O.A. 6-1-98

FILED
SID J. WHITE
DEC 14 1998
CLERK, SUPREME COURT
By_____
Chief Deputy Clerk

CIRCUIT COURT
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
Office of the General Master

Robert J. Jones
Administrative General Master

DADE COUNTY COURTHOUSE
73 WEST FLAGLER STREET
SUITE 1801
MIAMI, FLORIDA 33130
TELEPHONE: (305) 375-3597
FAX: (305) 375-1357

December 11, 1998

Sid White, Clerk
The Supreme Court of Florida
Supreme Court Building
500 South Duval Street
Tallahassee 32399-1925

89,955

Re: Comment regarding the Civil Contempt Rule, Rule 12.615, and the Expert Witness Rule, Rule 12.365, Florida Family Law Rules of Procedure.

Dear Mr. White:

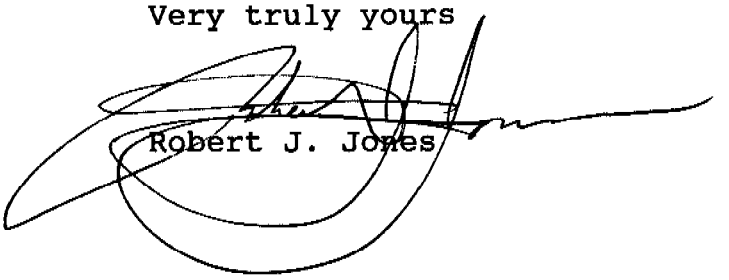
Enclosed herewith please find an original and seven (7) copies of a comment regarding the Civil Contempt Rule and the Expert Witness Rule, which comment is being filed by certain Circuit Court Judges and General Masters of the Family Division of the Eleventh Judicial Circuit, in and for Dade, County, Florida.

It should be noted that the **same** comment, signed by certain other Circuit Court Judges and General Masters of the Family Division of the Eleventh Judicial Circuit, in and for Dade, County, Florida, was submitted by Judge Richard Yale Feder directly to Justice Pariente at the recent Judicial Conference. However, that comment, as delivered, did not include the required copies or the actual proposed rules (with the recommended changes). The comment submitted herewith includes the required copies and the proposed rules (with the recommended changes), and serves as a supplement to the comment previously submitted by Judge Richard Yale Feder.

For information purposes, the following Circuit Court Judges and General Masters support the comment: Judge Richard Yale Feder (Administrative Judge), Judge Judith L. Kreeger (Associate Administrative Judge), Judge Jennifer D. Bailey, Judge Joel H. Brown, Judge Eugene J. Fierro, Judge Carol R. Gersten, Judge Maynard A. Gross, Judge Henry H. Harnage, Judge Gerald D. Hubbart, Judge Sandy Karlan and Judge Arthur H. Taylor, General Master Robert J. Jones (Administrative General Master), General Master William E. Dellow, Jr., General Master Alejandro Gamboa, General

Master Joe L. Kershaw, Jr., General Master Betty Kessler, General Master Gordon Murray, General Master Margaret Ann Rosenbaum, General Master Melissa Tenenbaum, and General Master Thomas A. Tilson.

Very truly yours



Robert J. Jones

Incl.

cc: Judge Richard Yale Feder, Administrative Judge, Family Division

December 11, 1998

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?

