047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,610

CURTIN R. COLEMAN, II

Petitioner,

vs.

MARIE PRESTON LAND COLEMAN,

Respondent.

PETITIONER'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

Respondent's Reply [Answer] Brief on the Merits contains argument, based in part on alleged facts, which requires documentation for rebuttal not included in the previously filed Petitioner's Appendix on the Merits. Thus there is served and filed concurrently with this Reply Brief, Petitioner's Supplemental Appendix on the Merits. In this brief the prefix symbol "SA" will be used to indicate page locations in the Supplemental Appendix. The prefix symbol "A" will continue to be used for reference to the previously filed Appendix.

REBUTTAL TO ARGUMENT PRESENTED IN APPELLEE'S REPLY [ANSWER] BRIEF

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.

Husband's initial brief clearly relied on the conflict jurisdiction of this Court by illustrating the direct and express conflict of the Fourth District's decision under review (A113-114) with the decision in *Schorb v. Schorb*, 547 So.2d 985 (Fla. 2d DCA 1989) (A108-112). In Husband's argument on Issue I he also appropriately went back to argue why the trial court should have followed *Schorb v. Schorb*, *supra*, as well as *Department of Health and Rehabilitative Services of the State of Florida, et al. v. Reed*, 560 So.2d 426 (Fla. 4th DCA 1990).

Wife's brief first criticizes Husband's reliance on the *Reed* case because it was a *per curiam* affirmance, and argues it is speculative insofar as the *Reed* decision reference to *Schorb*. Most certainly *Reed* was *per curiam* but it went further and "AFFIRMED on the authority of *Schorb v. Schorb*, 547 So.2d 985 (Fla. 2d DCA 1989)". This is not mere speculation. Since there was only one express "holding" in *Schorb*, this is the obvious "authority" followed in *Reed*.

Wife's brief then comments on why *Schorb* is "bad law". Husband disagrees and relies on his initial brief plus a brief discussion of *Schorb* later in this rebuttal.

Wife's brief next comments on "Senate Bill 428, Florida Senate Legislative Session of 1993" and states "The Senate Bill passed 36 Ayes 0 NAYS and was presented to the Governor who signed it on May 5, 1992". This is confusing, although perhaps academic. Husband's copy of Florida Session Laws shows that Section 61.1301, Florida Statutes, 1992 Supplement, [including § 61.1301 (1) (a)], was amended by Chapter 93-188, Committee Substitute for Senate Bill No. 428, Section 5, which became a law without the Governor's approval May 5, 1993. It also contains the following provisions:

> Section 8. This act does not apply to proceedings pending on October 1, 1993, but those proceedings remain governed by the law in effect on September 30, 1993.
> Section 9. This act shall take effect October 1, 1993.

Wife's brief then relies on footnote 2 of the District Court's opinion (A114) and its reference to this Court's opinions in *Aetna Casualty & Surety Company v. Huntington National Bank*, 609 So.2d 1315 (Fla. 1992) and *Streeter v. Sullivan*, 509 So.2d 268, 271 (Fla. 1987). It is submitted that these two decisions are clearly distinguishable from the case at bar for the reasons which follow.

In *Aetna Casualty* this Court clearly distinguished the "legislative history" of a statute from its "legislative intent". In that case Aetna had in desperation resorted to comments made in debate of the proposed bill. Such was not the situation in the

Schorb decision where the court properly observed that statutes arising out of the same act should be read *in pari materia*.

In *Streeter v. Sullivan*, this Court's judicial labors were eased where the Legislature had seen fit to provide a clear definition of the term "employee."

In *Schorb*, the Legislature had not seen fit to provide a separate definition of "Support" for inclusion in Chapter 61 although it had in the same act (Chapter 86-220) provided precisely the same definitions in Chapter 61 and §409.2554 for "Obligee" and "Obligor" and a definition of "Support" in §409.2554.

Although the *Schorb* court did not find it necessary to do so, it could have gone further in its discussion of the legislative intention of enacting Chapter 86-220 and cited the inclusion of the clearly expressed legislative intent in §409.2551.

Wife's brief concludes its argument on Issue I by contending that the recent action by the Florida Legislature renders this issue moot. Wife's counsel misreads Chapter 93-188 and overlooks its expressed non application to proceedings pending on 1 October 1993.

ISSUE II

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

The Wife's brief objects to Husband's presentation of this Issue separately from Issue I, contending this attempts to circumvent this Court's order accepting jurisdiction.

