IN THE SUPREME COURT OF FLORIDA

DEPARTMENT OF REVENUE,

Petitioner,

v. CASE NOS. SCO1-913
SC01-914

KELVIN M. JACKSON,
MORGAN P. TILLERY, SR.,

Respondents.
_____/

RESPONDENTS' ANSWER BRIEF ON THE MERITS

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PREFACE

The Petitioner, the Department of Revenue, will be referred to as the "DOR."

Respondents KELVIN M. JACKSON and MORGAN P. TILLERY, SR. will be referred to collectively as "Respondents."

The DOR's initial brief on the merits will be referred to as "IB" followed by the page number where the information may be found.

STATEMENT OF THE CASE AND FACTS

Respondents accept the statement of case history and facts set forth in Petitioner's initial brief.

SUMMARY OF ARGUMENT

Incarcerated parents should not be barred from modifying child support down based on the plain language of the statute, the established precedent of the 'clean hands doctrine' in equity, and public policy.

Florida Statute sections 61.13, 61.14, and 61.30 govern modifications of child support obligations created in Florida. The plain language of those statutes do not treat incarcerated parents differently. This Court should adhere to the plain language of the statutes, as it did in *Overbey v. Overbey*, 698 So. 2d 811 (Fla. 1997), when resolving this case.

The equitable doctrine of 'clean hands' is not a basis to categorically deny downward modification because the doctrine is confined to misconduct occurring within the litigation between the parties and has no application to wrongs committed at large. *Dale v. Jennings*, 90 Fla. 234, 107 So. 175 (1926) (*en banc*). The *Waskin v. Waskin*, 484 So. 2d 1277 (Fla. 3d DCA 1986) and *Mascola v. Lusskin*, 727 So. 2d 328 (Fla. 4th DCA 1999) decisions were correctly decided under the 'clean hands' doctrine because both cases involved obligor parents attempting to kill the custodial parent for the purpose of avoiding child support.

Finally, categorically barring all downward modification for incarcerated parents is bad policy because it is impossible to anticipate and resolve the wide variety of ways that child support obligations are created and enforced. Instead, support cases should be resolved on a case-by-case basis within the sound discretion of the trial court judge.

It is also bad public policy to force parents having a present inability to pay child support to accrue a large support arrearage whose non-payment is a crime and results in other severe economic penalties.

ARGUMENT

The DOR requests this Court adopt a categorical rule that incarcerated parents may not downward modify their existing child support obligations. (IB at 11). This Court should decline because such a fixed rule is contrary to Florida statutes governing modifications, is contrary to the clean hands doctrine in equity, and is bad public policy.

Standard of Review.

This case presents a conflict of opinions between District Courts of Appeal in Florida, and, the questions of law should be reviewed *de novo*.

Issue: Whether An Incarcerated Parent Should Be Barred From Downward Modifying Child Support.

The DOR correctly notes that Florida Statute Section 61.14 authorizes modification of child support obligations. (IB at 12). Subsection 61.13(1)(a) also authorizes the courts to modify child support. § 61.13(1)(a), *Fla. Stat.* (2001). The plain language of both Section 61.14 and subsection 61.13(1)(a) apply to all persons paying child support. It is contrary to the canons of statutory construction, judicial restraint, and constitutional equal protection to carve out a special exception

for incarcerated parents only when the statutes do not contain such an exception.

This Court's decision in ***Overbey,*** cited by DOR (IB at 12), closely and explicitly adheres to the Chapter 61 statutory language. This Court pointedly described Section 61.13 as the "statute which governs the power of courts to issue orders regarding child support" when analyzing child support modification. ***Overbey v. Overbey***, 698 So. 2d 811, 813 (Fla. 1997). This Court held both Sections 61.13 and 61.14 govern modifications on their face and must be read ***in pari materia***. ***Overbey*** at 814. So too here. Subsection 61.14(3) governing modifications could not be clearer that it embodies Legislative intent: "This section is declaratory of existing public policy and of the laws of this state." § 61.14(3), ***Fla. Stat.*** (2001). There is no special exclusion pertaining to incarcerated parents in Chapter 61, or anywhere else in the Florida Statutes. The Legislature can supply an exception to incarcerated parents if it chooses. This Court should follow its approach in ***Overbey*** and construe the plain language of the statute.

