an intra-court conflict on this issue is evident in the First District.

Four of the judges an the First District, Judge Zehmer (in Eyster, dissenting opinion), and Judges Ervin, Thompson, and Nimmons (in Granville), have concluded that in a post-dissolution matter, the ex-husband can insulate himself from intrusive financial discovery by admitting an ability to pay a reasonable increase in alimony or support. In his dissenting opinion in Eyster, Judge Zehmer stated:

> In this modification proceeding, since the husband admits to being able to pay any reasonable increase in alimony, the sole disputed issue is whether the wife, due to a changed financial need, is entitled to an increase in alimony; and the court should not even permit, let alone require, discovery of the former husband's financial ability to pay the requested increase. *Palmar* v. *Palmar*, 402 So.2d 20 (Fla. 3rd DCA 1981). The former wife's motion for modification should identify the basis and amount of her increased need, and the former husband's stipulated ability and willingness to pay any reasonable amount set by the court within the requested range should be binding upon him, the same as any other admission by a defendant in answer to the plaintiff's allegations seeking affirmative relief. Once the former husband's ability to pay is admitted, consideration of that factor is no longer a matter of discretion with the trial court; it must be accepted as established. There is simply no legally sufficient reason for the trial court to permit the former wife to engage in discovery and litigation of undisputed and admitted issues concerning the former husband's financial situation.

Id. at 344-5. This reasoning applies with equal logic to a petition for an increase in child support.

While a substantial increase in ability to pay may be grounds for an increase in child support, the child's needs must be taken into account to determine the amount of increase.[8] This two-step analysis is similar to the determination of liability and damages in tort law. The father's increased income is analogous to tort liability, and the child's increased needs are analogous to damages. If the father stipulates as to his ability to pay, it is the same as a defendant in a negligence action admitting liability. It is no longer necessary

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[8]This is consistent with this Court's interpretation of Fla. Stat. §61.14(1) as it relates to alimony. In *Bedell v. Bedell*, 583 So.2d 1005 (Fla. 1991) this Court stated:

> we conclude that proof of a substantial change in the financial ability of a paying spouse may, by itself, properly support an order for an increase in alimony. On the other hand, the statute further provides that "the court has jurisdiction to make orders as equity requires, with due regard to the changed circumstances or the financial ability of the parties." Id. We construe this reference to equitable jurisdiction to mean that the court is not required to grant an increase in alimony simply upon proof of a substantial increase in the financial ability of the paying spouse if equity does not dictate that such a change should be ordered. In fact, ***we would expect that a raise in alimony would be ordered when no increased need was shown only in extraordinary cases where the equitable considerations were particularly compelling.***

*Id.* at 1007. Since the provisions of Fla. Stat. §61.14(1) pertain to alimony as well as child support, this interpretation applies to support modification proceedings. Consequently, there must be a showing of both a substantial change in the financial ability of the paying spouse and an increase in the child's needs to justify an increase in child support, except in extraordinary circumstances.

for the petitioner in the post-dissolution action, or the plaintiff in the personal injury action, to prove entitlement to financial relief, The only issues remaining are the amounts - based on the child's needs on the one hand, and the injured plaintiff's damages on the other.

Once a defendant admits liability in a tort action, liability discovery comes to an abrupt halt. It would be counterproductive for a plaintiff's attorney, who is usually paid a contingency fee, to waste precious time and resources proving that which has already been admitted.

Similarly, once a father in a post-dissolution proceeding admits ability to pay, discovery relating to his ability to pay should cease.[9] The difference is that matrimonial attorneys, whose hourly fees will most likely be paid by their opponent, have a financial (and perhaps strategic) incentive to continue with burdensome discovery in order to prove an admitted fact. Meanwhile, the children, for whose

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[9]When an issue has been removed from litigation by stipulation, dismissal or otherwise, discovery relevant only to that issue will not be allowed. *Avatar* Properties, Inc. v. *Donestevez*, 575 So.2d 785 (Fla.2nd DCA 1991) (Plaintiff should not have been compelled to respond to discovery which pertained only to affirmative defenses and counterclaim which had been stricken or dismissed.); Foley v. Outboard *Marine Corp.*, 573 So.2d 118 (Fla. 3rd DCA 1991) (once the products liability defendant conceded the issues of notice and foreseeability, it was appropriate to refuse discovery into past similar accidents because these issues were no longer relevant); *Alterman* v. Alterman, 361 So.2d 773 (Fla. 3rd DCA 1978) (financial discovery in support of wife's alimony modification petition disallowed where former husband admitted his ability to pay increased alimony).

benefit the support proceedings are allegedly brought, will see their college education funds and potential inheritance disappear into the hands of the attorneys.

