

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

XXX,
Former husband,

vs.
YYY,
Former wife,

Case No. 0 N

**ORDER ON MOTHER’S MOTION FOR CONTEMPT AND
NOTICE OF CONTINUED HEARING**

This matter came before the court on June 1, 2010 on the mother’s “Motion for Contempt” filed DDD. It is ordered:

1. Findings

The parties have a child, ZZZ., born DDD. The father agreed to pay child support of \$X per week, which is the amount ordered on DDD. The father now has two more children by his present wife. His wife is not working outside of the father’s self-employment business. The father is a self-employed building contractor. He operates his business through a wholly owned corporation.

As of DDD the child support arrearage was \$X. Until July 2009 the father was paying regularly but since then he has accumulated the entire arrearage. Since July 2009 he has made only one payment of \$X on this obligation. That payment was made in April 2010. There is also a \$X credit given to him by the mother for his payment of a \$X mediation fee, half of which was her obligation.

In 2009 the father had total deposits in his business account of about \$X and on 3/31/2010 he had a balance of about \$X in his business checking account. He said, with no corroboration or accounting, that all of this money was spent to pay legitimate business expenses. He offers no proof of his net income from the business at any time. His 2009 income tax return is not in evidence. A profit and loss statement is not in evidence. The mother’s counsel proved that the father paid his personal housing expense for one month by a check drawn on his business account since July 2009. A payment for a personal housing expense is not a legitimate business expense. In response the father claims that this in-kind payment of a personal expense through his business account should be reported as personal income. Yes, it should be but there is no proof that it was. The father is in possession of all of his financial records and he has the ability to corroborate what he claims, that is, that he did not have enough income from his business to pay his child support since July 2009.

He also testified that he sold some assets - a boat, a camper, etc. - for which he received

some thousands of dollars, but despite receiving this money he paid only \$X toward his support since July 2009.

Today, the father has no accounting that demonstrates what he did with his deposits to his business, beyond a generalized and self-serving declaration that he had to pay subcontractors, etc., so there was not any money left with which to pay his child support. However, he admits that since July 2009 his housing expense has been paid, his car insurance has been paid, his wife and after-born children have been fed, and his utility bills are current. So, he had the financial ability to pay his child support, which is his first obligation, but he willfully decided to use the money to pay other bills.

The father filed a supplemental petition to modify on 12/23/2009 but that petition has not been noticed for trial. The present child support amount, \$X per month, presumes an income of about \$X a week to the father, or \$X an hour for a 40 hour week, and about \$X a week to the mother, or about minimum wage. The father would have the burden to prove a substantial change in circumstances at the trial on his petition.

The father says he is trying to change occupations. He attended a “captain’s school” to become a boat captain so that he can operate vessels for hire. He has completed the school and he will get his license from the Coast Guard within a “few weeks.” He says he is not presently working as a building contractor. He says he is now looking for work as a captain.

2. Ruling

2.1 Civil contempt procedure; father is in contempt The mother’s motion is a motion for civil contempt. It is not a motion under Rule 3.840 for an order to show cause that would begin an indirect criminal contempt proceeding. Motions for civil contempt are governed by Fla. Fam. L. R. P. 12.615 and *Bowen v. Bowen*, 471 So.2d 1278 (Fla. 1985).

An 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*). In this case, the evidence demonstrates that the father had the ability to pay the support since July 2009 because he has paid his housing expense, bought his groceries, paid his utilities, and otherwise supported himself, his wife and his two after-born children from his income and from the assets he sold. However, despite having funds for these purposes, beyond \$X paid in April 2010, he has not applied any of these funds to his child support debt, which is his first obligation. Child support is the first bill that a payor owes, not the last bill that he owes after he has paid all of his own living expenses to his satisfaction.

Therefore, the father is in willful contempt of the order to pay child support. He had the ability to pay the support but he willfully and purposely decided to pay other bills with the money that was available to him. The court finds there is a valid prior order to pay child support entered in this case on 8/27/2002.

2.2 Incarceration as a sanction is denied However, even if the father is in contempt of the order to pay support because of his past conduct, if incarceration is sought as a sanction, then the

motion must allege and the evidence at the hearing must demonstrate that the contemnor now has a present and immediate ability at the time of the hearing to pay a certain purge amount demanded by the movant, and the evidence at the hearing must create a record that identifies the source from which the contemnor can pay a purge 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 before the court can order jail as a sanction. The court's order must find from the evidence presented that the payor has the present and immediate ability to pay the purge amount that is ordered and the order must name the source of the funds from which the payor can pay the purge immediately. 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.

For these reasons, the mother's request for incarceration as a sanction for civil contempt is denied, without prejudice, because the evidence at the hearing did not demonstrate the named source from which the father has a present and immediate ability to pay a purge amount and let himself out of jail as soon as he decides to pay the purge amount. See also *Burbage v. Burbage*, 24 So.3d 684 (Fla. 5th DCA 2009).

2.3 Arrearage payment ordered As a sanction, the court orders the father to pay an arrearage payment of \$X per week or \$X per month in addition to the child support ordered, \$X per week or \$X per month. This total child support obligation is his first financial obligation before any other obligation can be paid. He is, again, ordered to pay this obligation.

Child support shall be paid by check or money order payable to and sent to the "Florida Support Disbursement Unit", P.O. Box 8500, Tallahassee, FL 32314-8500. The payor must write on each check (1) this case number and also the words (2) "Lee County case".

2.4 Amended income deduction order The court will issue an amended income deduction order for the current support amount and the arrearage payment.

2.5 Attorney's fees granted as a sanction The mother was required to hire an attorney to bring her motion. The father is in contempt. As a sanction, the court awards the mother \$X in fees. The court finds that the fees requested by her counsel are reasonable and necessary for the representation of the mother in this matter and that three hours time at \$X an hour is a reasonable number of hours and hourly rate for the mother's counsel.

However, the child's support comes first. Therefore, the court orders that the depository account balance shall be increased by \$X and the clerk is directed to adjust the account balance by that amount.

2.6 Job search order The court reserves on a decision about whether the father should be

ordered to participate in the Lee County Pay or Appear Program, a sanction requested by the mother. At this time it appears that the father is not employed.

The father is ordered to return to court at the time and place below and to bring documentary corroboration of his claim that he is conducting a job search. It is his burden to prove that he is diligently conducting a good faith job search. The mother and her counsel are not required to attend this hearing. The father must attend this hearing. If he fails to appear, the court may issue an arrest warrant for him to be brought before the court with the assistance of law enforcement officers.

Notice of Hearing

The parties are hereby notified that the court will hold a hearing to review the father's proof of his job search before the undersigned judge, at _____ .m., on _____, _____, in Courtroom 4 I, on the 4th Floor of the Lee County Justice Center, 1700 Monroe Street, Fort Myers, Florida.

2.7 Hearing continued The hearing on the mother's "Motion for Contempt" filed 12/3/2009 is continued until the time and place above, for consideration of other sanctions for civil contempt, including but not limited to incarceration as allowed by law.

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

R. Thomas Corbin, Circuit Judge

Copies provided to:
_____, Esq.