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CASE NO: **78,636**
DCA No. 91-1025 Third District

JUNE **MILLER,**

Petitioner,

vs.

MICHAEL J. SCHOU,

Respondent.

BRIEF OF THE FAMILY LAW SECTION OF THE FLORIDA BAR AS AMICUS CURIAE

THE FAMILY LAW SECTION OF THE FLORIDA BAR
A. Matthew Miller, Chair
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Deborah **Marks,** Chair– Amicus Curiae Committee

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INTRODUCTION

The Family Law Section of The Florida Bar files this Brief, as Amicus Curiae, to address the following issues:

> whether a financial affidavit is required in all cases wherein child support is in issue, inclusive of those circumstances in modification proceedings where **a** party stipulates to the ability to pay any reasonable award as may be set by the trial court

and

> whether "good fortune" must be plead as **a** basis for modification of child support for there to be financial discovery where the paying party stipulates to the ability to **pay** any reasonable award.

The Family Law Section of The Florida Bar represents that the opinions contained herein are the opinions of the Family Law Section of The Florida Bar only, and not of The Florida Bar as a whole.

The Family Law Section of The Florida Bar takes no position with regards to the merits **of** the action giving rise to this appeal, but seeks only to address the above legal issues which the Family Law Section believes to be of general importance to the Family Law Bench and Bar. **As** a result, this Brief will not address the issues as framed by the Petitioners.

All emphasis in this brief is added.

TABLE OF CONTENTS

TABLE OF CITATIONS iii

POINTS OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT

POINT 1

A Financial Affidavit Should Be Required in All Cases Wherein Child Support is in Issue, Inclusive of Those Circumstances in a Modification Proceeding Where a Party Stipulates to the Ability to Pay Any Reasonable Award as May Be Set By the Trial Court 4

POINT 2

Financial Discovery, Exclusive of the Financial Affidavit, May Be Limited By the Trial Court in Appropriate Circumstances Where the Paying Party Stipulates to the Ability to Pay Any Reasonable Award, Unless "Good Fortune" Has Been Plead as a Basis For Modification of Child Support 7

CONCLUSION... 9

CERTIFICATE OF SERVICE 10

TABLE OF CITATIONS

Authority **Page**

Bolton v. Gordon,
201 So.2d 754 (Fla. 4th DCA 1967) 5

Eyster v. Eyster,
503 So.2d 340 (Fla. 1st DCA 1987),
rev. den., 513 So.2d 1061(Fla. 1987) 8

Gubana v. Gubana,
511 So.2d 1066 (Fla. 4th DCA 1987) 5

Lane v. Lane,
17 FLW D1221 (Fla. 4th DCA May 13, 1992) 5

Orlowitz v. Orlowitz,
199 So.2d 97 (Fla. 1967) 8

Parker v. Parker,
182 So.2d 498 (Fla. 4th DCA 1966) 7

Sedell v. Sedell,
100 So.2d 639 (Fla. 1st DCA 1958) 5

Slimer v. Slimer,
112 So.2d 581 (Fla. 2nd DCA 1959) 6

Smith v. Bloom,
506 So.2d 1173 (Fla. 4th DCA 1987) 7

Walton v. Walton,
537 So.2d 658 (Fla. 1st DCA 1989),
rev. den., 545 So.2d 1370 (Fla. 1989) 7

Wanstall v. Wanstall,
427 So.2d 353 (Fla. 5th DCA 1983) 6

Rule 1.611, Florida Rules of Civil Procedure 2, 4

F.S. 61.30(12) 4

Ch. 92-138, General Laws Enacted
by The Florida Legislature, 1992 Session 5, 8

POINTS OF AMICUS CURIAE

Point 1

WHETHER A FINANCIAL AFFIDAVIT IS REQUIRED IN ALL CASES WHEREIN CHILD SUPPORT IS IN ISSUE, INCLUSIVE OF THOSE CIRCUMSTANCES IN A MODIFICATION PROCEEDING WHERE A PARTY STIPULATES TO THE ABILITY TO PAY ANY REASONABLE AWARD AS MAY BE SET BY THE TRIAL COURT