The DOR notes the Florida appellate courts have relied heavily on the notion of voluntariness when urging use of a categorical rule. (IB at 12). This Court correctly held, however, the 'voluntary' factor is a judicial gloss created by

the Florida courts "to ensure that the duty to furnish adequate support is not deliberately avoided." *Overbey v. Overbey*, 698 So. 2d 811, 814 (Fla. 1997). It is significant that this Court disapproved of a voluntary/involuntary distinction in *Overbey* when deciding child support modifications. *Overbey* at 815. Instead this Court relied on Section 61.30 as the legal authority that income may be imputed to a voluntarily underemployed parent. *Overbey* at 814.

This Court should again apply the plain intent of Section 61.30 when determining this case. Section 61.30 provides that income will be imputed to an obligor parent "absent physical or mental incapacity or other circumstance over which the parent has no control." § 61.30(2)(b), *Fla. Stat.* (2001) (underlining added). That is the situation here. An incarcerated parent has no control over the length of her sentence or whether she will be allowed to work while under Department of Corrections' supervision. The DOR essentially suggests that Section 61.30 should be construed to add a legal fiction that incarceration is voluntary as a choice of sentence alternatives. (AB at 5-6, 11-12). That logic is far from inexorable. Incarceration without the ability to earn income is a legislative choice among sentencing alternatives. It is more consistent to construe Section 61.30 as embodying the policy that obligor parents

should pay child support whenever possible, and therefore, incarceration should be avoided so the obligor can be required to continue earning income and paying support. Clearly it is better that a child receive actual support during minority rather than pile up a paper arrearage during incarceration that is payable only after the age of majority or as recoupment for limited public welfare received during minority. Incarcerated parents are therefore more consistently interpreted under Section 61.30 as not having the present ability to pay due to circumstances over which they do not control, that is the legislative preference for lengthy terms of incarceration, rather than through creation of a legal fiction that parents voluntarily choose incarceration as a means to avoid child support.

The DOR also relies on the equitable 'clean hands doctrine' for denying downward modification. (IB at 11). Respondents agree the 'clean hands doctrine' can bar downward modification in cases like *Waskin v. Waskin*, 484 So. 2d 1277 (Fla. 3d DCA 1986) and *Mascola v. Lusskin*, 727 So. 2d 328 (Fla. 4th DCA 1999), cited by the DOR. (IB at 11). The DOR, however, requests this Court to extend the 'clean hands doctrine' beyond its boundary, and Respondents do not agree with that.

The 'clean hands doctrine' requires a direct connection, or nexus, between the iniquitous behavior and the relief sought in equity. This Court has emphatically held: "The doctrine of clean hands is confined to misconduct in the matter of litigation, and must concern the other party. It has no application to wrongs committed at large." *Dale v. Jennings*, 90 Fla. 234, 245, 107 So. 175, 180 (1926) (*en banc*). *Accord*, *Pennington v. Pennington*, 390 So. 2d 809, 810 (Fla. 5th DCA 1980).

This is the accepted rule for other states as well. 27A Am. Jur. 2d *Equity* § 133 (1996); *e.g.*, *Powell v. Mobile Cab & Baggage Co.*, 83 So. 2d 191 (Ala. 1955).

The 'clean hands doctrine' therefore is inapplicable to the vast majority of incarcerated parents.

The 'clean hands' nexus is present in the *Waskin* and *Mascola* decisions cited by the DOR. (IB at 14-15). In both cases the obligor attempted to kill the custodial parent <u>for the purpose of</u> avoiding child support. The DOR concedes these two cases can be construed to hold simply "that an individual who attempts to kill a custodial parent in order to avoid child support may not receive relief," but urges such a reading is "far too narrow." (IB at 15). To the contrary, such interpretation is consistent with the limited scope of the 'clean hands doctrine' and is

consistent more generally with statutes and equitable rules barring profit from wrongdoing. The DOR's request for a more expansive, categorical rule uncouples the equitable nexus and is contrary to this Court's holding in the *Dale v. Jennings* decision.

