Order for civil contempt and incarceration as a sanction denied

The motion is a motion for civil contempt under Rule 12.615. It seeks to compel compliance with a prior court order requiring the payment of support. It is not a motion for an indirect criminal contempt proceeding and a trial under Rule 3.840. *See* the last sentence of Rule 12.615(a): "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."

A civil contempt motion to compel compliance with a support order, like any other civil contempt motion, "must recite the essential facts constituting the acts alleged to be contemptuous." Rule 12.615(b). So, in a civil motion for failure to pay child support or alimony, the motion must allege the following facts: (1) there was a prior, valid support order entered on a certain date, (2) the support was not paid at some specific date in the past after that order was entered, (3) the payor had the financial ability to pay the support on the specific date that he failed to pay the support, (4) therefore, the failure to pay the support on the specific date was willful, and (5) therefore, the payor willfully violated the prior court order to pay support.

To prove the third item, a past financial ability to pay on a specific date, the motion may allege the evidentiary presumption of an ability to pay on a specific date, as allowed under §61.14(5)(a) and *Bowen v. Bowen*, 471 So.2d 1274 (Fla. 1985). An evidentiary presumption is a substitute for proof of an ability to pay when the support payment came due. The evidentiary presumption created by this law says the payor is presumed able to pay the support each month when it comes due.

Rule 12.615(b) also provides that "[n]o civil contempt may be imposed without notice to the alleged contemnor and without providing the alleged contemnor with an opportunity to be heard," and Rule 12.615(c) requires the court to make "an express finding that the alleged contemnor had notice of the motion and hearing."

These are the essential allegations for a motion for civil contempt 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 also 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." Rule 12.615(d)(1). The court's findings must, of course, be based on evidence in the record at the hearing. So before the court can grant a civil motion for contempt, at the hearing the movant must present evidence that proves (1) there was a prior, valid support order entered on a certain date, (2) the support was not paid at some specific date in the past after that order was entered, (3) the payor had the financial ability to pay the support on the specific date that he failed to pay the support, (4) therefore, the failure to pay the support on the specific date was willful, and (5) therefore, the payor willfully violated the prior court order to pay support. As provided in *Bowen v. Bowen*, 471 So.2d 1274 (Fla. 1985) and §61.14(5)(a) the movant may rely on the evidentiary presumption to prove a past ability to pay.

These facts must be alleged in the motion and also proven by the evidence at the hearing so that the court has a record sufficient to support the factual findings required by the Rule, that is, (1) there was a prior, valid support order entered on a certain date, (2) the support was not paid at some specific date in the past after that order was entered, (3) the payor had the financial ability to pay the support on the specific date that he failed to pay the support, (4) therefore, the failure to pay the support on the specific date was willful, and (5) therefore, the payor willfully violated the prior court order to pay support. These findings may not be conclusory. On the

contrary, the order "shall contain a recital of the facts on which these findings are based." Rule 12.615(d)(1).

Further, if these facts are alleged and proven, if incarceration is sought as a sanction, then the motion must also 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. Finally, 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 movant's request for incarceration as a sanction for civil contempt is denied, without prejudice, because the evidence at the hearing did not demonstrate [LEAVE ALL THAT APPLY] (1) there was a prior, valid support order entered on a certain date, (2) the support was not paid at some specific date in the past after that order was entered, (3) the payor had the financial ability to pay the support on the specific date that he failed to pay the support, (4) therefore, the failure to pay the support on the specific date was willful, (5) therefore, the payor willfully violated the prior court order to pay support, and (6) the named source from which the payor has a sufficient present and immediate ability to pay the purge ordered 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).