IN THE SUPREME COURT OF FLORIDA

PETRA SMITH,

Appellant / Petitioner,

v.

J. ROBERT FISHMAN,

Appellee / Respondent.

_____ /

FLA. S. CT. NO. 83,243

4th DCA CASE NO. 92-00865

APPELLANT'S INITIAL BRIEF

On Appeal from the Fourth District Court of Appeal on a Certified Question of Great Public Importance.

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A. The District Court disregarded over one hundred years of case law holding that unrebutted evidence cannot be set aside unless it is inherently improbable or unreasonable. The District Court's decision thereby also circumvents the procedure this Court set forth in Bowen v. Bowen, 471 So. 2d 1274 (Fla. 1985), regarding the allocation and shifting of the burden of proof in contempt proceedings. The Court also misread the facts. 31

B. The District Court's decision disregards and conflicts with well established case law on indispensable parties and escrow accounts where it is undisputed that the accident settlement fund to which the former wife allegedly had access was in the hands of a third party's attorney who was never joined in the action below. The decision further ignores Florida Rule of Professional Conduct 4-1.15 Safekeeping Property which may require the third party's attorney to deposit the fund into the trial court's registry where there are conflicting claims to those funds. Such funds cannot be held to be "available" to the former wife to pay the purge amount in the contempt order herein under review. 36

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PRELIMINARY STATEMENT

Petitioner will be referred to as "former wife" or "Ms. Smith." Respondent will be referred to as "former husband" or "Mr. Fishman."

References to the record on appeal will be designated "(R:)." The transcript of the underlying contempt proceedings appear at pages 1-20, volume 1, of the record; the relevant and most recent financial affidavit of the former wife, Ms. Smith, appears at pages 622-626, volume 4.

Copies of the transcript of the contempt proceedings as well as the trial court's contempt order and the decisions of the District Court can also be found in the Appendix this Brief.

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STATEMENT OF THE CASE AND FACTS

THE CASE

Petitioner, Petra Smith, seeks review and reversal of the Fourth District Court of Appeals decision affirming a trial court Order of Contempt for failure to pay certain of her former husband's attorney's fees and costs, arising from visitation enforcement proceedings, and ordering her to be incarcerated, without further hearing, until such time as she pays $1,000.00 directly to William E. Raikes, III, the former husband's attorney. (R: 629). See also attached Appendix for copy of said order. The Order of Contempt granted Ms. Smith a five day grace period during which time she moved, through counsel, for a stay pending appeal. (R: 630, 633).

The fees and costs that Ms. Smith is ordered to pay the attorney are unrelated to any support obligations she has to her former husband; she has no such obligations. In fact, as will be shown below, it is the husband who is seriously in arrears on his child support obligation.

Initially, the Fourth District affirmed the contempt order by relying in its decision solely on Heitzman v. Heitzman, 281 So. 2d 578 (Fla. 4th DCA 1973), though it had been pointed out to the Court that the decision did not appear to provide support for contempt proceedings for attorney's fees unrelated to child support or alimony. (App. Ehx. 3, Appellant's 4th DCA Reply Brief at 6).[1] However, the District Court did state in this first decision that: "We believe that the enforcement of those [visitation] rights is sufficiently important to authorize the enforcement of a fee order related thereto by the power of contempt." (Fourth District Decision filed Nov. 10. 1993, App. Exh. 3).

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[1] Motion was made to the District Court to include with the transmitted record the parties' briefs as well as the motions for reargument. These are necessary to a full understanding to the procedural context of the case and the development of the issues on appeal. Petitioner, Ms. Smith does not seek to argue the case at this point, but since it is petitioner's position that the District Court, essentially sua sponte, sought to create new constitutional law or modify existing constitutional law, it is important to present the exact sequence of steps whereby this case was ultimately certified to this Court.

A second holding in the District Court's very brief decision states that the underlying record supports a finding that Ms. Smith had a "present ability" to pay the contempt order's purge amount:

> The record reflects the existence of an available fund from which a substantial portion of the fees could be paid. While the former wife testified she had ***pledged*** the use of that fund for other purposes, the record also reflects a basis for the trial court to deny credibility to this testimony.

Id. (emphasis added). This holding and the fact that the term ***pledge*** does not appear anywhere in the record below or in the trial court's contempt order forms the basis for part of petitioner, Ms. Smith's, argument in Point II (A.). Only the term ***assignment*** appears in the proceedings before the trial court. (R. 11-12, see also R. 1-19, the transcript of the entire contempt proceedings - also at App. Exh. 6).

The trial court had also based its finding of a "present ability" to pay the purge amount based on the fact that, as court stated, Ms. Smith "***will receive*** an income tax refund check from the Internal Revenue Service." (Trial court's Contempt Order, App. Exh. 5) (emphasis added). In the contempt proceedings before the trial court Ms. Smith had testified that she had not yet even filed her tax papers. (R. 6-7, 14). The District Court's decision did not address this aspect of the trial court's decision.

Only upon the submission by Ms. Smith, as the appellant below, of extensive motions for rehearing and rehearing en banc, as well as suggestions to certify, did the District Court certify the case to this Honorable Court as raising an issue of great public importance.

Appellant, Ms. Smith, respectfully pointed out to the District Court that, at the very least, its decision created a new exception to established constitutional law prohibiting incarceration for debt, except, of course, for the very limited public policy exception for alimony and child support (and attorney's fees directly related thereto), and created a conflict with decisions of this Supreme Court, other District Courts, as well as with prior decisions of the Fourth District itself. (See generally, Motions for Rehearing and Rehearing En Banc and footnote 1, supra).

Additionally, since the District Court seemed to place great reliance on the rather vague language of Heitzman v. Heitzman, supra at p. 2, the unpublished lower court orders in that case were submitted as additional authority to the District Court demonstrating that the attorney's fees sought and allowed to be enforced by order of contempt in that case were, in fact, related to the husband's child support obligations.[2]

The District Court's decision on rehearing no longer cited Heitzman, but based its denial of rehearing on this Court's decision in Orr v. Orr, 192 So. 466, 141 Fla. 112 (Fla. 19) (discussed infra at Point I (A.). However, the District Court did certify the following question to this Honorable Court:

> MAY THE POWER OF CONTEMPT BE USED TO ENFORCE THE PAYMENT OF ATTORNEY'S FEES DIRECTED TO BE PAID BY ONE FORMER SPOUSE TO THE OTHER FOR FEES INCURRED BY THE LATTER IN ENFORCING VISITATION RIGHTS WITH THE PARTIES' CHILD?

THE FACTS

Ms. Smith is the custodial parent of the couple's five year old son who is presently enrolled on a local pre-school. (R. 232). The former husband relocated to New Jersey sometime in 1991. (R: 567-68). With the former husband providing only nominal child support (and he is

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[2] As was indicated to the District Court below, Petitioner is unaware of any authority or rule that lower court decisions or orders need be judicially noticed by reviewing courts. On the other hand, appellate courts are presumed to rely on the record before them; consequently the District Court was asked to take judicial notice of the Directions to the Clerk filed in Heitzman showing that the Final Judgment (providing for child support) was part of the record before the Fourth District when it made its decision in that case. The District Court's decision on rehearing did not state whether it took judicial notice of the Directions; therefore the request to take judicial notice is repeated with respect to this Honorable Court. (See Motion for Rehearing at pp. 7-8. and Appendix thereto at Exh.s 4 and 5.)

Since Heitzman became an issue on appeal (raised by the former husband's attorney), and was never even cited to the trial court - there is no reason the Court should deny taking judicial notice. Moreover, the discussion surrounding Heitzman concerns and issue of law not fact, to wit, whether there is any precedential authority for allowing contempt and incarceration to enforce the payment of attorney's fees unrelated to child support or alimony.

substantially in arrears on that), Ms. Smith works six days a week to provide for herself and their son. (Id., R: 12).

In January of 1992, attorney William Raikes, assertedly on the former husband's behalf, brought contempt proceedings against Ms. Smith to recover certain of his fees. Civil as well as criminal contempt was alleged, the latter without even attempting to meet procedural requirements. (R: 3, 610-11). At issue were attorney's fees and costs awarded against Ms. Smith in connection with three enforcement proceedings. The underlying issues involved visitation, make-up visitation, and phone contact between the child and former husband. (R: 413, 428, 442).

There is no indication that the lower court made any findings regarding Ms. Smith's ability to actually pay the attorney fees at the time they were assessed. Nor does the order taxing attorney's fees set forth legally required findings regarding the number of hours reasonably and justifiably expended; the court simply held that the attorney was entitled to compensation for "all time expended." Ms. Smith could not afford to appeal these orders. (R: 597, 601&22)

At the hearing on the Motion for Order of Contempt, however, the former wife did establish that her household expenses exceeded her income, she had to borrow money from family and friends to get by, and that she lacked the present ability to pay all or a substantial amount of Mr. Raikes's fees. (R: 4-14). Ms. Smith also testified that she sent Mr. Raikes whatever she could afford on a, more or less, monthly basis. Unfortunately, this only amounted to about ten dollars per month for a total of thirty dollars for the two and half month period from the time the attorney's fees were assessed to the date of the contempt hearing. Id.

Specifically, the court below ordered Ms. Smith to pay Mr. Raikes $2,875.00 on December 16, 1991. (R: 597-98). Court costs were taxed against her on December 27, 1991. (R: 601). Only days later, on January 7, 1992, Mr. Raikes filed the Motion for Order of Contempt for Ms. Smith's failure to pays the fees and cost. (R: 610-11). The motion also raised allegations of harassment against the former wife. Id. A hearing on the motion for contempt was held before the Honorable John Fennelly on March 6, 1992. (R: 1-20). Mr.