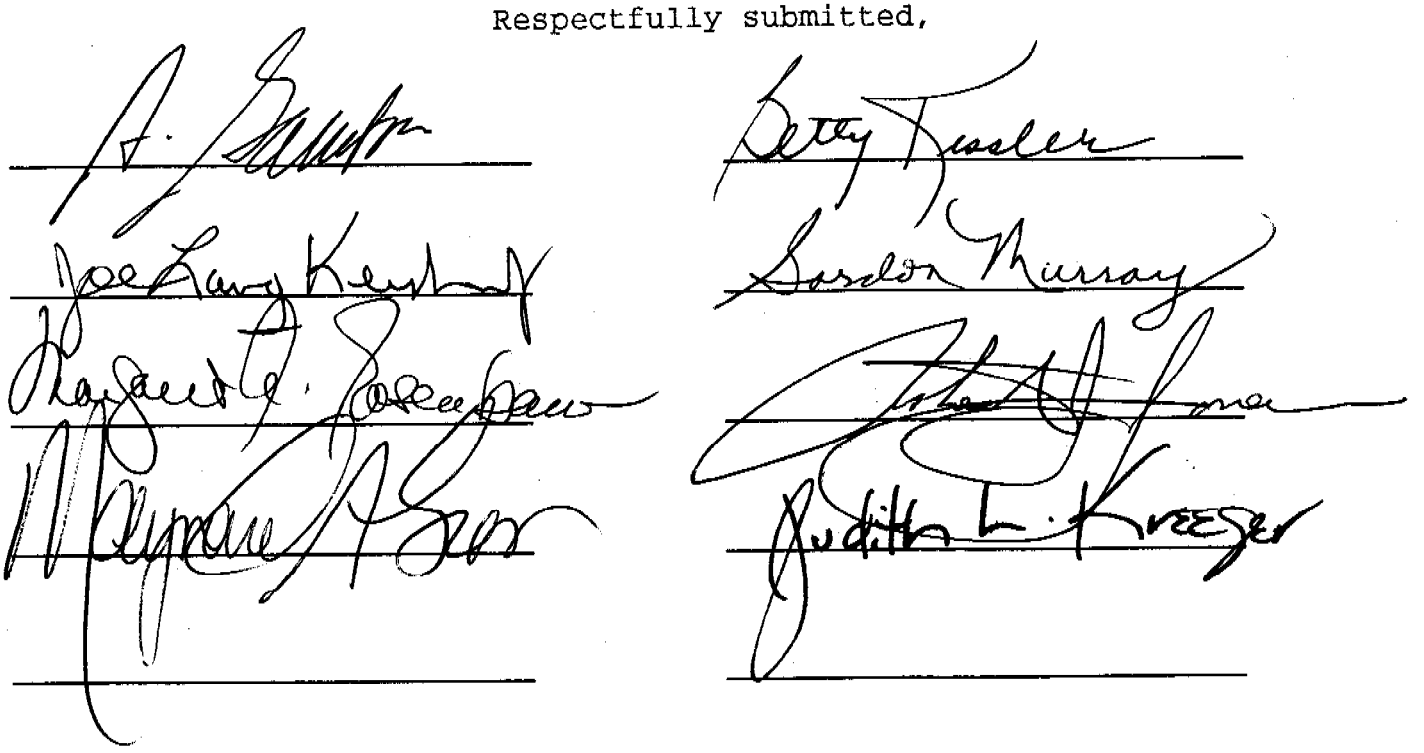
4. Presently, and in the absence of written expert opinions, a very substantial number of cases are settled within the 30 day period immediately before the final hearing. Should parties be forced to incur the costs or expenses associated with the preparation of written expert opinions when under the 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).

The proposed rules, which include the recommended changes, are attached hereto for your review and consideration.

Respectfully submitted,



RULE 12.615 CIVIL CONTEMPT IN SUPPORT MATTERS

(a) **Applicability.** This rule governs civil contempt proceeds in support matters related to family law cases. 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. Contempt sanctions intended to punish an offender or to vindicate the authority of the court are criminal in nature and are governed by Florida Rules of Criminal Procedure 3.830 and 3.840.

(b) Motion and Notice. 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 by mail is reasonably calculated to apprise the alleged contemnor of the pendency of the proceedings. 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.

(c) **Hearing**. In any civil contempt hearing, after the court makes an express finding that the alleged contemnor had notice of the motion and hearing.

(1) 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; and

(2) if the court finds the movant has established all of the requirements in subdivision 12.615(c)(1) of this rule, the court shall,

(i) if the alleged contemnor is present, determine whether the alleged contemnor has established that the alleged contemnor no longer has the present ability to pay support. If the court finds that the alleged contemnor has the present ability to pay support, the court is to determine whether the failure to pay such support is willful.

(ii) if the alleged contemnor fails to appear, issue a writ of bodily attachment and direct that, upon execution of the writ of bodily attachment, the alleged contemnor be immediately brought before the court for a hearing on whether the alleged contemnor has the present ability to pay support and, if so, whether the failure to pay such support is willful. The writ of bodily attachment shall include a provision for the posting of a reasonable bond.

(3) 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) Order and Sanctions. After hearing the testimony and evidence ~~presented by each party~~, the court shall enter a written order granting or denying the motion for contempt.

