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Abstract

Florida's courts often use contempt sanctions as a highly effective means of enforcing final divorce decrees." Accordingly, when a party fails to comply with a provision of the divorce order, the recalcitrant party may be threatened with imprisonment.

KEYWORDS: court, enforce, decrees

The Use Of Contempt Of Court To Enforce Florida Divorce Decrees

Florida's courts often use contempt sanctions as a highly effective means of enforcing final divorce decrees.¹ Accordingly, when a party fails to comply with a provision of the divorce order, the recalcitrant party may be threatened with imprisonment. This threat ensures rapid compliance with the duty the final decree imposes.² The recent action of a Dade County circuit judge exemplifies the effectiveness of such a threat. Judge Rainwater cited 480 men in contempt of court over a four day period.³ Of the 480 men cited, 440 immediately paid the owed family support ordered by their respective divorce decrees.⁴

The Florida Constitution, however, limits the courts' extraordinary power to coerce: "No person shall be imprisoned for a debt, except in cases of fraud."⁵ Therefore, it is imperative a court determine, prior to exercising its power, whether a debt is the underlying cause for the imposition of contempt and subsequent imprisonment. Courts have had particular difficulty making this determination regarding property settlements incorporated into final divorce decrees.⁶ Florida courts, in particular, have reached conflicting conclusions when determining whether these settlements are enforceable through contempt of court.⁷

If a court considers property settlements as merely imposing a

1. Miami Herald, Sept. 19, 1981, at 8B, col. 1.

2. *Id.*

3. *Id.*

4. *Id.*

5. FLA. CONST. art. 1, § 11.

6. Compare *Collins v. Collins*, 179 So. 2d 231 (Fla. 2d Dist. Ct. App. 1965) and *Firestone v. Ferguson*, 372 So. 2d 490 (Fla. 3d Dist. Ct. App. 1979) holding the respective parties in contempt for failure to comply with a provision of a property settlement agreement incorporated into final divorce decrees with *Howell v. Howell*, 207 So. 2d 507 (Fla. 2d Dist. Ct. App. 1968) and *Carlin v. Carlin*, 310 So. 2d 403 (Fla. 4th Dist. Ct. App. 1975) holding contempt is not an available remedy to enforce property settlement agreements incorporated into final divorce decrees.

7 See note 6 *supra*.

debt, it should not punish the debtor by using its contempt power to enforce the decree. This note will attempt to set forth certain guidelines a Florida court might use in determining when a property settlement incorporated in a final divorce decree constitutes a debt. In such cases the decree is unenforceable through contempt because of Florida's constitutional guarantee.

Contempt

In order for any judicial system to function smoothly, its courts must have the ability to enforce their decrees. One such means of enforcement is the power of contempt. Florida defines contempt as "[a] refusal to obey any legal order, mandate or decree, made or given by any judge either in term time or in vacation relative to any business of said court, after due notice thereof. . . ."⁸

When the *court* seeks to punish a party for violating a judicial decree, it initiates *criminal contempt* proceedings.⁹ When a private *party* initiates proceedings for the purpose of coercing another party into action or non-action, the proceedings are for *civil contempt*.¹⁰ At times, the distinction between civil and criminal contempt is nebulous. The Florida Supreme Court discussed the differences and the difficulty of making the distinctions between the two in *Pugliese v. Pugliese*.¹¹

Tina and Rocco Pugliese were divorced in 1975. The final divorce decree ordered Rocco to vacate the marital dwelling. Subsequent to entry of final judgment, Rocco's attorney filed motions for a new trial, stay of execution of judgment and notice of hearing. The attorney advised Rocco the judgment requiring surrender of the premises was stayed pending final determination of the motions. Thus, Rocco refused to vacate the marital dwelling.

Upon Rocco's refusal to vacate, Tina Pugliese filed a motion for contempt and a notice of hearing. The judge held Rocco in contempt of

8. FLA. STAT. § 38.23 (1979); *see also* FLA. STAT. § 38.22 (1979) which states that "[e]very court may punish contempts against it whether such contempts be direct, indirect, or constructive, and in any such proceedings the court shall proceed to hear and determine all questions of law and fact."

9. *In re S.L.T.*, 180 So. 2d 374 (Fla. 2d Dist. Ct. App. 1965).

10. *Id.*

11. 347 So. 2d 422 (Fla. 1977).

court for willfully refusing to vacate the premises as required by the divorce decree. Rocco was sentenced to thirteen days in county jail, but the order did not provide Rocco with an opportunity to purge his contempt by fulfilling the decree requirements which would terminate the sentence. Florida's Second District Court of Appeal affirmed the decision without opinion.¹²

To properly review the decision, the Florida Supreme Court had to determine whether the order was for civil or criminal contempt.¹³ In doing so the court stated that "if the purpose of the proceedings is to *coerce* action or non-action by a party, the order of contempt is civil."¹⁴ In civil contempt, the party seeking to coerce the action or non-action initiates the proceedings. The judge then would hold the non-complying party in contempt for the "private benefit of the offended party."¹⁵

Criminal contempt, on the other hand, punishes rather than coerces. It is maintained solely and simply to "vindicate the authority of the court or to *punish* otherwise for conduct offensive to the public in violation of an order of the court."¹⁶ Criminal contempt can be either direct or indirect.