Raikes opened by saying he was seeking attorney's fees as well as an order of indirect criminal contempt for some alleged harassment of his client who, apparently, remained in New jersey and did not even attend the hearing , whereupon the court informed the attorney that he had failed to meet the procedural requirements for criminal contempt. An order to show cause had not been served, the matter was not properly set for a criminal contempt hearing, etc.. (R: 3). The attorney then proceeded with the real issue at hand, the matter of his fees. Id. He called Ms. Smith to the stand as his sole witness. Id.

Ms. Smith testified that she owed the fees, that she intended to pay the fees, that she was, in fact, making every effort to pay his fees. (R: 4). She further testified that ten dollars per month was all she could presently afford to pay but that she expected to receive a refund on her income taxes from which she would pay additional monies to the attorney. (R: 6-7, 14). At the time of the hearing (March 6), though, she had not yet calculated her taxes and did even not know the amount of the anticipated refund. Id.

Her former husband had sent her $300.00 in child support two days before the hearing, but was still behind in his support payments in addition to the arrearages he was required to pay on a weekly basis. (R: 6). At the end of December 1991 the arrearages totaled approximately $4000.00. (R: 604). "I do not get it [child support] on a consistent basis, and it always varies," she explained. Id. Moreover, the child support payments were reduced in November of 1991 by nearly two-thirds to $57.00 per week plus arrearages by order of the court in modification proceedings. (R: 565-69. 602-07). The former husband had, apparently, injured his back in 1990 which temporarily interrupted his employment. By September 1991, he was working full time though at significantly reduced wages; the court discounted assertions that the former husband was conveniently employed at such reduced wages by his father and noted only that he was *paid* by a friend of his father. (R: 602-607, 554-58).

Mr. Raikes sought to establish several changes in Ms. Smith's income since an October 1991 financial statement, which he did not introduce in evidence at the hearing. (R: 4-5).

However, a contemporaneous financial statement, executed March 5, 1992, and accepted by Mr. Raikes, was submitted into evidence on the former wife's behalf. (R: 6,12). It established $1465.00 as her total net income per month, and $1655.00 as monthly expenses not including the payments she had been making to the attorney. (R: 622-26) Thus, Ms. Smith demonstrated a net monthly deficit of, on average, $190.00 per month to which Mr. Raikes did not object and did not attempt to refute. (R: 6-14).

Mr. Raikes attempted to establish several other sources of funds. Ms. Smith readily testified that her boyfriend occasionally helped her financially in addition to the rent he paid her; the rent was included on the financial statement. (R: 7-8,12). He lent her money and helped her get a car when her old one deteriorated beyond repair; he helped her pay some of her own attorney's fees. (R: 7,14). The attorney attempted to show that Ms. Smith paid back her boyfriend before paying his, Mr. Raikes's, fees but the former wife explained that she had not been able to pay back much. In fact, the only repayment she made to her friend occurred the previous year (long before she was ordered to pay Mr. Raikes) when she paid him about $1000.00 upon receiving her tax return. (R: 7-8, 597-98). As indicated above, the tax return she was expecting at the time of the hearing had not even been calculated, nor was any evidence submitted that her tax papers had even been filed at that time.

Another alleged source of money of particular interest to Mr. Raikes concerned a $6,500.00 settlement from a personal injury (auto accident) case in which Ms. Smith had suffered injuries. As the attorney himself put it, "presently there's being held $6,500.00 by the liability carrier's attorney." (R: 6). *Held ...by the liability carrier's attorney* - the attorney failed to submit any evidence whatever that these funds were available to Ms. Smith or even that they would become available. (R: 4-14). Moreover, Ms. Smith testified that the money had long since been assigned to her previous attorney, Mr. Jerry Randolph, to whom she owed over $7,300.00. (R: 11-12). The assignment predated the order to pay Mr. Raikes's fees by over a

year. Id. And this did not even include the money owing to the law firm representing Ms. Smith in the personal injury matter.

Finally, Mr. Raikes apparently sought to establish Ms. Smith's father as a source of funds. The father had paid, *the previous year*, for a two week trip to Germany where he lived so that Ms. Smith could visit with him on his 50th birthday. That is, he paid for her plane ticket and her expenses while she stayed with him in Germany. (R: 14-15). One of the two weeks constituted her paid vacation from work, the other week was an unpaid leave. Id.

Additional testimony by the former wife established that she made monthly payments on outstanding balances on several credit cards ranging from about $30.00 to $75.00 each, though frequently she would not pay anything depending on her financial circumstances. Most of the credit card companies appeared to have cut off further credit. (R: 8-10).

Ms. Smith explained that she managed to keep from "going under" financially despite her monthly income deficit by skipping payments on her bills and trying to make them up another month, with some assistance from her boyfriend, and "now and then... I do get child support. Up until about four months ago, I did not, so it actually balances itself out," but, she continued, "I don't have any extra money." (R: 13). She stated that she intended to continue to pay some money to Mr. Raikes every month as she had been doing and to pay more when she received her tax refund. (R: 13-14).

At the conclusion of her testimony, the court asked Ms. Smith whether she had the written assignment to Mr. Randolph with her. She did not, but the court was informed by her attorney that Mr. Raikes had deposed Mr. Randolph and, thus, knew not only that Ms. Smith did not have the money in her possession but that there were prior claims to it. Mr. Raikes did not deny this and even offered to "testify briefly" about it. (R: 15).[3] Asked by the court what relief he was seeking, he answered:

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[3] This honorable Court is advised that no reference herein is made to the actual pages of the deposition. Reference is, and has been below before the District Court, solely to the transcript of the contempt hearing before the trial court - at which hearing the deposition was, however,

> All right, Your Honor, first of all, we're asking for willful contempt of this court...hold her in contempt and require her to pay a sizable amount to purge herself of contempt. ...
>
> Secondly, Your Honor, *because of the settlement that is pending*, I have been in contact with the attorney for the liability carrier...
> ...
> we are entitled to a writ of garnishment.

(R: 15-17) (italics added). The writ of garnishment was to be for suit money pursuant to F.S. §61.12. The court, however, replied: "But you didn't ask for that." (R: 17). Counsel then reiterated his demand that Ms. Smith be incarcerated "[i]f she doesn't pay." Id. Counsel for Ms. Smith kept pointing out that the former wife should not be held in willful contempt if she lacked the funds to pay. The court, however, appeared to take offense that the original order was not being obeyed:

> We disagree, with all due respect. This Court order is going to be obeyed. Its order is going to get real unpleasant.

(R: 18). Then, while accepting Ms. Smith's testimony regarding the existence of the personal injury settlement, the court rejected her sole and unrebutted testimony that the money was not available to her. Id. The court next directed Mr. Raikes to prepare the Order of Contempt. The Order, which issued March 19, 1992, set forth that the former wife's income as $1,465.00 per month as indicated in her financial affidavit, plus the child support the former husband was supposed to pay. In addition, the order expressly stated that the "former wife has available to her a personal injury settlement in the amount of $6,500.00 and will receive an income tax refund check from the Internal Revenue Service on her 1991 income tax return." Incarceration was ordered "without further hearing" unless or until the purge amount of $1,000.00 was paid to the former husband's attorney. The court further assessed additional attorney's fees, the specific

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discussed. The legal significance of this colloquy - that Respondent never really challenged the existence of the assignment, while very peripheral to the case, is discussed infra at Point II (B.).

amount to be later determined, against Ms. Smith, again, without any determination of her ability to pay. (R: 629-31).

A timely Notice of Appeal was filed March, 20, 1992. (R: 632).

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SUMMARY OF ARGUMENT

MAY THE POWER OF CONTEMPT BE USED TO ENFORCE THE PAYMENT OF ATTORNEY'S FEES TO BE PAID BY ONE FORMER SPOUSE TO THE OTHER FOR FEES INCURRED BY THE LATTER IN ENFORCING VISITATION RIGHTS WITH THE PARTIES CHILD?

The very straightforward issue in the case is whether to expand the present very limited exception to the general constitutional prohibition against debt, specifically, whether to expand that exception to allow for the collection of attorneys fees, and costs, arising from visitation disputes.

To date, there does not appear to be a single case in the state of Florida, except of course for the one at bar, where a custodial parent has been ordered incarcerated for failing to pay fees to a former spouse's attorney that are unrelated to an underlying child support or alimony obligation.

The certified question should be answered in the negative, first because the constitution expressly prohibits incarceration for debt. Fla. Const. art. 1, §11.

Contempt is already available to enforce visitation rights - by incarcerating the offending parent if necessary. Consequential attorney's fees may, of course, be granted to the prevailing party, provided that the requisite analysis of the offending parent's ability to pay is conducted. "The contempt of a noncomplying party is only one of several factors a trial court must examine in exercising its authority to award attorney's fees." Geronemous v. Geronemus, 599 So. 2d 256 (Fla. 4th DCA 1992). Such analysis, incidentally, was never conducted prior to the trial court's awarding the attorney's fees in question against the Petitioner, Ms. Smith. The attorney's fees, as they are unrelated to Ms. Smith's child support or alimony obligations to her former husband, she has none, constitute financial obligations (but see discussion below) which the attorney can only enforce by the measures available to creditors in general.

