

**IN THE SUPREME COURT OF FLORIDA**

**FLORIDA DEPARTMENT OF REVENUE,  
o/b/o SINTERIA SMITH,**

**Petitioner,**

**vs.**

**CASE NO.: SC01-913  
DCA CASE NO.: 5D00-2543**

**KELVIN M. JACKSON,**

**Respondent.**

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**FLORIDA DEPARTMENT OF REVENUE,  
o/b/o DONNA LANE,**

**Petitioner,**

**vs.**

**CASE NO.: SC01-914  
DCA CASE NO.: 5D00-2951**

**MORGAN P. TILLERY, SR.,**

**Respondent.**

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**PETITIONER'S REPLY BRIEF ON THE MERITS**

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**ARGUMENT**

Contrary to the respondents’ claim, DOR is not seeking to create a special exception regarding the child support obligations of persons incarcerated for criminal misconduct. Instead, it is the respondents who ask for a special reprieve from paying child support based upon their status as incarcerated criminals.

The respondents argue that voluntary behavior - i.e. the commission of a crime resulting in the obligor’s financial inability to pay his child support - should be considered to be “involuntary” behavior, and exempt from the standard “voluntary” test necessary for child support modification. They argue that although they committed a crime resulting in incarceration, since they did not control the sentencing

process they are not responsible for the resulting inability to support their children.

The petitioner disagrees with the respondents' interpretation of *Overby v. Overby*, 698 So.2d 811 (Fla. 1997). *Overby* does not stand for the general principle of law that the voluntary/involuntary test has no application in child support modification actions. Rather, the court disapproved of certain district court of appeal decisions that applied the voluntary/involuntary test rather than the best interests of the child analysis in modification actions involving obligor's who purposely reduced their earning capacity in order to pursue educational opportunities. The court held that it was then necessary to determine whether the voluntary reduction in income was in the child's best interests.

The respondents' argument for termination of their support fails under *Overby*. *Overby* recognizes that the voluntary reduction of one's earning ability is insufficient to support a finding of a substantial change in circumstances necessary to justify a modification of support. *Id.*, 698 So.2d at page 815. The respondents attempt to avoid this fatal problem by claiming their inability to pay is involuntary. They blame the Florida Legislature for their incarceration and inability to meet their child support obligation. (Answer Brief, Page 6) They claim it "is the legislative preference for lengthy terms of incarceration" that results in their inability to support their children. Therefore, they claim that under Section 61.30, an incarcerated parent should not be

considered to have the ability to pay his child support. The respondents claim it is a legal fiction that parents voluntarily choose incarceration as a means to avoid child support. By framing their argument in terms of incarceration being the involuntary event causing their inability to pay, the respondents avoid addressing the fact they imposed upon themselves any inability to pay support. However, the respondent's voluntary act was their commission of a crime that had foreseeable results, including incarceration and the inability to pay their child support. The voluntary act of criminal misconduct caused the respondents' inability to pay their child support. Any inability to pay their child support is self-imposed, and standing alone does not justify a modification of the support obligation during incarceration.

Other states have addressed the issue of the voluntary nature of a criminal act and its impact on the incarcerated obligor's support obligation. *Sorey v. Smith*, No. FA000631383 (Sup.Ct. Conn. Aug. 21, 2001); *Shipman v. Roberts*, 15 S.M.D. (Sup. Ct.Conn. June 7, 2001) discuss at length cases from the across the country that are pertinent to the issue before this Court.

The respondents contend that the clean hands doctrine does not apply. They claim that the application of the doctrine uncouples the equitable nexus concept established in *Dale v. Jennings*, 90 Fla. 234, 107 So. 175 (1926). However, the clean hands doctrine falls directly within the requirements of *Dale* and applies to this case.

There is a direct connection between the respondents' misconduct and the modification litigation they initiated.

Central to the modification litigation initiated by the respondents is the issue of their ability to meet their ongoing payment obligations. By alleging in their modification pleadings their financial inability to meet their support obligations, the respondents raised the ability to pay issue, thus making it central and directly connected to the matter of litigation.

The burden of justifying their modification request was on the respondents as the parties seeking the modification. *Overby v. Overby*, 698 So.2d 811 (Fla. 1997); *Deatherage v. Deatherage*, 395 So.2d 1169 (Fla 5<sup>th</sup> DCA 1981). "A party seeking a change in the amount of child support has the burden of proving a substantial change in circumstances, which change is significant, material, involuntary [for a party seeking to make lower payments] and permanent in nature." *Bernstein v. Bernstein*, 498 So.2d 1270, 1273 (Fla. 4<sup>th</sup> DCA 1986). The respondents' voluntary misconduct caused their inability to pay that is the central issue on appeal.

The respondents' alleged inability to pay is directly linked to their ability to earn the money or maintain assets sufficient to meet their support obligation. Since the respondents are seeking the modification of their support obligation it was their burden to demonstrate that the loss of their ability to earn an income, and thereby pay their

child support, was involuntary. As an element of proof in a modification action, the voluntary nature of the respondents' loss of income is clearly directly connected to the modification litigation. *Dale v. Jennings*, 90 Fla. 234, 107 So. 175 (1926).