A direct criminal contempt is one committed in the "presence of the court."¹⁷ Oftentimes this type of conduct occurs during the course of a trial. For example, in *Olds v. State*, a judge held the public defender in direct contempt of court.¹⁸ The holding stemmed from the judge's displeasure with the public defender's continued efforts to impeach an important state's witness. The witness had been previously represented by the public defender's office and the judge felt the continued effort to impeach the witness violated the attorney-client privilege. This violation prompted the judge to hold the attorney in direct criminal contempt.

Although the decision to hold someone in contempt is generally left to the trial court's discretion, Florida's Fourth District Court of

12. *Id.* at 424.

13. *Id.*

14. *Id.* (emphasis added).

15. *Id.*

16. *Id.* (emphasis added).

17. *Demetree v. State*, 89 So. 2d 498 (Fla. 1956).

18. 302 So. 2d 787 (Fla. 4th Dist. Ct. App. 1974).

Appeal reversed the *Olds* contempt order.¹⁹ The court concluded the trial judge erred in believing the information sought by the public defender was privileged: the subject matter of the attempted cross examination included statements by the state's witness made in the presence of third parties and involved matters of public record. Based on these facts, the appellate court found the information was not privileged and the trial court's order for direct criminal contempt could not stand.²⁰

In contrast to direct criminal contempt, an indirect criminal contempt is one committed "outside the presence of the court."²¹ For example, in *Demetree v. State*,²² a judge held the defendant in contempt of court for violating an order enjoining him from operating a house of prostitution. The judge sentenced the defendant to six months in the Dade County Jail.

The Florida Supreme Court affirmed the *Demetree* order for indirect criminal contempt.²³ It stated that typically, an indirect criminal contempt proceeding is brought on behalf of the public.²⁴ Here, the injunction was obtained by the county solicitor in the name of the State of Florida. The alleged contemptuous conduct was not committed against the county solicitor as an individual, but was committed against the public at large. The trial court had sustained its burden of showing, beyond a reasonable doubt, the defendant was guilty of contemptuous conduct by continuing the operation of his brothel. Therefore, the order for indirect criminal contempt was valid.²⁵

Preliminarily, the court must decide who was offended by the contemptuous conduct since this determines whether direct or indirect criminal contempt was committed or whether civil contempt was committed. In *Pugliese*, the Florida Supreme Court found Rocco's conduct in failing to obey the court order to vacate could be subject either to indirect criminal contempt proceedings or civil contempt proceedings.²⁶ The supreme court rejected Tina's argument that by admitting in open

19. *Id.*

20. *Id.* at 790.

21. 89 So. 2d at 501.

22. *Id.* at 500.

23. *Id.* at 501.

24. *Id.* at 503.

25. *Id.* at 502.

26. 347 So. 2d at 424.

court, at the contempt hearing, he had defied the terms of the divorce order Rocco committed a direct criminal contempt. A judge must always hear testimony in his presence at a hearing for indirect criminal contempt. Declaring that this testimony constituted conduct equivalent to direct criminal contempt would obliterate the distinctions between direct and indirect criminal contempt.²⁷ Thus, Rocco's conduct could not constitute a direct criminal contempt and the more stringent standards for an indirect criminal contempt proceeding applied.²⁸

To determine whether the proceeding was for criminal or civil contempt, the supreme court in *Pugliese* looked to the language of the order itself. Orders for civil contempt classically include a purging provision whereby the contemnor can terminate the sentence upon compliance with the court ordered action.²⁹ Since the *Pugliese* order lacked this purging provision it was an atypical civil contempt order.³⁰

Turning to whether the order could be classified as one for indirect criminal contempt, the supreme court in *Pugliese* looked to the procedure followed by the lower court prior to adjudging Rocco in contempt. Florida Rule of Criminal Procedure 3.840 spells out the procedural requirements³¹ to initiate an indirect criminal contempt proceeding. Since

27. *Id.* at 426.

28. *Id.*

29. *Id.* at 424.

30. *Id.*

31. FLA. R. CRIM. P. 3.840. *Indirect Criminal Contempt:*

(a) Indirect (Constructive) Criminal Contempt. A criminal contempt except as provided in the preceding subsection concerning direct contempts, shall be prosecuted in the following manner:

(1) *Order to Show Cause.* The judge, of his own motion or upon affidavit of any person

(2) *Motions; Answer.* The defendant, personally or by counsel, may move to dismiss the order to show cause, move for a statement of particulars or answer such order by way of explanation or defense. All motions and the answer shall be in writing unless specified otherwise by the judge. A defendant's omission to file motions or answer shall not be deemed as an admission of guilt of the contempt charged.

(3) *Order of Arrest; Bail.* The judge may issue an order of arrest of the defendant if the judge has reason to believe the defendant will not appear in response to the order to show cause. The defendant shall be admitted to bail in the manner provided by law in criminal cases.