Partly because of the existing availability of contempt to enforce visitation, cases like the one at bar do not present the overriding policy considerations underlying the judicially recognized exception, to the constitutional prohibition against imprisonment for debt, allowing a dependent spouse to compel payment of alimony and child support (and related fees) by contempt. It is respectfully submitted that creating a new constitutional rule or an additional exception to the existing rule should be seen as beyond the proper jurisdiction of not just the District Court but of this Honorable Court as well.

Second, in exceeding its jurisdiction, and in not following accepted procedure requiring the District Court to rule in accordance with existing law before certifying a matter to the Supreme Court, Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973), the District Court seriously prejudiced Ms. Smith by compelling her to perfect and pursue further review before this Court with the considerable added burden of proceeding as the petitioner.

Having decided to create new law, or at least considerably modify existing law, the District Court then overlooked a number of legal issues including, inter alia, that unrebutted evidence is controlling, that rules regarding money held in trust or escrow require the holder of the funds to be joined as an indispensable party, and that funds held by a third party's attorney are not "available" absent some evidence that there is access to those funds. The District Court also misread both the facts of the case and the law on "pledges" versus "assignments." Unrebutted evidence established that certain funds in question had been assigned long before Ms. Smith's financial obligation to the former husband's attorney, Mr. Raikes. The term "pledge" does not even appear in the record.

Additionally, Petitioner argues that the underlying order directing her to pay the former husband's attorney is unenforceable by any means as an unconstitutional order of criminal contempt. Bowen v. Bowen, 471 So.2d 1274, 1276-77 (Fla. 1985).

Finally, for the above bases and Ms. Smith's great financial need, the District Court abused its discretion and failed to follow its usual precepts in denying Ms. Smith appellate attorney's fees.

MAY THE POWER OF CONTEMPT BE USED TO ENFORCE THE PAYMENT OF ATTORNEY'S FEES TO BE PAID BY ONE FORMER SPOUSE TO THE OTHER FOR FEES INCURRED BY THE LATTER IN ENFORCING VISITATION RIGHTS WITH THE PARTIES CHILD?

POINT ONE

THE CERTIFIED QUESTION SHOULD BE ANSWERED IN THE NEGATIVE.

THE ORDER OF CONTEMPT AND INCARCERATION FOR THE FORMER WIFE'S FAILURE TO PAY THE FORMER HUSBAND'S ATTORNEY AMOUNTS TO AN UNCONSTITUTIONAL INCARCERATION FOR DEBT AND MUST BE REVERSED.

A. The case does not fall into the limited public policy exception recognized by this Court allowing contempt for enforcement of alimony or child support. In fact, it is the former husband that has the support obligation and is seriously in arrears. Consequently there is no basis in law or public policy to use this case to carve out a new exception to well settled constitutional law.

This Honorable Court has expressly held:

> **In Florida, imprisonment for debt is specifically prohibited by the Florida Constitution.**

Gibson v. Bennett, 561 So. 2d 565, 570 (Fla. 1990) (emphasis added). Another Florida Supreme Court decision that expressly and directly holds that imprisonment for debt is unconstitutional is Goode v. Nelson, 110 So. 17, (Fla. 1917), where, on a habeas corpus petition, the Florida Supreme Court reversed, as violating both the state and federal constitutions, a judgment against a debtor and ordered his release from incarceration.

Because the underlying basis for the imprisonment in Goode was for the "failure or refusal ... to perform labor or service under the contract, or for failure or refusal to pay for the money or other thing of value so received upon demand" and additionally the foregoing was unrelated to

any element requiring proof of fraud, the Court held the imprisonment unconstitutional under the "supreme law of the land on the subject" - the Thirteenth Amendment of the United States Constitution providing that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Id. at 18.

The Florida Supreme Court has to date only recognized two (2) exceptions to the constitutional prohibition against imprisonment for debt. The first is the exception for fraud which is an express part of the Florida Constitution's prohibition set forth at Article I, Section 11. The second is the exception allowing imprisonment for failure to pay spousal or child support, though, the term "exception" is not quite accurate.

> It has been the law of Florida for many years and well settled that alimony or maintenance from the husband to the wife is not a debt within the meaning of the constitutional inhibition against imprisonment for debt.

State ex rel. Krueger v. Stone, 188 So. 575, 576 (Fla. 1939). See also Gibson, 561 So. 2d at 570.

> [A] support obligation is viewed as a personal duty, not only to a spouse but to society generally. Bronk v. State, 43 Fla. 461, 31 So. 248 (1901). Thus, because the courts are enforcing a duty not a debt, enforcement of spousal or child support by contempt, under both federal and state law, is not a violation of Florida's prohibition against imprisonment for debt.

Gibson, 561 So. 2d at 570. Bronk v. State, 31 So. 248 (Fla. 1901).

"Suit money" includes attorney fees, Orr v. Orr, 192 So. 466, 167 (Fla. 1939), and is also recoverable together with alimony or child support by contempt proceedings on behalf of the dependent spouse. Krueger, 188 So. at 576. A close reading of the two cases makes clear that with respect to the dependent former spouse a fair distinction cannot be made between the support owed and the related attorney's fees. "Alimony" (or child support) and "suit money" are conjunctive, or linked, for purposes of the limited exception to the constitutional prohibition against imprisonment for debt. See also Price v. Price, 382 So. 2d 433,437 (Fla. 1st DCA 1980).

In Price, which involved the Appellees' failure to pay a court ordered award of attorney's fees arising out of litigation on a divorce decree, the First District held that the use of contempt, under circumstances unrelated to support, "simply to vindicate the authority of the court, cannot be justified." Id. at 438. The District Court's analysis relied expressly on the holding in Krueger that alimony and related suit money were indistinguishable and recognized that not all awards of attorney's fees in domestic cases fall into that category.

> The issue is whether the attorney's fee award in this case falls within the category of debts for which "no person shall be imprisoned," Article I, § 11, Florida Constitution, or within the category of awards of alimony, child support, and suit money in domestic relations cases, which the courts of Florida have long since declared to be excluded from the constitutional prohibition. We reverse the trial court's contempt order because we find the money judgment here is subject to the constitutional provision, precluding the court's use of its contempt power and a sentence of imprisonment for enforcement.

Price, 382 So. 2d at 435.

A review of the case law indicates that whenever orders to pay attorney's fees are enforced by contempt proceedings involving the threat of incarceration they invariably are related to alimony or child support enforcement proceedings. See, e.g., Bowen v. Bowen, 471 So. 2d 1274 (Fla. 1985); Krueger, supra; Bronk, supra; Warnhoff v. Warnhoff, 493 So. 2d 52 (Fla. 4th DCA 1986).

Put another way, courts lack subject matter jurisdiction to enforce payment of such debt, i.e. unrelated to child support or alimony, by contempt power. Price, 382 So.2d at 438; See also Laing v. Laing, 431 So.2d 324, 325 (order of contempt reversed as to Mr. Laing for failure to pay in a divorce proceeding his attorney, a third party); Seng v. Seng, 590 So.2d 1120 (contempt inappropriate to enforce ex-wife's obligation under divorce decree).

The order of contempt under review here is totally unrelated to alimony or support. The former husband receives neither, and the fees owed his attorney are thus not enforceable under

the traditional bases that exempt certain monetary awards from the constitutional prohibition against imprisonment for debt. Pursuant to that constitutional prohibition, both state and federal, the former wife, therefore, may not properly be incarcerated for the money she owes Mr. Raikes, the former husband's attorney.

The worthy cause of facilitating visitation cannot create jurisdiction where it has not previously existed. Even the Fourth District recognized this general principle in Schwarz v. Waddell, 422 So.2d 61 (Fla. 4th DCA 1982) (partly superseded by Gibson v. Bennet, 561 So. 2d 565 (Fla. 1990). In Schwarz, the District Court refused to allow contempt proceedings to enforce child support arrearages once the child reached the age of majority reasoning that there were no longer grounds for the support exception to probation against imprisonment for debt. The Court recognized that it lacked the jurisdiction to even expand the existing exception. Years later, this Court addressed the issue in Gibson, supra, and determined essentially that since the support obligation was never a "debt" within the meaning of Florida Constitution Art. I, § 11, it did not become such a debt when the child reached the age of majority; there were also strong policy considerations in preventing particularly egregious deadbeat parents from avoiding their support obligations. Such consistent and conservative reasoning, however, cannot be used to expand the existing exception to encompass financial obligations that are not even remotely related to support. The Court would have to fashion an entirely new exception and it is respectfully submitted that the Court either lacks the subject matter jurisdiction to do so because of the unambiguous language of the constitution or lacks a sufficient public policy basis to stretch its existing jurisdiction to recognize an additional exception to the prohibition against imprisonment for debt to financial obligations related to visitation litigation.

The District Court below appears to have overlooked the fact that the Petitioner, Ms. Smith had already been held in contempt for her interference with visitation. Visitation may itself be enforced by imprisonment upon the establishment of contempt. Lee v. Lee, 43 So. 2d 904, 905 (Fla. 1950); De Mauro v. State, 19 FLW D557 (Fla. 3rd DCA March 8, 1994). Obviously, it

was not necessary for the trial court below to go so far as to even threaten incarceration to secure Ms. Smith's compliance with visitation. The trial court did, however, levy a substantial penalty - that of paying the husband's attorney's fees.[4] If incarceration for contempt was not necessary to enforce visitation in the present case, it hardly seems appropriate for an ensuing financial obligation. There are not the same public policy concerns as there are in securing from a financially superior parent their obligations for support and alimony. Moreover, the incarceration of a custodial parent of a five year old (at the time of the proceedings below) whose father lives over one thousand miles away, in New Jersey, owes thousands in back support and generally pays support only intermittently, is not in the best interests of the child.

