

**IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR
LEE COUNTY, FLORIDA** **CIVIL ACTION**

**R. H. K.,
Former husband,**

**vs.
K. K.,
Former wife,**

Case No. 0 DR N

**ORDER DENYING FORMER WIFE'S MOTION FOR CONTEMPT
WITHOUT PREJUDICE**

This matter having come before the court today on the former wife's motion for contempt filed 7/1/2010 for the former husband's nonpayment of attorney's fees, it is ordered:

1. Findings

The parties were divorced by a Final Judgment entered in this case on 12/29/2008. The judgment reserved jurisdiction to consider motions for fees, costs and suit money. On 9/11/2009 the court entered an order that granted the former wife's motion for fees. On 1/22/2010 the court entered an order directing the former husband to make certain monthly payments directly to the former wife's counsel for the total amount of fees plus interest as allowed by law.

The former wife's motion is a motion for civil contempt that alleges the former husband willfully failed to pay the attorney fee order. The object of a motion for civil contempt is to compel compliance with a prior court order. The court has no jurisdiction to punish a contemnor in a civil contempt proceeding. Punishment is the object of a criminal contempt proceeding. The movant has the burden of proof.

The former wife's affidavit establishes that the former husband has not paid any of the fees to her, and her counsel testified that no fees have been paid to him. The former husband has paid \$11,000 to the former wife, which she credited to an equalizing payment ordered by the Final Judgment for equitable distribution. Her affidavit states that the former husband has paid all of the child support.

The movant's proof today established the prior order requiring the former husband to pay the fees. It also established that since the fee order was entered the former husband spent some money for trips to Kentucky to see his children, paid some rent for a house in Kentucky, and sold some real estate in Florida. The movant's evidence is insufficient to establish that at any particular time in the past the former husband had the ability at that time to pay the fees as ordered from a definite sum of money at his disposal but he failed to do so. Therefore, the evidence does not establish the former husband's willful contempt for the fee order, because there is no competent, substantial evidence in the record of the former husband's past failure to pay the fees at a certain

time in the past when he had the ability to pay the fees or any part of them.

Further, assuming the record did support a finding of willful contempt, because the motion seeks incarceration as a sanction, the movant must also prove that today the former husband has the present, immediate ability to pay a certain amount at the time of the hearing toward the fees in order to purge himself of contempt. Before the court can order incarceration as a sanction, the movant's evidence must establish the source from which the husband has the immediate ability at the time of the hearing to pay a specific amount of money in order to purge himself of contempt. The court's order must make findings naming the source and the amount. Evidence supporting a finding of a present, immediate ability to pay a purge is wholly lacking in the record.

In short, the evidence does not establish that the former husband had the ability to pay the fees at a particular time in the past, so that he was then in willful contempt of the court order to pay fees. Further, incarceration as a sanction is not supported by the movant's evidence because there is no evidence that he now has "the key to his cell." The former wife's proof does not show that he can now pay a certain sum from a certain source that is readily available to him whenever he decides to comply with the court's order and avoid an order for his incarceration.

2. Ruling

2.1 Willful contempt of a court order is not proven The former wife's motion is a motion for civil contempt. Therefore, the procedure and due process are governed by Rule 12.615 and *Bowen v. Bowen*, 471 So.2d 1278 (Fla. 1985) and the cases citing *Bowen*.

Because the question is the nonpayment of fees, rather than the nonpayment of child support, there is no presumption of an ability to pay, presently or at any time in the past. *Bowen* and §61.14(5)(a) create a presumption of an ability to pay support, not a presumption of an ability to pay fees. Consequently, because there is no presumption that supplies the proof of an ability to pay fees at any time in the past or presently, the movant has the burden to prove those abilities by competent, substantial evidence. The movant did not carry that burden.

An order granting a civil contempt motion must make a finding that the payor "had the present ability to pay ..." Rule 12.615(d)(1)(*Emphasis supplied*). The evidence at the hearing does not demonstrate that the former husband had the ability to pay the fees at any particular time in the past since the obligation was created from a definite source of funds available to him at that time.

Therefore, the court has no competent, substantial evidence that the former husband is in willful contempt of the order to pay fees at any particular time in the past.

2.2 Incarceration as a sanction is not justified from the evidence Assuming the court had a sufficient record from which the court could find that the former husband were in contempt of the order to pay fees, if incarceration is sought as a sanction the motion must also allege and the movant must also prove at the hearing that the contemnor has the present, immediate ability at the

time of the hearing to pay a certain purge amount demanded by the movant. The movant's evidence at the hearing must create a record that identifies the source from which the contemnor can pay a purge immediately. The court's order must find that the payor has the present, immediate ability to pay the purge amount ordered, and the order must name the source of the funds from which the payor can pay the purge amount immediately. Those specific findings must be supported by competent, substantial evidence in the record. *See* Rule 12.615(e) and *Bowen v. Bowen*, 471 So.2d 1278 (Fla. 1985) and all of the cases citing *Bowen*.

Without that proof and without those findings, the record and the order do not demonstrate that the former husband now has the "key to his cell," and if incarceration were ordered without those findings the order amounts to punishment for a past failure to pay, which is the object of a criminal contempt proceeding, and not an order compelling compliance, which is the object of a civil contempt proceeding, but the procedure and due process for a criminal proceeding have not been afforded to the former husband, so such an order would be illegal. The many reported cases concerned with civil contempt orders abound with opinions that reverse trial courts that entered such illegal orders. Those cases are instructive. *See, e.g., Aburos v. Aburos*, ___So.3d ___ (Fla. 3d DCA 2010); *Burbage v. Burbage*, 24 So.3d 684 (Fla. 5th DCA 2009).

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.

For these reasons, the former wife's motion for civil contempt and request for incarceration as a sanction are denied, without prejudice. The evidence at the hearing did not demonstrate either a past ability to pay and a willful refusal at that time to pay the fees, and, assuming the evidence did demonstrate a past, willful failure to pay the fees, it did not demonstrate the named source from which the former husband now has a present, immediate ability to pay a specific purge amount at the time of the hearing to release himself from jail as soon as he decides to pay the purge amount.

Done and ordered in Fort Myers, Lee County, Florida, this _____

R. Thomas Corbin, Circuit Judge

Copies provided to:
_____, Esq., and _____, *pro se*