

Order for incarceration denied The motion is a motion for civil contempt under Rule 12.615. It is not a motion for an indirect criminal contempt order to show cause and trial under Rule 3.840.

In a civil contempt motion, if a support order has not been performed, the motion must allege there was a prior support order, the support was not paid at some point in the past, and the payor had the ability to pay the support when he failed to pay the support. To prove a past ability to pay, the motion may allege the presumption of ability to pay allowed under §61.14(5)(a) and *Bowen v. Bowen*, 471 So.2d 1274 (Fla. 1985). These are the essential allegations under Rule 12.615(b) because the court's order granting a civil contempt motion must make a finding that the payor "*had* the present ability to pay support." Rule 12.615(d)(1)(*Emphasis supplied*). The Rule requires that the court's order on a motion for civil contempt "shall contain a recital of the facts on which these findings are based." So at the hearing the movant must present evidence demonstrating a prior support order, a past ability to pay, and a past failure to pay, and, as provided in *Bowen v. Bowen*, 471 So.2d 1274 (Fla. 1985), the movant may rely on the presumption allowed under §61.14(5)(a) to prove a past ability to pay. These facts must be in the motion and in the evidence at the hearing so that the court has a record sufficient to support the factual findings required by the Rule, that is, that the payor was ordered to pay, he had a present ability to pay at some point in the past and he did not pay.

In other words, if it is not alleged in the motion and proven at the hearing that the payor was ordered to pay, had a past ability to pay and he did not pay, the court has no allegation and no record basis for finding that a past failure to pay was willful. A past willful failure to obey a court order is the essential question in a civil contempt hearing.

If a past willful failure to obey a court order is alleged and proven, if incarceration is sought as a sanction, then the motion must also allege and the evidence at the hearing must prove that the contemnor now has a present, immediate ability at the time of the hearing to pay a certain purge amount demanded by the movant, and the court must make findings from the evidence at the hearing that identifies the source from which the contemnor can pay a certain purge amount of money immediately. Proof of an immediate ability to pay a certain amount of money from a particular, named source must be in the record of the hearing on a motion for civil contempt and the source must be stated in the court's order. *See* Rule 12.615(e) and *Bowen v. Bowen*, 471 So.2d 1278 (Fla. 1985) and all cases citing *Bowen*. As the supreme court said in *Bowen*: "...the purpose of a civil contempt proceeding is to obtain compliance on the part of a person subject to an order of the court. Because incarceration is utilized solely to obtain compliance, it must be used only when the contemnor has the ability to comply. This ability to comply is the contemnor's 'key to his cell.'" *Id.* at 1277. The evidence at the hearing did not demonstrate a source from which the contemnor can immediately pay a certain purge amount and have himself released from jail. Therefore, the court does not have a sufficient factual record for an order of incarceration and a purge amount.

For these reasons, this movant's request for incarceration as a sanction for civil contempt is denied, without prejudice.