(4) *Arraignment; Hearing.* The defendant may be arraigned at the

these requirements were not met, Rocco was not given notice of the consequences that might follow the hearing.³² Thus, because the trial court's order failed to adhere to procedural requirements for criminal contempt nor contained a purging clause, as required for civil contempt, the order for contempt could not stand whether classified as either criminal or civil. The supreme court reversed the Second District

time of the hearing, or prior thereto upon his request. A hearing to determine the guilt or innocence of the defendant shall follow a plea of not guilty. The judge may conduct a hearing without assistance of counsel or may be assisted by the prosecuting attorney or by an attorney appointed for that purpose. The defendant is entitled to be represented by counsel, have compulsory process for the attendance of witnesses, and may testify in his own defense.

All issues of law and fact shall be heard and determined by the judge.

(5) *Disqualification of Judge.* If the contempt charged involves disrespect to or criticism of a judge he shall disqualify himself from presiding at the hearing. Another judge shall be designated by the chief justice of the Supreme Court.

(6) *Verdict; Judgment.* At the conclusion of the hearing the judge shall sign and enter or record a judgment of guilty or not guilty. There should be included in a judgment of guilty a recital of the facts constituting the contempt of which the defendant has been found and adjudicated guilty.

(7) *The Sentence; Indirect Contempt.* Prior to the pronouncement of sentence, the judge shall inform the defendant of the accusation and judgment against him and inquire as to whether he has any cause to show why sentence should not be pronounced. The defendant shall be afforded the opportunity to present evidence of mitigating circumstances. The sentence shall be pronounced in open court and in the presence of the defendant.

FLA. R. CRIM. P. 3.830. *Direct Criminal Contempt:*

A criminal contempt may be punished summarily if the court saw or heard the conduct constituting the contempt committed in the actual presence of the court. The judgment of guilt of contempt shall include a recital of those facts upon which the adjudication of guilt is based. Prior to the adjudication of guilt the judge shall inform the defendant of the accusation against him and inquire as to whether he has any cause to show why he should not be adjudged guilty of contempt by the Court and sentenced therefore. The defendant shall be given the opportunity to present evidence of excusing or mitigating circumstances. The judgment shall be signed by the judge and entered of record. Sentence shall be pronounced in open court.

32. 347 So. 2d at 426.

Court of Appeal and remanded the case for proceedings consistent with its opinion.³³

The *Pugliese* case illustrates that non-compliance with the provisions of a divorce decree may be subject to either civil or criminal contempt proceedings. Generally, non-compliance is characterized as a civil contempt because the purpose of the proceeding is to "preserve and enforce rights of private litigants to compel obedience to orders and decrees of the court made for the benefit of such parties."³⁴ Usually the party who has not received family support payments (either permanent alimony or child support) initiates civil contempt proceedings to coerce the other party into making the delinquent payments.³⁵ The sentence imposed as a result of a finding of civil contempt continues until the recalcitrant party fulfills his or her obligation.

When the purpose of the contempt proceeding is coercive, the trial judge is required to make an affirmative finding:

- (1) The petitioner presently has the ability to comply with the or-

33. *Id.* at 427.

34. *Deter v. Deter*, 353 So. 2d 614, 617 (Fla. 4th Dist. Ct. App. 1977).

35. 180 So. 2d at 379.

Civil contempt proceedings should be instituted by the aggrieved party or those who succeed to their rights or someone who has an interest in the right to be protected. Due process of law requires that the party accused be advised of the charge and accorded opportunity to defend himself. In these proceedings there is no presumption of innocence and the burden of proof is upon the party bringing the charge to prove the facts charged by a preponderance of the evidence. Where a court order and its violation are established or admitted the burden is on the accused to show facts which would excuse his default. If the defense or excuse is that of inability to comply, the accused has the burden of proving by a preponderance of the evidence such inability. This is based upon the fact that the making of the order involved an implicit finding of ability to comply. Thus there must be an affirmative finding appearing on the commitment order that it is within the power of the accused to obey the order and, conversely, imprisonment is not available if the accused is unable to comply. It is for this reason often stated that the accused carries the keys of his prison in his pocket. In Florida it has been held that imprisonment for civil contempt must be for a fixed term and must include a specifically stated provision for purging. The fixed term requirement was imposed without stating whether the contempt was civil or criminal. As a general rule a fixed term is not required in punishment for civil contempt.

der and willfully refuses to do so, or (2) that the petitioner previously had the ability to comply but divested himself of that ability through his fault or neglect designed to frustrate the intent and purpose of the order.³⁶

The Florida Supreme Court spelled out this requirement in *Faircloth v. Faircloth*, where it remanded the case because the lower court had not made the required determination prior to exercising its contempt power.³⁷ Apparently, the reason behind making this determination is to assure that the contemnor has the ability to comply with the order. Otherwise, the purpose of the proceeding would have to be something other than coercion. The trial court in *Faircloth* had held the former husband in contempt because his child support payments were in arrears and because he failed to comply with other provisions of the divorce decree. He was sentenced to the county detention center for five months and twenty-nine days or until he paid the money owed.³⁸

Duties Enforceable Through Contempt

Florida considers court ordered imposition of family support payments a legally imposed duty rather than a debt.³⁹ The language used in the Florida statutes, allowing the court to impose family support obligations, reflects this conclusion: "The court may at any time order either or both parents a *duty of support* to the child. . . ."⁴⁰ The constitutional prohibition against imprisonment for a debt is circumvented by this analysis.⁴¹

Although the Florida statute allowing the court to impose alimony does not expressly mention the word "duty,"⁴² it is referred to in a

36. *Faircloth v. Faircloth*, 339 So. 2d 650 (Fla. 1976).