Additionally, the District Court's decision creates an exception from the constitutional prohibition against imprisonment for debt that may ultimately be difficult to distinguish from the equally or even more legitimate claims of other creditors having problems collecting on their judgments. Is the attorney's claim herein more worthy of extraordinary judicial intervention than, say, a family who has lost its home or had to pay twice for subcontractor's work due to a contractor's financial irresponsibility (which doesn't rise to the level of fraud)? How about the victim of gross medical malpractice where the doctor doesn't carry insurance because of the Florida Constitution's provisions allowing individuals to shelter their assets? It is respectfully submitted that the District Court did not fully consider the true ramifications of its very brief decision. The policy considerations simply do not exist to create a new and possibly unwieldy constitutional exception.

Contempt is indeed available to enforce the award of attorney's fees to a *dependent* spouse (of either gender), or one receiving child support, provided that the fee is related to those support requirements; otherwise, as is the case here, incarceration for contempt is constitutionally prohibited as a remedy for enforcement of a debt. The District Court's decision must be reversed.

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[4] The term "penalty" is used because there was never a finding of Ms. Smith's ability to pay those fees which finding is required t be made pursuant to controlling case law. Bowen v. Bowen 471 So. 2d 1274 (Fla. 1985) (see discussion, infra at p.) (R: 597-61, 622).

B. The District Court, in fashioning a new exception to the constitutional prohibition against imprisonment for debt, exceeded its jurisdiction and violated long standing procedure that precludes district courts from departing from or modifying Supreme Court precedent.

In quashing a decision of the Fourth District Court of Appeal, the Supreme Court of Florida unequivocally held:

> **No district court can legitimately circumvent a decision of this Court.**

Continental Assur. Co. v. Carroll, 485 So. 2d 406, 409 (Fla. 1986) (emphasis added) citing Hernandez v. Garwood, 390 So. 2d 357 (Fla. 1980); Greene v. Massey, 384 So. 2d 24 (Fla. 1980); Morgan v. State, 337 So. 2d 951 (Fla. 1976); State v. Dwyer, 332 So.2d 333 (Fla. 1976). See also Endres v. Mathias, 353 So. 2d 843 (Fla. 1977), in which the Florida Supreme Court took only nine (9) lines to summarily vacate a decision of the Fourth District Court in which conflict with a Florida Supreme Court decision had been conceded.

In Hoffman v. Jones, 280 So.2d 431 (Fla. 1973), the Florida Supreme Court ultimately adopted the Fourth District's decision, which had been certified to the Supreme Court, to jettison the contributory negligence rule and replace it with one of comparative negligence. The Supreme Court, however, expressed a certain uneasiness with the District Court's procedure:

> The District Court of Appeal attempted, therefore, to overrule all precedent of this Court... In so doing, the District Court has exceeded its authority.
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> In a dissenting opinion, Judge Owen stated well the position of the District Court's of Appeal when in disagreement with controlling precedent set down by this Court:
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> > "[I]f and when such a change is to be wrought by the judiciary, it should be at the hands of the Supreme Court rather than the District Court of Appeal.
> > ... The majority decision would appear to flatly overrule a multitude of prior decisions of our Supreme Court, a prerogative which we do not enjoy."
> > Jones v. Hoffman, 272 So. 2d 529, p. 534.

> The other District Courts of Appeal have recognized the relationship between their authority and that of this Court. Griffin v. State, 202 So. 2d 602 (Fla. App. 1st, 1967); Roberts v. State, 199 So. 2d 340 (Fla.App.2d, 1967); and United States v. State, 179 So. 2d 890 (Fla.App.3d, 1965). To allow a District Court of Appeal to overrule controlling precedent of this Court would be to create chaos and uncertainty in the judicial forum, particularly at the trial level.

Hoffman v. Jones, 280 So. 2d at 433-434. This Court explained its concerns and set forth appropriate procedure as follows:

> We point out that mere certification to this Court by a District Court of Appeal that its decision involves a question of great public importance does not vest this Court with Jurisdiction. If neither party involved petitioned for a writ of certiorari, we would not have jurisdiction to answer the question certified or to review the District's Court's action.
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> This is not to say that the **District Courts** of Appeal are powerless to seek change; they **are free to certify questions to this Court for consideration, and even to state their reasons for advocating change. They are, however, bound to follow the case law set forth by this Court.**

Hoffman, 280 So.2d at 434.

In Conley v. Boyle Drug Co., 477 So. 2d 600, 602 (Fla. 4th DCA 1985), quashed 570 So. 2d 600 (Fla. 1986), Judge Anstead expressly recognized that while the Court could advocate changes in the law, it was bound to first follow Supreme Court case law. The District Court refrained in that case from recognizing a new theory of tort liability and reluctantly affirmed the trial court's dismissal of the action. The Florida Supreme Court ultimately quashed that decision and allowed the plaintiff the relief requested. In Schwarz, however, discussed supra at p. 16, the Florida Supreme Court did not provide relief in the area of child support arrearages after the child reaches the age of majority until years after that decision and in a different case entirely. As the Supreme Court recognized in Hoffman, even certification does not vest the Court with

jurisdiction. Had the District Court herein followed proper procedure and reversed the trial court order of contempt and incarceration because 1. the constitution and Florida Supreme Court case law, Gibson, supra, Goode, supra, prohibits it, and 2. there is no case law whatever that supports the underlying order of contempt under the circumstances of this case, it is unlikely that the case would have found its way to the Supreme Court docket, particularly if the District Court had granted Ms. Smith her appellate attorney's as the District Court invariably does in indistinguishable cases. (See discussion on attorney's fees, infra at p.).

Additionally, since the Fourth District felt in Schwarz that it could not expand the very limited support/alimony exception to imprisonment for debt, than similarly here the District Court could not properly create an entirely new and unprecedented exception even if it was for the arguably laudable purpose of enforcing visitation. While the best interest of the child are certainly served by visitation, once the problems with visitation had been worked out without resort to incarceration, it is at best questionable whether the best interests of the child, in this case a five year old at the time of the order of contempt, are served by incarcerating the custodial parent and primary caregiver because she hasn't paid enough to the former husband's attorney, particularly where the father lives over one thousand miles away. It should be recalled that Ms. Smith did not refuse to pay the attorney, but that she only sent him a small amount per month because that was all she could afford.

More importantly, though conflict with a Florida Supreme Court decision has not been expressly conceded by the former husband's attorney, the existing law in the area is sufficiently clear that the case comes amply close to the situation in Endres v. Mathias, supra, where this Court summarily vacated the District Court decision, that similar action is warranted here.

It goes without saying that decisions of the Florida Supreme Court are controlling over District Court decisions to the contrary; it follows from Judge Anstead's decision in Conley. Nevertheless, the District Court below initially sought to rely on a vaguely worded old decision in Heitzman v. Heitzman, 281 So. 2d 578 (Fla. 4th DCA 1973), to support affirmance of the

contempt order against Ms. Smith, despite the fact that Heitzman relied solely on decisions allowing contempt against spouses (former husbands) in default on their support obligations. Not until the Motion on Rehearing and the submission of the unpublished trial court's Final Judgment as supporting authority that the former husband in that case was, in fact, in default on his support obligation, did the District Court apparently drop its reliance on Heitzman, substituting in its stead this Court's decision in Orr v. Orr, 192 So. 466 (Fla. 1939).

As in Heitzman, however, Orr is a case involving attorney's fees owed the wife in a divorce action. While the Court recognized that "this is a case of nonpayment of counsel fees rather than failure to contribute so the support of the wife," the Court further held that "it is the disobedience of the court's order, *as well as the necessity of the spouse*, which furnishes grounds for this process of court." Moreover, the Supreme Court had just spent the previous five paragraphs reciting that:

> [T]he wife 'may in the bill for divorce, or by petition, claim alimony and suit money...' The term 'suit money' is broad enough to include attorney's fees and all costs of the divorce proceeding pendente lite.
>
> ...
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> This court has further held that failure to pay alimony allowed by an order of court places the person so failing to comply with the order in contempt of court.

Orr, 192 So. at 467 (quoting Smith v. Smith, 90 Fla. 824, 107 So. 257). There is nothing in the language of this Court in Orr to support incarceration for failing to pay sums owed that are unrelated to "alimony and suit money." The Court's language is clear that the attorney's fees sought are "suit money" related to the husband's conduct whereby he:

> "wilfully (sic) refuses to comply with the order of the court commanding him to pay alimony, costs and attorneys' fees."

Orr, 192 So. at 467. Moreover, to the extent either decision conflicts with Bowen v. Bowen, 471 So. 2d 1274, wherein the Florida Supreme Court resolved some ambiguities and arguably open questions with respect to the distinctions between and the procedural requisites of both civil and

criminal contempt, any holding or language not consistent with the latter case has clearly been superseded. For example, the Supreme Court in Orr states, the "evidence in this case, while tending to show present inability, on the part of appellee, to pay, indicates clearly his [negative] attitude towards such payment." Orr, 192 So. at 468. Today, under Bowen, such present inability would preclude granting civil contempt, though criminal contempt would be in order if the necessary procedural requirements were met and it was established that the party willfully divested himself or herself of assets. Bowen, 471 So. 2d at 1279. Bowen expressly held that it was receding from any language to the contrary in its earlier cases. The decision in Bowen also only recognizes the availability of contempt in "family support matters." Id. at 1278. Inasmuch as the present case does not involve a support matter, there remains a lack of any case law basis for the order of contempt and incarceration here under review, while, on the other hand, the provisions of Art. I §11 of the Florida Constitution continue to control.