**2. An Allegation of Enhanced "Good Fortune" does not Necessitate Financial Discovery where the Non-Custodial Parent Admits Ability to Pay.**

Miller and the Amicus claim their "good fortune" argument provides justification for financial discovery even after the father admits his ability to pay. They have lifted the innocuous words "good fortune" from dicta in some appellate decisions and have infused these words with significance that was never intended. Miller and Amicus are now treating this phrase as a term of art, which they argue provides a new cause of action for modification of child support. They next argue that in order to prove "good fortune" they must have extensive financial discovery, even if the father admits that his income has substantially increased, because it is for the benefit of the children to determine the extent of the good fortune.

An analysis of the decisions cited by Miller and Amicus reveal that "good fortune" is simply a paraphrase for a substantial increase in earnings and assets. By admitting his ability to pay increased child support, the non-custodial parent is stipulating that his earnings and assets have substantially increased. ***Schufflebarger v. Schufflebarger,*** 460 So.2d 982, 984 (Fla. 3rd DCA 1984); ***Schottenstein v. Schottenstein***, 384 So.2d 333 (Fla. 3rd DCA 1980), ***rev. denied,*** 392 So.2d 1378 (Fla. 1980). Such a stipulation removes from further

consideration the issue of whether the father's financial condition has improved since the dissolution of marriage, and it obviates the need for discovery into his financial affairs.

With the exception of *Asrani* v. *Asrani*, 591 So.2d 283 (Fla. 4th DCA 1991), all of the decisions cited by petitioner in support of her **"good** fortune" argument have focused not only on the husband's increased income, but on the children's needs as well: *Meltzer* v. *Meltzer*, *356* So.2d 1263 (Fla. **3rd** DCA 1978), *cert.* ***den.,*** 370 So.2d 460 (Fla. 1979) ("The appellant argues persuasively that the children's needs are significantly greater today. . ." Id. at 1265); ***Schottenstein*** *v.* ***Schottenstein,*** **384 So.2d 933 (Fla.** 3rd DCA 1980), rev. ***den.,*** **392 So.2d 1378 (Fla. 1980)** ("The child support payments. . . are not commensurate with the husband's present financial ability and the present needs of his school-age children." Id. at 935); ***Wanstall*** v. ***Wanstall,*** 427 So.2d 353 (Fla. 5th DCA 1983) ("The cost of support for the child had increased due to his age" **Id.** at 355); *Smith* v. *Smith*, 474 So.2d 212 (Fla. 2d DCA 1985), rev. ***den.,*** 486 So.2d 597 (Fla. 1986) ("The wife's unrebutted evidence that the monthly expenses for the child's basic needs exceeded the child support payment established a prima facie case for an increase" Id. at 213); *Hosseini v. Hosseini*, 564 So.2d 548 (Fla. 1st DCA 1990) (The court reiterated the wife's testimony that the child support received did not meet the children's expenses, and she could not afford to pay for lessons and extracurricular activities, even with her own father's support); and ***Creel*** v.

***Creel,*** 568 So.2d 942 (Fla. **3rd** DCA 1990) ("The children's needs have ***drasticall*** , increased over the yea s" Id. at 943, emphasis original).

Petitioner would have us believe that the good fortune of the non-custodial parent alone entitles the child (and hence, the custodial parent) to a windfall in excess of the child's needs. Such a result could cause custodial parents to treat their children as a profit center, and encourage the custodial parents to subject their children to the emotional turmoil associated with post dissolution litigation for no reason other than an improvement of the father's financial position.

Permitting the court to purposely award support for the child that exceeds the child's needs would also impinge upon a parent's innate right to instruct and guide the child in the values important to the parent. As an institution of the state, the courts should tread lightly when interfering with parental discretion. Obviously, the courts cannot regulate parental discretion when the parents are still married. Wealthy, married parents who choose to live modestly, or who seek to provide their child with a healthy work ethic and a sense of fiscal responsibility, could not be commanded by the state to shower the child with luxuries. The state's only legitimate concern, whether the parents are married or unmarried, is to insure that the child's needs are fulfilled.

Of course, the distinction between needs and luxuries is a necessarily ambiguous one. But the legislature has established

guidelines for use in determining support payments [561.30(6), Fla. Stat. (1991)], which indicate a be ief on the part of the legislature that a child's needs are not infinite. The table of support payments given in the guidelines ends when the support payments reach $1148 for a single child, suggesting that the child's "needs", as determined by the state, are satisfied at that point.

