

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

B A,
Former wife,
vs.

B J,
Former husband,

Case No. YY DR XXXX N

ORDER GRANTING FORMER WIFE'S MOTION FOR CONTEMPT

This matter having come before the court today on the former wife's "Motion for Contempt and Enforcement" filed 10/3/2013, it is ordered:

1. Findings

The parties have two minor children, ages 15 and 11. The father was ordered to pay child support of \$692.78 per month in a "Modification Order" dated 5/25/2010. He is now in arrears \$16,812.45. He is paying partial payments sporadically.

The father testified. He quit a job at "*Job Omitted*" in 2010 to take "general education" classes at a local college. He testified that then he was not working a full 40 hours a week. He was paid at the rate of \$20 an hour when he did work for this firm.

The father did not offer any corroboration of this testimony.

He swore he is now working less than 40 hours a week for "*Job Omitted*," earning \$15 an hour.

The father did not offer any corroboration of this testimony.

He believes he may have another job with "*Job Omitted*" that might begin "before Christmas." He thinks that maybe this job will be full time and might pay "\$15 to \$20" an hour.

The father testified that the Department of Revenue is pursuing the revocation of his driver's license from time to time and that the suspension of his driver's license might hinder his ability to get to and from work.

The father is in contempt of the child support order requiring him to pay \$692.78 per month. He is presumed able to pay the full amount every month. F.S. §61.14(5) and *Bowen v. Bowen*, 471 So.2d 1274 (Fla. 1985). He has failed to pay the full amount for at least one month in the past.

There is no evidence of the father's present ability to pay.

2. Ruling

2.1 Pursuing education does not excuse the nonpayment of child support A parent's decision to pursue education, which results in a reduction in his work hours and income, does not excuse the nonpayment of child support or justify a reduction in the child support order. *Overbey v. Overbey*, 698 So.2d 811 (Fla. 1997).

2.2 Arrearage payment ordered The mother's counsel requested an arrearage payment of \$138.56 or 20% of the child support amount and an amended income deduction order reflecting this arrearage payment. (\$682.78 x 20% = \$138.56) This request is granted. Florida Statute §61.1301(b)2. requires the court to enter an arrearage payment in the amount of 20% of the child support order and

an amended income deduction order if there is an arrearage.

2.3 Amended Income Deduction Order As required by F.S. §61.1301, an Amended Income Deduction Order ("IDO") shall be signed by the judge assigned to this case that directs the payor's employer and any future employer to deduct the child support due under this order from any income due to the payor plus the arrearage payment and to forward it to the depository, the "Florida Support Disbursement Unit."

The form of the Amended IDO must comply with the form required by the United States Office of Management and Budget. That agency calls an "Income Deduction Order" an "Income Withholding Order" or IWO, but either name refers to the same thing: an order to take the child support out of the payor's pay to the extent allowed by law.

The IDO or IWO form shall be prepared by the payee or the payor and sent to the undersigned judge for signing and filing. *The undersigned judge will not prepare the form of IDO or IWO.* Delivering a copy of the IDO or IWO to the payor's employer is the responsibility of the payee and the payor.

The court hereby orders the payor to give a copy of the Amended IDO or IWO to his or her employer immediately upon receiving a copy of it and to any subsequent employer until the child support is no longer payable, including any arrearage, and if the payor does not do so then the payee must give a copy of it to the payor's employer. *It is not the responsibility of the undersigned judge to find the payor's employer from time to time and deliver a copy of the IDO or IWO to that employer.*

2.4 Place of Payment 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) the case number of this case and also the words (2) "Lee County case".**

2.5 Addresses and Social Security numbers As required by §61.13(8)(a), F.S., within 30 days of this order both parties are ordered to write to the "State Case Registry", P.O. Box 8500, Tallahassee, FL 32314-8500 and advise that agency of this Case Number in Lee County, Florida, and their current names, addresses, social security numbers, telephone numbers, driver's license numbers, and their employer's name, address, and telephone number, as these presently exist and as they change in the future. A copy of any letter with that information sent to the "State Case Registry" must also be delivered or mailed to the Clerk of the Court, Lee County, Florida, 1700 Monroe Street, Fort Myers, FL 33901.

2.6 Payment of a purge amount with incarceration is denied There is no evidence of the father's present ability to pay. Therefore, the court cannot order him to pay a "purge" or a fixed amount toward the arrearage on this civil motion.

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 presumption in F.S. §61.13(5) and *Bowen* and the father's testimony today demonstrate that the father had the ability to pay the support since the 2010 "Modification Order" because he has supported himself to some degree since then and because he is presumed able to pay the full amount every month. His testimony did not rebut that presumption.

However, despite having funds for his own support he has not applied all of those 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, he is presumed able to pay the full amount and he did not rebut the presumption, 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 5/25/2010.

2.7 A purge amount and incarceration as a sanction is denied on this civil motion 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 a purge amount and incarceration until the purge is paid in full, 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).

2.8 Attorney's fees granted as a sanction; reserved as to the amount 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 fees in an amount to be determined at later hearings. Today there was no testimony from mother's counsel of the hours reasonably and necessarily required to represent the mother in this matter.

2.9 Indirect criminal contempt proceeding On the court's own motion, upon the testimony of the father at the hearing today, the court will begin an indirect criminal contempt proceeding under Rule 3.840. The court issued an Order to Show Cause today at the hearing setting an arraignment date, as required by the Rule. The father signed for a copy of that Order to Show Cause. The court advised the father that if he cannot afford to hire an attorney, he must make an affidavit with the clerk of the court and if the clerk determines he is indigent, then the court will appoint an attorney to represent him in this indirect criminal contempt proceeding.

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

R. Thomas Corbin, Circuit Judge