37. *Id.* at 651.

38. *Id.*

39. *Bronk v. State*, 43 Fla. 461, 465, 31 So. 2d 248, 252 (1901).

40. FLA. STAT. § 61.13(1) (1979) (emphasis added).

41. 43 Fla. at 465, 31 So. 2d at 252.

42. FLA. STAT. § 61.08 (1979).

(1) In a proceeding for dissolution of marriage, the court may grant alimony to either party, which alimony may be rehabilitative or permanent in nature. In any award of alimony, the court may order periodic payments or payments in lump sum or both. The court may consider the adultery of

related statute. Florida Statute § 61.12 sets forth the procedure necessary to garnish or attach amounts due for alimony and child support. Subsection (2) of the statute states, the court through issuance of a “writ may provide that the salary of any person having a *duty of support* pursuant to said order be garnished on a periodic and continuing basis for as long as the court may determine. . . .”⁴³ The Florida Supreme Court has interpreted the obligation of family support (permanent alimony or child support) as a legally imposed duty. The supreme court reflected this view in *McRae v. McRae*: “The law imposes on [the] civilized [person] the *duty* to provide food, shelter and raiment for his [or her] own.”⁴⁴

Because courts consider imposition of family support imposition of a legal duty, they will enforce family support orders through contempt of court when policy considerations justify such action. As early as 1901, the Florida Supreme Court decided in *Bronk v. State*⁴⁵ that contempt of court can be exercised to enforce the obligation of family support. The *Bronk* decision was based on the court’s belief that:

a spouse and the circumstances thereof in determining whether alimony shall be awarded to such spouse and the amount of alimony, if any, to be awarded.

(2) In determining a proper award of alimony or maintenance, the court shall consider all relevant economic factors, including but not limited to:

- (a) The standard of living established during the marriage.
- (b) The duration of the marriage.
- (c) The age and the physical and emotional condition of both parties.
- (d) The financial resources of each party.
- (e) Where applicable, the time necessary for either party to acquire sufficient education or training to enable him or her to find appropriate employment.
- (f) The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education and career building of the other party.

The court may consider any other factor necessary to do equity and justice between the parties.

43. FLA. STAT. § 61.12(2) (1979).

44. 52 So. 2d 908, 909 (Fla. 1951) citing *Pollack v. Pollack*, 159 Fla. 224, 225, 31 So. 2d 253, 254 (1947).

45. 43 Fla. 461, 31 So. 248 (1901).

Alimony or maintenance from the husband to the wife is not a debt, within the meaning of the constitutional inhibition against imprisonment for a debt. It is regarded more in light of a personal duty due not only from the husband to the wife, but from him to society, that courts of equity have the power to enforce by detention of the person of the husband in cases where he can discharge it but will not.⁴⁶

A policy consideration implicit in this argument is to make the husband pay support so that the wife and family do not become a burden on society.

Florida's Third District Court of Appeal reiterated this view in *Chapman v. Lamm*: "Contempt for failure to pay court ordered alimony or child support is based upon the fact that such obligations arise out of the duty owed and that, in accordance with public necessity, dependents must be supported."⁴⁷

It is interesting to note, however, in *Chapman* the appellate court reversed the trial court's decision holding the former husband in contempt of court because part of the obligation of support had been converted into a debt to a third party.⁴⁸ Joe Chapman had been committed to the Dade County Jail for ninety days or until he paid the clerk of the court \$8,170 in overdue child support payments. Part of this amount, \$2,987.50, had been converted into a debt owed to the State of Florida, Department of Health and Rehabilitative Services. On appeal, Chapman argued the order was reversible because it purported to imprison him for a debt owed to a third party, the State of Florida.⁴⁹ Florida's Third District Court of Appeal agreed and said the obligation "no longer carried the public necessity for enforcement by imprisonment."⁵⁰ That part of the money owed to the State of Florida would not be used to support the children, and consequently public policy did not support the court's exercise of its contempt power.

Courts will not imprison parties for failure to render payment of

46. *Id.* at 463, 31 So. at 252.

47. 388 So. 2d 1048 (Fla. 3d Dist. Ct. App. 1980), *rev'd*, 7 Fla. L. Weekly 124 (March 12, 1982). *See infra* note 116.

48. *Id.* at 1049.

49. *Id.*

50. *Id.*

family support unless policy reasons, such as continued maintenance and nourishment of the family, justify such action.⁵¹ In other words, public necessity must justify court exercise of contempt power. Florida's First District Court of Appeal reflected this view when it stated in *Smith v. Morgan* that once public necessity no longer exists, "the purpose and justification for the extraordinary power of contempt expires."⁵²

In *Morgan*, the lower court found the former husband in contempt of court for failure to make child support payments in arrears.⁵³ The facts demonstrated upon dissolution of marriage in 1963, the husband was ordered to pay child support. In 1979, the circuit court entered an order abating the child support obligation because the 17 year old son was residing with the former husband and consequently was deriving support directly from the former husband. On the same day the court entered the abatement order the former husband was held in contempt. The judge sentenced him to five months and twenty-nine days in jail.⁵⁴ On appeal, the husband argued that the circuit court was without jurisdiction to punish, through contempt, the failure to pay child support arrearages once the obligation of support had been abated.⁵⁵ Florida's First District Court of Appeal agreed and found the order for abatement "eliminated the public necessity for the extraordinary remedy of contempt since the father is now supporting the child directly."⁵⁶

