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ORIGINAL

IN THE SUPREME COURT

CASE NO. 81,

CURTIN R. COLEM

Petitione

vs.

MARIE PRESTON LAND COLEMAN

Respondent

PETITIONER'S INITIAL BRIEF ON THE MERITS

ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL
DCA Case No. 92-1582

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PREFACE

The petitioner, Curtin R. Coleman, II, was the defendant in the trial court and appellant in the District Court, while the respondent, Marie Preston Land Coleman, was the plaintiff in the trial court and appellee in the District Court.

In this brief, the petitioner/defendant/former husband will be referred to as "Husband," while the respondent/plaintiff/former wife will be referred to as "Wife," and the following symbol will be used:

"A" Appendix containing copies of portions of the record and other authorities before the trial court, pertinent orders, motions and opinions in the District Court of Appeal, Fourth District and this Court's Order accepting jurisdiction.

For brevity the District Court of Appeal, Fourth District will be referred to as the "District Court" or "Fourth District" as the context permits.

Subsequent to service of Petitioner's Brief on Jurisdiction the District Court vacated its order of 5 August 1992 which had consolidated the appeals in Case 92-826 and 92-1582 and, as explained further in Statement of the Case, only the appeal in Case 92-1582 is ripe for review by this Court.

Had not this Court dispensed with oral argument in its Order Accepting Jurisdiction, Petitioner would have timely filed a request for the same for the purpose of hopefully assisting this Court in its deliberations.

STATEMENT OF THE CASE

This review involves an appeal from a non-final order entered, *ex parte*, by the trial court pursuant to §61.1301, Fla. Stat. (1991), against the Husband, which Order was entered by the trial court on 22 April 1992 and filed 23 April 1992 (A64-65).

On 20 April 1992, Wife served her Verified Motion for Income Deduction Order (A61-63) which was received by Husband without composite Exhibit "A" referred to therein. On 1 May, Husband received via certified mail a copy of the trial court's Income Deduction Order described above.

On 4 May 1992, Husband served Defendant's Motion for Rehearing and to Alter or Amend Income Deduction Order (A66-68), together with Affidavit of Curtin R. Coleman, II in Support of Defendant's Motion for Rehearing on Income Deduction Order (A69-71).

On 5 May 1992, pursuant to Local Rule No. 7 of the Broward County Circuit Court (A72), Husband served and submitted to the trial court judge his Memorandum of Law in Support of Defendant's Motion for Rehearing and to Alter or Amend Income Deduction Order (A73-75) with copy of Defendant's Motion for Special Order Pursuant to Local Rule No. 7 (A76-77) as enclosures to his letter of 5 May 1992 to The Honorable Patti Englander Henning, the trial court judge (A78).

On 8 May 1992, Wife served Response to Defendant's Motion for Rehearing and to Alter or Amend Income Deduction Order (A79-82) and on 20 May 1992, having had no communication from the

trial court judge with respect to Defendant's Motion for Special Order Pursuant to Local Rule No. 7, the Husband filed his Notice of Appeal of Non-Final Order (A90-91). This appeal became pending in the District Court, as its Case No. 92-1582, along with Husband's appeal in Case No. 92-826 from the final orders entered by the trial court on 5 September 1991 and 23 January 1992, rendered 24 February 1992, in the same case in the trial court.

All briefs were served in Case No. 92-1582 by 10 July 1992 and on 20 July 1992 the District Court, *sua sponte*, entered Order dispensing with oral argument (A92). On 5 August 1992, the District Court, *sua sponte*, ordered that Case Nos. 92-826 and 92-1582 be consolidated for review on the merits (A93).

In the meantime there were delays in preparation of the record and supplemental record in the trial court in Case No. 92-826, primarily because of difficulties in obtaining hearing time for the trial court judge to settle and approve a statement of the evidence and proceedings pursuant to Fla. R. App. P. 9.200(b)(4). This hearing was finally conducted on 25 November 1992 and on 7 January 1993 the trial court judge entered an order which enabled completion of the supplemental record which was thereafter forwarded to the District Court.

On 13 January 1993 the District Court filed an Opinion (A94-95) addressing the single issue presented in Case No. 92-1582. Husband timely filed Motion for Rehearing, And Motion for Rehearing En Banc, Or In The Alternative, Motion to Certify

Question (A96-107). This motion, to a large degree argues that the District Court had failed to fully consider the decision in *Schorb v. Schorb*, 547 So.2d 985 (Fla. 2d DCA 1989) (A108-112).

