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SID J. WHITE
DEC 15 1998
CLERK, SUPREME COURT
By ______
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENT TO THE FLORIDA FAMILY LAW RULES OF PROCEDURE

NO: 89-955

COMMENTS OF THE FLORIDA DEPARTMENT OF REVENUE, CHILD SUPPORT ENFORCEMENT PROGRAM, ON THE SUPREME COURT'S ORDER OF OCTOBER 29, 1998

The Florida Department of Revenue, Child Support Enforcement Program, the state's Title IV-D agency as provided by s. 409.2557(1), Florida Statutes (Supp. 1998), submits these comments and recommendations for consideration by the court.

COMMENT # 1

Concerning Rule 12.400, Florida Family Law Rules of Procedure, the court's October 29, 1998 opinion states that both the Family Court Steering Committee (steering committee) and the Family Law Rules Committee (rules committee) asked the court to find as a matter of public policy that any financial information filed in a family law case be sealed by the court at the request of either or both parties. The court provided a well-written, reasoned opinion affirming the right of each citizen to inspect and copy public records. The court further stated that it was sympathetic to the committees' concerns regarding the loss of privacy inherent in the filing of financial affidavits but it simply could not find that public policy dictated the regular sealing of this type of information. Citing Barron v. Florida Freedom Newspapers ,Inc., 531 So.2d 113 (Fla. 1988) the court stated:

> As we stated in Barron, closure of court proceedings or records should occur only under limited circumstances and in this regard family law proceedings should not be given special consideration. Moreover, we also noted in Barron that the legislature was free to enact legislation limiting public access to family law proceedings, but because it had not done so, family law proceedings must be cloaked with a presumption of openness. Barron was issued in 1988 and the legislature has not provided any additional provisions for closure in family law proceedings since the issuance of that opinion. Moreover, since our decision in Barron, the legislature proposed and the public subsequently enacted article I, section 24, of the Florida Constitution...

States are required by 42 U.S.C. § 666(a)(13) to enact laws requiring the recording of social security numbers for use in certain family law matters. Florida has

implemented that requirement by directing state and local government officials to collect social security numbers, which may be disclosed for the limited purpose of administration of the state's Title IV-D child support enforcement program, or in some cases, for use by the collecting agency or as otherwise provided by law. Ch. 97-170 §§ 2, 3, 40, 42, 44 and 63-70, Laws of Fla.; ch. 98-397 §§ 15-18, 32, Laws of Fla. See also § 409.2579(1), Fla.Stats. (Supp. 1998). In addition, the state Title IV-D agency is prohibited by 42 U.S.C § 654(26) and section 409.2579(3), Florida Statutes (Supp. 1998), from disclosing information on the whereabouts of one party or the child to the other party against whom a protective order with respect to the former party or the child has been entered. The department is authorized to establish procedures to implement this requirement. § 409.2579(5), Fla. Stats. (Supp. 1998).

As a result of federal and state laws limiting disclosure of confidential records, the department, like the rules committee and the steering committee before, requests the court to reconsider its opinion and find there is both a legislative and public policy basis for keeping certain information in family law cases confidential without having to comply with the time consuming, confusing, and expensive procedure set out in article I, section 24, Florida Constitution, and Rule 2.051, Rules of Judicial Administration. If the rule does not provide for keeping social security numbers in family law cases confidential without the need to comply with the closure requirements under article I, section 24, Florida Constitution, and Rule 2.051, Rules of Judicial Administration, the department may be unable to discharge its duty to keep the information confidential under sections 409.2579(1), Florida Statutes (Supp. 1998) and 42 U.S.C § 654(26) once that information is provided to the court.

RECOMMENDATION: It is recommended that Rule 2.051(c)(7), Rules of Judicial Administration be amended as follows:

> (7) All records made confidential under the Florida and United States Constitutions and state and federal law;

COMMENT # 2:

Rule 12.615(b), Florida Family Law Rules of Procedure states "The civil contempt motion and notice of hearing may be served by mail provided notice is reasonably calculated to apprise the alleged contemnor of the pendency of the proceedings." This language conflicts with section 61.13(9)(c), Florida Statutes (Supp. 1998) and section 742.032(2), Florida Statutes (Supp. 1998), which were enacted in response to a federal Title IV-D mandate concerning presumptive notice. See 42 U.S.C. § 666(c)(2)(A); P.L. 104-193, § 325(a). Both sections, which are substantially similar, were amended by Chapter 98-397, Laws of Florida, to comply with a federal technical amendment to Welfare Reform found in the Balanced Budget Reconciliation Act of 1997, P.L. 105-33, § 5538. Section 61.13(9)(c) now reads as follows:

> Beginning July 1, 1997, in any subsequent Title IV-D child support enforcement action between the parties, upon sufficient showing that diligent effort has been made to ascertain the location of such a party, *the court of competent jurisdiction shall deem state due process requirements for notice and service of process to be met with respect to the party, upon delivery of written notice to the most recent residential or employer address filed with the tribunal and State Case Registry pursuant to paragraph (a).* Beginning October 1, 1998, in any subsequent non-Title IV-D child support enforcement action between the parties, the same requirements for service shall apply. (emphasis added)

In addition, section 61.13(9)(a), Florida Statutes (Supp. 1998), also mandated by 42 U.S.C. § 666(c)(2)(A), and which is substantially similar to section 742.032(1), Florida Statutes (Supp. 1998), states:

> Beginning July 1, 1997, each party to any paternity or child support proceeding is required to file with the tribunal as defined in s. 88.1011(22) and the State Case Registry upon entry of an order, and to update as appropriate, information on the location and identity of the party, including social security number, residential and mailing addresses, telephone number, driver's license number, and name, address, and telephone number of employer. Beginning October 1, 1998, each party to any paternity or child support proceeding in a non-Title IV-D case shall meet the above requirements for updating the tribunal and State Case Registry.