Obviously this Court would not have accepted jurisdiction had it not appeared that the decision of the Fourth District (A113-114) directly and expressly conflicts with *Schorb v. Schorb, supra*. To the extent that the decision of the Fourth District not only conflicted with *Schorb* but went further, we do not believe that this Court is without jurisdiction to properly address this extension of the Fourth District's interpretation of §61.1301, Fla. Stat. (1991), especially should it find that it is not a correct interpretation of the statute. We simply chose to argue this as a separate issue. For this Court to remain completely silent beyond a decision to resolve a somewhat narrow conflict between the case at bar and *Schorb* could lead to needless future litigation not only in the case at bar but also other cases involving the same issue.

In *Ellison v. City of Fort Lauderdale*, 183 So.2d 193 (Fla. 1966) this Court accepted jurisdiction by petition for certiorari on the basis

of alleged conflict on the issue of the authority of the Florida District Courts of Appeal to issue common-law writs of certiorari. This Court held and observed as follows:

> Therefore, the District Court was in error in denying its jurisdiction to issue such a writ in the instant case. We can, with the case in this posture, either remand to the District Court with directions to issue the writ or we can determine the whole matter here. However, it is the policy of this Court to avoid needless litigation and secure a final determination whenever possible. In accordance with this principle we will examine the decision of the Circuit Court.

Wife's brief correctly states that the *Schorb* court did not address the issue of whether an Income Deduction Order is mandatory or permissive. The primary reason this is true is because such issue was not clearly before that court. If it had been an issue the court would have no doubt disregarded it and ruled as it did.

One issue was clearly not before the *Schorb* court and that is the subsequent provision of §61.1301 (3) added by Chapter 88-176, Laws of Florida. This clearly made the use of §61.1301 permissive for collection of arrearages in child support and no doubt the *Schorb* court would have either ignored this subsection or used it to fortify the holding it did make. In considering subsection (3) to §61.1301, which clearly makes the income deduction statute permissive as to child support arrearages, the question arises whether the Legislature, by implication, meant the statute to be mandatory for collection of alimony arrearages. Certainly such an intention is inconceivable and the amendment is the obvious result of "legislative patchwork" during a busy session.

It is submitted that the Fourth District Court's holding "...that the enforcement of any alimony obligation requires an income deduction order." (A114), even when applied to the statutory provisions enacted pursuant to Chapter 93-188 (not affecting the case at bar), will create serious and mostly unnecessary problems for litigants and the trial courts within the Fourth Appellate District and elsewhere. In considering §61.1301 (1)(b)1.,Fla. Stat. what if there is no "payor" to direct? What if the alimony order "established" constitutes lump sum alimony? How then is the "required" income deduction order to be structured? These are only two examples which immediately came to mind.

Counsel for Wife then makes the following astonishing argument:

> 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.

We are not quite certain what Wife's counsel is saying but it seems to be that whether or not it was permissible for the trial court to enter the completely *ex parte* Income Deduction Order is irrelevant simply because it did so or stated otherwise "doing so makes it O.K." even if not permissible under the statutes.

Counsel for Wife then again argues what is the desire of the Florida Legislature in the year 1993 in the enactment of Chapter 93-188. We are here concerned with the Florida Statutes in effect when the Income Deduction Order (A64-65) was entered in April 1992 or possibly when these supplemental proceedings were initiated in

November 1989 by the filing of Former Husband's Supplemental Petition for Modification (A17). We have responded to this argument under Issue I of this reply brief.

Next, counsel for Wife argues in opposition to Husband's argument on page 23 of his initial brief to the effect that there was no basis in the orders preceding the Income Deduction Order (A64-65) for a deduction of $400.00 per month of <u>future</u> alimony payments as distinguished from "<u>unpaid alimony</u>".

Husband continues to contend that following the Final Decree of 31 July 1964 (A1-16) divorcing the parties (at which time income deduction orders did not exist) there has not been "...the entry of an order establishing, enforcing or modifying an alimony or a child support obligation..." as between the parties <u>except</u> as to the <u>arrearages</u> in the Amended Judgment of Arrearage (A51). The sequence of orders relevant as to alimony in the case at bar were:

> Order and Judgment of Dismissal on Petition for Modification, dated 9/5/91, filed 9/6/91 (A35)
>
> Order (on Motion Calendar) dated and filed 11/19/91 (A49)
>
> Judgment of Arrearage, dated 12/5/91, filed 12/6/91 (A51)
>
> Amended Judgment of Arrearage, dated 1/23/92, filed 1/24/92 (A51)
>
> Income Deduction Order, dated 4/22/92, filed 4/23/92 (A64-65)

In response to Husband's foregoing argument Wife makes the assertion:

> "There was petitioner's own attempt at modification [A17], which was dismissed [A35], which clearly falls within the statutory guideline and there was the Wife's Counter-Petition for Contempt [A18-20] which resulted in

> the Amended Judgment of Arrearage [A51]. Both of those actions fall within the purview of Florida Statutes 61.1301."

