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THE SUPREME COURT OF FLORIDA
Case No. ***78,636***

JUNE MILLER, :

Petitioner, Third District Case No. 91-1025

VS. :

MICHAEL J. **SCHOU,** :

Respondent. :

REPLY BRIEF OF PETITIONER, JUNE MILLER

By: Andrew S. Berman, Esq.
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REPLY ARGUMENT

I. THE NONCUSTODIAL PARENT SHOULD NOT BE ALLOWED TO AVOID FINANCIAL DISCOVERY IN A POST DISSOLUTION PROCEEDING TO INCREASE CHILD SUPPORT BY MAKING AN UNSWORN ACKNOWLEDGEMENT SUGGESTING ABILITY TO PAY

A. The trial court did *not* depart from essential requirements of law in ordering SCHOU to file a financial affidavit, notwithstanding his stipulation, since his financial status is central to the issue of child support modification.

SCHOU's Answer Brief is little more than a diatribe against the Family Law Bar. His cynical "hypothetical scenario" and invectives, while entertaining, add little to the pool of knowledge from which this Court will draw in deciding this significant issue. We dare say fhere is not a scintilla of evidence in this record from which any conclusion can be drawn other than that **MILLER** is seeking the subject financial discovery in good faith, to supply the trial court with the full factual picture in order that equity can be done. For **SCHOU** to even suggest that **MILLER's** counsel and the Family Law Section of The Florida Bar are pursuing this case for the sole purpose of feathering their own nests is

irresponsible and scandalous'.

This case is and has always been about the rights of children, SCHOU's child, to not be left behind while he ascends the socio-economic scale into greater and greater prosperity. He has tried every trick he could think of to avoid meeting this issue squarely, from unilateral "stipulations" in the trial court to supplying a financial affidavit immediately after this Court accepted jurisdiction in an effort to moot out this appeal. Now, when compelled to respond on the merits, he, for the most part, only casts aspersions and stale effusions at his former wife's lawyers and the entire Family Law Bar.

Beyond the hyperbole, the only relevant argument made by SCHOU is that a child is not entitled to share in the good fortune of both parents. He argues that the only appropriate analysis is to assess the needs of the child whenever a parent stipulates to an ability to pay increased support. He attempts to explain away most of the cases we cited for the proposition that a child is entitled to share in both parents' good fortune, by claiming that most of the cases cited also involve the issue of a child's needs. We do not find his attempt to distinguish our cases persuasive because the cases are unmistakably

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[1] On Page 7 of his brief, SCHOU writes:

> Of course, such routine audits would redound to the economic benefit 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...

On Page 26, he writes:

> Unfortunately, matrimonial attorneys cannot be trusted *to* police themselves or their clients in family law matters where one or both parties have "deep pockets."

clear. Nor does he advance a compelling policy argument for the abolition of "good fortune" alone as a basis for an increase in child support.

Incredibly, SCHOU characterizes any child support above the child's needs as a "windfall". Br. at 18. He views the investiture of power in a court to award child support above the child's demonstrated needs to be unwarranted ***interference*** with parental discretion. He believes that "The state's only legitimate concern, whether the parents are married or unmarried, is to ensure that the child's needs are fulfilled." Br. at 18.

As part of his argument, SCHOU points to the child support guidelines in Section 61.30(6), Fla.Stat. (1991) as proof that as monthly income increases, a child's proportionate share for support entitlement decreases. So, he argues, financial discovery should not be allowed simply to "eke out a few extra dollars per month in child support."

It is always difficult to respond to such cynical commentary. Nevertheless, the guidelines to which SCHOU refers establish only ***minimum*** payments based upon available income. The Third District has held that "the guidelines should be utilized as a floor in the consideration of sums to be awarded for child support." *Sinclair v. Sinclair,* 594 So.2d 807 (Fla. 3d DCA 1992); *Weinstein v. Steele,* 590 So.2d 1005 (Fla. 3d DCA 1991). The statute itself vests a trial judge with discretion to "adjust the minimum child support award, based upon the following considerations... (h) Total available assets of the obligee, obligor, and the child." §61.30(10)(3), Fla.Stat. (1991). It is thus plainly obvious that the issue of "good fortune," apart from being recognized by every District Court in the State as an independent basis for an increase in child support, is etched into the very statute relied upon by SCHOU in his effort to demonstrate that good fortune is not a valid

