IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,610

CURTIN R. COLEMAN, II,

Petitioner

vs.

MARIE PRESTON LAND COLEMAN

Respondent

RESPONDENT'S REPLY BRIEF ON THE MERITS

ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL

DCA CASE NO. 92-1582

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PREFACE

MARIE PRESTON LAND COLEMAN, referred to in this brief as the "Wife", was the Plaintiff in the original dissolution action in 1964. The Wife was the Respondent in the Husband's Petition to Modify the Final Judgment filed in November of 1989. The Husband, CURTIN R. COLEMAN, II, appealed the entry of an Income Deduction Order by the Seventeenth Judicial Circuit in and for Broward County, Florida to the Fourth District Court of Appeals. The Fourth District Court of Appeals affirmed the entry of the Income Deduction Order by Corrected Opinion dated January 13, 1993. The Husband has appealed to the Florida Supreme Court.

CURTIN R. COLEMAN, II shall be referred to as "Husband", MARIE PRESTON LAND COLEMAN shall be referred to as "Wife", and references may be made to Husband's Appendix by designation "A".

STATEMENT OF THE FACTS

This appeal arises pursuant to this Court's discretionary jurisdiction pursuant to Florida Rule of Appellate Procedure 9.320 by order dated May 28, 1993.

The Husband has appealed to the Florida Supreme Court the Fourth District Court of Appeal's Corrected Opinion dated January 13, 1993 affirming the entry of an Income Deduction Order dated April 22, 1992, by the Seventeenth Judicial Circuit in and for Broward County, Florida, the Honorable Judge Patti Englander presiding.

The case dates to 1964 when the parties were divorced. The parties had vigorously litigated their divorce proceedings until July 30, 1964, when, by stipulation and agreement, and apparently in the middle of the hearing, the couples resolved the financial aspects of the divorce proceeding. The Husband has included a transcript of that agreement.

The agreement included the provision of a permanent periodic alimony award of Four Hundred Dollars ($400.00) per month.

The Husband paid the alimony award until August of 1989, when he unilaterally stopped making payments, and in November of 1989 he filed a Supplemental Petition for Modification. The Wife never had remarried and the thrust of the Petition was the alleged financial distress of the Husband (A-17).

The Wife was without counsel until June 20, 1990, when an answer was filed to the Supplemental Petition for Modification along with a Counter-Petition for Contempt (A-18-20).

The Husband admitted not making payments in his response dated July 12, 1990 (A-23-25). He tempered that admission with a reassertion of his alleged financial distress. The Husband admits in his brief that no payment has been forthcoming since that time (Appellant's Brief at page 6).

The trial court heard testimony of the Husband and presentation of his case and on September 5, 1991, dismissed his Petition for Modification (A-35). The Wife filed an Application for Judgment citing his admissions on non payment and attaching an Affidavit of Non Payment and at hearing on November 19, 1991, the trial court judge directed the Wife to prepare a Judgment against the Husband for $10,400.00 plus interest and attorneys fees. On December 5, 1991 the Judgment was signed inadvertently listing Curtin R. Coleman, III as Defendant (A-50). The proper Defendant was changed by amendment on January 23, 1992 (A-51).

A Verified Motion for Income Deduction Order was filed by the Wife pursuant to Florida Statute 61.1301 on April 20, 1992 (A-62). The Husband was receiving pay as a Naval Reserve Officer. An Income Deduction Order dated April 22, 1992 was entered by the trial court on the verified Motion (A-64).

At the time of the supplemental proceedings the Wife was without minor children, although she was and is in her seventies and gets Social Security and Veterans Disability checks and had relied on the alimony award to maintain her living standards which, despite protestations by the Husband to the contrary, are modest at best.

The Husband filed appeals of the entry of judgment of dismissal under a separate case number still pending decision by the Fourth District Court of Appeals.

The Husband also appealed to the Fourth District Court of Appeals the entry of the Income Deduction Order (A-90-91).