The foregoing argument of Wife's counsel may well be considered by this Court to be harmless but to the author of this reply brief he is attempting to suggest that Wife's Counter-Petition for Contempt resulted in an order within the purview of § 61.1301 (1)(a), Fla. Stat. (1991). We will now demonstrate that such a suggestion is false and that Wife has argued one set of facts to the Fourth District Court and another to this Court.

Husband has served and filed concurrently with this Reply Brief his Supplemental Appendix on the Merits. The contents are:

> Appellee's Reply [Answer] Brief, served 24 May 1993 in Case Number 92-826 in the Fourth District Court of Appeal (SA1-16)
>
> Order on Appellant's Statement of the Evidence and Proceedings Pursuant to Rule 9.200 (b)(4) Fla. R. App. P. dated 7 January 1993 (SA 17-29)

At SA15 Wife acknowledges filing a Counter-Petition for Contempt. The following paragraph begins:

> The Wife notified the Court [presumably at the Motion Calendar hearing on 19 November 1991 which Husband could not attend] that due to the testimony of the Husband to nonpayment, she was entitled to a money judgment as a matter of law. She abandoned her plea for Contempt at that time. [emphasis added]

Most certainly the mention of such abandonment was not in the presence of Husband and if made was totally off the record.

In the Order on Appellant's Statement etc., the text on pages SA 27-29 pertain to Wife's Application for Judgment, Husband's Response and Motions thereto, the Motion Calendar hearing of 19

November 1991, the Order thereon and the Judgment of Arrearage and Amended Judgment on Arrearage (A36-51). Nowhere is there mention of Wife's Counter-Petition for Contempt or a hearing or order thereon or, for that matter, Wife's abandonment of her plea for contempt as argued to the Fourth District Court in Wife's brief.

The Motion Calendar Order of 19 November 1991 (A49), handwritten by Wife's counsel, orders that "Husband's Motion for Continuance is denied. Wife's Application for Judgment is granted. Former Wife will submit Judgment in the Amount of 10,400.00 + costs + interest with reservation for Attorney's Fees." The simple undisputed fact is that Wife's counsel presented to the trial judge, on an absolutely *ex parte* basis without an advance copy to Husband, the Judgment of Arrearage (A50) improperly reciting that the cause came "...on to be heard upon the Petition for Contempt and other relief." and repeated this procedure in submitting the Amended Judgment of Arrearage (A51).

In Husband's initial brief, on pages 18-19, he comments on the constitutional issues he raised in Case No. 92-826 still pending in the Fourth District at that time. By now this Court has received its copy of the PCA decision entered on 21 July 1993 by the District Court in that case and unfortunately it appears highly unlikely that this Court will be able to review this decision.

We will not comment further on the double talk arguments in the briefs of Wife in this Court and the District Court. That is for the Court to do if it deems appropriate.

In summary, the record in these proceedings is devoid of the

entry of an order establishing, enforcing or modifying an alimony or child support obligation as between the parties except as to the arrearages in the Judgement of Arrearage and Amended Judgment of Arrearage. Thus there is no basis for a deduction of $400.00 per month of future alimony payments in the Income Deduction Order.

Wife's brief concludes its argument on Issue II by commenting on the fact that the Fourth District has not considered some of the arguments made by Husband under Issue II. Wife overlooks the fact that the posture of these proceedings relative to the Income Deduction Order, when presented to the District Court in its Case No. 92-1582, were that the trial court had entered that order in conflict with *Schorb v. Schorb, supra*, contrary to the guidelines in Point I before the District Court in *State v. Hayes*, 333 So.2d 51 (Fla. 4th DCA 1976) at which time *Schorb* and *H.R.S. v. Reed*, supra were the only decided cases on the issue in the State of Florida, *Reed* of course being without a full opinion. It would not have been appropriate appellate advocacy for Husband to have argued to the District Court all of the possible reasons the trial court may have erred outside of failing to follow *Schorb* which was on "all fours" with the case appealed from the trial court. Then when the District Court not only decided in conflict with *Schorb* but went further it became necessary to argue other reasons why the District Court decided incorrectly.

CONCLUSION

For the reasons set forth in Petitioner's Initial Brief and this Reply Brief, it is respectfully submitted that this Court should order the decision of the District Court of Appeal, Fourth District to 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 2nd day of August, 1993.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing, together with a copy of Petitioner's Supplemental Appendix, was furnished by mail to Donald K. Corbin, Esquire, Counsel for Respondent, 727 N.E. 3rd Avenue, Suite 301, Fort Lauderdale, FL 33304, this 2nd day of August, 1993.

Curtin R. Coleman