Finally, sound public policy militates against a categorical rule versus a case-by-case decision left in the sound discretion of the trial court. First, it is impossible to fully anticipate and equitably resolve the wide variety of ways child support obligations are created and enforced with a fixed rule. Child support obligations can arise either within or without a marriage. *E.g.*, §§ 61.13(1)(a), 61.30, *Fla. Stat.* (2001) (pursuant to dissolution of marriage); §§ 61.09, 61.10 , *Fla. Stat.* (2001) (acknowledged paternity unconnected with dissolution). It can arise through a paternity contest. § 742.031(1), *Fla. Stat.* (2001). It can arise when a child is sheltered, declared dependent, or declared delinquent. §§ 39.402(11), *Fla. Stat.* (2001) (shelter); 39.521(1)(d)(7), *Fla. Stat.* (2001) (dependent); 985.231(1)(b), *Fla. Stat.* (2001) (delinquent). It can arise from a foreign support judgment enforceable in Florida, or, a Florida support order enforceable in another state. §§ 88.011-88.9051, *Fla. Stat.* (2001). The

equities will be different in each case, and it unwise to shackle the Florida trial court judges with an ironclad rule to resolve all these cases.

There are policy problems with the needless accrual of a large arrearage without an ability to pay it. Florida decisional law presently holds that a parent cannot eliminate an arrearage vested during incarceration without compelling circumstances. *Department of Revenue v. Evans*, 706 So. 2d 933, 933 (Fla. 2d DCA 1998). A vested arrearage, non-dischargeable in bankruptcy, produces inequitable results. For example, assume a parent receives a 25-year minimum mandatory sentence for illegal purchase of 40 Lortab painkiller tablets containing schedule II hydrocodone. § 893.135(1)(c)(1)(c), *Fla. Stat.* (2001) (revised hydrocodone trafficking statute).[1] The child will be emancipated by at least 7 years when the parent is freed. There is no benefit to the child during minority in

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[1] *See also*, Christopher Mascharka, *Mandatory Minimum Sentences: Exemplifying the Law of Unintended Consequences*, 28 Fla. St. U. L. Rev. 935, 959-60 (Summer 2001) (comparing minimum hydrocone sentence with 25-year minimum for 28 grams of pure heroin, 15-year minimum for 300 pounds of cocaine, and 10-year minimum for 10,000 pounds of marijuana).

accruing child support that cannot be paid for 25 years. There is, however, an overwhelming problem to the released parent facing this financial debt that is owed either to the adult child or the Florida DOR.

The DOR optimistically disclaims that incarcerated parents accruing an arrearage will not be at risk of further punishment by contempt. (IB at 16-17). Other penalties are omnipresent, however, and not in the DOR's control. Most significantly, the Child Support Recovery Act of 1992 ("CSRA") makes it a federal offense to willfully not pay an accrued arrearage greater than $5,000.00 for a child residing in another state. 18 U.S.C.A. § 228 (West 2001). Florida has a similar criminal statute, whose penalty was recently enhanced in the 2000 Legislative session. § 827.06, *Fla. Stat.* (2001). Florida support arrearages accrued while incarcerated in Florida can be enforced in virtually any state under the Uniform Interstate Family Support Act ("UIFSA"). *See* §§ 88.6031, 88.0641, *Fla. Stat.* (2001) (registration of orders and choice of law); §§ 88.8011, 88.8021, *Fla. Stat.* (2001) (demand for rendition of persons incarcerated for non-support). There are no predictable consequences to how other federal or state prosecutors will respond to an arrearage accrued in Florida. Indeed, the arrearage may be prosecuted with zero tolerance, or instead

strain comity when other states are asked to enforce Florida's policy of running up an arrearage during incarceration.

The DOR requests, in essence, to create the unavoidable accrual of a unique debt whose non-payment is a crime. This creates serious future constitutional issues of imprisonment for debt or involuntary servitude when the DOR is enforcing a subrogated arrearage in its own name for an emancipated child.