basis alone for an increase in child support. SCHOU has never challenged the power of the Legislature to enact this statute. His argument that his daughter is not entitled to share in his good fortune is therefore nothing more than social commentary, completely irrelevant to this appeal. So long as a parent is not permitted to financially "divorce" his/her children, financial disclosure and discovery remains an essential tool in the process of determining the amount of child support to which the children are entitled. Such discovery is the only means to reach an equitable end.

We also take issue with SCHOU's reliance on *Bedell* v. Bedell, 583 So.2d 1005 (Fla. 1991) for the proposition that there must be both a substantial change in circumstances and an increase in need to justify an increase in child support, except in extraordinary cases. *Bedell* is a post divorce alimony modification case. Before *Bedell* a spouse had to prove need in every case to obtain an increase in alimony. Bedell retreated from that absolute requirement in exceptional cases. It is not analogous to this case because while SCHOU could divorce his wife, he cannot divorce his daughter. The burden should clearly be heavier on an ex-wife to obtain an increase in alimony without demonstrating an increase in need than on a child who is seeking more support because her father is prospering financially. The ex-wife's standard of living should be and is set based upon her standard of living during the marriage. As time goes by the child is ***entitled*** to enjoy a ***better*** standard of living than when her parents were married, if her father can afford it.

I. An established Rule of Civil Procedure and a Florida Statute expressly required SCHOU to file a financial affidavit, without exception.

SCHOU's argument in Subsection I(C) of his brief that Section 61.30(12), Fla.Stat. (1991) is unconstitutional because it conflicts with Rule 1.611 is totally illogical based upon his argument in Subsection I(B). In Subsection I(B) of his brief SCHOU argues that Rule 1.611 is completely inapplicable to this case. In Subsection I(C) he argues that the above Statute conflicts with the Rule to support his unconstitutionality argument. He cannot have it both ways. The Statute and Rule can only conflict if they cover the same subject matter. If he argues that Rule 1.611 is inapplicable, he must concede that it does not cover the same subject matter and hence does not conflict with the Statute.

Without a direct collision between the Statute and Rule, SCHOU's argument absolutely fails because this Court has previously stated that where a statute has substantive and procedural aspects which may be severed from each other, the procedural aspects are ineffectual ***only to the extent they are inconsistent with rules of court. LePai v. Milton, 595*** So.2d 12 (Fla. 1992); ***The Florida Bar Re: Amendment to Rules of Civil Procedure, Rule 1.442, 550*** So.2d 442, 443 (Fla. 1989). His own argument in Subsection I(B) thus defeats his constitutionality argument. Alternatively, if the Rule covers this issue, it can easily be reconciled with the Statute and there is no conflict between them. ***See Miller's Initial Brief,*** Section I(A)(i)(1).

Moreover, the amendment to Rule 1.611 expressly requires the filing of a financial

affidavit in this context. The absence of the amendment when this case was initially decided does not necessarily lead to the conclusion that the trial court order was unauthorized. Basic discovery principles of relevancy and materiality alone offer "substantial" support for the trial court's decision.

CONCLUSION

The Opinion of the Third District should be quashed and the case remanded with instructions that SCHOU file a financial affidavit and full financial discovery may be permitted subject to the control of the trial court in accordance with the Florida Rules of Civil Procedure,

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed **this** 27th day **of October, 1992 to Paul Louis, Esq., Sinclair, Louis, Siegel,** Heath,

Nussbaum & Zavertnik, P.A., 1125 Alfred I. DuPont Bldg., Miami, FL 33131 and Lyndall Lambert, Esq., Barwick, Dillian & Lambert, P.A., attorneys for Respondent, SCHOU, 9636 N.E. 2nd Avenue, Miami Shores, FL 33138 and Deborah Marks, Esq., counsel for Amicus Curiae, The Family Law Section of The Florida Bar, 12555 Biscayne Blvd., STE 933, North Miami, FL 33181.

By 
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