Point 2

WHETHER "GOOD FORTUNE" MUST BE PLEAD AS A BASIS FOR MODIFICATION OF CHILD SUPPORT FOR THERE TO BE FINANCIAL DISCOVERY WHERE THE PAYING PARTY STIPULATES TO THE ABILITY TO PAY ANY REASONABLE AWARD

SUMMARY OF THE ARGUMENT

Point 1

A FINANCIAL AFFIDAVIT SHOULD BE REQUIRED IN ALL CASES WHEREIN CHILD SUPPORT IS IN ISSUE, INCLUSIVE OF THOSE CIRCUMSTANCES IN A MODIFICATION PROCEEDING WHERE A PARTY STIPULATES TO THE ABILITY TO PAY ANY REASONABLE AWARD AS MAY BE SET BY THE TRIAL COURT

This Court has established Rule 1.611, Florida Rules of Civil Procedure, which requires the filing of financial affidavits by each party in every action which seeks child support. There is no exclusion contained in that Rule for Modification Proceedings.

The legislature has required the filing of financial affidavits, or more precisely income statements, by each party in every action which seeks child support. Pursuant to the latest legislative enactment, the guidelines statute no longer contains the language which renders the statute inapplicable to levels of joint income exceeding $100,800.00; and, further, the guidelines alone provide **a** basis for modification.

The responsibility for determining the appropriate amount of child support, and for monitoring agreements between the parties as to the amount of child support, is in the hands of the trial judges. It is not possible for a trial judge to determine what the appropriate support amount should be in any individual case without having a full understanding of the finances of both parties. The fact that the proceeding sounds in "modification" makes no difference to this analysis.

Giving due consideration to the above factors, there is no basis **for** any exemption from the requirement for the filing of **a** financial affidavit where **a party** stipulates to the ability to pay support. **As** such, the requirement for filing a financial affidavit should be uniformly imposed.

Point 2

FINANCIAL DISCOVERY, EXCLUSIVE OF THE FILING OF A FINANCIAL AF'FIDAVIT, MAY BE LIMITED BY THE TRIAL COURT IN APPROPRIATE CIRCUMSTANCES WHERE THE PAYING PARTY STIPULATES TO THE ABILITY TO PAY ANY REASONABLE AWARD, UNLESS "GOOD FORTUNE" HAS BEEN PLEAD AS A BASIS FOR MODIFICATION OF CHILD SUPPORT

Although a financial affidavit is essential to the trial court's determination of reasonable child support, the filing of a modification petition should not automatically open the door to an *unlimited* foray into the financial circumstances of a former spouse. The Family Law Section of The Florida Bar believes that, in appropriate circumstances, the trial court should and does have the inherent discretion to limit additional discovery. The Family Law Section **of** The Florida Bar further believes that if the paying party stipulates to the ability to pay any reasonable amount of child support and provides basic financial information including **a** financial affidavit, that factor weighs in favor of limiting additional discovery except where there is **a** reasonable belief that the financial affidavit filed is inaccurate, or where there has been an allegation in the pleadings that the payor spouse has had such **a** substantial increase in income and lifestyle so as to require a "good fortune" increase in support – and, thus, a full evaluation of the finances and lifestyle **of** the payor spouse.

ARGUMENT

Point 1

A FINANCIAL AFFIDAVIT SHOULD BE REQUIRED IN ALL CASES WHEREIN CHILD SUPPORT IS IN ISSUE, INCLUSIVE OF THOSE CIRCUMSTANCES IN A MODIFICATION PROCEEDING WHERE A PARTY STIPULATES TO THE ABILITY TO PAY ANY REASONABLE AWARD AS MAY BE SET BY THE TRIAL COURT

Rule 1.611, Florida Rules of Civil Procedure provides, in part:

> (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 opposing party ***shall*** make an affidavit about his financial circumstances and shall serve it before or at the hearing ... The affidavits shall be in substantially the form approved by the Supreme Court.

F.S. 61.30(12) 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.

As a result of the two provisions set forth above, a litigant in any child support proceeding (presumptively including modification proceedings, since no exclusion for modification proceedings exists), has two obligations. The first, to

provide an income/deduction affidavit along with initial pleadings; and, second, to provide a full affidavit prior to hearing, Of course, since the full affidavit contains the income/deduction information, if that full affidavit is filed initially then the dual obligation has been met.