This conclusion is further supported by the general trend of the child support guidelines, which may be shown graphically by plotting the suggested support payments against the parents' combined income, (See Exhibit "D") Such a graph demonstrates that support payments do not increase proportionally with increases in income. An analysis of the guidelines reveals that for combined monthly incomes between $700 and $8,400, as the parents' income increases, the child's proportionate share decreases. At $700 monthly income, the single child's proportionate share is the highest - 23.714%. From there, it decreases: at $2,000 income, the child's share is 21.85%; at $5,000, the child's share is 18.08%; and, at the upper limit of the guidelines, $8,400 combined monthly income, the single child's share is only 13.67%.

For higher incomes, the amount of child support would level off. For instance, the increase in child support between incomes of $1,000 to $2,000 is $206 per month, while the increase in child support between incomes of $7,000 to $8,000 is only $65 per month. The extrapolated portion of this graph shows that for monthly combined

income exceeding $10,000, the incremental increase in child support would only be a few dollars per month for every $1,000 increase in monthly income. Thus, financial discovery in situations where the parents' income greatly exceeds $8,400 **per** month is an effort *with diminishing* returns. The parents should not incur exorbitant attorney's fees and costs in financial discovery where the net result would be to eke out a few extra dollars per month in child support.

### B. The Current Rule 1.611 Does Not Require the Filing of a Financial Affidavit in Post Dissolution Modification Proceedings.

The current Rule 1.611, Fla.R.Civ.P., which will continue to be in effect until January 1, 1993, provides, in pertinent part, as follows:

> **RULE 1.611 DISSOLUTION OF MARRIAGE (DIVORCE)**
>
> (a) **Financial Statement.** Every application **for** temporary alimony, child support, attorneys' fees or suit money shall be accompanied by an affidavit specifying the party's financial circumstances. The affidavit shall be served at the same time that notice of hearing on the application is served. The opposing party shall make an affidavit about his financial circumstances and shall serve it before or at the hearing. If no application for temporary award is made, the parties shall make and serve the affidavits at least 10 days before the trial if permanent alimony, child support, attorneys' fees or suit money is sought.

It is apparent from **its** title and provisions that this Rule applies only to initial dissolution of marriage cases in which temporary or

permanent financial relief is sought. This rule makes no mention of, and therefore doe not apply to, post-dissolution modification proceedings.

It is a general principal of statutory construction that mention of one thing implies exclusion of another. Towerhouse condominium, *Inc.* v. *Millman*, 475 So.2d 674 (Fla. 1985). The mention of "Dissolution of Marriage (Divorce)" in the title, and the reference to applications for temporary and permanent financial relief in the body of the Rule, imply the exclusion of post-dissolution matters. The rule of expression *unius est exclusio* leads to the conclusion that Rule 1.611 did not require Schou to file a financial affidavit.

The recent amendment to Rule 1.611(a) is a further indication that the current Rule does not apply to post dissolution modification proceedings. See In *Re: Amendments to the Florida Rules of* Civil *Procedure,* 17 F.L.W. S477, S507 (Fla. July 16, 1992). This amendment changes the name of the Rule to "Marital and Post-Marital Proceedings" and it includes the requirement of filing a financial affidavit in post-dissolution child support modification proceedings. However, since this amended Rule does not go into effect until January 1, 1993, the filing of a financial affidavit in this case is not mandated under its terms.

**C. The Trial Court Erroneously Required the Filing of a Financial Affidavit Under Fla. Stat. 61.30(12) Because the Statute is an Unconstitutional Attempt by the Legislature to Promulgate a Procedural Rule.**

Where this Court promulgates rules relating to the practice and procedure of all courts and a statute provides a contrary practice or procedure, the statute is unconstitutional to the extent of the conflict. *Haven Federal Savings & Loan Association v. Kirian*, 579 So.2d 730 (Fla. 1991). Section 61.30(12) of the Florida Statutes provides:

> Every petition for child support or for modification of child support shall be accompanied by an affidavit which shows the party's income, allowable deductions, and net income computed in accordance with this section. The affidavit shall be served at the same time that the petition is served. The Respondent shall make an affidavit which shows the party's income, allowable deductions, and net income computed in accordance with this section. The respondent shall include his affidavit with the answer to the petition.

§61.30 (12) Fla. Stat. (1991). This section is purely procedural, it is inconsistent with Rule 1.611, and, as such, it is an unconstitutional intrusion into this Court's rule making authority.