Precisely because of Section 11, the District Court's have fashioned a test to determine the availability of civil contempt :

> [I]n examining obligations to see if contempt proceedings are permitted, the test is whether the payments involve an exchange of financial obligations as opposed to payments that serve to discharge the party's duty to support the other party and the children. If the former, then the obligation is in the nature of a settlement of property rights; the latter concerns payments considered to be alimony or support, which are enforceable by contempt.

Filan v. Filan, 549 So. 2d 1105 (Fla. 4th DCA 1989). Given the constitutional prohibition against imprisonment for debt, Fla. Const. art. 1, §11, the courts have consistently required the above analysis before sustaining the drastic remedy of incarceration for contempt for failure to pay divorce related obligations. Veiga v. State, 561 So. 2d 1335 (Fla. 5th DCA 1990); Pabian v. Pabian, 480 So. 2d 237 (Fla. 4th DCA 1989); Howell v. Howell, 207 So. 2d 507 (Fla. 2nd DCA 1986); Ball v. Ball, 440 So. 2d 677 (Fla. 1st DCA 1983). To add insult to injury, the same day the decision under review here issued, a different panel of the Fourth District overturned, relying

on Pabian v. Pabian, 480 So. 2d 237 (Fla. 4th DCA 1989), a contempt order against a husband directing him to pay the former wife certain monies because contempt was not available to enforce debt unrelated to support. Dorta v. Dorta, 626 So. 2d 312 (Fla. 4th DCA 1993).

In Filan this Court found the husband's obligation to make second mortgage payments was not related to support or maintenance duties. Alimony or other support had not been awarded in that case, and thus the "contempt power of the trial court was erroneously invoked." Id. at 1106. The Court also relied on its earlier decision in Pabian v. Pabian, supra, holding that the contempt power is only available to enforce debts that are "in the nature of support" commitments. Pabian, 480 So. 2d at 238. That case, in turn, relied on case law going back to the Florida Supreme Court's decision in State ex rel. Cahn v. Mason, 4 So. 2d 255 (Fla. 1941), which long ago demonstrated that not all divorce related obligations raise the court's contempt power in matters of enforcement.

Since in the present case the former wife's financial obligation cannot in any manner be characterized as being in the nature of or even related to any support obligations owing her former husband, it being the former husband's duty to provide (child) support to the former wife, the order of contempt against her violates the constitutional prohibition against imprisonment for debt and must be reversed. If the District Courts are unwilling, that is, consider it constitutionally prohibited, to extend the availability of civil contempt to mortgage payments that, fundamentally, relate to the availability of a necessity such as shelter, than clearly a redundant availability of contempt for attorney fees, in addition to the existing availability of contempt for the underlying visitation enforcement, goes too far. Additionally, there remains, in appropriate cases, the option of pursuing criminal contempt to enforce visitation with its attendant involvement of the State. De Mauro v. State, 19 FLW D557 (Fla. 3rd DCA March 8, 1994).

A look at De Mauro also helps place the present case into context and clarifies the unavailability of contempt here. In De Mauro, the former wife disappeared with the children for three months. While the Third District suggested that criminal contempt might still be available, it

held that once the children were found and returned to the father, who had custody, civil (that is - coercive) contempt was no longer available against the former wife. Because in the present case the payment of the attorneys fees no longer has the coercive effect of reinstating visitation, that was already accomplished by the original order of contempt on the visitation violation, it no longer constitutes civil contempt under either the standards of De Mauro or under this Court's decision in Bowen. Since the former wife is complying with the visitation schedule, the only coercion involved in the present case is for the payment of a financial obligation - and that is prohibited by the express terms of the constitution.

For the numerous bases recited above, the decision of the Fourth District Court of Appeal must be reversed. Moreover, the unequivocal language of the Florida Constitution and of this Honorable Court in Gibson v. Bennett, supra, and Goode v. Nelson, supra, that incarceration for debt is prohibited, except in cases of fraud or for enforcement of family support obligations (defined by decisional law as a duty rather than a debt), warrants summary reversal pursuant to this court's decisions in Hoffman v. Jones and Endres v. Mathias, supra at pp. 18-20.

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POINT TWO

REGARDLESS OF WHETHER THE COURT RECOGNIZES A NEW EXCEPTION TO THE CONSTITUTIONAL PROHIBITION AGAINST IMPRISONMENT FOR DEBT, THE FOURTH DISTRICT ERRED ON BOTH THE LAW AND FACTS IN DISREGARDING UNREBUTTED EVIDENCE THAT THE FORMER WIFE DID NOT HAVE ACCESS TO A FUND FROM WHICH SHE COULD PAY THE PURGE AMOUNT SET FORTH IN THE ORDER OF CONTEMPT AND INCARCERATION.

This Honorable Court is not limited to ruling solely on the certified question, that is, once the Court has jurisdiction, and here jurisdiction lies on a certified question of great public importance as well as on the District Court decision's conflict with a number of Supreme Court and other district court decisions, the Court may "at its discretion, consider any issue affecting the case." Cantor v. Davis, 489 So. 2d 18 (Fla. 1986). Regardless of the Court's decision on Point I of this brief, it is respectfully requested that the Court rule on the closely related issue that Ms. Smith simply did not have available to her the funds to pay the $1000.00 purge amount in the trial court's Order of Contempt.

Initially, it may be of assistance to the Court to review the law regarding contempt as well as the related facts.

Civil contempt's purpose serves to coerce compliance on the part of a person subject to a court order. Bowen v. Bowen, 471 So.2d 1274, 1277 (Fla. 1985). Absent the ability to comply with the order, a person cannot be incarcerated for civil contempt, or in the words of the Florida Supreme Court in the leading case on the issue, "[w]ithout the present ability to pay from some available asset, the contemnor holds no key to the jail house door." Id. It is this ability to comply with the court order in question that justifies incarceration of an individual following fairly summary civil proceedings.

Although not at issue here, it remains well established that even where one has purposefully divested oneself of assets, civil contempt cannot be sustained. Id. at 1279. The point with respect to the proceedings at bar, is that a court cannot use civil contempt, as the trial court below attempted to do (and which the District Court sustained), as a punitive weapon. Criminal contempt, with its extensive due process guaranties, serves that purpose. Bowen, 471 So.2d at 1279; Price v. Price, 382 So.2d 433, 438 (1st DCA 1980). Though the former husband's attorney below demanded criminal sanctions as well, despite the lack of allegations that the former wife divested herself of available assets, that cause summarily failed for lack of compliance with the requisite procedure.

Civil contempt actions, according to Bowen, involve a two-stage inquiry: "first, a determination of whether the respondent willfully violated the court's order; second, the decision as to what remedy is appropriate." Perez v. Perez, 599 So.2d 682, 683 (Fla. 3rd DCA 1992). The underlying Order of Contempt here, ordering Ms. Smith to pay $1,000.00 to the former husband's attorney or face incarceration without further hearing, fails both stages of the analysis.

Ms. Smith's testimony was unrebutted that she did make regular, albeit small, payments to Mr. Raikes, the former husband's attorney, pursuant to the lower court's order. These were not token payments; the former wife skips paying certain bills each month, hoping to make up the payments at some other time, and relies on help from family and friends to get by. The case law establishes beyond doubt that Mr. Raikes has no right of contribution from Ms. Smith's family or friends. The monies owed him must come from her own available assets. Perez, 599 So.2d at 683. Ms. Smith further testified that she intended to continue making monthly payments to the

attorney and to remit to him a greater amount upon receiving her tax refund which at the time of the hearing had not yet even been calculated.

The former wife works six days per week holding down a full time job and cleaning houses for people on Saturdays. Her former husband pays child support intermittently and owes thousands in arrearages. (R: 12-13, 604). She has no cash, no savings, no property. (R: 622-26). Ms. Smith settled a personal injury claim for $6,500.00 and will never see a penny of that money since she owes her former attorney, Mr. Randolph, over $7,000.00, and he, in turn, has long since had the rights to the settlement assigned to him (up to the amount of his fees, presumably). Of course, Ms. Smith's personal injury attorney probably also has a claim to a substantial part of the settlement as well. Thus, Ms. Smith does not have present access to those funds, as is required before she can be held in contempt for failing to turn them over to Mr. Raikes, and will not have access to them in the future.

The former husband's attorney knows this. Not only did he depose Mr. Randolph, the wife's former attorney, but he was in close contact with the liability carrier's attorney who had not released the settlement funds. In Mr. Raikes own words before the trial court: "there's presently being held $6,500.00 by the liability carrier's attorney." (R: 6, 15). And later in colloquy with the court, he referred to the "settlement that is pending." (R: 16). This establishes beyond doubt that Ms. Smith did not have access to or control over the $6,500.00. Furthermore on appeal before the District Court, **Mr. Raikes conceded in the Appellee's Answer Brief, at page 3 ¶4, that the funds were "being held in escrow,"** that is, that they were contractually tied up in the hands of a third party because that is what being held in escrow means. (See discussion below at Point II B.) Moreover, Mr. Raikes argument to the trial court demonstrates what he really wanted: a writ

of garnishment against the liability carrier so that he could, effectively, preempt other creditors, Mr. Randolph and the personal injury attorney, who had prior claims to the settlement funds. (R: 16). This is not a proper use of the court's contempt powers. Contempt is not available to resolve competing claims of third parties. See, e.g., Laing v. Laing, 431 So.2d 324 (Fla. 3rd DCA 1983).

