

89,955

D&7

FILED

SID J. WHITE

DEC 10 1998

December 12, 1998

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

The Supreme Court of Florida
Supreme Court Building
500 South Duval Street
Tallahassee 32399-1925

Re: Comments regarding the Civil Contempt Rule (Rule 12.615)
and Expert Witness Rule (Rule 12.365)

Dear Chief Justice and Justices:

The comments contained in this letter regarding Rule 12.615, Florida Family Law Rules of Procedure, and Rule 12.365, Florida Family Law Rules of Procedure, are respectfully submitted for your review and consideration.

I. With regard to the Civil Contempt Rule (Rule 12.615), we have the following comments and recommendations:

A. Section (a) of the Rule provides, in part, that: "The use of civil contempt sanctions under this rule shall be limited to those used to compel compliance with a court order." That language appears to preclude the use of **compensatory fines**. Compensatory fines are used to compensate a complainant for losses sustained, not to coerce compliance. Further, and as pointed out by the Court, a purge provision is unnecessary if the fine is compensatory. A compensatory fine is and should continue to be an available remedy in civil contempt matters. Thus, it is respectfully submitted that the second sentence of section (a) should be amended to read as follows: "The use of civil contempt sanctions under this rule shall be limited to those used to compel compliance with a court order or to **compensate a movant for losses sustained as a result of the contemnor's willful failure to comply with a court order.**"

B. Section (b) of the Rule provides, in part, that: "The civil contempt motion and notice of hearing may be served by mail provided notice by mail is reasonably calculated to apprise the alleged contemnor of the pendency of the proceedings." In light of the provisions of **Section 61.13(9)(a)-(c), Florida Statutes (1997)**, and the provisions of **Section 742.032, Florida Statutes**, if a movant sufficiently shows that a diligent effort has been made to ascertain the location of the alleged contemnor, but the location was not ascertained, would mail service of the motion for contempt and notice of hearing to "the most recent residential or employer address filed with the tribunal and State Case Registry" satisfy the requirements of said **section (b)** of the rule?

C. It is clear that the Civil Contempt Rule attempts, admirably, to provide a step-by-step approach in handling a civil contempt matter involving support. However, there are a few problems inherent in the rule. For example, section (c)(1) of the rule states, in part, that: "the court shall determine whether the movant has established that a prior order directing payment of support was entered, that the order was based on a finding that the alleged contemnor had the ability to pay the support ordered, and that the alleged contemnor has failed to pay all or part of the support set forth in the prior order." Then section (c)(2) of the rule states that: "if the court finds that the movant has established all of the requirements in subdivision 12.615(c)(1), the court shall...." Unfortunately, and notwithstanding the requirements of Section 61.14(5)(a), Florida Statutes, a very substantial number of support orders, especially those based on Marital Settlement Agreements or other Settlement Agreements and entered during uncontested calendar hearings, do not include "a finding" that the obligor/alleged contemnor had the ability to pay the support ordered. Thus, although the court might be able to determine in a particular case that the movant has established that a prior order directing payment of support was entered and that the alleged contemnor has failed to pay all or part of the support set forth in the prior order, it might not be able to determine that the order was based on a finding that the alleged contemnor had the ability to pay the support ordered. In that particular situation, since the court could not find that the movant has established all of the requirements in subdivision 12.615(c)(1), there is, under the rule, no next step. Since, under the rule, the court is not going to make a determination regarding the alleged contemnor's ability to pay the support and purge, if any, unless the alleged contemnor is present at the hearing, it is respectfully submitted that the following language and punctuation be deleted from section (c)(1): ", that the order was based on a finding that the alleged contemnor had the ability to pay the support ordered,". Of course, if the order establishing the support includes the appropriate finding as to obligor/alleged contemnor's ability to pay the support, then the court, at the appropriate time, would be able to consider the presumptions set forth in Bowen v. Bowen and Section 61.14(5)(a), Florida Statutes. It is also respectfully recommended that a section (c)(3) be added to the rule and, assuming that the above recommended deletion is made, that that section read as follows: "if the court finds that the movant has not established all of the requirements in subdivision 12.615(c)(1) of this rule, the court shall grant such relief as may be appropriate under the circumstances."

D. Since the Writ of Bodily Attachment mentioned in section (c)(2)(ii) of the rule is being issued for the ultimate purpose of bringing the alleged contemnor before the court so a hearing can be held, and not for the purpose of incarcerating the alleged contemnor for sanction or punishment purposes, a purge provision for that writ is not necessary. That rule section

should, however, provide that the Writ shall include a provision for the posting of a bond and that the court shall establish a reasonable bond amount. Thus, it is respectfully submitted that the rule should be amended accordingly.

E. In light of the recommendations made in paragraphs C. and D. above, it is respectfully recommended that section 12.615(d) of the rule be amended by deleting the following from that section: "by each party." With the deletion, the rule section would read as follows: "After hearing the testimony and evidence presented, the court shall enter a written order granting or denying the motion for contempt."