In *Morgan*, because the trial court was without jurisdiction to punish the appellant by contempt, the wife's remedy for recovery of child support arrearages was limited to a judgment by "ordinary civil proceedings."⁵⁷ The circuit court was without jurisdiction to use its power of contempt to enforce payment of child support in arrears once the child had reached the age of majority.⁵⁸ No sufficient policy reasons justify court exercise of contempt power to enforce child support pay-

51. *Smith v. Morgan*, 379 So. 2d 1052 (Fla. 1st Dist. Ct. App. 1980).

52. *Id.* at 1053.

53. *Id.* at 1052.

54. *Id.*

55. *Id.* at 1053.

56. *Id.*

57. *Id.*

58. *Wilkes v. Revels*, 245 So. 2d 896 (Fla. 1st Dist. Ct. App. 1970).

ment when the child is no longer a minor.⁵⁹

On the other hand, a policy consideration supporting the court's exercise of contempt power is that orders for family support are modifiable.⁶⁰ Family support orders for alimony and child support generally

59. *Id.*

60. FLA. STAT. § 61.14 (1979).

Modification of alimony judgments, agreements, etc.—

(1) When the parties have entered into, or hereafter enter into, an agreement for payments for, or instead of, support, maintenance, or alimony, whether in connection with a proceeding for dissolution or separate maintenance or with any voluntary property settlement, or when a party is required by court order to make any payments, and the circumstances or the financial ability of either party has changed or the child or children who are beneficiaries of an agreement or court order as described herein have reached the age of 18 years since the execution of such agreement or the rendition of the order, either party may apply to the Circuit Court of the circuit in which the parties, or either of them, resided at the date of the execution of the agreement or reside at the date of the application, or in which the agreement was executed or in which the order was rendered, for a judgment decreasing or increasing the amount of support, maintenance, or alimony, and the court has jurisdiction to make orders as equity requires, with due regard to the changed circumstances or the financial ability of the parties or the child or children, decreasing, increasing, or confirming the amount of separate support, maintenance, or alimony provided for in the agreement or order.

(2) When an order is modified pursuant to subsection (1), the party having an obligation to pay shall pay only the amount of support, maintenance, or alimony directed in the new order, and the agreement or earlier order is modified accordingly. No person shall commence, or cause to be commenced, as party or attorney or agent or otherwise, in behalf of either party in any court, an action or proceeding otherwise than as herein provided, nor shall any court have jurisdiction to entertain any action or proceeding otherwise than as herein provided to enforce the recovery of separate support, maintenance, or alimony otherwise than pursuant to the order.

(3) This section is declaratory of existing public policy and of laws of this state which are hereby confirmed in accordance with the provisions hereof. It is the duty of the Circuit Court to construe liberally the provisions hereof to effect the purposes hereof.

(4) If a party applies for a reduction of alimony or child support and the circumstances justify the reduction, the court may make the reduction of alimony or child support regardless of whether or not the party applying for it has fully paid the accrued obligations to the other party at the time

continue over extended periods of time; often the circumstances surrounding support payment change substantially. For instance, a former spouse may remarry or the needs of a child might increase or decrease. Thus, it is necessary that orders for family support be flexible to fit changed circumstances. Upon sufficiently changed circumstances, either party to the divorce may request the judge to modify a family support order to reflect the changes that have occurred.⁶¹ Since these orders are modifiable, thereby giving the recalcitrant party no excuse for continued disobedience of the order, courts are more willing to exercise their extraordinary contempt powers to enforce orders. The former spouse could have had the order modified if he felt the order was excessive and sufficiently changed circumstances justified modification of the order.⁶²

In addition to necessary family support payments, court ordered payment of attorney's fees for services rendered during the divorce is not considered a debt.⁶³ The reason for placing legal fees in the same category as family support obligations is unclear. Arguably, the policy behind treating court ordered legal fees as a duty is to ensure that both parties will retain competent legal counsel throughout divorce proceedings.⁶⁴ Because courts are willing to treat court ordered legal fees as imposing a duty, they are able to use contempt powers to enforce such orders avoiding constitutional stricture against debtor imprisonment.⁶⁵

Debts Not Enforceable Through Contempt

Property settlements incorporated into final divorce decrees have given courts particular difficulty in deciding whether they should be enforced through contempt proceedings or by ordinary civil proceedings available to creditors against debtors. Two Florida district courts of appeal have decided that property settlements incorporated into final di-

of the application or at the time of the order of modification.

61. *Id.* § 1.

62. *Howard v. Howard*, 207 So. 2d 90 (Fla. 1st Dist. Ct. App. 1960).

63. *Orr v. Orr*, 141 Fla. 112, 192 So. 2d 466 (1939).

64. *See Price v. Price*, 382 So. 2d 433, 437 (Fla. 1st Dist. Ct. App. 1980).

