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

T. J.,
Petitioner & former husband,

vs. **Case No. XX DR YYYY N**
P. A.,
Respondent & former wife,

ORDER ON WIFE'S MOTION FOR CONTEMPT

This matter having come before the court for a hearing on *Date omitted /* 2014 on the wife's amended motion to enforce and for contempt filed *Date omitted* /2014, it is ordered:

1. Findings

The former wife's motion is a motion for civil contempt for the nonpayment of an alimony order pursuant to Rule 12.615. "Support matters" under that rule include alimony orders as well as child support orders. That rule is a restatement of the law governing contempt proceedings found in *Bowen v. Bowen,* 471 So.2d 1274 (Fla. 1985) and the cases decided under that authority.

The former wife's counsel complains in argument that the former husband is not paying the alimony as ordered. Counsel says the former husband pays her client "$700" a month, rather than the $2,900 that was ordered previously. The wife did not testify and no other evidence was offered.

Exactly how much he has paid and when he paid it since the alimony order was entered is not in evidence. The total arrearage to date is not in evidence. A certified copy of the depository case history is not in evidence. The prior alimony order was not admitted into evidence by the former wife.

In response to this argument of former wife's counsel, the former husband testified and he asked the court to judicially notice the court file and the evidence at the trial held on 6/25/2014, which the court did. The court file establishes the entry of the prior alimony order.

In their marital settlement agreement filed 7/22/2010 the parties agreed to permanent periodic alimony payable by the husband to the wife in the amount of $2,900 a month beginning 6/10/2010. They agreed the alimony is payable through the depository. They did not agree to the entry of an income deduction order.

There was a finding in the judgment filed 8/21/2014 that the former husband has not paid the full monthly amount of alimony since 12/26/2012. So, the existence of an arrearage is proven in the record.

So, there is a prior alimony order and there is an arrearage, and the requirements of Rule 12.615(c)(1) are met.

The husband testified at this hearing that he is employed by a business owned by his mother and he is paid "$1,200" gross per week, which is his wages. He testified that he receives "$898.20" in net income each week, after taxes, or $3,889 net income each month from his wages. He offered no document to corroborate this testimony.

The former husband also testified briefly about his living expenses and assets and liabilities. He testified from his financial affidavit filed 11/21/2013. The documentary evidence admitted at the trial on 6/25/2014 consisted of his income tax returns for certain years, among other matters. He did not offer a more current financial affidavit.

From this presentation, it seems to be his argument that after he pays all of his personal living expenses to his satisfaction, he has nothing left over with which to pay his alimony obligation so he has no ability to pay alimony, at least, nothing more than $694.75 per month, which in argument the wife's counsel said he has been paying for some time. The judgment filed 8/21/2014 also finds he unilaterally reduced his payment to $694.75 on 12/26/2012.

In the judgment filed 8/21/2014, the court found his evidence at the trial on 6/25/2014 did not amount to competent substantial evidence and that he did not meet his burden to prove the essential allegation of his supplemental petition that was tried on 6/25/2014, which was that his income was less than it was when the alimony order was entered. In other words, he offered the same incompetent evidence at this hearing that he offered at the trial.

Counsel for the former husband argued at this hearing and at the trial on 6/25/2014 that the former husband's income tax returns before and after he filed bankruptcy prove his income for any year. However, the court found in the judgment dated 8/21/2014:

> *"The former husband's repeated refrain when questioned about the personal expenses he paid with funds of the LLC was: "My mother had no objection," or words to that effect.*
>
> *However, the distinction between an ordinary and reasonable business expense and a personal living expense is not determined by the opinions of the former husband's mother. The Internal Revenue Code and the regulations of the Internal Revenue Service define what is an ordinary and reasonable business expense and what is a personal living expense.*
>
> *The husband has no understanding of the meanings of these terms. He operates the business and his personal spending on the proposition that he can take what he needs to live from whatever source is at hand, whether it is the account of the LLC , a credit card of the LLC or his personal bank account and personal credit card, and that his "income" is limited to the amount that he pays himself as wages or salary.*
>
> *Although this proceeding on the former husband's supplemental petition has been pending since 10/2/2013, and even though the former husband's income was the central issue of the trial, the former husband has not maintained, established or produced accurate and reliable records and proof of his personal income since 10/2/2013 or for any period of time. He did not account for all of his "in kind" income. He has the burden to prove his income and he did not carry that burden.*
>
> *He commingles and mixes up his business and personal items in the business bank account and credit cards. He has a separate, personal bank account and separate, personal credit cards but he routinely uses the business bank account and credit cards to pay personal living expenses with no reporting or accounting of each and every personal living expense as personal income. He does not keep his personal spending separate from the business' spending for ordinary and reasonable business expenses. His inadequate accounting for the business' expenses and his inability to separate his personal expenses from the business' expenses calls into question his accounting for the income of the business.*
>
> *He does not appear to have any source documents for his business income or his business expenses. It seems that he produces compilations for his accountant, not original source documents to his accountant or what accountants sometimes call "back up." It appears that he has no copies of the bills he has says he incurred for business expenses that he keeps in any regular fashion.*
>
> *There is no question that he pays personal living expenses through the business bank account and credit card, expenses that are deducted as business expenses even though they are not business expenses. Personal living expenses paid by a business that are not otherwise*

reported as personal income are "in kind" income to the former husband. Due to his commingling of personal and business expenses it is impossible to determine the total "in kind" income that the former husband has had since he started operating the post bankruptcy business from the evidence he produced at trial.