A second "Corrected Opinion," also dated 13 January 1993, was filed in the District Court and was mailed in envelope postmarked 28 January 1993 (A113-115), the same date on which Husband's Motion for Rehearing was received and filed in the District Court. On telephone inquiry to the Clerk of the District Court Husband was advised to promptly file an Amendment (addressing the Corrected Opinion) to the earlier motion for rehearing which he did and which was received and filed in the District Court on 8 February 1993 (A116-118).

The District Court's Order of 17 March 1993, denying motion for rehearing filed 28 January 1993 (A119) was silent regarding the amendment to Husband's motion for rehearing but on telephone inquiry to the Clerk, Husband was advised that the Order was intended to cover the motion for rehearing, as amended, and thus Husband's Notice to Invoke Discretionary Jurisdiction (A120) was based on a rendition date of 17 March 1993.

Because of some uncertainty as to the impact on Case No. 92-826 of the District Court's opinions filed 13 January 1993 (A94 and A113) and its Order denying motion for rehearing filed 17 March 1993, Husband filed with the District Court a Motion for Clarification, *inter alia*, suggesting certain confusion possibly arising from the previous Order of Consolidation which motion was adjudicated in the District Court's Order filed 5 May 1993 (A121-

122), *inter alia*, vacating its order of consolidation of 5 August 1992. This Court accepted jurisdiction on 28 May 1993 (A123) and thus this review and this brief deal only with the issues arising from the Income Deduction Order entered 22 April 1992 (A64-65) and the District Court's affirmance in its opinion filed 13 January 1993 (A94 and A113) in its Case No.92-1582.

STATEMENT OF THE FACTS

This cause arises out of a Final Decree (of Divorce) between Husband and Wife dated 31 July 1964 (A 1-16), pursuant to which Husband was obligated to pay to Wife periodic alimony in the sum of $400.00 per month, plus an annual premium for medical insurance. It is undisputed that Husband promptly paid the required periodic alimony for 25 years in semimonthly installments of $200.00 until the 15th of August 1989. It is also undisputed that Husband has made no payment of periodic alimony subsequent to 15 August 1989 although he has continued to make the required annual premium payment for medical insurance.

On 14 November 1989, Husband filed Former Husband's Supplemental Petition for Modification (A 17) which was thereafter served by certified mail. On 20 June 1990, Wife filed Response to Former Husband's Supplemental Petition for Modification, Affirmative Defenses and Counter-Petition for Contempt (A 18-20). Thereafter, on 12 July 1990, Husband served Former Husband's Reply to Affirmative Defense (A 21-22) and Former Husband's Response to Former Wife's Counter-Petition for Contempt (A 23-25). On 8 May 1991, Wife served her Pre-Trial Statement (A26-28), followed by Husband's Pretrial Statement (A29-34, LESS exhibits).

It is undisputed that this cause came to trial in the trial court on 6 June (partial day) and 27 August (partial day) 1991, and on 27 August 1991, at the conclusion of Husband's evidence on his Supplemental Petition for Modification, Wife's counsel moved

for a "directed verdict" in support of Wife's contention that Husband had not shown his changed circumstances or adverse financial ability to be of a permanent nature and the trial court orally granted Wife's motion. Thereafter, the trial court entered Order and Judgment of Dismissal on Petiton [sic] for Modification on 5 September 1991 (A35). It is undisputed that Husband thereafter timely served Motion for Rehearing with supporting Affidavit and Motion to Alter or Amend Judgment with respect to the Order and Judgment of Dismissal on Petiton [sic] for Modification, the Motion for Rehearing and First Amendment thereto having been denied by the trial court on 21 February 1992 (A52), and his Motion to Alter or Amend Judgment having been granted by Order dated 6 March 1992 (A53-54). The altered Order and Judgment of Dismissal on Petition for Modification dated 5 September 1991, rendered 24 February 1992 is a subject of Husband's appeal in Case No. 92-826 still pending in the District Court, presently awaiting disposition without oral argument.