65. *Harrison v. Harrison*, 178 So. 2d 889 (Fla. 2d Dist. Ct. App. 1965); *Lawrence v. Lawrence*, 384 So. 2d 279 (Fla. 4th Dist. Ct. App. 1980).

voce decrees may be enforced through contempt of court.⁶⁶

Florida's Third District Court of Appeal upheld use of contempt to enforce a property settlement incorporated into a final divorce decree in *Firestone v. Ferguson*.⁶⁷ The Firestones were divorced in 1974. The final divorce judgment included a property settlement with a provision that Myrna Firestone, the former wife, sell a farm in Kentucky and split the proceeds equally with her former husband, Russell. The agreement also provided Russell pay Myrna \$5,000 per month in alimony.⁶⁸

During a court hearing, Myrna indicated she would be willing to sell the property for \$5,000 per acre.⁶⁹ Thereafter, a Kentucky corporation offered her \$4,700 per acre for the farm. Myrna refused to sign the sale papers and the offer expired. Russell moved to compel Myrna to comply with the settlement agreement. Judge Ferguson, a Dade County circuit court judge, held Myrna in contempt of court. He gave her ten days within which to execute the offer and agreement for sale. When she refused, the judge relieved Russell from paying further alimony.⁷⁰

The appellate court affirmed the lower court's decision, but indicated the possibility of a different result had the property settlement called merely for the payment of money. This possibility was premised on the general rule that "the contempt process may not be utilized to enforce payments required under a property settlement agreement."⁷¹ However, the court found the general rule inapplicable to the facts of *Firestone* because the contempt proceedings were initiated to compel Myrna to execute a contract for the sale of property, not to make payments of money.⁷²

Similarly, Florida's Second District Court of Appeal in *Collins v. Collins* held the trial court did not err by holding Marion Collins in contempt of court for failing to make mortgage payments pursuant to a

66. 179 So. 2d 231 (Fla. 2d Dist. Ct. App. 1965); 372 So. 2d 490 (Fla. 3d Dist. Ct. App. 1979).

67. 372 So. 2d 490.

68. *Id.* at 491.

69. *Id.*

70. *Id.*

71. *Id.* at 492.

72. *Id.*

property settlement.⁷³ Marion and Nannie Lou Collins were divorced in 1963 and their final divorce decree incorporated a stipulation to the property settlement whereby Marion would make mortgage payments on certain properties. In 1964 the trial court adjudged Marion in contempt of court for failure to make the required payments. He was sentenced to sixty days in jail.⁷⁴ The *Collins* decision seems to violate the general rule espoused in the *Firestone's* dicta which prohibits use of contempt proceedings to enforce a property settlement calling for payment of money.

Other cases strictly adhere to the general rule found in *Firestone*, which *Collins* seemingly did not follow.⁷⁵ These cases hold that contempt of court is unavailable to enforce property settlements which merely impose a debt upon one of the former spouses.

For instance, in *Howell v. Howell*, Florida's Second District Court of Appeal followed the general rule.⁷⁶ A property settlement agreement had been incorporated into the final divorce decree of William and Thelma Howell in 1959.⁷⁷ In pertinent part, the agreement provided:

The husband in full and complete settlement and discharge of all obligations to the wife for alimony, support and maintenance, dower or claim of the wife against the husband or against his estate, agree[d] to pay to the wife the sum of \$100.00 per week. . . . The husband agree[d] that there would be no abatement in the weekly payments hereinabove provided for any reason whatsoever except the remarriage of the wife. . . .⁷⁸

In addition, the parties stipulated "[t]he settlement agreement . . . contained [a] full and complete payment and satisfaction of all alimony, maintenance, support, court costs . . . [and] neither party [would] ask for, nor be entitled to any other settlement. . . ."⁷⁹

Three years after the decree's execution, William unsuccessfully

73. 179 So. 2d 231.

74. *Id.*

75. *Howell v. Howell*, 207 So. 2d 507 (Fla. 2d Dist. Ct. App. 1968); *Carlin v. Carlin*, 310 So. 2d 403 (Fla. 4th Dist. Ct. App. 1975).

76. 207 So. 2d 507.

77. *Id.* at 509.

78. *Id.*

79. *Id.*

petitioned the court to reduce the "alimony" payments.⁸⁰ The judge held the agreement was a property settlement because the agreement was for the transfer of property rights and not for continued maintenance of the wife. The sum of money called alimony was actually the consideration paid to the wife for the transfer of her property rights.⁸¹ Because the agreement was actually a property settlement it was not modifiable.⁸² Property settlement agreements are contracts to distribute property upon dissolution of marriage and when fairly and voluntarily entered into, the courts will not disturb them.⁸³ The former husband appealed and Florida's Fourth District Court of Appeal affirmed.

In November of 1964, Thelma petitioned the court to hold William in contempt.⁸⁴ For some sixty-nine weeks, William had only paid \$50.00 per week instead of the \$100.00 per week he was required to pay under the final divorce decree.⁸⁵ William argued that when the Fourth District Court of Appeal affirmed the lower court's dismissal of his petition for modification, it fixed the legal status of the original agreement as a property settlement rather than purely an agreement to pay alimony.⁸⁶ Consequently, the payments to Thelma under the agreement constituted an ordinary contractual obligation enforceable only as between creditor and debtor.⁸⁷ William urged contempt proceedings were improper since this was not a default of alimony payments but rather a failure to fulfill the contractual obligations of the property settlements. The appellate court noted that whether the contempt proceeding could be used to enforce these payments depended on whether the payments fulfilled an alimony or property settlement agreement.⁸⁸ The court admitted that often it was difficult to determine whether the agreement constituted alimony or a property settlement.