F. Section (d)(2) of the Rule appears to require a purge provision for a compensatory fine. Consistent with the law as stated by this Court and the Supreme Court of the United States, it is respectfully submitted that section (d)(2) of the Rule should be amended by deleting the existing words "compensatory or" in the sentence, and then replacing the existing period at the end of the sentence with a comma, and then adding the following language after the comma: "except that a compensatory fine shall not require a purge provision."

G. In certain cases it is clear that although there is no willful failure to pay the required support, the alleged contemnor has failed to pay all of the support due or has failed to pay the support on a timely basis. In those cases, the court must determine that the obligor/alleged contemnor is not in contempt. However, under those circumstances, the court should be able to require the obligor to take certain steps or action, or award other appropriate relief, so as to insure payment or timely payment of the support in the future. For example, the obligor might be underemployed or unemployed but has not made any good faith effort to secure employment, or an income deduction order has not been entered in the past. Thus, the court, even though it does not find the obligor in contempt, should be able to require the obligor to do a reasonable job search or, if appropriate, enter an income deduction order. Therefore, it is respectfully submitted that a section (g) should be added to the rule and that that section should read as follows: "Other Relief. Where there is a failure to pay support or to pay support on a timely basis but the failure is not willful, nothing in this rule shall be construed as precluding the court from granting such relief as may be appropriate under the circumstances."

II. With regard to the Expert Witness Rule (Rule 12.365), we have the following comments and recommendations:

A. Rule 12.010(b)(1) provides as follows: "These rules shall be construed to secure the just, speedy, and inexpensive determination of the procedures covered by them and shall be

construed to secure simplicity in procedure and fairness in administration." Sections (c) and (d) of Rule 12.365 will not allow for such construction. The litigation, time and expense, both financial and emotional, that will be engaged in or expended because of the requirements of Sections (c) and (d) will clearly exceed any benefit that the requirements might provide or suggest.

B. The following are a few of the concerns or likely problems:

1. Is an anticipated three (3) day temporary support hearing a "trial?"

2. The filing provisions of sections (c) and (d) conflict with or may conflict with the following statutory provisions: Section 742.12(3), Florida Statutes, Section 61.20(1), Florida Statutes, and Section 61.403(5), Florida Statutes.

3. What happens if the expert's opinion changes subsequent to the service of the written opinion but within the 30 days prior to "trial?" Under those circumstances, will the expert be precluded from giving an expert opinion at trial that varies from that which is set forth in the written opinion? Will the trial have to be continued, for at least another 30 days, so that a new written opinion can be served?

4. Presently, and in the absence of written expert opinions, a very substantial number of cases are settled within the 30 day period immediately before the final hearing. Should parties be forced to incur the costs or expenses associated with the preparation of written expert opinions when under the existing rules they would not have to incur such costs or expenses?

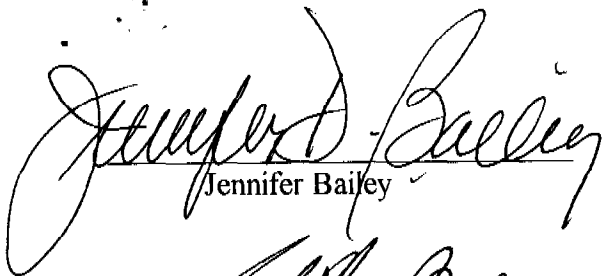
C. It should be noted that the existing Sections (a), (b) (e) and (f) of Rule 12.365, with the new section (c) recommended below, will clearly protect the due process and ethical concerns that we should have with regard to expert witnesses. It should be further noted that the court has the authority to enter pretrial orders, on a case by case basis, that may impose, under certain circumstances, certain pretrial disclosures.

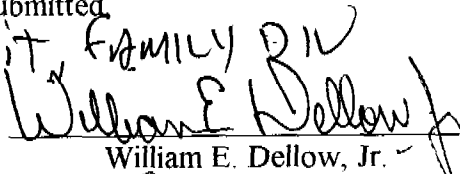
D. Thus, it is respectfully submitted that Rule 12.365 should be amended by deleting the existing sections (c) and (d) of the rule, and replacing them with a new section (c) that reads as follows: "No written opinion of an expert shall be reviewed or considered by the court until the opinion is introduced into evidence at a hearing with notice to all parties." Further, the rule should be amended by designating the existing section (e) as section (d) and designating the existing section (f) as section (e).