The significance of Mr. Raikes concessions both to the trial court and on appeal cannot be ignored. The Fourth District has historically disliked attorney's unsworn statements made to trial court's, but these have generally been disputed issues of fact made before juries. See Leon Shaffer Golnick Advertising, Inc. v. Cendar, 423 So. 2d 1015 (Fla. 4th DCA 1982). Other district courts distinguish Shaffer where, as here, there is no dispute regarding the attorney's statements or where objection has not been made to such attorney statements. Bartholomew v. Bartholomew, 611 So. 2d 85 n. 1 (Fla. 3d DCA 1993); Centennial Inc. Co. v. Fulton, 532 So. 2d 1329 (Fla. 3rd DCA 1988). In Centennial, the Third District held:

> [W]e are not so willing as the court in Leon Shaffer..., to hold that representations of counsel as an officer of the court mean nothing. Obviously, a lawyer's unsworn statement cannot overcome actual testimony to the contrary. In this case, however, there was neither such evidence, nor even any argument which challenged the accuracy of the attorney's representation.

Id. at 1331. Here, of course, the undisputed statements are those of Respondent/Appellee's counsel. Moreover, they constitute concessions regarding a legal conclusion based on the undisputed testimonial evidence off Ms. Smith that the funds in question were unavailable as they were in the hands of a third party's attorney. Additionally, appellate courts frequently accept parties' concessions on appeal. See, e.g., Livingston v. Livingston, 19 FLW D633, 634 (Fla. 1st DCA 1994) (wife concedes error on appeal). Even if Mr. Raikes' statements are disregarded, there remains, of course, the unrebutted testimony that the funds were in the hands of an

insurance company's attorney who can properly only hold those funds in either escrow or trust. (See discussion on escrow, infra at Point II B.).

Based on Ms. Smith's unrebutted testimony and the admissions of the movant, through his attorney Mr. Raikes, there can be no finding of willful violation of the lower court's orders assessing fees and costs against Ms. Smith and the lower court's findings to that effect constitute an abuse of discretion requiring reversal of the court's Order of Contempt. The evidence also demonstrates that under the second prong of the Bowen inquiry, Ms. Smith did not have the present ability to comply with the $1,000.00 purge requirement thus precluding the availability of incarceration as a remedy.

> Where incarceration is under consideration as a possible remedy for a civil contempt, there must be an affirmative separate finding that the contemnor possesses the present ability to comply with the purge conditions set forth in the contempt order... Absent such an unqualified finding, the court is limited to such non-incarcerative options such as payroll deductions and similar alternatives in its order for contempt.

Ugarte, 608 So. 2d 838-39 (citations to Bowen omitted). Although it may be argued that the trial court's order appears to make such an unqualified finding, a closer reading shows the order to be internally inconsistent and ambiguous.

The trial court's Order of Contempt lumps together the former wife's monthly income, without making any adjustments for living expenses, the personal injury settlement, which was demonstrated to be unavailable, as well as the Internal Revenue Service refund that by the very words of the order is identified as money that "will" be received in the future. It is not clear that the court made the appropriate and "unqualified" finding of present ability to meet the purge requirement when it thus confused available and unavailable funds. Reference to the court's own

words at the hearing further suggest that the court was impermissibly incorporating the punitive aspects of criminal contempt into the civil contempt proceedings before it:

> This Court order is going to be obeyed. Its order is going to get real unpleasant.

(R: 18). On this basis alone the Fourth District's affirmance of the Order of Contempt must be reversed.

Additionally, incarceration for contempt is considered a "drastic remedy." Price v. Price, 382 So.2d 436 (2d DCA 1980). Bowen itself recommends various non-incarcerative options. 471 So.2d at 1279. The record already demonstrates that the movant , or really Mr. Raikes, actually desired a writ of garnishment. It simply does not make sense to incarcerate Ms. Smith because of his failure to properly pursue that remedy. Beyond that, given the extensive testimony Mr. Raikes elicited from the former wife about the assistance she receives occasionally from her father and boyfriend, the real purpose behind seeking incarceration appears to have been a totally impermissible attempt to extract the money owed from these third parties. In Perez, the Third District called the suggestion that a former husband under an order to pay his wife's attorney fees obtain those funds by taking a loan from his relatives an "outrageous theory." Perez, 599 So.2d at 683. Similarly in the present case, Ms. Smith cannot be held hostage to the movant's unprincipled attempt to get paid in whatever manner possible. It should be recalled that Mr. Raikes submitted the Motion for Order of Contempt herein under review only **two or three weeks** after issuance of the lower order assessing attorney's fees and costs against her!

> A. The District Court disregarded over one hundred years of case law holding that unrebutted evidence cannot be set aside unless it is inherently improbable or unreasonable. The District Court's decision thereby also circumvents the procedure this Court set forth in Bowen v. Bowen, 471 So. 2d 1274 (Fla. 1985), regarding the allocation and shifting of the burden of proof in contempt proceedings. The Court also misread the facts.

The second part of the District Court's one paragraph decision in Fishman affirms the trial court's finding of "the existence of an available fund from which a substantial portion of the fees could be paid." The decision states:

> While the former wife testified she had pledged the use of that fund for other purposes, the record also reflects a basis for the trial court to deny credibility to this testimony.

Fishman, 629 So.2d 195 (Fla. 4th DCA 1993) (See Appendix). The decision does not articulate what that basis is. Since the former wife was the only witness called and the only other evidence submitted at the contempt proceeding was her latest financial affidavit,[5] the former wife's evidence stands unrebutted. The former husband's attorney attempted to impeach her testimony by reference to allegedly untrue statements in prior unspecified proceedings but the trial court sustained opposing counsel's objection: "Mr. Raikes, you can certainly show she's been convicted of a crime, indicating a false statement. You can impeach her by inconsistent statements, or you can impeach her for falsifying, and there is none of those, so let's move on." (R: 11, Transcript of Contempt Proceedings at p. 11, see Appendix). The former wife's testimony remained unimpeached and uncontradicted.

First it must be brought to this Honorable Court's attention that **the District Court below misread the transcript, that is, the testimony of Ms. Smith**. While the District Courts decision states that Ms. Smith testified that she "pledged" the allegedly available fund; the transcript

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[5] That affidavit showing an average monthly deficit of $190.00 was not only accepted by former husband's attorney, Mr. Raikes himself introduced it into evidence at the contempt hearing below. (R: 4, lines 22-23, see also Appendix).

clearly reflects her testimony to have been that the fund was **"assigned"** to her previous attorney over a year before the contempt proceedings here in question.[6] (R: 11, Transcript at p. 11, see Appendix). The significance of the very different meanings attaching to "pledge" and "assigned" will be discussed below.

In holding that the trial court can disregard the unrebutted evidence in the proceedings below, the District Court overlooked Florida Supreme Court precedent to the contrary going back over 100 years, see Levy below.

> **It, therefore, follows that when the defendant proved the allegations of her pleas and that proof was uncontradicted, she was, absent a challenge of the sufficiency of the pleas, entitled to a verdict on the issues thus made and presented.**

Ruff v. Cooper, 169 So. 490, 491 (Fla. 1936) (emphasis added). Even in the case of jury trials the Florida Supreme Court has held:

> **On this uncontradicted evidence the jury should have found a verdict for plaintiff.**
>
> **The jury, it is true, are the judges of the evidence, but when a plaintiff makes out a plain and uncontradicted case, and his witnesses are unimpeached, they have no right to disregard the evidence.**

Levy v. Cox, 22 Fla. 548, 549 (Fla. 1886). See discussion, supra Point I B., and Gilliam v. Stewart, 291 So.2d 593, (Fla. 1974) (when intermediate appellate court determines that ancient precedents should be overruled, it is their duty to adhere to former precedents and then certify decision to Supreme Court).

Unimpeached testimony may be disregarded only under limited circumstances:

> Where testimony on a pivotal issue of fact is neither contradicted nor impeached *in any respect* and no

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[6] Specifically, her attorney asked whether the money had been assigned, to which she answered, under oath, "Yes." (R: 11). By analogy, if the question had been, "Did you kill him?" and the answer, "Yes," it would have been an admission to the killing in issue. There should be no dispute that the testimony was of an "assignment."

> conflicting evidence is introduced, this testimonial evidence cannot be wholly disregarded or arbitrarily rejected; rather, **the testimony must be accepted as proof of the issue for which it is tendered even though given by an interested party so long as it consists of fact as distinguished from opinion and is not essentially illegal, inherently improbable or unreasonable, contrary to natural laws, opposed to common knowledge of contradictory within itself.** *Duncanson v. Service First, Inc. 157 So.2d 696, 699 (Fla. 3d DCA 1963), as quoted in Merrill Stevens Dry Dock Company v. G & J Investments Corporation, Incorporated, 506 So.2d 30, 32 (Fla. 3d DCA 1987) rev. denied, 515 So.2d 229 (Fla. 1987) and Roach v. CSX Transportation, Incorporated, 598 So.2d 246 (Fla. 1st DCA 1992).*

Evans v. State, 603 So.2d 15 (Fla. 5t DCA 1992). Evans also demonstrates that the holdings of Ruff and Levy, supra, are still relevant and controlling today. Explaining what inherently improbable means, the Florida Supreme Court gives this guidance:

> While the testimony of an unimpeached witness is not to be arbitrarily disregarded, it must be measured by the standard of common experience and business usage. **The statement that a man under certain circumstances did something, which we know from experience not one in a thousand would do under the circumstances, is discredited by the inherent improbability of the truth of the statement.**

Howell v. Blackburn, 129 So. 341 (Fla. 1930) (emphasis added).