There are very few propositions of Florida constitutional law that are better established than the principle that the legislature cannot pass statutes which infringe upon the procedural rule making authority of the Florida Supreme Court. *Haven Federal Savings & Loan Association v. Kirian*, *573* So.2d *730* (Fla. 1991) (statute requiring severance of counterclaims in foreclosure actions is unconstitution-

al); *Markert* v. *Johnston,* 367 So.2d 1003 (Fla. 1978) (statute prohibiting joind r of insurance carri r is invalid); *Carter v.* Sparkman, *335* So.2d 802 (Fla. 1376) *cert.* den. 429 U.S. 1041 (1977) (statute prohibiting references to insurance at medical malpractice trial is unconstitutional) ; *Johnson* v. State, 336 So.2d 93 (Fla. 1976) (statute on destruction of judicial records is invalid); *Huntley* v. *State,* **339** So.2d 194 (Fla. 1976) (statute making pre-sentence investigation reports mandatory in felony cases invalid).

The distinction between practice and procedure, which is regulated by the Supreme Court, and substantive law, which is regulated by the legislature, is discussed in Justice Adkins' concurring opinion, In Re: *Florida Rules of* Criminal *Procedure,* 272 So.2d 65 (Fla. 1972):

> Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described by the machinery of the judicial process as opposed to the product thereof.

*Id.* at *6* . Under this definition, §61.30(12) Fla. Stat. (1991) is entirely procedural. It does nothing more than provide for the method of discovery of the parents' income and deductions.

This statute is also inconsistent with the current Rule 1.611 in several respects: 1) the statute applies to modification proceedings, the current Rule does not; *2)* the statute requires the parties to file the financial affidavits with their pleadings, the Rule allows

the parties to wait until 10 days before trial; and 3) the statute requires disclosure of only the parties' income, allowable deductions and net income, while the Rule specifies the use of the form approved by the Supreme Court, in which living expenses, assets and liabilities are revealed as well. Since the procedural provisions of Fla. Stat. §61.30(12) are in conflict with Rule 1.611, especially in the context of post-dissolution child support modification proceedings, the statute is unconstitutional. *Haven Federal Savings & Loan Association v. Kirian,* 579 So.2d 730 (Fla. 1991).

### D. The Courts Must Take An Active Role In Limiting Discovery In Divorce and Post-Dissolution Litigation to Reduce Exorbitant Attorneys Fees and Costs

Appellate courts have become alarmed at the ever-escalating costs and fees incurred in marital litigation and have urged matrimonial attorneys and judges to consider their concerns. When the Fourth District Court of Appeal, in *Katz* v. Katz, 505 So.2d 25 (Fla. 4th DCA 1987), learned the parties' total fees and costs would exceed 50% of the parties' assets (valued at $650,000) the court sounded the alarm:

> It is the responsibility of the marital bar and the bench at trial and appellate levels to be mindful of unnecessary expense in the litigation of contested dissolution matters, as any other. This type of case must be tried and reviewed quickly, without needless and wasted motion. Without responsible direction, not only will the parties - who are represented - have their assets dissipated without good cause, but also their innocent, unrepresented children will see their opportunity for higher education vanish in a

> nightmarish plethora of motions, transcripts and time sheets.

***Id.* at** 26.

In *Kass* v. *Kass,* 560 So.2d 293 (Fla. 4th DCA 1990), the appellate court, after affirming an award of $64,700 in temporary fees to the wife (and noting that the husband's fees were almost $87,000), felt compelled to remind the parties: "if this litigation continues at its present pace, not only their entire marital estate, whatever that may be, but perhaps their parents' estates as well, may be consumed by the cost of this litigation." Id. at 294.

In a recent case involving the reluctant reversal of an equitable distribution, the same court lamented on "the plunging estate occasioned by the parties' war." *Vogedes v. Vogedes,* 596 So.2d 147, 148 (Fla. 4th DCA 1992). Judge Polen, in his specially concerning opinion, bemoaned "the considerable expenditure of resources, with little, if any, benefit to *either* of the parties concerned" (emphasis original) Id. at 149, and pointed out that such litigation extracts an emotional as well as financial toll on the litigants and expends precious time and resources of the judiciary.