On 28 October 1991, Wife served her Application for Judgment (A36-37), together with Wife's Affidavit (A38), and by Notice of Hearing served 30 October 1992 (A39), Wife's Application for Judgment was set on the motion calendar of the trial court judge on 19 November 1991. Thereafter, on 8 November 1991, Husband served Defendant's Response to and Motion to Strike Plaintiff's Application for Judgment (A40-44), Defendant's Motion for Continuance (A45-46) and Notice of Hearing on these two pleadings also for the motion calendar of the trial court on 19 November

1991 (A47-48). On 19 November 1991 (following argument by Wife's counsel in Chambers and by Husband on telephone), the trial court entered its Order (A49) on a portion of the matters noticed for its motion calendar and on 5 December, the trial court entered, on a virtual *ex parte* basis, Judgment of Arrearage (A50). On 23 January 1992, the trial court entered, *ex parte*, an Amended Judgment of Arrearage (A51).

It is undisputed that Husband timely filed Motion for Rehearing with supporting Affidavits with respect to both the Judgment of Arrearage and Amended Judgment of Arrearage. Following argument by both parties on 19 February 1992, the trial court, on 6 March 1992, entered Order Vacating Judgment of Arrearage of December 5, 1991 (A55-56) and by Order dated 21 February 1992 (A52) denied Husband's Motion for Rehearing on the Amended Judgment of Arrearage, and thus the Amended Judgment of Arrearage dated 23 January 1992, rendered 24 February 1992, is also a subject of Husband's appeal in Case No. 92-826 still pending in the District Court, presently awaiting disposition without oral argument.

Defendant's Second Motion for Stay Pending Review (A57-60) was argued before the trial court on 19 February 1992 and denied by Order dated 21 February 1992 (A52).

It is undisputed that Wife served her Verified Motion for Income Deduction Order (A61-63) on 20 April 1992, less composite Exhibit "A" referred to therein, and that the trial court, *ex*

parte, on 22 April 1992 entered the Income Deduction Order (A64-65) which is the subject of Husband's appeal from a non-final order (A90-91) and the District Court's decisions of 13 January 1993 (A94 and A113) being reviewed by this Court.

It is also undisputed as follows:

1) A copy of the Income Deduction Order (A64-65) was received via certified mail by Husband on 1 May 1992.

2) On 4 May 1992, Husband served Defendant's Motion for Rehearing and to Alter or Amend Income Deduction Order (A66-68) and Affidavit of Curtin R. Coleman, II in Support of Defendant's Motion for Rehearing on Income Deduction Order (A69-71).

3) Pursuant to Local Rule No. 7, Broward County Circuit Court (A72), Husband, on 5 May 1992, submitted to the trial court judge his Memorandum of Law in Support of Defendant's Motion for Rehearing and to Alter or Amend Income Deduction Order (A73-75) and Defendant's Motion for Special Order Pursuant to Local Rule No. 7 (A76-77) and by letter of 5 May 1992 to the trial court judge, requested her action pursuant to Local Rule No. 7 (A78).

4) Wife, on 8 May 1992, served Response to Defendant's Motion for Rehearing and to Alter or Amend Income Deduction Order (A79-82).

5) That as of 20 May 1992 (the date of filing of the appeal to the District Court), the trial court judge had taken no action with respect to the Income Deduction Order.

Although, for reasons unknown, in Wife's Response to Former Husband's Supplemental Petition for Modification (A18-20) she

denied the allegations of paragraph 4.c of Former Husband's Supplemental Petition for Modification (A17), it is undisputed that Wife is not living with minor children. See Wife's Response (A80) and also Husband's Affidavit (A69-71), which is not disputed or controverted by Wife.

SUMMARY OF ARGUMENT

Husband argues that the trial court erred in utilizing §61.1301, Fla. Stat. (1991), to enforce orders or judgments of periodic alimony or delinquent periodic alimony to a former spouse not living with a child by failing to follow the authority in *Schorb v. Schorb*, 547 So. 2d 985 (Fla. 2d DCA 1989).

Husband argues that the District Court incorrectly failed to consider the statutory support for the decision in *Schorb v. Schorb*, *supra*, and especially in finding that the enforcement of any alimony obligation requires an income deduction order. To the extent that the Fourth District Court goes so for as to make the use of income deduction orders mandatory, Husband argues that the Fourth District Court not only disagrees expressly and directly with *Schorb* but extends the scope and legislative intent of such orders, requiring the addressing of its holding in this respect as a separate issue in this brief. Under this separate issue Husband argues, *inter alia*, that the Income Deduction Order in the case at bar is clearly invalid as to future alimony deductions.