It is respectfully suggested that Ms. Smith's unrebutted testimony that her interest in the proceeds of an accident settlement claim, which formed the alleged "available fund" to purge contempt, had been "assigned" cannot be disregarded as inherently improbable or opposed to common knowledge. The only other source of funds that the trial court held to be actually available was her IRS refund - which her unrebutted testimony proved had not even been applied for yet! That is, at the time of the contempt order for incarceration, she had not even prepared much less filed her tax return, and did not even know how much of a return she would get. (R: 6-7, 14, see Appendix).

Besides entering Ms. Smith's Financial affidavit into evidence, showing a monthly deficit of $190.00, the former husband's attorney presented no evidence whatever at the contempt hearing. It was unrebutted, and therefore, controlling that at the time the contempt order for Ms. Smith's incarceration was issued she did not have nor did she have access to any fund to meet the $1000.00 purge amount. Nor can she be incarcerated with the intention that her family or friends will provide or loan the funds for the purge amount. Perez v. Perez, 599 So. 2d 682, 683 (Fla. 3d DCA 1992).

Additional district court decisions in accord with Ruff and Levy, including Fourth District decisions, are as follows:

Republic Nat. Bank of Miami v. Roca, 534 So. 2d 736 (Fla. 3d DCA 1988) (trial court cannot arbitrarily reject unrebutted testimony).

M. Stevens Dry Dock v. G & J Inv. Corp., 506 So. 2d 30 (Fla. 3d DCA 1987) (Uncontradicted testimony must be accepted as proof of contested issue).

In Re Estate of Hannon, 447 So. 2d 1027 (Fla. 4th DCA 1984) (trial court cannot arbitrarily ignore unrebutted testimony).

Ackerly Comm., Inc. v. City of West Palm Beach, 427 So. 2d 245 (Fla. 4th DCA 1983) (trial court erred in rejecting unrebutted testimony).

In disregarding the unrebutted evidence of Ms. Smith as to her inability to meet the purge amount, the District Court, unwittingly, allowed the trial court to run afoul of the procedure regarding the allocation and shifting of the burden of proof in proceedings seeking incarceration for contempt that the Florida Supreme Court carefully and thoughtfully set forth in Bowen v. Bowen, 471 So. 2d 1274 (Fla. 1985). Bowen involved contempt proceedings against a non-custodial parent for failure to make child support payments.

Bowen recognizes a presumption in favor of the party seeking incarceration for contempt for delinquency of support payments. This presumption assumes the delinquent party has the means to pay:

> This presumption, of course, places the burden on the defendant to come forward with evidence to show that, due to circumstances beyond his control, he had no ability to pay.

Bowen, 471 So. 2d at 1279. That this creates a rebuttable presumption is further supported by the Florida Supreme Courts more recent language in Gibson:

> The burden rests upon the defaulting party to dispel the presumption of ability to pay due to circumstances beyond his or her control and to prove there was no willful disobedience of the court order.

561 So. 2d at 570. Ms. Smith's unrebutted testimony regarding her inability to pay more than a small amount every month, which she did send to the attorney (R: 13, see Appendix), as well as her Financial Affidavit, introduced into evidence by Mr. Raikes, showing a net monthly deficit - are more than sufficient under the evidentiary rulings of this Court and the procedural scheme set out in Bowen to shift the burden to the party moving for contempt.

In discussing the interplay between evidence and a rebuttable presumption the Florida Supreme Court has held:

> The presumption provides a prima facie case which sifts to the defendant the burden to go forward with the evidence to contradict or rebut the fact presumed. When the defendant produces evidence which fairly and reasonably tends to show that the real fact is not as presumed, then the impact of "the presumption is dissipated".
>
> ... As we stated in Tyrrell: "Presumptions disappear when facts appear; and facts are deemed to appear when evidence is introduced from which they may be found".

Gulle v. Boggs, 174 So. 2d 26, (Fla. 1965) (quoting McNulty v. Cusack, 104 So. 2d 785 (Fla. 2d DCA 1956; and Tyrrell v. Prudential Ins. Co., 109 Vt. 6, 192 A. 184).

B. The District Court's decision disregards and conflicts with well established case law on indispensable parties and escrow accounts where it is undisputed that the accident settlement fund to which the former wife allegedly had access was in the hands of a third party's attorney who was never joined in the action below. The decision further ignores Florida Rule of Professional Conduct 4-1.15 Safekeeping Property which may require the third party's attorney to deposit the fund into the trial court's registry where there are conflicting claims to those funds. Such funds cannot be held to be "available" to the former wife to pay the purge amount in the contempt order herein under review.

The District Court's misreading of Ms. Smith's testimony, in which the Court in its decision stated that she had "pledged" the "available fund ...for other purposes" is an error, or rather, a misapprehension of fact that goes to the heart of the case. As was indicated above, the testimony was that she had "assigned" the fund to an attorney that had represented her in a previous case. (See supra p. 31, R: 11). Black's defines the term thus:

> Assignment. A transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein. It includes the transfer of all kinds of property...including negotiable instruments. **The transfer by a party of all of its rights to some kind of property, usually intangible property such as rights in a lease, mortgage, agreement of sale or partnership**. Tangible property is more often transferred by possession and by instruments conveying title such as a deed or a bill of sale.

Black's Law Dictionary 109 (Fla. 5th ed. 1979) (citation omitted, emphasis added). And in defining an assignment of an account, the example most analogous to the case at bar:

> Assignment of account. Transfer to assignee giving him a right to have moneys when collected applied to payment of his debt.

Id. See also:

> Assignment of wages. Transfer of right to collect wages from wage earner to creditor; generally, statutes govern the extent to which such assignment may be made.

Id.

The significance of "assignment" is that it is a transfer of the right to collect or possess, in this case, the accident settlement fund. The entry for pledge, on the other hand goes on about bailments, until the end of the entry where the definition reflects a more colloquial meaning:

> Pledge. ...A pledge is a promise or agreement by which one binds himself to do or forbear something.

This definition suggests, obviously, that a promise can be broken with possibly the promisee being entitled to damages for breach of the agreement. It assumes the promisor has control over the funds - an assumption that is completely at odds with the express testimony of Ms. Smith. And the transcript reflects that she was answering in the affirmative a question posed by her own attorney - so the choice of the term "assignment" was not simply the accidental misstatement of a lay witness. (See supra p. 32 n.). Commonsense also dictates that what was involved was, in fact, an assignment. Would an attorney owed back fees by a client, or rather, former client slated to get a settlement, accept a mere promise to pay?

The case law on assignments and pledges also comports with the above definitions. An assignment transfers to the assignee all interests of the assignor to a given contract or property (usually intangible) or collateral. State Farm Fire and Cas. Co. v. Ray, 556 So. 2d 811, 811-813 (Fla. 5th DCA 1990). The assignor is left with no rights to the collateral unless such is expressly reserved. Id. Assignments can be written or oral. Protection House, Inc. v. Daverman and Assoc., 167 So. 2d 65 (Fla. 3rd DCA 1964).

The rights of a pledgee on the other hand are secured by actual possession of the collateral, such as stock certificates. Brightwell v. First Nat. Bank of Kissimmee, 109 So. 2d 271,272 (Fla. 5th Cir. 1940). A pledge creates a "special property right" in the collateral, with the pledgor retaining the "general property right." Seaman v. Clearwater Oaks Bank, 469 So. 2d 246, 246-248 (Fla. 2d DCA 1985). The act of possession protects the pledgee from a superior

claim of a subsequent good faith transferee. Where the collateral is, for example, a mortgage - the pledgor may protect the property right by recording that interest; failure to do so can result in loss of the special property right to a subsequent purchaser who lacks notice of the pledge. Guaranty Mortgage & Insurance Co. v. Harris, 193 So. 2d 1, 1-2 (Fla. 1967).

The unrebutted testimony that the fund was assigned precluded the District Court from suddenly holding on appeal that the fund was pledged.

Ms. Smith's testimony established that she did not have possession of the funds:

Q: (by Mr. Raikes) And presently there's being held $6500.00 by the liability carrier's attorney.

A: (Ms. Smith) Yes, that's correct.

(R: 6, transcript at p. 6, see Appendix). It was later established under questioning by Ms. Smith's attorney, that the fees were over $7300.00 and the settlement was $6500.00. (R: 12, transcript at p. 12, see Appendix).

The fact that the money was held by the liability carrier's attorney is also significant in light of the unrebutted evidence of an assignment of the fund. There are basically only two ways an attorney can properly and ethically hold funds for a client: in a trust fund, or in escrow. See Rules of Professional Conduct, Rule 4-1.15 Safekeeping Property and attendant Comment. The Comment indicates that the attorney trust fund rules are independent of the fiduciary rules related to the maintenance of escrow accounts. The Comment expressly states, at ¶ 3, that:

> Third parties, such as a clients creditors, may have just claims against funds or other property in a lawyer's custody. A lawyer may have a duty under applicable law to protect such third party claims against wrongful interference by the client and, accordingly, may refuse to surrender the property to the client.... the lawyer should consider the possibility of depositing the property or funds in dispute into the registry of the court so that the matter may be adjudicated.