There are other federal and state penalties to confront if an arrearage is accrued while incarcerated. The United States Secretary of State is authorized to deny a passport for an arrearage greater than $5,000.00. 42 U.S.C.A. § 652(k)(1) (West 2001). A citizen can be disqualified from receiving food stamps. 7 U.S.C.A. § 2015(n)(1),(2) (West 2001). Federal law authorizes income tax intercepts for an arrearage greater than $5,000.00. 42 U.S.C.A. § 664 (West 2001); 26 U.S.C.A. § 6305 (West 2001). In Florida, a delinquent obligor's driving license can be suspended, §§ 61.13016, 322.058, *Fla. Stat.* (2001), and professional licenses suspended. § 61.13016, *Fla. Stat.* (2001). The courts can issue writs restraining a person or a person's property from leaving the state. § 61.11, *Fla. Stat.* (2001). Wages can be garnished. § 61.12, *Fla. Stat.* (2001).

Title IV-D child support enforcement is another entire world altogether. §§ 409.2551-409.2598, *Fla. Stat.* (2001). These

enforcement actions include administrative fines, initiation of passport revocation, public listing as an overdue obligor, garnishment of wages and levy of personal property, compelled disclosure of an obligor's financial data by financial institutions, liens on automobiles and boats, and mandatory tracking and wage withholding by an obligor's employer. §§ 409.2564(8), *Fla. Stat.* (2001) (administrative fine); 409.2564(11), *Fla. Stat.* (2001) (passport revocation); 409.2565, *Fla. Stat.* (2001) (publication of delinquent obligor); 409.25656, *Fla. Stat.* (2001) (garnishment and levy); 409.25657, *Fla. Stat.* (2001) (reporting by financial institutions); 409.2575, *Fla. Stat.* (2001) (liens); 409.2576(3), (7), *Fla. Stat.* (2001) (employer reporting and wage withholding).

Title IV enforcement also hides legal shortcuts. The DOR may unilaterally escalate a delinquent obligor's child support payment by 20% and force the obligor to seek court protection to contest the action. § 409.2564(10)(b), *Fla. Stat.* (2001). A driver's license may be suspended through notice by regular mail. § 61.13016, *Fla. Stat.* (2001). These are substantial enforcement mechanisms that do not discriminate between delinquencies accrued while incarcerated or otherwise.

Neither is the DOR's benign forgiveness to an accrued arrearage widespread. Writing in the professional journal of

the Florida Bar, Judge Eaton, Jr. heartily recommends the use of criminal sanctions against parents claiming an inability to pay; he describes the situation as:

> 'Human law' is the law of reason. It assumes that human beings are rational and are able to obey the law or weigh the advantages and disadvantages of violating the law by assessing the risk of being caught, evaluating the possible penalties, and deciding whether violating the law is worth the risk. By way of example, 'human law' principles are assumed in criminal statutes, zoning ordinances, and the law of contracts.
>
> 'Dog law,' on the other hand, does not include any rational reasoning. When a dog jumps up on a couch, the couch gets dirty. The dog does not realize that this is a problem. If the dog's owner slaps the dog, he will get off of the couch. After being slapped a few times, the dog will not jump on the couch. This is not because the dog understands that he is getting the couch dirty, but because the dog knows he will get slapped if he jumps up on it.
>
> 'Dog law' is particularly applicable to deadbeat parents. It is not rational to refuse to pay child support.

Judge O.H. Eaton, Jr., *Frustrated By a Deadbeat Parent? Try Invoking the Dog Law*, 74 FBJ 64, 64 (March 2000).

Respondents present a case where there is an unquestioned inability to pay, not a refusal. It would be wrong to place a parent unable to pay in the same class as a parent unwilling to pay, which is what is urged through the escalation of an arrearage with no ability to pay.

For the reasons given above, this Court should decline the invitation to stretch the statutory language of Chapter 61, Florida Statutes, and the ‘clean hands’ doctrine in equity to create a debt punishable by ‘dog law’.

CONCLUSION

This Court should resolve the conflict between District Courts by holding that an incarcerated parent may downward modify an existing child support obligation on the same terms provided in the Florida Statutes for a non-incarcerated parent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing Initial Brief On the Merits was sent to JON J. JOHNSON, ESQ., Assistant Attorney General, 2002 North Lois Avenue, Westwood Center, 7th Floor, Tampa, FL, 33607, by U.S. Mail this 26th day of November 2001.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using font style Courier New type size 12.

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R. MITCHELL PRUGH, ESQ.