The purpose and effect of sections 61.13(9)(a) and (c) and sections 742.032(1) and (2) are inappropriately negated by the rule. Under the rule, if the department, or the obligee in a non-IV-D case, knows the obligor no longer resides at the obligor's record address, the department or obligee would need to locate the obligor before a motion for contempt could be initiated. This requirement places an undue burden on custodial parents and children because many child support obligors deliberately conceal their whereabouts or change location frequently to avoid payment of child support. The inability to locate and serve parties in child support enforcement proceedings has frustrated lawful collection actions for years, resulting in hundreds of millions of dollars in uncollected, court ordered child support. To help remedy this problem, Congress has mandated disclosure of location and identifying information by each party to a child support proceeding upon entry of an order and presumptive notice in subsequent court actions upon mailing to the party's record address. The Florida Legislature has complied with these mandates by enacting sections 61.13(9)(a) and (c) and sections 742.032(1) and (2), Florida Statutes. States that do not comply with federal law risk losing all Federal Title IV-D funding and, potentially, a portion of the State's Federal Title IV-A block grant.

As indicated, the statutes require each party to file and update specific location

and identification data with the court. Because Rule 12.615(b) provides that the motion and notice of hearing may be served by mail only when the notice is reasonably calculated to apprise the alleged contemnor of the pendency of the proceedings, the rule will prevent a party from providing notice in appropriate cases with a proper showing as permitted by sections 61.13(9)(c) and 742.032(2), Florida Statutes.

RECOMMENDATION: It is recommended that Rule 12.615(b), Florida Family Law Rules of Procedure, be amended as follows:

> Civil contempt may be initiated by motion. No civil contempt may be imposed without notice to the alleged contemnor and without providing the alleged contemnor with an opportunity to be heard. The civil contempt motion and notice of hearing may be served by mail provided notice is reasonably calculated to apprise the alleged contemnor of the pendency of the proceedings, <u>or upon sufficient showing that diligent effort has been made to ascertain the location of the alleged contemnor upon delivery of written notice to the alleged contemnor's most recent residential or employer address filed with the court and State Case Registry.</u> The notice must specify the time and place of the hearing and the motion must recite the essential facts constituting the acts alleged to be contemptuous.

COMMENT # 3:

Rule 12.615(e), Florida Family Law Rules of Procedure requires that if incarceration is deferred to allow the contemnor a reasonable time to comply with purge conditions set by the court, upon incarceration, the contemnor is to be "immediately" brought before the court to determine whether the contemnor continues to have the present ability to pay support. The difficulty we see with this standard is the department and other parties do not control the immediacy of a hearing. There are many factors beyond the control of the parties which can delay a hearing. For example, if the contemnor is stopped for speeding in Leon County and the arresting officer discovers that an outstanding Writ of Bodily Attachment was issued in Broward County, the individual would be arrested, incarcerated and, in all likelihood, transported to Broward County for a hearing on the contemnor's failure to pay as ordered by the circuit court in Broward County. Transportation to the court of jurisdiction could take one or more days. Another example of how a hearing can be delayed is when a contemnor is arrested on a weekend and the hearing takes place on the next business day.

Under the rule, a contemnor may claim wrongful incarceration due to the failure to provide an immediate hearing. Regardless of fault, we would expect an increase in actions of this nature being filed against government officials as a result of the rule. For the foregoing reasons, the department recommends that the proposed rule be

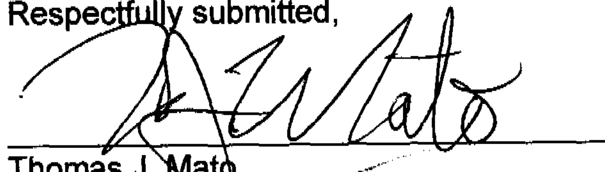
amended as provided below, using the same standard as provided by Rule 12.610(b)(5). In the alternative, "immediately" could be defined in the rule.

RECOMMENDATION: It is recommended that Rule 12.615(e), Florida Family Law Rules of Procedure, be amended as follows:

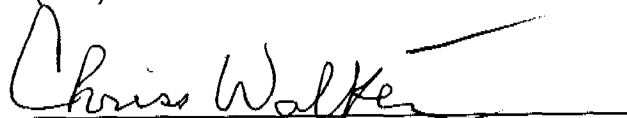
> If the court orders incarceration, a coercive fine, or any other coercive sanction for failure to comply with a prior support order, the court shall set conditions for purge of the contempt, based on the contemnor's present ability to pay. The court shall include in its order a separate affirmative finding that the contemnor has the present ability to comply with the purge and the factual basis for that finding. 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 purge conditions, and the contemnor fails to comply within the time provided, then, upon incarceration, the contemnor must be brought ~~immediately~~ before the court <u>at the earliest possible time</u> for a determination of whether the contemnor continues to have the present ability to pay the purge. <u>When incarceration occurs when the court is closed, the hearing to determine whether the contemnor continues to have the present ability to comply with the purge conditions shall take place on the next business day of the court.</u>

December 15, 1998

Respectfully submitted,



Thomas J. Mato
Chief Legal Counsel
Florida Bar No.140740
Department of Revenue
Child Support Enforcement
P.O. Box 8030
Tallahassee, Florida 32314-8030
(850) 922-9560



Chriss Walker
Senior Attorney
Florida Bar No. 188653
Department of Revenue
Child Support Enforcement
P.O. Box 8030
Tallahassee, Florida 32314-8030
(850) 922-9546