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IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,610

CURTIN R. COLEMAN, II,

Petitioner

vs.

MARIE PRESTON LAND COLEMAN

Respondent

PETITIONER'S BRIEF ON JURISDICTION

ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL
DCA Case No. 92-1582 (combined with No. 92-0826)

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ORIGINAL

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PREFACE

This brief is accompanied with an appendix containing the two opinions by the Fourth District Court and the conflict case by the Second District Court, the page numbers of which will be indicated by the prefix "A".

This brief is by petitioner, Curtin R. Coleman, II, defendant in the lower tribunal and appellant in the Fourth District Court of Appeal, on conflict jurisdiction directed to an opinion of the latter Court dated 13 January 1993 (A1-2). A motion for rehearing was denied by Order of 17 March 1993 and review by this Court was sought by notice filed 14 April 1993.

A second "Corrected Opinion," also dated 13 January 1993, was filed in the District Court and was mailed in envelope postmarked 28 January 1993 (A3-5), the same date on which petitioner's motion for rehearing was received and filed in the District Court. On telephone inquiry to the Clerk of the District Court petitioner 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. The Order of 17 March 1993 denying motion for rehearing filed 28 January 1993 was silent regarding the amendment to motion for rehearing but on telephone inquiry to the Clerk, petitioner was advised that the Order was intended to cover the motion for rehearing as amended.

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."

STATEMENT OF THE CASE AND OF THE FACTS

The parties were divorced in 1964 and Husband was ordered to pay permanent periodic alimony, which he did until 1989.

In November 1989 Husband filed a supplemental petition for modification which proceeded to trial. Upon Husband resting his case in chief, Wife moved for a "directed verdict" [involuntary dismissal] and the trial court in September 1991 entered Order and Judgment of Dismissal on Petition for Modification. Thereafter on Wife's Application for Judgment set on a motion calendar hearing over Husband's objections, the trial court entered an Amended Judgment of Arrearage in January 1992. Husband timely filed motions for rehearing of the September 1991 and January 1992 Judgments and after denial of the same by the trial court, as well as denial of Husband's motion for stay pending review and other motions, Husband timely filed his notice of appeal of the two final orders which became Case No. 92-0826 in the Fourth District Court.

On 20 April 1992 Wife served her Verified Motion for Income Deduction Order and on 22 April 1992, the trial court entered, *ex parte*, an Income Deduction Order, effective immediately. Upon receipt of copy of Wife's motion and the Income Deduction Order Husband sought relief from the trial court but could obtain no hearing before having to file his notice of appeal from a non-final order which became Case No. 92-1582 in the Fourth District Court.

It is undisputed that the youngest child of the parties became *sui juris* in 1973 and that no minor children whatsoever have resided with Wife since these supplemental proceedings began in November 1989.

The Fourth District Court consolidated Case No. 92-0826 and No. 92-1582 and that Court's opinions, both dated 13 January 1993 (A1-5), adjudicated the single issue presented in Case No. 92-1582 and did not address the multiple issues presented in Case No. 92-0826.

SUMMARY OF ARGUMENT

The decision of the Fourth District Court (A3-4) conflicts with the decision of the Second District Court in *Schorb v Schorb*, 547 So.2d 985 (Fla. 2d DCA 1989) (A6-10), which 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. The Fourth District (A3-4) held that §61.1301(1)(a) Fla. Stat. (1991) requires an income deduction order for the enforcement of <u>any</u> alimony obligation and in a footnote expressly disagreed with *Schorb v. Schorb*, *supra* to the extent that it holds otherwise. Conflict is direct and express.

ARGUMENT

ISSUE ON REVIEW

WHETHER THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL CONFLICTS WITH THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL IN *Schorb v. Schorb*, 547 So.2d 985 (Fla. 2d DCA 1989)

The *Schorb* court (A6-10) 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 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. (A8)

On the other hand, in the case at bar, the Fourth District decided as follows:

> 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. (A4)

By footnote the Fourth District goes on to expressly disagree with *Schorb v. Schorb, supra*, to the extent that it holds otherwise. Thus conflict is direct and express.

It is especially significant that the *Schorb* court construed §61.1301, Fla Stat. (19<u>87</u>) [emphasis added], which section ended with Subsection (2)(k) whereas the Fourth District in the case at bar construed §61.1301, Fla. Stat. (19<u>91</u>) [emphasis added] to which the Legislature had added subsection (3) providing: "It is the intent of the Legislature that this section <u>may</u> [emphasis added] be used to collect arrearages in child support payments which have accrued against an obligor." It is suggested that the *Schorb* decision was responsible for this addition in order that the courts need no longer struggle with the Legislative intent of Chapter 86-220, Laws of Florida or §61.1301, Fla. Stat. (1991).

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 1989 addition of subsection (3) to §61.1301, Fla. Stat. which most certainly conflicts with the language of §61.1301(1)(a). We further suggest that applying accepted principles of statutory construction, 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:

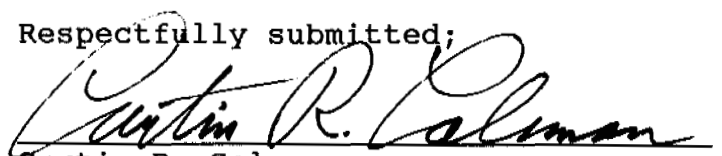
> "(2) ....No court has jurisdiction to entertain any action to enforce the recovery of separate support, maintenance, or alimony other than as herein provided.
> (3) This section is declaratory of existing public policy and of the laws of this state."

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).

CONCLUSION

This Court should accept jurisdiction and review the matter on the merits.

Respectfully submitted;



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by mail to Donald K. Corbin, Esquire, Counsel for Respondent 727 N. E. 3rd Avenue, Suite 301, Fort Lauderdale, FL 33304, this 21st day of April, 1993.

Curtin R. Coleman