(1) An order finding the alleged contemnor to be in contempt shall contain a finding that a prior order of support was entered, that the alleged contemnor has failed to pay part of all of the support ordered, that the alleged contemnor has the present ability to pay support, and that the alleged contemnor has willfully failed to comply with the prior court order. The order shall contain a recital of the facts on which these findings are based.

(2) If the court grants the motion for contempt, the court may impose appropriate sanctions to obtain compliance with the order including incarceration, attorneys' fees, suit money and costs, ~~compensatory or~~ coercive fines, and any other coercive sanction or relief permitted by law provided the order includes a purge provision as set forth in subdivision 12.615(e) of this rule, except that a compensatory fine shall not require a purge provision.

(e) **Purge.** 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 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. 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 for a determination of whether the contemnor continues to have the present ability to pay the purge.

(f) **Review after Incarceration.** Notwithstanding the provisions of this rule, at any time after a contemnor is incarcerated, the court on its own motion or motion of any party may review the contemnor's present ability to comply with the purge condition and the duration of incarceration and modify any prior orders.

(g) **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.

Commentary

1998 Adoption. This rule is limited to civil contempt proceedings. Should a court wish to impose sanctions for criminal contempt, the court must refer to Florida Criminal Rules of Procedure 3.830 and 3.840 and must provide the alleged contemnor with all of the constitutional due process protections afforded to criminal defendants. This rule is created to assist the trial courts in ensuring that the due process rights of alleged contemnor are protected. The contempt notice in Form 1.982, Rules of Civil Procedure, may be used to initiate civil contempt proceedings under this rule.

RULE 12.365. EXPERT WITNESSES

(a) **Application**. The procedural requirements in this rule shall apply whenever an expert is appointed by the court or retained by a party. This rule applies to all experts including, but not limited to, medical, psychological, social, financial, vocational, and economic experts. Where in conflict, this rule shall supersede Florida Rule of Civil Procedure 1.360.

(b) **Communication with Court by Expert.** No expert may communicate with the court without prior notice to the parties and their attorneys, who shall be afforded the opportunity to be present and heard during the communication between the expert and the court. A request for communication with the court may be conveyed informally by letter or telephone. Further communication with the court, which may be conducted informally, shall be done only with notice to all parties.

~~(c) **Opinion of Expert Appointed by the Court.**~~

~~(1) **Service.** Any opinion of an expert appointed by the court shall be served in writing on the parties within 10 days of the formation of the opinion, but not less than 30 days before trial.~~

~~(2) **Discovery.** The parties shall be permitted a reasonable opportunity to conduct discovery after service of the expert's opinion including, but not limited to, the right to take the deposition of the expert.~~

~~(3) **Submission to Court.** No expert opinion shall be filed with or otherwise submitted to the court until the opinion is introduced as evidence at a hearing with notice to all parties.~~

~~(d) **Opinion of Expert Not appointed by Court.**~~

~~(1) **Service** Any opinion of an expert retained by a party who is expected to testify at a trial shall be served in writing on all other parties within 10 days of formation of the opinion, but not less than 30 days before trial.~~

~~(2) **Discovery.** The parties shall be permitted a reasonable opportunity to conduct discovery after service of the expert's opinion including, but not limited to, the right to take the deposition of the expert.~~

~~(3) **Submission to Court.** No expert opinion shall be filed with or otherwise submitted to the court until the opinion is introduced as evidence at a hearing with notice to all parties.~~

(c) **Opinion of Expert.** 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.

(d~~e~~) **Use of Evidence.** The court shall not entertain any presumption in favor of a court-appointed expert's opinion. Any opinion by an expert may be entered into evidence on the court's own motion or the motion of any party in a manner consistent with the rules of evidence, subject to cross-examination by the parties.

(e~~f~~) **Evaluation of Minor Child.** This rule shall not apply to any evaluation of a minor child under rule 12.363.

Committee Note

1998 Adoption. This rule establishes the procedure to be followed for the use of experts. The District Court of Appeal, Fourth District, has encouraged the use of court-appointed experts to review financial information and reduce the cost of divorce litigation. *Tomaino v. Tomaino*, 629 So.2d 874 (Fla.4th DCA 1993). Additionally, section 90.615(1), Florida Statutes, allows the court to call witnesses whom all parties may cross-examine. See also Fed.R.706 (trial courts have authority to appoint expert witnesses).