ARGUMENT

ISSUE I

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

Undersigned counsel, remembering the lesson he was taught as counsel for the appellant in *Everhart v. Everhart & Co.*, 139 So.2d 747 (Fla. 2d DCA 1962), promptly sought relief from the trial court's, *ex parte*, Income Deduction Order (A 64-65) by the actions reflected in his Petitioner's Appendix (A 66-78), before going to the District Court but to no avail.

From the supporting Affidavit filed concurrently with appellant's Motion for Rehearing and to Alter or Amend Income Deduction Order (A 69-71), from Wife's Response to Defendant's Motion for Rehearing and to Alter or Amend Income Deduction Order (A 79-82), from the pretrial statements of both Wife and Husband (A 26-34), served and filed in the trial court, and from the pleadings filed in the trial court by each of the parties and the orders and judgments entered by the trial court, it is abundantly clear that respondent, Marie Preston Land Coleman, is not "a former spouse living with a child."

In *Schorb v. Schorb*, 547 So.2d 985 (Fla. 2d DCA 1989), it was held that §61.1301, Fla. Stat. (1987), should be used by trial courts only to enforce orders which provide support to a child or to a former spouse living with a child.

In *State v. Hayes*, 333 So.2d 51 (Fla. 4th DCA 1976), Point I before the District Court was:

> Is a Circuit Court of the Fifteenth Circuit of Florida "bound" by the decision of a District Court of Appeal other than the Fourth District Court of Appeal?

to which question the District Court answered in the affirmative. Thus the trial court should have followed *Schorb v. Schorb*, *supra*, which was brought to its attention in Husband's Motion for Rehearing (A66), but this motion was not read by the trial court before Husband was required to appeal its non-final Income Deduction Order. Because the Income Deduction Order was entered *ex parte* Husband had no opportunity to cite the *Schorb* decision before its entry.

Additionally, the District Court in *Department of Health and Rehabilitative Services of the State of Florida, et al v. Reed*, 560 So.2d 426 (Fla. 4th DCA 1990), affirmed *per curiam* on the authority of *Schorb v. Schorb, supra.* Although the PCA opinion in *Reed* does not reflect which aspect of the *Schorb* opinion it relies on as authority, it is submitted that because there was only one express "holding" in *Schorb* which was the one dealing with the proper utilization of income deduction orders, that this holding is the "authority" followed in the *Reed* decision. The *Reed* decision was also cited in Husband's unread trial court Motion for Rehearing (A66).

The *Schorb* court was squarely confronted with the statutory intent of §61.1301(1)(a) Fla. Stat. (1987) and especially such

terms as "obligor", "support" and "support payments" as employed in Chapter 61 and elsewhere in Florida Statutes. The common denominator was Chapter 86-220, Laws of Florida, enacted primarily to protect child support payments. Following time honored statutory intent rules the Second District in *Schorb* decided as follows:

> Accordingly, we hold that section 61.1301, Florida Statutes (1987), should be used by trial courts only to enforce orders which provide support to a child or to a former spouse living with a child. Since the order entered by the lower court does not involve a child, it must be vacated by the trial court on remand. (A110)

Although the *Schorb* court's holding was based on a construction of §61.1301, Fla. Stat. (1987) it is submitted that its statutory construction and rationale apply to the Income Deduction Order dated 22 April 1992 in the case at bar. Although there were amendments to §61.1301 subsequent to 1987 they do not dictate a different result than *Schorb*, but to the contrary fortify the *Schorb* decision.

It is especially significant that the *Schorb* court construed §61.1301, Fla Stat. (1987) [emphasis added], which section ended with Subsection (2)(k) whereas the Fourth District in the case at bar construed §61.1301, Fla. Stat. (1991) [emphasis added] to which the Legislature by Chapter 88-176, Laws of Florida had added subsection (3) providing: "It is the intent of the Legislature that this section may [emphasis added] be used to collect arrearages in child support payments which have accrued against an obligor." §61.1301(3), Fla. Stat. (1988 Supp.)

