D.A. 6-1-98

IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,955

FILED
SID J. WHITE
DEC 9 1998
CLERK, SUPREME COURT
By______
Chief Deputy Clerk

AMENDMENTS TO FLORIDA FAMILY LAW RULES OF PROCEDURE
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COMMENTS ON PROPOSED RULE 12.615

The Florida Public Defender Association, Inc., ("FPDA") offers the following comments on proposed Family Law Rule of Procedure 12.615, relating to civil contempt in support cases. Public defenders have a duty under Florida Criminal Rule of Procedure 3.111(c)(4)(A) to represent indigent persons who are illegally incarcerated. Despite this Court's admonitions in *Bowen v. Bowen*, 471 So. 2d 1274 (Fla. 1985), even a brief survey of reported cases shows that trial courts repeatedly fail to understand or follow the law, resulting in many illegal incarcerations.[1]

[1] *See, e.g., Portee v. Manning*, 702 So. 2d 546 (Fla. 3d DCA 1997); *Paez v. Manning*, 696 So. 2d 1368 (Fla. 3d DCA 1997); *Raba v. Manning*, 696 So. 2d 1367 (Fla. 3d DCA 1997); *Brown v. Manning*, 696 So. 2d 1367 (Fla. 3d DCA 1997); *Tremblay v. Tremblay*, 687 So. 2d 313 (Fla. 4th DCA 1997); *Zdravkovic v. Zdravkovic*, 684 So. 2d 822 (Fla. 4th DCA 1996); *Betancourt v. Manning*, 679 So. 2d 83 (Fla. 3d DCA 1996); *Arena v. Herman*, 675 So. 2d 210 (Fla. 3d DCA 1996); *Tribue v. Langston*, 667 So. 2d 508 (Fla. 3d DCA 1996); *Coogan v. Coogan*, 662 So. 2d 1380 (Fla. 1st DCA 1995); *Brown v. Brown*, 658 So. 2d 627 (Fla. 5th DCA 1995); *Roundtree v. Felton*, 656 So. 2d 584 (Fla. 3d DCA 1995); *Johnson v. Felton*, 655 So. 2d 1286 (Fla. 3d DCA 1995); *Blanco v. Roth*, 655 So. 2d 213 (Fla. 3d DCA 1995); *Smith v. Felton*, 654 So. 2d 620 (Fla. 3d DCA 1995); *Marcellus v.*

The FPDA therefore supports the creation of rules of procedure that would decrease the number of illegal incarcerations. To that end, the FPDA would suggest modifying subsection (e) as follows:

> (e) Purge. If the court orders incarceration, a coercive fine, or other coercive sanction for failure to comply with a prior support order, the court shall set conditions for purge of the contempt, based on the contemnor's present ability to comply. No presumption of the contemnor's present ability to comply arises and the movant shall have the burden of producing evidence of the contemnor's present ability to comply. The court shall include in its order a separate affirmative finding that the contemnor has the present ability to comply with the purge and the factual basis for that finding. If the purge requires the payment of monies, the order shall specifically make findings of what cash, accounts, or other liquid assets the contemnor owns from which the contemnor can pay the purge amount. The court may grant the contemnor a reasonable time to comply with the purge conditions. If the court orders incarceration but defers incarceration to allow the contemnor a reasonable time to comply with the time provided, then, upon incarceration, the contemnor must be brought immediately before the court for a determination of whether the contemnor continues to have the present ability to pay the purge.

Voltaire, 649 So. 2d 944 (Fla. 4th DCA 1995); *Pino v. Felton*, 647 So. 2d 335 (Fla. 3d DCA 1995); *Haymon v. Haymon*, 640 So. 2d 1204 (Fla. 2d DCA 1994); *Mourra v. Mourra*, 622 So. 2d 1358 (Fla. 3d DCA 1993); *Galligher v Galligher*, 643 So. 2d 706 (Fla. 4th DCA 1994); *Cummins v. Cummins*, 615 So. 2d 173 (Fla. 5th DCA 1993); *Dragland v. Dragland*, 613 So. 2d 561 (Fla. 2d DCA 1993); *Perez v. Perez*, 599 So. 2d 682 (Fla. 3d DCA 1992); *LeNeve v. Navarro*, 565 So. 2d 836 (Fla. 4th DCA 1990); *Connolly v. Connolly*, 543 So. 2d 356 (Fla. 2d DCA 1989).

Thirteen years ago this Court clearly required a "separate, affirmative finding that the contemnor has the present ability to comply with the purge conditions." *See Bowen*, 471 So. at 1279. Codifying that holding in a rule of procedure will not, by itself, solve the continuing problem of illegal incarcerations in support cases. More explicit directions are required.