As for the business income, he may keep invoices for goods and services sold to customers that would match itemized items on deposit slips or other deposit and income records, but his lack of any understanding of basic accounting principles about business and personal expenses calls into question his understanding of income and whether all of the business' income makes it into a business bank account.

***As a result, his declarations of his income in his financial affidavits, his testimony or his tax returns are not reliable or competent substantial evidence. His federal income tax returns are not an accurate reporting of his income as defined by the Internal Revenue Code and regulations of the Internal Revenue Service*.**" (**Emphasis supplied.**)

So his tax returns, his financial affidavits, and his testimony are not reliable or competent substantial evidence, not then, not now. Accurate and complete bookkeeping and financial records maintained by the former husband and his mother's business according to generally accepted accounting principles and the Internal Revenue Code and the regulations of the I.R.S. that separate business and personal expenses and maintain supporting records according to those principles, laws, and regulations might some day amount to competent substantial evidence of his income, but there was no proof that such existed on 6/25/2014 and there is no proof of the existence of such at this hearing.

It is the former husband's burden to rebut the evidentiary presumption in §61.14(5) with competent substantial evidence. That statute creates the presumption that he has the ability to pay $2,900 a month in alimony to the former wife every month as that obligation comes due. "*At the contempt hearing, the obligor shall have the burden of proof to show that he or she lacks the ability to purge himself or herself from the contempt*." F.S. §61.14(5).

At this hearing his evidence did not rebut the presumption. At this hearing the former husband presented a summary version of what he presented at the trial on 6/25/2014. What he presented then did not carry his burden of proof and it does not meet his burden now on this motion for contempt.

So, pursuant to Rule 12.615(2)(A) the court finds the former husband had the present ability to pay the alimony each month that it came due in the past and for which he did not pay the full amount and so he willfully failed to pay the alimony for each such month. This finding is based on the presumption in §61.14(5), which is not rebutted by the former husband's proof.

However, the court cannot find the total amount of the arrearage or for exactly which months the full amount was not paid because that evidence is not before the court.

Pursuant to Rule 12.615(c), the court finds the former husband received notice of the motion and notice of the hearing. He appeared at the hearing with counsel and testified.

2. <u>Ruling</u>

(1) The former wife's motion is a civil contempt motion pursuant to Rule 12.615. Her motion is granted to the extent that:

(a) the court will issue an income deduction order pursuant to §61.1301 because the judgment filed 8/21/2014 finds there is an arrearage in the alimony obligation. And,

(b) the court orders the former husband to make a monthly payment toward the arrearage of 20% of the monthly alimony obligation, which is an additional payment of $580 a month. §61.1301(1)(b). (20% x $2,900 = $580) This additional arrearage payment shall be ordered in the income deduction order. And,

(c) former wife's counsel shall prepare the form of income deduction order and submit it to the court.

The court will not go beyond the foregoing orders because there is no evidence of the total amount of the arrearage or evidence of the amount of the payments that have been made and when they were paid.

The court finds the foregoing orders are the only appropriate sanctions on the record at this hearing.

See, e.g., Blimpie Capital Venture, Inc., v. Palms Plaza Partners, Ltd., 636 So.2d 838, 840 (Fla. 2d DCA 1994): "We have held that, in the absence of a stipulation, a trial court cannot make a factual determination based on an attorney's unsworn statements. *State v. Brugman,* 588 So.2d 279 (Fla. 2d DCA 1991). A trial court, as well as this court, is also precluded from considering as fact unproven statements documented only by an attorney. *Schneider v. Currey,* 584 So.2d 86 (Fla. 2d DCA 1991). *See also Leon Shaffer Golnick Advertising, Inc. v. Cedar,* 423 So.2d 1015, 1017 (Fla. 4th DCA 1982) ('If the advocate wishes to establish a fact, he must provide sworn testimony through witnesses other than himself or a stipulation to which his opponent agrees.')". *See, also, Florida Standard Jury Instructions in Criminal Cases 2.7.*"Please remember that what the attorneys say is not evidence." *See also Romeo v. Romeo,* 907 So.2d 1279, 1284 (Fla. 2d DCA 2005) "argument of counsel does not constitute evidence," *and Kunsman v. Wall,* ___ So.3d ___ (Fla. 4^{th} DCA 2013) "Regarding the remaining $2,471.40 for miscellaneous family expenses, the only evidence showing how these marital funds were spent was argument of counsel."

(2) F.S. §61.14(5) creates an evidentiary presumption that the former husband has the ability to pay each installment of alimony as it comes due, $2,900 per month. The former husband's evidence at the hearing did not rebut this presumption. There is an arrearage. Therefore, since he had the ability to pay the alimony in full each month as it came due, he is in willful contempt of the order to pay alimony for each such monthly amount not paid.

(3) Alimony is not the last bill the husband pays with what he has left over after he has paid all of his personal living expenses to his satisfaction. Rather, it is the first bill he owes *before* he pays his own personal living expenses. If he has wages, then he has the ability to pay. *See, e.g.,* §61.1301 regarding "income deduction orders," which deduct child support and alimony from an obligor's wages *before* the obligor receives his wages so that he gets what is left over after those obligations are paid.

(4) Having found the former husband in willful contempt of the order to pay alimony, the sanction imposed at this time is the entry of an income deduction order with an order to pay an additional 20% toward the arrearage. On the record at this hearing, the court finds this is the appropriate sanction.

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

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R. Thomas Corbin, Circuit Judge

Copies provided to:

, Esq.

, Esq.