After the submission of Appellant's Initial Brief in the District Court Husband received the 1992 Supplement to Florida Statutes, 1991, which contains a revision to Chapter 88, Florida Statutes, which already contained a definition of "Support orders." This chapter now contains the following addition:

> §88.031(20) "Support includes:
> (a) Support for a child, or child and spouse, or former spouse who is living with the child or children, but only if a support obligation has been established for that spouse and the child support obligation is being enforced under Title IV-D of the Social Security Act; or
> (b) Support for a child who is placed under the custody of someone other than the parent pursuant to s39.41." [emphasis added]

Rather than seeing legislative action disapproving *Schorb* we see the Legislature adopting the rationale of *Schorb* and it would appear to include the express legislative disapproval of the result in *State ex rel. Quigley v Quigley*, 463 So.2d 224 (Fla. 1985). §88.012, Fla. Stat. (1991) continued to declare that the public policy of this state is that this act shall be construed and administered to the end that children residing in this or some other state shall be maintained from the resources of responsible parents, etc.

The 1992 Supplement to Florida Statutes 1991 continues to include the same definition of "Support" as in §409.2554, Fla. Stat. 1987 and 1991 as well as the same Legislative intent (§409.2551).

In summary, the Legislature apparently enacted §88.031(20), Fla. Stat. (1992 Supp.) to change the result in cases like *Quigley,*

supra decided in 1985. It is also obvious that the Legislature through 1992 did not have any trouble with the *Schorb* result and, with the exception of adding the permissive language of subsection (3) to §61.1301 in 1988, left intact the portions of §61.1301 construed by *Schorb*.

The very recently published American Heritage Dictionary of The English Language (3d ed.) defines "support" as "Maintenance, as of a family, with the necessities of life" (emphasis supplied).

This Court is obviously aware of the trend in recent years for the general public to express to the legislatures and the courts a dissatisfaction with the number of scofflaws who ignore child support orders. The Florida Legislature has reacted in various ways to this demand and one only needs to peruse the table of contents of Chapters 61, 88 and 409, Fla. Stat. (1991) to see the emphasis placed on "child support" and to some degree "family support" as opposed to statutory "alimony." Florida Statutes reflect that the Legislature has had an active vocal constituency for "child support" enforcement as contrasted to whatever constituency it may have for collection and enforcement of alimony.

It is respectfully suggested that the District Court overlooked or failed to consider the intent of the Florida Legislature in enacting Session Law Chapter 86-220 primarily to enforce child support payments.

It is respectfully suggested the District Court, in its

opinion, overlooked or failed to consider the primary statutes provided by the Legislature for the collection and enforcement of pure alimony (unconnected with child support) which are §61.08 and §61.14, Fla. Stat. (1991). Nowhere has the Florida Legislature provided that "the enforcement of any alimony obligation requires an income deduction order" or words to that effect. Unfortunately legislative draftsmanship has never attained the status of an exact science and thus the courts in their judicial labors wrestle with statutory construction in an effort to determine legislative intent. The Florida Legislature has provided a number of statutory tools to the trial courts of this state for the purpose of collecting and enforcing the payment of both child support and statutory alimony. Certainly it is not the legislative intent for a trial judge to engage in "overkill" and employ each and every enforcement tool in each and every case. For example, the word "shall" is used in §61.1301(1)(a) Fla. Stat. (1991) four times. It is submitted that a logical construction of the first "shall" could be the word "may" in a proper case. See such an example in §61.1301(3), Fla. Stat. (1988 Supp.) as the Legislative intent. In considering §61.1301(1)(b)1., Fla. Stat. (1991), what if there is no "payor" to direct? If so, the proper tool, and perhaps the only one needed by the trial judge, could be contempt proceedings.

Footnote 2 in the District Court's Opinion filed 13 January 1993 (A114) makes reference to "impecunious former spouses" and

"a needy former spouse living alone." If the District Court assumed that Wife in the instant case is either "impecunious" or "needy," we respectfully hasten to correct that assumption. Unfortunately in this case the Husband is the "needy spouse." See the respective financial conditions of the parties in Appendix of Petitioner (A83-89).

Some members of this Court may question why the Husband has not raised the constitutional issues of due process and access to the courts considering the number of *ex parte* orders and virtual *ex parte* orders entered by the trial court in these proceedings. To be candid with the Court these issues have been raised as to the Amended Judgment of Arrearage (A51) in Case No. 92-826 still pending in the Fourth District based on these issues raised in the trial court in Defendant's Motion for Rehearing on Amended Judgment of Arrearage (A124-137).