As this Court has acknowledged, *Bowen* has been difficult to implement among the trial judges and general masters. *See Amendments to the Florida Family Law Rules of Procedure*, 23 Fla. L. Weekly S573, S576 (Fla. Oct. 29, 1998). While this Court refers to two cases that have come before it, *see id. at S576 n.1*, the situation is much worse in other courts. After numerous writs, the Third District Court of Appeal finally issued an opinion threatening to refer the judges to the Judicial Qualifications Commission and the assistant state attorneys to The Florida Bar. *See Garcia v. Manning*, 717 So. 2d 59, 60 & n.4 (Fla. 3d DCA 1998). While the problem has temporarily subsided in that court, it has not disappeared completely. *See Clark v. Manning*, 23 Fla. L. Weekly D2455 (Fla. 3d DCA Nov. 4, 1998).

One reason for these continuing problems is a confusion between the substantive charge of civil contempt for wilfully refusing to make support payments, and the use of coercive remedies to cure that contempt. On the substantive charge, the usual issue is the wilfulness of the failure to make support payments. A previous court order

finding the ability to make support payments creates a presumption of the continuing ability to do so. *See Amendments*, 23 Fla. L. Weekly at S576; *Bowen*, 471 So. 2d at 1278. The alleged contemnor has the burden of proving that he or she could not make the support payments. *See Amendments*, 23 Fla. L. Weekly at S576; *Bowen*, 471 So. 2d at 1278-79.

Once a court finds someone in civil contempt, the question shifts to what remedy can force compliance with the court's order. The issue is no longer the wilfulness of the failure, but the present ability to comply. Some judges, general masters, and assistant state attorneys, however, apparently do not understand that this second, remedial question is distinct from the first, substantive one. They seem to believe that if the contemnor has not rebutted the presumption of the ability to pay the entire support obligation, then the contemnor presumably is presently able to pay any purge amount up to and including the total support obligation (A. 8-9, 28, 46-47).[2]

The problem with such reasoning is that while the failure to pay may have been wilful, the money may no longer be available. Or the money may have never existed, but the indigent and barely literate contemnor was incapable of putting on credible

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[2]The appendix contains only a sampling of transcripts and order from the Child Support Division of the Eleventh Judicial Circuit. Copies of many other transcripts are available on request. The Third District Court of Appeal granted writs of habeas corpus in all these cases.

evidence to rebut the presumption.[3]

Admonishing judges and general masters to make an "affirmative finding" of the present ability to pay has not cured this problem in the thirteen years since *Bowen* and will not cure it now. The form orders uniformly recite such a finding. (A. 11, 32, 51, 66-67, 81). Courts often make no inquiry into what assets the contemnor has from which to pay the purge amount (A. 9, 17, 44-47, 60-63, 79, 90).

While these erroneous decisions can be corrected through writs of habeas corpus, that procedure involves the unnecessary expenditure of resources by the public defenders to file the writ, the attorney general to respond to the writ, and the appellate court to decide the writ. Moreover, the contemnor usually spends at least a week or two in jail waiting for the transcript of the hearing.[4]

To clarify the legal issues, this Court should issue a procedural rule explicitly stating that no presumption of the contemnor's ability to comply with the purge provisions exists and that the party moving for contempt has to burden to produce such evidence. To avoid perfunctory findings without any evidence to support them, this

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[3]The judges and general masters generally do not believe the contemnor's own testimony (A. 27, 45-46, 50).

[4] Because the form orders recite an "affirmative finding" of the present ability to pay the purge amount, writs usually cannot be brought without the transcript. Only the transcript reveals the complete lack of evidence to support these pro forma findings.

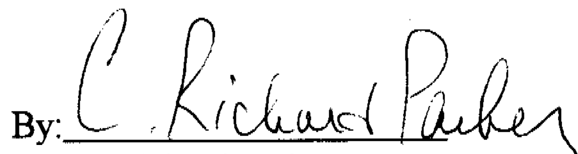
Court should require trial courts to make a finding of the source for the funds to pay the purge. With such a procedural rule, the resulting form orders would not merely recite an "affirmative finding." The resulting form orders would instead have a blank for the source of the monies. If a judge cannot fill in the blank because the movant has provided no information on where the purge amount is supposed to be coming from, the judge should realize that incarceration would be an illegal remedy.

While these two changes will not avoid every illegal incarceration, they should greatly reduce the number of illegal incarcerations.

WHEREFORE, the Florida Public Defender Association respectfully requests this Court to adopt the above amendments to the Family Law Rule of Procedure 12.615(e).

Respectfully submitted,

FLORIDA PUBLIC DEFENDER ASSOCIATION, INC.

By: 

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