By extension, of course, this recognizes the possibility of competing claims for funds held, in this case, by the liability carrier's attorney. The result would be an impleader action while Ms. Smith remains in jail, with her child in the hands of HRS.

The same holds true if the money were held in an escrow account. The definition of an escrow is functional:

> The essential elements of a valid escrow arrangement are a contract between the grantor and the grantee agreeing to the conditions of a deposit, delivery of the deposited item to a third party, and communication of the agreed upon conditions to the third party.

Johansson v. United States, 336 F.2d 809, 815 (5th Cir. 1964). Johansson involved conflicting claims between the Government and the appellant Feature Sports against the funds in an escrow account. The Circuit Court held that:

> If a valid escrow arrangement was in effect prior to the time the Government's tax lien attached, Feature Sports could not have prevented the transfer of $250,000 to Johansson following the third [boxing] fight [the condition of the escrow arrangement] ... When income has been assigned to an independent party for value, the courts have not allowed a lien on that property ... **Although there is no formal assignment in evidence, the relevant consideration in determining the applicability of the foregoing principle is the question whether Feature Sports would have an enforceable right to the funds.**

Id. at 815-816 (emphasis added). An escrow arrangement can be implied:

> In the absence of an express agreement, written or oral, the law will imply from the circumstances of the escrow that the agent has undertaken a legal obligation (1) to know the provisions and conditions of the principal agreement concerning the escrowed property, and (2), to exercise reasonable skill and ordinary diligence in holding and delivering possession of the escrow property (i.e. to disburse the escrowed funds) in strict accordance with the principals' agreement.

United American Bank v. Seligman, 599 So. 2d 1014 (Fla. 5th DCA 1992). As in a trust agreement, the escrow agent has fiduciary duties to his principal. Id. The District Court further held that disbursing the funds to the wrong party in the face of an agreement changing the beneficiary opens the agent to the liability to pay the full amount to the right party:

> The agreement was in effect, in equity, an assignment of Seligman's interest in the escrow funds to the bank, subject to certain terms, conditions and limitations, or, at least, by that agreement the bank became, in equity, if not in law, a third party beneficiary to Seligman's rights under the original escrow agreement. ...the escrow agent breached his duty when he disbursed the escrowed funds directly to his client, Seligman, contrary to Seligman's agreement with the Bank.

Id. at 1017.

The Fourth District Court recognizes that escrow funds cannot properly be disbursed in the face of competing claims in the absence of all indispensable parties:

> [Appellant]...was an indispensable party with respect to the defendant developer's cross claim against bank for alleged breach of escrow agreement and should have been joined in cross claim.

Loxahatchee River Environmental Control District v. Martin Co. Little Club, 409 So. 2d 135, 136 (Fla. 4th DCA 1982). Neither the liability carrier's attorney nor Ms. Smith's prior attorney were parties to the underlying proceeding. Thus, regardless of whether the liability carrier's attorney is holding the settlement funds in trust or escrow, those funds were/are not "available" to pay the contempt purge amount as that term is used in Bowen, 471 So. 2d at 1279. The Fourth District was, therefore, wrong on both the law and the facts when it held on appeal that the fund "was available" to Ms. Smith. For these additional bases, the decision of the district Court must be reversed.

Finally, the underlying contempt orders assessing attorney's fees and costs against Ms. Smith (R: 413-14, 428-29, 442-43 and R: 597-98, 601) should be held to be unenforceable as

unconstitutional orders of criminal contempt under Bowen v. Bowen, 471 So. 2d 1274, 1276-77 (Fla. 1985).

While Ms. Smith has not previously challenged the fees and costs owed the former husband's attorney Mr. Raikes, careful review of the case law suggests that the underlying assessment of fees and costs is unenforceable by any means. The fees arose out of contempt orders against Ms. Smith, however, the trial court failed to make the required findings as to her ability to pay fees. The award of attorney's fees in domestic litigation is dependent upon the party's ability to pay. Stowell v. Stowell, 604 So. 2d 940 (Fla. 4th DCA 1992). Moreover,

> "an adjudication of contempt, however, 'is not a prerequisite to an assessment to an assessment of attorneys fees against the noncomplying party. The contempt of a noncomplying party is only one of several factors a trial court must examine in exercising its discretion to award attorney's fees.'"

Geronemous v. Geronemous, 599 So. 2d 256 (Fla. 4th DCA 1992).

Since the purpose of civil contempt "is to obtain compliance on the part of the person subject to an order of the court," the assessment of attorney's fees absent a finding that the party has an ability to pay turns that part of the contempt order assessing the fees into an order of criminal contempt. In the proceedings below, Ms. Smith's compliance with visitation rights was secured by threat of incarceration if she did not comply with court ordered visitation; it was not secured by the imposition of attorney's fees. The imposition of fees was purely and simply a penalty. See generally, Bowen v. Bowen, 471 So. 2d 1274, 1276-77 (Fla. 1985). Penalties are by definition criminal contempt. Id.

The orders assessing fees against Ms. Smith are thus de facto orders of criminal contempt - and they are void as having been obtained without proper notice of criminal contempt and without any compliance with Ms. Smith's due process rights in criminal contempt matters. This constitutes "fundamental error" which may be raised at any time on appeal. See, e.g., Hopkins v. State, 19 FLW S 162 (Florida Supreme Court, March 31, 1994). The situation is also analogous

to the failure to raise the topic of modification by proper pleading, this too has been deemed a failure to properly invoke the subject matter of the trial court, thus constituting fundamental error which may be raised for the first time on appeal. Citizens and Peoples Nat. Bank of Pensacola v. Futch, 19 FLW D693, 699 n. 9 (Fla. 1st DCA March 30 1994) (citing HRS v. Porbansky, 569 So. 2d 815 (Fla. 5t DCA 1990).

A proper and additional basis for reversing the District Court's decision is therefore the fact that the underlying financial obligation to the former husband's attorney is void for having been obtained without properly invoking the trial court's subject matter jurisdiction.

POINT III

THE DISTRICT COURT ERRED IN DENYING THE FORMER WIFE APPELLATE ATTORNEY'S FEES.

Petitioner next respectfully moves this Court to review and reverse the District Courts denial of appellate attorney fees.[7]

The District Court had authority to assess reasonable attorney's fees in this dissolution of marriage matter and may remand to the lower court for determination of same. F.S. §61.16; Fla.R.App.P. 9.400 (b); Sierra v. Sierra, 505 So. 2d 432 (Fla. 1987); Chertoff v. Chertoff, 553 So. 2d 179 (Fla. 3rd DCA 1989); Thornton v. Thornton, 433 So. 2d 682 (5th DCA 1983); Ludeman v. Ludeman, 317 So. 2d 800 (Fla. 4th DCA 1975). Another basis for awarding Ms. Smith her appellate attorney's fees is F.S. § 57.105 which, as was held recently held in Parker v. Critton, 18 FLW D99 (Fla. 4th DCA Case No. 92-1092, December 23, 1992), provides for

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[7] Review of attorney fee matters may be sought by petition to the appellate court, however on recommendation by the Court's Office of the Clerk, review is sought here as for an ancillary order (denial of the fees was duly noted in Petitioner's Notice Seeking Discretionary Review to this Court). The Court may, of course, under its all writs powers, treat this Point as a Petition for Review.

attorney's fees in cases where there is a complete absence of justiciable issues of fact or law. This latter basis is applicable because the order of civil contempt and incarceration obtained against the Petitioner, Ms. Smith, violates the constitutional prohibition against imprisonment for debt and does not fall into the narrow exception to that prohibition which permits a dependent former spouse to seek an order of contempt and incarceration to enforce financial obligations of the supporting spouse, typically the former husband, which are in the nature of support payments. Pabian v. Pabian, 480 So. 2d 237, 238 (Fla. 4th DCA 1985) (imprisonment for debt is unconstitutional unless the obligation is in the nature of alimony, support or maintenance)

Appellant's need is clear, she is a single mother and works six days a week to support herself and her, and her former husband's, five year old son. She receives only sporadic child support. She makes ends meet by selectively paying her bills and borrowing from family and friends.

The failure of the District Court to grant appellate attorneys fees under the facts and circumstances of this case constituted an abuse of discretion and is at odds wit the decisional law granting such fees in legally indistinguishable cases. Whereupon, Ms. Smith respectfully asks this Honorable Court to reverse the District Court's denial of attorney's fees.

CONCLUSION

The unambiguous provisions of the Florida Constitution and the conflict of the District Court decision here under review with Florida Supreme Court decisional law in the areas of the constitutional prohibition against imprisonment for debt, deference to Supreme Court authority and procedural schemes both with respect to the debt issue and the allocation and shifting of the burden of proof in Bowen, as well as the conflict regarding the treatment of unrebutted evidence and the additional bases recited above necessitates reversal of the decision under review here, including the District Court's denial of attorney's fees.

Respectfully submitted,

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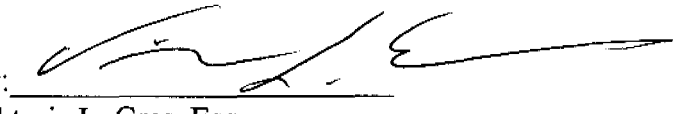
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 18th day of April, 1994, to William E. Raikes, III, Attorney for Appellee, 100 Avenue A, Suite C, Fort Pierce, Florida 34950.

By: 

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