Because the *ex parte* Income Deduction Order (A64-65) was entered as an enforcement measure to the Amended Judgment of Arrearage (A51) the Income Deduction Order should necessarily be vacated if the Amended Judgment of Arrearage was improperly entered. However, Husband, in requesting discretionary review by this Court pursuant to Fla. R. App. P. 9.030(a)(2)(iv), considered it inappropriate to request this Court at this time to review the constitutional aspect of these proceedings on which the Fourth District has not yet rendered a decision. Most certainly the propriety of the Income Deduction Order will not become moot should the District Court affirm the Amended Judgment

of Arrearage and depending upon the exact decision the District Court will make, may continue to be an issue which should be resolved by this Court on its discretionary review, despite the refusal of the District Court to certify the question.

It is respectfully submitted that because the Income Deduction Order entered by the trial court was not used to provide support to a child or to a former spouse living with a child, the decision of the District Court should be quashed, with directions to the District Court to remand this case to the trial court with instructions to vacate the Income Deduction Order.

ARGUMENT

ISSUE II

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

The Fourth District, in its Opinions filed 13 January 1993 (A94 and A113), not only expressly and directly disagreed with *Schorb v. Schorb*, *supra*, but went on hold:

> Income deduction orders are not limited by the statute to households with minor children. The applicable provision of section 61.1301(1)(a), Florida Statutes (1991), 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.
>
> The unmistakable meaning of this text is that the enforcement of <u>any</u> alimony obligation requires an income deduction order. Here the court obviously enforced the unpaid alimony by a money judgment. That judicial action was enough to require the separate income deduction order.[2] AFFIRMED. (A114)

By footnote in which the Fourth District disagrees with *Schorb*, it appears to justify this disagreement on the basis that §61.1301(1)(a) is not ambiguous on its face. It is respectfully suggested that, among other things, the Fourth District overlooked or misinterpreted the addition of subsection (3) to §61.1301, Fla. Stat. (1987) by Chapter 88-176, Laws of Florida which most certainly conflicts with the language of §61.1301(1)(a), Fla. Stat. (1991). We further suggest that applying accepted principles of statutory construction, the

clearly permissive language of subsection (3) becomes controlling rather than creating an ambiguity.

The District Court's attention was also invited to §61.14 Fla. Stat. (1991) which includes subsections (2) and (3) reading in part as follows:

> "(2) ....No court has jurisdiction to entertain any action to enforce the recovery of separate support, maintenance, or alimony other than as herein provided.
> (3) This section is declaratory of existing public policy and of the laws of this state."

In rendering its decision the District Court did not comment on the apparent conflict between §61.14 and §61.1301(1)(a) Fla. Stat. (1991).

With regard to the addition to Footnote 2, first appearing in the District Court's Corrected Opinion (A114), citing as authorities the opinions in *Aetna Casualty & Surety Co. v. Huntington National Bank*, 17 Fla. L. Weekly S750, S751 (Fla. Dec. 17, 1992) and *Streeter v. Sullivan*, 509 So. 2d 268, 271 (Fla. 1987), it is respectfully submitted that the District Court overlooked or failed to consider the clear legislative intent (as distinguished from the legislative history) in the enactment of Session Law Chapter 86-220 and reenactments of, together with amendments to, Chapters 61, 88 and 409, Florida Statutes, since the publication of Florida Statutes 1986 and 1987, sections of which were construed in *Schorb v. Schorb*, *supra*, and especially the 1988 addition of subsection (3) to §61.1301, Florida Statutes.

As pointed out above and also in Issue I, §61.1301(3) Fla.

Stat. (1991) reads:

> (3) It is the intent of the Legislature that this section may be used to collect arrearages in child support payments which have been accrued against an obligor. [emphasis added]

A reasonable interpretation of this section added by Chapter 88-176, Laws of Florida is that the use of §61.1301, Fla. Stat. (1991) is permissive rather than mandatory, that it may be used only in child support situations and that it as to arrearages it is permissive rather than mandatory. Because of the clear intention that the adoption of Chapter 86-220, Laws of Florida was to deal with child support as opposed to alimony it is not reasonable for it to be interpreted in the present case in 1991 that its use to collect arrearages in alimony is mandatory and to collect arrearages in child support is permissive.

Even if §61.1301, Fla. Stat. (1991) was properly used in the case at bar by using the terms "alimony" and "child support" interchangeably it is suggested that it would apply only to "arrearages." This was not done in the trial court's Income Deduction Order (A64-65) which also erroneously ordered the deduction of $400.00 per month of future alimony payments.