The Fourth District filed an Opinion dated January 13, 1993, and a Corrected Opinion bearing the same date (A-94-95, A-113-114). Said Opinion affirmed the trial court entry of the Income Deduction Order.

The Husband filed Notice to Invoke Discretionary Jurisdiction (A-120) on the basis that the opinion of the Fourth District Court of Appeal in the instant case conflicts with the holding in Schorb v. Schorb, 547 So 2d 985 (Florida 2nd DCA, 1989).

This Court accepted jurisdiction by Order dated May 28, 1993.

SUMMARY OF ARGUMENT

The Wife argues that the use of Florida Statutes (1991) 61.1301 to enforce orders or judgments of periodic alimony to a former spouse living without minor children is not only contemplated by the statutes, but is demanded by the statutes.

The clear and unmistakable language of Florida Statutes 61.1301 (1)(a) dictates that the Court shall enter an Income Deduction Order in alimony or child support cases.

The intent of the Legislature is further buttressed by the clear language adopted in recent amendments to Chapter 61 by the 1993 Session of the Florida Legislature.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN UTILIZING FLORIDA STATUTES 61.1301 TO ENFORCE ORDERS WHICH PROVIDE SUPPORT TO A FORMER SPOUSE NOT LIVING WITH A CHILD?

The clear and unmistakable language of Florida Statues (1991) 61.1301 (1)(a) reads:

> Upon the entry of an order establishing, enforcing, or modifying an alimony or a child support obligation, the court shall enter a separate order for income deduction if one has not been entered. (emphasis added)

The trial court on Verified Motion by the Wife in this cause entered an Income Deduction Order against the Husband after an attempt by the Husband to modify his alimony obligation by eliminating the award. The Wife, relying on the clear language of the Statute applied for and received an Income Deduction Order against the Husband's pay as a Naval Reserve Officer.

The Husband attacks the Income Deduction Order citing that the Wife did not live with minor children, a fact the Wife does not deny, and relying on the Opinion of Schorb v. Schorb, 547 So 2d 985 (Florida 2d DCA, 1989) and Department of Health and Rehabilitative Services of the State of Florida, et al v. Reed, 560 So 2d 426 (Florida 4th DCA, 1990).

The Reed case must be addressed first. The Reed case is a "per curiam" affirmance. This Court cannot go behind a "per curiam" opinion to analyze anything except the record proper. To speculate what part of Schorb the "per curiam" affirmance in Reed

refers to, as the Husband would urge, transcends the rules of appellate review.

Schorb v. Schorb, supra, which is the Husband's other defense, is, simply put, "bad law". The opinion in Schorb admits that on its face the statutory provision of Florida Statute 61.1301 (1)(a) applies to alimony (Schorb at page 987). Schorb admits that the provisions of Florida Statute, Chapter 61 are to be liberally construed to protect a spouse from possible harm (Schorb at page 988). Yet, given the admitted clear language, the Schorb court delves behind that language to assign a legislative intent to the statute on income deductions that would attempt to render it powerless in the case of an elderly spouse dependent on that income unless that spouse resides with minor children.

While the Schorb court and the Husband in his brief argue word meaning, definition, usage of the same words in different statutes, and all of the proper arguments for a law school final exam in legislation, the Second District and the Husband fail to answer the very basic question, "Why would the Florida Legislature want to limit a very effective tool for the payment of family maintenance to only alimony connected with child support when needy spouses need the same effective tool?"

The answer is clearly that the Legislature wishes the Income Deduction Order to be available to all those who are dependent on support from parents or ex-spouses.

The Husband argues that the Legislature attempts to answer to the general public outcry against "scofflaws" who don't pay support for their children. Obviously, the Husband feels there is no public outcry against "scofflaws" who don't pay their alimony

to their ex-spouses for he is one of those "scofflaws". The Wife submits to the Court that the Florida Legislature wishes to protect needy spouses be they with or without children.