The court in *Howell* found alimony to mean "nourishment" or

80. *Id.* at 510.

81. *Id.*

82. *Id.*

83. *Sedell v. Sedell*, 100 So. 2d 639 (Fla. 1st Dist. Ct. App. 1958); *Bergman v. Bergman*, 145 Fla. 10, 199 So. 2d 920 (1940).

84. 207 So. 2d at 510.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

“sustenance.”⁸⁹ That is, alimony continues to sustain a former spouse in a lifestyle to which he or she had become accustomed prior to the divorce, within the means of the other spouse. If, on the other hand, the periodic payments were made in consideration for relinquishment of property rights, they should be classified as payments pursuant to the executed property settlement.⁹⁰ The court aptly summarized this method of classification: “It is the substance and not the form which is controlling.” The use of the term “alimony” in the property settlement agreement is not conclusive.⁹¹

On final analysis, the court agreed with William’s argument that when the Fourth District Court of Appeal affirmed the dismissal of his previous petition for modification, it fixed the “law of the case” as to the legal classification of the payments.⁹² Thus, the appellate court was bound to characterize these payments as those pursuant to a property settlement, unenforceable through contempt.⁹³ Thelma was limited to the usual remedies available to a creditor against her debtor.⁹⁴ To allow otherwise, said the court, would result in imprisonment for a debt.

In *Carlin v. Carlin*,⁹⁵ the Fourth District Court of Appeal broadened the general rule articulated in the *Firestone* dicta. The facts showed the husband voluntarily entered into a property settlement agreement which was incorporated into the final divorce decree. The former wife failed to comply with a provision of the agreement and was therefore adjudged in contempt of the final judgment for dissolution of marriage.⁹⁶ The appellate court reversed the contempt order on the grounds that when the property settlement agreement is fairly and voluntarily entered into, its “violation . . . is not enforceable by contempt but only by the usual remedies available to a creditor against his debtor.”⁹⁷ This broadens the general rule in that it prohibits the use of contempt to enforce any property settlement agreement and not just

89. *Id.* at 511 citing *Underwood v. Underwood*, 64 So. 2d 281 (Fla. 1953).

90. 207 So. 2d at 512.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. 310 So. 2d 403.

96. *Id.*

97. *Id.*

one requiring the payment of money.

Florida's Fourth District Court of Appeal later retreated somewhat from the rule in *Carlin*, in *Burke v. Burke*,⁹⁸ where it held payments required under terms of a property settlement agreement could not be enforced by contempt proceedings.⁹⁹ Prior to dissolution of their marriage, Joseph and Doris Burke entered into a property settlement agreement which was incorporated in the final divorce decree. The settlement agreement stipulated that Joseph was to pay Doris \$1,956.26. In addition he was to execute and deliver to Doris the joint income tax return for 1974 together with a check in the amount of one-half the taxes due. Finally, Joseph was also to execute and deliver to Doris all documents necessary to release to her all his interests in a note and mortgage and transfer all of his interests in certain securities. Joseph failed to comply with any of these provisions which prompted Doris to file a motion to enforce the agreement through civil contempt.¹⁰⁰

The trial court held the former husband in contempt of court. The appellate court affirmed in part and reversed in part.¹⁰¹ Regarding the money Joseph owed to Doris, the Fourth District Court of Appeal held it was clearly a payment required under the terms of a property settlement, unenforceable through contempt proceedings.¹⁰² The court, therefore, reversed that part of the trial court's order holding Joseph in contempt for failure to execute and deliver the joint tax return and a check for taxes due for the same reason.¹⁰³

The court was faced with a different situation regarding the remaining portion of the lower court's order requiring Joseph to execute and deliver certain documents.¹⁰⁴ These acts did not involve holding the former husband in contempt of court for failure to make an agreed *payment* pursuant to a property settlement agreement, but rather ordered he comply with the obligations assumed in the agreement.¹⁰⁵ The effect of incorporating the agreement into the final divorce decree cou-

98. 336 So. 2d 1237 (Fla. 4th Dist. Ct. App. 1976).

99. *Id.* at 1238.

100. *Id.*

101. *Id.* at 1239.

102. *Id.* at 1238.

103. *Id.*

104. *Id.*

105. *Id.*

pled with the trial court's order for compliance was a "mandatory order to specific performance of that act,"¹⁰⁶ which the court found distinguishable from the payment of money.