In the District Court opinions of 13 January 1993 (A95 and A114) it said regarding §61.1301(1)(a) Fla. Stat. (1991):

> 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.

> The unmistakable meaning of this text is that the enforcement of any alimony obligation requires an income deduction order. Here the court obviously

enforced the unpaid alimony [emphasis added] by a money judgment.

It is submitted that §61.1301(1)(a), Fla. Stat. (1991) should be construed in its entirety which reads:

> (a) 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. Copies of the orders shall be served on the obligee and obligor. If the support order directs that support payments be made through the depository, the court shall provide a copy of the support order to the depository. If the obligee is a IV-D applicant, the court shall furnish copies of the support order and the income deduction order to the IV-D agency. [emphasis added]

With respect to trial court's ordering the deduction of $400.00 per month of future alimony payments, as distinguished from "unpaid alimony", there is no basis in the orders preceding the Income Deduction Order (A64-65) for such a deduction. The Amended Judgment of Arrearage (A51) dealt only with arrearage and was not "...an order establishing, enforcing or modifying an alimony...obligation..." except as to arrearages. The Order and Judgment of Dismissal on Petition for Modification (A35) as altered (A53-54) simply denied Husband's Petition for Modification (A17) and was not "...an order establishing, enforcing, or modifying an alimony...obligation...." There was no modification and the order establishing the alimony obligation was the Final Decree of 31 July 1964! Income Deduction Orders did not exist in 1964 and §61.1301, Fla. Stat. (1991) cannot constitutionally or otherwise be applied retroactively to the year 1964.

Chapter 61, Fla. Stat. (1991) contains no definition of

"support" but one is found in §409.2554. Fla. Stat. (1991) reading as follows:

> (10) "Support" means:
> (a) Support for a child and spouse or former spouse who is living with the child or children, but only if a support obligation has been established for that spouse and the child support obligation is being enforced under title IV-D of the Social Security Act; or
> (b) Support for a child who is placed under the custody of someone other than the custodial parent pursuant to s.39.41. [emphasis added]

The terms "Obligee" and "Obligor" are defined in §61.046, Fla. Stat. (1991) as follows:

> (8) "Obligee" means the person to whom support payments are made pursuant to an alimony or child support order.
> (9) "Obligor" means a person responsible for making support payments pursuant to an alimony or child support order. [emphasis added]

and in §409.2554, Fla. Stat. (1991) which contains the definition as follows:

> (5) "Obligee" means the person to whom support payments are made pursuant to an alimony or child support order.
> (6) "Obligor" means a person who is responsible for making support payments pursuant to an alimony or child support order. [emphasis added]

along with the only definition of "support" as quoted above.

Of significance in defining the term "support," "support order" and the combined term "alimony or child support" are these terms use in Chapter 88, Fla. Stat. (1991). After describing the Legislative intent in §88.012 and Purpose in §88.021 the Definitions provided in §88.031 contain the following:

> (9) "Petitioner" means a person, including a state or political subdivision, to whom a duty of support is owed or a person, including a state or political subdivision, who has commenced a proceeding for enforcement of an alleged duty of support or for

registration of a support order. It is immaterial if the person to whom a duty of support is owed is a recipient of public assistance.
(15) "Respondent" means any person owing a duty of support or against whom a proceeding for the enforcement of a duty of support or registration of a support order is commenced.
(19) "Support order" means any judgement, decree, or order of support in favor of a petitioner, whether temporary or final or subject to modification, revocation, remission, regardless of the kind of action or proceeding in which it is entered. [emphasis added]

Then in 1992 the Legislature added the definition of "support" as §88.031(20) reading:

(20) "Support" includes:
(a) Support for a child, or child and spouse, or former spouse who is living with the child or children, but only if a support obligation has been established for that spouse and the child support obligation is being enforced under Title IV-D of the Social Security Act; or
(b) Support for a child who is placed under the custody of someone other than the parent pursuant to s.39.41. [emphasis added]

The 1993 Florida Legislature has seen fit to substantially amend §61.1301, Fla. Stat. (1992 Supp.) and certain definitions in §61.046, Fla. Stat. (1992 Supp.). Although these amendments do not directly affect the case at Bar, it is submitted that they are highly valuable for the purpose of construing the statutes which do affect the case at the bar.