Since both the Rule of Civil Procedure, and the Statute are absolute, there is no basis for the creation, by caselaw, of an exception to these mandatory requirements as was set out by the Third District herein. For the policy reasons set forth below the Family Law Section of The Florida Bar believes that there should be no such exception in any case.

F.S. 61.30 now applies to all cases, regardless of joint net income, and now provides a basis for a finding of substantial change of circumstance in a modification action. Ch. 92-138, General Laws Enacted by The Florida Legislature, **1992** Session. **As a** result, the substantive rights of the child would be impaired if a financial affidavit were unavailable. The lower tribunal would be unable to determine if that specifically enumerated factor was present in the case presented to it.

A trial court's responsibility to a child cannot be abdicated to any parent, or any expert. ***See, Lane v. Lane,*** 17 FLW D1221 (Fla. 4th **DCA** May **13,** 1992); ***Sedell v. Sedell,*** 100 So.2d **639** (Fla. 1st **DCA** 1958); ***Bolton v. Gordon,*** 201 So.2d 754 (Fla. 4th **DCA 1967**)[1]. **A** trial court has the duty to determine the appropriateness of a child support. This fact remains true even in the context of a negotiated agreement between the parents. ***See,*** *e.g.* ***Gubana v. Gubana,*** 511 So.2d 1066 (Fla. 4th **DCA** 1987). That being the case, it seems perfectly reasonable that a trial court would be remiss if it failed to **require** that it have before it all factors necessary for it to independently determine the appropriateness of child support. Ability to pay "all

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While **these cases deal primarily with custody and visitation, the basic concept that the child is to be protected by the Court** should **remain the same in the support context.**

reasonable needs" does not permit the trial court to determine the what those reasonable needs are, if they are to be consistent with the lifestyle of the paying parent.

A child's "needs" are not defined as the minimum sums required for basic survival. At varying economic levels, different "needs" apply. Private school may be appropriate in some contexts and not in others. Clothing allowances, and recreational allowances vary greatly based upon the ability of the parents and the standard of living that the parents have set for themselves. ***Wanstall v. Wanstall,*** 427 So.2d **353** (Fla. 5th **DCA 1983);*****Slimer v. Slimer,*** 112 So.2d **581** (Fla. 2nd **DCA** 1959).

Without fiscal information from both parents, it is impossible for a trial court to be aware of what luxuries, if any, are or should **be** within the reasonable expectations of the child. This determination cannot be made based upon the "needs" set forth by the receiving parent, as those "needs" are curbed by that parent's ability to pay and may not reflect all that can be done for the child. This is precisely the reason why the judgment of the appropriateness **of** the amount of support must, in all cases, be monitored by the trial court – and precisely the reason why the trial court must have sufficient information before it to make such **a** determination. **At** the very minimum, a financial affidavit would be essential.

The fact that the action was one for modification should not impact on the analysis of the information required by the lower tribunal. In each circumstance, the trial court must determine the needs of the children, and the ability of each parent. In the modification setting, the lower tribunal must make additional findings of substantial change. How can it do so without full information? **A** stipulation fails to tell the lower tribunal to what extent **a** substantial change has occurred,

As an additional basis for this requirement this Court must recognize that the filing of joint financial affidavits is important so that in the future **a** court could determine whether a substantial change had occurred since the modification then being considered. If **a** parent in an early modification were permitted to avoid the filing of **a** financial affidavit, how could the lower tribunal know a few years later whether that parent had substantially improved his **or** her circumstances?

Point 2

FINANCIAL DISCOVERY, EXCLUSIVE OF THE FILING OF A FINANCIAL AFFIDAVIT, MAY BE LIMITED BY THE TRIAL COURT IN APPROPRIATE CIRCUMSTANCES WHERE THE PAYING PARTY STIPULATES TO THE ABILITY TO PAY ANY REASONABLE AWARD, UNLESS "GOOD FORTUNE" HAS BEEN PLEAD AS A BASIS FOR MODIFICATION OF CHILD SUPPORT