The court in *Burke* indicated that because the trial court was in effect ordering Joseph to specifically perform the act, Florida Rule of Civil Procedure 1.570 applied.¹⁰⁷ Florida's procedural requirements provided, in part: "If any other judgment, injunction or mandatory order for the specific performance of any act or contract is not complied with, the court may hold the disobedient party for contempt. . . ."¹⁰⁸ The trial court ordered Joseph to specifically perform certain acts which did not involve payment of money. The former husband's failure to comply was willful and deliberate, and not caused by inability to perform. Under these circumstances, the court held the trial court had the authority to enforce its order by holding the former husband in contempt.¹⁰⁹

Upon final analysis, it seems the rule regarding the enforcement of property settlement agreements incorporated into final divorce decrees swings from extreme to extreme. On one hand, as in *Collins*, contempt of court is available to coerce a former spouse to make required mortgage payments. On the other hand, as in *Carlin*, contempt of court is never an available remedy to enforce property settlement agreements incorporated into final divorce decrees. The more moderate approach was exhibited by *Benson v. Benson*, where Florida's Fourth District Court of Appeal stated: "Failure to make payments pursuant to a pure property settlement is not the subject of contempt proceedings, . . ."¹¹⁰

Conclusion

Florida courts have, on occasion, reached conflicting conclusions when addressing the issue of whether contempt is available as a remedy to enforce property settlement agreements incorporated into final divorce decrees. It seems clear that contempt is an available remedy to enforce family support obligations. Where, then, does confusion arise

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. 369 So. 2d 99, 100 (Fla. 4th Dist. Ct. App. 1979).

with regard to property settlement agreements?

One source giving rise to confusion is Florida's constitutional prohibition against imprisonment of debtors.¹¹¹ Judicial construction of this provision does not prohibit court use of contempt as a means of enforcing family support obligations because these obligations are not classified as debts, but rather are viewed as legally imposed special duties. Therefore, when the court threatens a party with imprisonment for failure to comply with a family support provision, it is coercing that party's compliance with a legally imposed duty. The court is not threatening the party with imprisonment as a means of enforcing a debt, and consequently does not violate Florida's constitutional guarantee in this respect.

The situation is different when a property settlement agreement is involved. Property settlement agreements create no special duties upon the parties. They are merely contracts distributing property between husband and wife upon dissolution of marriage.¹¹² When freely and voluntarily entered by the parties, these contracts are not disturbed and courts treat them like any other.¹¹³ Unlike family support orders, these settlement agreements are not modifiable.

Unpaid money obligations arising from settlement agreements are considered debts. Because courts must be careful not to violate the prohibition against imprisoning debtors, they follow the general rule that contempt of court is not an available remedy to enforce these payments.¹¹⁴ Therefore, the party seeking relief is limited to those proceedings any creditor would have against his debtor.¹¹⁵

Another source of confusion is, unlike cases presented by breached family support obligations, there really are no sufficient policy reasons justifying contempt for property settlement violations. Property settlement agreements are not intended to assure continued "sustenance" or "nourishment" to the family, and a party's failure to comply with a settlement provision does not necessarily mean a family will go without support. Why, then, should a court exercise its extraordinary power of contempt merely to enforce a contract to distribute property?

111. FLA. CONST. art. 1, § 11.

112. *Benson*, 369 So. 2d 99.

113. *Underwood v. Underwood*, 64 So. 2d 281 (Fla. 1953).

114. 207 So. 2d 507.

115. 310 So. 2d 403.

Certain guidelines might be useful to a court in determining whether a divorce order is enforceable through contempt. First the court should determine the source of the obligation for which enforcement is sought. If the court determines the source of obligation arises from a duty of family support then contempt may be an available remedy. The court must then determine whether policy considerations justify the exercise of its extraordinary power of contempt.¹¹⁶

If, on the other hand, the obligation arises from an agreement to distribute property, the court should be careful in exercising its power of contempt, lest a debtor be imprisoned. If courts treat these agreements like any other contract, the non-breaching party is afforded only those remedies sounding in contract. Perhaps, however, in cases of serious violation of a property settlement agreement, a court might impose punitive damages to deter future violations of serious magnitude.

The *Burke* decision laid down a particularly appealing approach where the court said it was enforcing the contract through its power of contempt because it had ordered the party to specifically perform the contract.¹¹⁷ The courts should be allowed to order a party to specifically perform a property settlement where the contract demands such action and there is no adequate remedy at law. Because specific performance, an equitable remedy, usually does not involve the payment of money, the court could circumvent the Florida proscription against im-

116. After this note was committed to print, the Florida Supreme Court reversed the Third District Court of Appeal in *Chapman v. Lamm*, 7 Fla. L. Weekly 124 (March 12, 1982). The supreme court recognized the general rule when a debt based upon an assignment of the right to receive child support payments is owed to a private third party (a bank for example), contempt of court is not an available means of enforcing that debt. See *State ex rel. Cahn v. Mason*, 148 Fla. 264, 2 So. 2d 255 (1941). However, when the state demonstrates sufficient public policy reasons, contempt of court is an available means of enforcing the child support payments owed to the state. Section 409.2561 of the Florida Statutes (1979) demonstrated the legislature's intent, based on the "unique relationship" between the state and the family, to allow the state to use contempt of court as a means of securing repayment of public monies. The supreme court held that the acceptance of public assistance for the support of a dependent child vests in the department the authority to proceed with *all* remedies available to the child's custodian. 7 Fla. L. Weekly at 126. Still the contempt order in *Chapman* was held to be improper because the former husband was not properly notified of the dissolution of marriage proceedings and the record did not support the determination that the husband had the ability to pay the child support. *Id.* at 124.

117. 336 So. 2d 1237.

prisoning for a debt. This type of approach would seemingly avoid much of the confusion surrounding the courts' use of contempt to enforce property settlements incorporated into final divorce decrees.

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