Chapter 93-188, Laws of Florida, a Committee Substitute for Senate Bill No. 428, became a law on 5 May 1993 and amends

§61.1301(1) and (1)(a), Fla. Stat. (1992 Supp.) to read as follows:*

> (1) ISSUANCE IN CONJUNCTION WITH AN ~~ALIMONY OR CHILD SUPPORT~~ ORDER ESTABLISHING, ENFORCING, OR MODIFYING AN OBLIGATION FOR ALIMONY OR CHILD SUPPORT ~~OR MODIFICATION~~. --
> (a) Upon the entry of an order establishing, enforcing, or modifying an ~~alimony or a child support~~ obligation for alimony, for child support, or for alimony and child support, the court shall enter a separate order for income deduction if one has not been entered. Copies of the orders shall be served on the obligee and obligor. If the ~~support~~ order establishing, enforcing, or modifying the obligation directs that ~~support~~ payments be made through the depository, the court shall provide to the depository a copy of the ~~support~~ order establishing, enforcing, or modifying the obligation ~~to the depository~~. If the obligee is a IV-D applicant, the court shall furnish to the IV-D agency copies of the ~~support~~ income deduction order and the order establishing, enforcing, or modifying the obligation ~~and the income deduction order to the IV-D agency~~.

§61.1301(3), Fla. Stat. (1992 Supp.) was amended to read:

> (3) It is the intent of the Legislature that this section may be used to collect arrearages in child support payments or in alimony payments which have been accrued against an obligor.

and there were other consistent minor amendments to §61.1301(1) and (2), Fla. Stat. (1992 Supp.).

The same Session Law also amended subsection (8) and (9) of §61.046, Fla. Stat.(1992 Supp.) to read:

> (8) "Obligee" means the person to whom ~~support~~ payments are made pursuant to an ~~alimony or child support~~ order establishing, enforcing, or modifying an obligation for alimony, for child support, or for alimony and child support.
> (9) "Obligor" means a person responsible for making ~~support~~ payments pursuant to an ~~alimony or a child~~

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*Coding: Words ~~stricken~~ are deletions; words underlined are additions.

~~support~~ order establishing, enforcing, or modifying and obligation for alimony, for child support, or for alimony and child support.

Although the writer of this brief was not privy to the legislative reasons for the above quoted amendments, it may well have resulted from a reading of the Opinions of the Fourth District of 13 June 1993 in the case at bar by one or more legislator members of the Family Law Section of the Florida Bar.

> In making material changes in the language of a statute, the legislature can neither be assumed to have regarded such changes as without significance, nor to have committed an oversight or to have acted inadvertently. To the contrary, the general rule is that a change in phraseology indicates persuasively, and raises a presumption, that a departure from the old law was intended, particularly where the wording of the statute is radically different. On the other hand, every change in phraseology does not indicate a change in substance and intent. Thus, a change in phraseology may be only to improve the diction, or to clarify that which was previously doubtful. 73 Am Jur 2d, Statutes §236 [emphasis added]

One thing is certain, and that is by the retention of the permissive "may" in §61.1301(3), Fla. Stat. (1992 Supp.) the use of income deduction orders is still not mandatory in the collection of arrearages of any alimony obligation.

Because by its very provisions Chapter 93-188, Laws of Florida is not applicable, other than for statutory interpretation purposes, in the case at Bar, it is noteworthy that it may be in violation of Article III, §6, Fla. Const. by failure to even briefly express an amendment to §61.1301, Fla. Stat. (1992 Supp.) in its title.

It is respectfully submitted that an extensive review of Florida Statutes (1991) leads to the conclusion that the

enforcement of any alimony obligation does not require an income deduction order. Furthermore, the Income Deduction Order is clearly invalid as to the attempted deduction of future alimony installments of $400.00 per month established in the year 1964. For these reasons, the decision of the District Court should be quashed, with directions to the District Court to remand this case to the trial court with instructions to vacate the Income Deduction Order.

CONCLUSION

For the reasons set forth in this brief, it is respectfully submitted that this Court should order the decision of the District Court of Appeal, Fourth District be quashed, with directions to the District Court to remand this case to the trial court with instructions to vacate the Income Deduction Order.

Respectfully submitted this 22nd day of June, 1993.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing, together with a copy of Appendix, was furnished by mail to Donald K. Corbin, Esquire, Counsel for Appellee, 727 N. E. 3rd Avenue, Suite 301, Fort Lauderdale, FL 33304, this 22nd day of June, 1993.

CURTIN R. COLEMAN