The Family Law Section of The Florida Bar believes that in cases where the issue to be litigated is an increase based, at least in part, upon the increased financial circumstances of the payor spouse (as opposed to pleadings which allege solely inflation or increased needs) then in addition to the financial affidavit further financial information which is relevant and material to the subject matter **of** the litigation or appears reasonably calculated to lead to the discovery of admissible evidence is and should be subject to discovery. ***Smith v. Bloom,*** **506** So.2d **1173** (Fla. 4th **DCA** 1987). The increased lifestyle and financial worth of the payor spouse is the heart of the presentation to be made on behalf of the child, and in **order** to provide the recipient parent to present the "whole factual picture", further discovery would be in order.[2]

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[2] It is necessary for the trier of fact to receive evidence as to the "whole factual picture" in order to allow for an independent and complete understanding and evaluation by the **Court,** Parker *v. Parker,* **182** So.2d **498 (Fla. 4th DCA 1966);** ***Walton v. Walton,*** 537 So.2d *658* (Fla. 1st DCA

In more routine situations, however, where there is no reasonable cause to challenge the veracity of the financial affidavit, where the change **of** circumstance is need not ability, and/or where the increases are due to either the implementation of the guidelines[3], or inflation, and where the payor spouse has admitted the ability to pay additional reasonable amounts to be awarded as support, a wholesale foray into the details of the financial picture of the payor spouse may not be in order. In those circumstances, the Family Law Section of The Florida Bar believes that the trial court must be permitted to utilize its inherent power to control its cases, and to prevent the use of the courts as an instrument of vexatious harassment, to limit the extent of additional discovery to be permitted.

The determination of the extent of discovery must be made on a case **by** case basis by the trial court. However, it is the opinion of the Family Law Section of The Florida Bar that the admission by the payor spouse of ability to pay is a factor which should be considered when the trial court determines whether protection should be provided to that party from additional discovery when, and only when, the basis for the modification is something other than a "good fortune". Where the basis for modification is a "good fortune" however, the Family Law Section of The Florida Bar believes that the admission by the payor spouse of ability to pay should not act as a bar to discovery since the discovery will be necessary to prove the essential elements **of** the cause **of** action.

1989), *rev. den.*, 545 So.2d 1370 (Fla. 1989); and *Eyster v. Eyster*, 503 So.2d 340 (Fla. 1st DCA 1987), *rev. den.*, 513 So.2d 1061 (Fla, 1987); *Orlowitz v. Orlowitz*, 199 So.2d 97 (Fla. 1967)

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Although this factor was not available at the time of the trial of this cause, in accordance with the 1992 Amendment to F.S.61.30 found in Ch, 92-138, General Laws Enacted by The Florida Legislature, 1992 Session, the guidelines not provide a basis for a finding of substantial change of circumstance.

CONCLUSION

Wherefore, the Family Law Section of The Florida Bar respectfully requests that the Opinion issued in this **cause** confirm the applicability of the requirement that a financial affidavit be filed contained within Rule **1.611,** Florida Rules of Civil Procedure, to all actions involving child support under all circumstances. Further, it is respectfully requested that the Opinion issued in this cause further state that fiscal discovery in addition to the financial affidavit may, in appropriate circumstances, be limited by the trial judge where there is a stipulation that **a party** has the ability to pay any reasonable award and there has been no pleading alleging a “good fortune” increase in ability to pay as a basis for modification.

Respectfully Submitted,

THE FAMILY **LAW** SECTION OF
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A. Matthew Miller, Chair
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Deborah Marks, Chair, Amicus Curiae Committee

BY: ______________________
DEBORAH MARKS

BY: ______________________
A. MATTHEW MILLER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that **a** true and correct copy of the foregoing was mailed this 20th day **of** July, 1992 **to:** Barry Franklin, Esq. and Andrew Berman, Esq., YOUNG, FRANKLIN & BERMAN, **P.A., 17071** West Dixie Highway, North Miami Beach, Florida 33160 to Lyndall Lambert, **Esq.,** BARWICK & DILLIAN, 9636 NE 2nd Ave., Suite **C,** Miami Shores, Florida **33138** and to Paul Louis, Esq., SINCLAIR, LOUIS, HEATH, NUSSBAUM & ZAVERTNIK, P.A., 1125 Alfred I. DuPont Building, Miami, Florida **33131**.

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