Judge Diamantis, in his opinion (concurring in part and dissenting in part) in *Straley v.* Frank, 585 So.2d 334 (Fla. **2d DCA** 1991) *quashed,* 17 F.L.W. S424 (Fla. July 2, 1932) (in which the wife incurred $71,000 in fees), reiterated his concerns about cost-ineffective marital litigation:

> it is the responsibility of the bar and the bench to be ever mindful of unnecessary legal expenses in the litigation of contested dissolution matters. (citations omitted) The bar and the bench should always be mindful of the fact that the highly emotional character of contested dissolution matters causes parties to expend ever increasing hours on an expanding geometric ratio to the emotion involved, resulting in dissipation of the parties' accumulated assets. This unfortunate practice "results in a species of social malpractice that undermines the confidence of the public in the bench and bar." (citations omitted)

Id. at 341.

Unfortunately, matrimonial attorneys cannot be trusted to police themselves or their clients in family matters where one or both parties have "deep pockets". It is not uncommon for an attorney to advise the wife to reject an early offer, only to have the court award less than the offer after full-blown litigation. In such a situation, the only true winners are the attorneys, who become richer at the expense of their clients and their client's children. The present system, in which the more pecunious spouse pays his opponent's fees regardless of the outcome, invites discovery abuses and overbilling. A client who is not paying her own attorneys fees will have no incentive to limit those fees, and may even be motivated by revenge to do just the opposite."' It is up to the courts, therefore, to send an unequivocal message to marital attorneys and litigants to end this

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'('*See* generally, A. Matthew Miller, *Section* 61.116 Awards - *A* ***Sword*** or a *Shield?*, The Florida Bar Journal, May 1991 at 57-60.

perversion of the discovery process and limit this massive economic waste.

The Second District, in *Wrona* v. Wrona, 592 So.2d 694 (Fla. 2nd DCA 1991), has offered several suggestions to reduce spiraling attorneys fees and costs in an initial divorce setting, including an early case management conference and mediation. The court recognized the pivotal role of the courts to avoid fruitless litigation:

> trial courts should understand that they have authority to take steps designed to avoid needless expense during a divorce proceeding, especially if that expense adversely affects the best interests of the children or jeopardizes the sources for payment of needed alimony. A primary purpose of Florida's divorce law is "to mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage." §61.001(2)(c), Fla.Stat. (1989). The role of the trial court in a divorce is more extensive if children are involved. 561.052(2), Fla. Stat. (1983). During any period of continuance, the court is authorized to enter appropriate orders for "the preservation of the property of the parties." §61.052(3), Fla. Stat. (1989). Thus, if given the opportunity during the pendency of a dissolution proceeding, a trial court has the power to prevent the parties from wasting marital assets that are needed for children or for future alimony.

Id. at 697.

While the Third District Court of Appeal has not been as vociferous as its sister courts in expressing its concerns about exorbitant marital litigation costs, it has fashioned a tool to help remedy the situation in modification proceedings - it has allowed the more pecunious spouse to stipulate to his financial ability to pay,

and thereby be insulated from the filing of a financial affidavit and other financial discovery. *Schot* v. Miller, 583 So.2d 805 (Fla. 3rd DCA 1931); *Braverman v. Braverman*, 549 So.2d 750 (Fla. 3rd DCA 1989); *Palmar v. Palmar*, 402 So.2d 20 (Fla. 3rd DCA 1981); *Alterman v. Alterman*, 361 So.2d 773 (Fla. 3rd DCA 1978).

The discovery provisions of the Florida Rules of Civil Procedure are designed as a litigation tool, not a weapon, Rule 1.010, Fla.R.Civ.P. provides: "[t]hese rules shall be construed to secure the just, speedy and inexpensive determination of every action." A divorced father should not be forced into an unreasonable settlement under the threat of unfettered financial discovery. This Court should not allow a post-dissolution modification proceeding to become a war of attrition; with the father funding both sides of the battle. All persons should be protected from oppressive, expensive and intrusive discovery into confidential financial affairs, especially where an admission renders the requested discovery irrelevant.

# CONCLUSION

The opinion of the Third District should be affirmed and the trial court should be instructed to enter a protective order in favor of Schou limiting further discovery into his financial affairs.

Respectfully submitted,

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# CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by mail to: Paul Louis, Esquire, 169 E. Flagler Street, Miami, Florida 33131 and Barry S. Franklin, Esq., 17071 W. Dixie Highway, North Miami Beach, Florida 33160; Deborah Marks, Esq. 12555 Biscayne Blvd., Suite 993, N. Miami, Florida 33181 on this a day of October, 1992.

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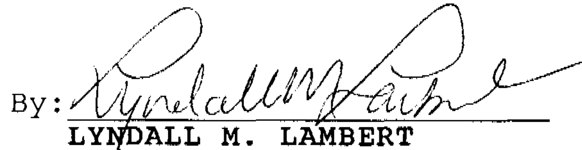
By: 
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