The Florida Legislature in its 1993 Session has made major revisions in Chapter 61. Senate Bill 428, Florida Senate Legislative Session of 1993 amended major portions of Florida Statute 61.1301 (1)(a) in the following manner:

> Upon the entry of an order establishing, enforcing or modifying an obligation for alimony, for child support, or for alimony and child support, the court shall enter a separate order for income deduction... (changed portion of statute underlined)

The Senate Bill passed 36 Ayes O NAYS and was presented to the Governor who signed it on May 5, 1992.

The 1993 Legislature did not change the wording above to change the law as argued by the Husband. The Wife submits the Legislature passed the bill to clarify its intent which was sorely misconstrued in Schorb v. Schorb, supra.

The Fourth District in its Correct Opinion dated January 13, 1993 in the instant case states in footnote 2 (A-114):

> ... the legislative history of a statute is irrelevant where the wording of a statute is, as here, clear and unambiguous. Aetna Casualty and Surety Co. v. Huntington National Bank, 17 Florida Law Weekly 5750 (Florida, 12/17/92). An inquiry into legislative intent may be conducted only where the statute is ambiguous on its face. Streeter v. Sullivan, 509 So 2d 268, 271 (Florida, 1987).

In quoting this Court, the Fourth District restrained itself from delving into legislative constructions and simply reading the clear language provided by Florida Statute 61.1301 (1)(a) (1991).

It should be remembered by the judicial system and those that

operate in it that the need to interpret statutory language may involve just reading the words and applying their common meaning. It is submitted that the Schorb court forgot that simple rule reiterated by this Court in Aetna Casualty, supra, and Streeter, supra.

The Fourth District in this case should be upheld and on the basis of recent legislative action by the Florida Legislature, this issue is moot.

ISSUE II

WHETHER THE ENFORCEMENT OF ANY ALIMONY OBLIGATION REQUIRES AN INCOME DEDUCTION ORDER?

The Wife objects to the Husband's rather naked attempt to circumvent the order accepting jurisdiction in the instant case which was based solely on the Fourth District's conflict in this case with the Schorb decision rendered by the Second District.

The Schorb court obviously did not address the issue of whether an Income Deduction Order was mandatory or permissive in cases such as the instant case because it denied its use in any case of alimony absent minor children.

In addition, the Husband selectively picks language in his attempt to defeat the trial court's order. Whether the statute states that it is permissive or mandatory, the facts in this case are that the trial court did so for the continuing obligation as well as arrearages. So the only possible question is whether the trial court could do what it did. It is irrelevant in the instant case whether the trial court had to enter an Income Deduction Order because it did.

It is interesting to note, however, that the Husband cites the 1993 Session Laws as relevant for statutory interpretation of the issues at bar. The Wife agrees and obviously Chapter 93-188, Laws of Florida, Senate Bill 428 indicates that it was the desire of the Florida Legislature to have the income deduction available for sole alimony as well as alimony with child support orders.

Further, the Husband argues that there was no basis upon which a deduction for future alimony payments could be made. There was petitioner's own attempt at modification, which was dismissed, which clearly falls within the statutory guideline and there was the Wife's Counter-Petition for Contempt which resulted in the Amended Judgment of Arrearage. Both of those actions fall within the purview of Florida Statutes 61.1301.

Clearly, the Fourth District has not even considered those issues, and the attempt to bring them to the highest Court in the State is violative of this Courts jurisdictional guidelines and the notice filed by the Husband invoking this Court's discretionary jurisdiction.

CONCLUSION

For the reasons above stated, the Florida Supreme Court should affirm the Fourth District Court of Appeals decision upholding the trial court's Income Deduction Order dated April 22, 1992.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Curtin R. Coleman, Esquire, P.O. Box 1625, 609 E. Market Street, Suite 206, Charlottesville, VA 22902 this 8th day of July, 1993.

DONALD K. CORBIN, ESQUIRE