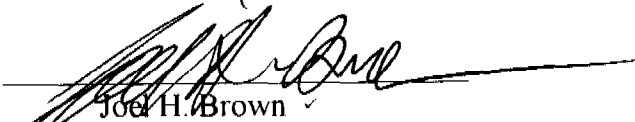
Respectfully submitted,

11th Circuit

FAMILY DIV

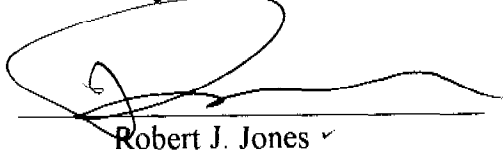

Jennifer Bailey ✓

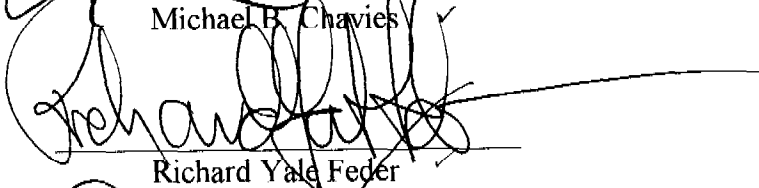

William E. Dellow, Jr. ✓

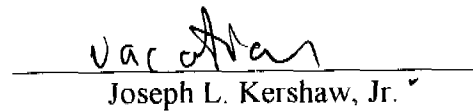

Joel H. Brown ✓

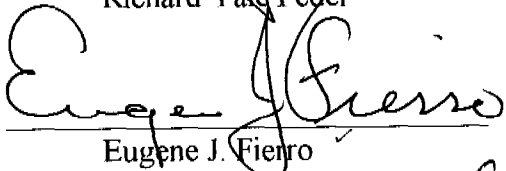

Alejandro Gamboa ✓

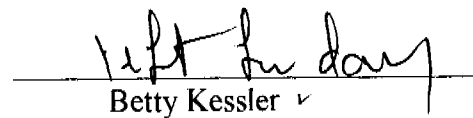

Michael B. Chavies ✓

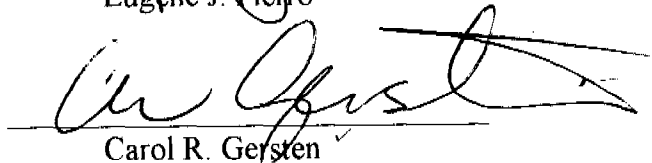

Robert J. Jones ✓

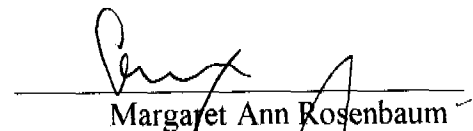

Richard Yale Feder ✓

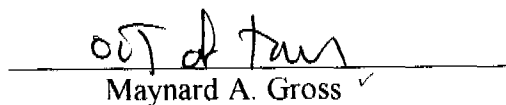

Joseph L. Kershaw, Jr. ✓


Eugene J. Fierro ✓

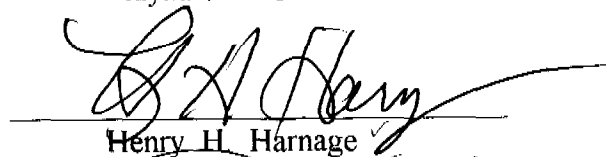

Betty Kessler ✓

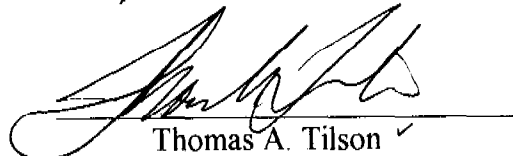

Carol R. Gersten ✓

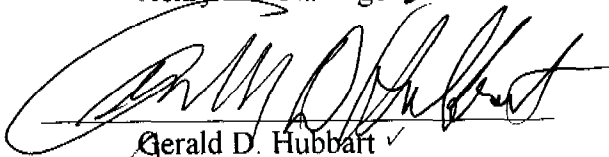

Margaret Ann Rosenbaum ✓

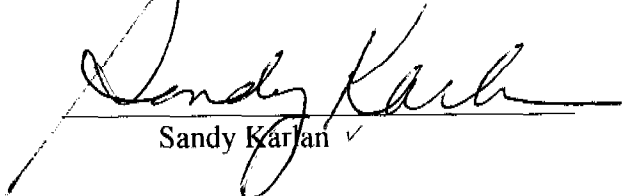

Maynard A. Gross ✓

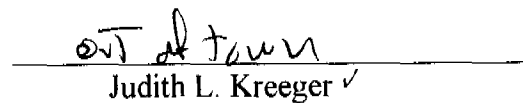

Melissa G. Tenenbaum ✓

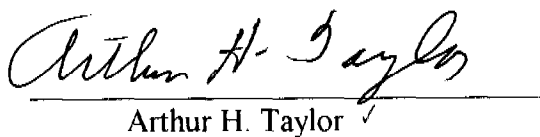

Henry H. Harnage ✓


Thomas A. Tilson ✓


Gerald D. Hubbard ✓


Sandy Karlan ✓


Judith L. Kreeger ✓


Arthur H. Taylor ✓