Since the voluntary nature of the change in ability to pay is directly connected to the matter of litigation, any misconduct by the respondents that resulted in their inability to meet their child support obligation must be considered by the court. The respondents cannot cause the circumstances of their inability to pay and then claim that it is improper for the court to consider the reasons for their inability to pay. Contrary to concepts of equity and fair play, they seek to rely on their own bad behavior to obtain relief while claiming that their behavior is not connected to the modification litigation.

“The clean hands doctrine precludes a court from relieving a party of his or her support obligation, when the decrease in ability to pay resulted from the party’s voluntary acts...” *Pitts v. Pitts*, 626 So.2d 278, 283 (Fla. 1<sup>st</sup> DCA 1993). Relief should only be granted due to an inability to pay for reasons not within the obligor’s control or making. Otherwise, the request for relief should be barred by the clean hands doctrine. *Martin v. Martin*, 256 So.2d 553 (Fla. 4<sup>th</sup> DCA 1972). “[O]ne who comes into equity must come with clean hands else all relief will be denied him regardless of the merit of this claim. It is not essential that the act be a crime; it is

enough that it be condemned by honest and reasonable men.” *Roberts v. Roberts*, 84 So.2d 717, 720 (Fla. 1956). In the present appeal, the “unclean hands” conduct was a criminal act. Applying the doctrine is consistent with this Court’s decision in *Dale*.

In looking at the voluntary nature of the respondents’ conduct, *Overby* is instructive. In *Overby*, the Court found that a father’s voluntary reduction in income was insufficient to justify a modification of his support obligation. That finding applies to the present appeal. The Court then recognized that notwithstanding the obligor’s voluntary conduct, Section 61.13(1)(a), F.S., can serve as a basis for modifying the support obligation if it serves the best interests of the children. *Overby*, 698 So.2d at page 815. The court considered the benefit to the children of the temporary reduction of the father’s support payment while he pursued further education. The court found no benefit. “In fact, the children would be subsidizing the father’s law school education through lower child support payments despite having no assurances of any future benefit.” *Id.*

No benefit accrues to children who have their support terminated as the result of their father’s incarceration. The children would be subsidizing their father’s misconduct with no assurance of any future benefit.

In *Reid v. Reid*, 57 Ark.App. 289, 944 S.W.2d 559 (1997), the court stated

We agree that equity will not come to the aid of one who of his or her

own volition engages in criminal behavior and suffers the consequences which affect the ability to pay child support. Moreover, the needs of the children have remained unchanged, and as between appellant and his children, the interests of the children must prevail. We can think of no reason how their best interests are served by depriving them of support.

The foregoing analysis applies when DOR acts in its Title IV-D capacity. By terminating an incarcerated obligor's support obligation, the taxpayers are subsidizing the obligor's criminal misconduct with no future benefit to the state. This is contrary to the stated legislative public policy. Section 409.2551, F.S.

The clean hands doctrine is applied to prevent a party in litigation from relying upon his own bad behavior as a basis for avoiding his legal and equitable obligations. A party cannot claim that his criminal behavior should relieve him from, or have no impact upon, his child support obligation. Such a position rewards an obligor for his criminal behavior. The doctrine exists to protect the innocent, not as a shield behind which one can hide to avoid his legal obligations.

Children should not be made to suffer financial hardship because of their parent's wrongdoing. A parent cannot, by intentional conduct or mere irresponsibility, seek relief from this duty of support. Defendant, who by his own wrongful conduct placed himself in a position that he is no longer available for gainful employment is not entitled to relief from his obligation to support his child. Incarceration was a foreseeable result of his criminal conduct and is thus deemed a voluntary act in and of itself.

*Richardson v. Ballard*, 113 OhioApp.3d 552, 555, 681 N.E.2d 507 (1996).

The other element of the clean hands doctrine stated in *Dale* is that the conduct

constituting the “unclean hands” must affect the adverse party. The respondents’ misconduct resulted in their incarceration, which was the basis for their claim that they lacked the ability to meet their support obligations. Such misconduct clearly affects DOR and the mothers in this action. The clean hands doctrine should act as a complete bar to the respondents’ modification request.

The respondents argue that public policy should not support the principles proposed by the petitioner. Legislative intent and public policy regarding the support of children is set forth in Section 409.2551, F.S. (2001).

Common-law and statutory procedures governing the remedies for enforcement of support for financially dependent children by persons responsible for their support have not proven sufficiently effective or efficient to cope with the increasing incidence of financial dependency. The increasing workload of courts, prosecuting attorneys, and the Attorney General has resulted in a growing burden on the financial resources of the state, which is constrained to provide public assistance for basic maintenance requirements when parents fail to meet their primary obligations... It is declared to be the public policy of this state that this act be construed and administered to the end that children shall be maintained from the resources of their parents, thereby relieving, at least in part, the burden presently borne by the general citizenry through public assistance programs.

Public policy supports a clear rule that incarceration of an obligor standing alone is not sufficient to terminate, abate, or modify a child support obligation. If there are competing public policy interests, any balancing of those interest should weigh in favor of the child, custodial parents, and the taxpayers.

The respondents' position is contrary to public policy and creates a double burden upon the state. Taxpayer money is expended to support the incarcerated obligor, and taxpayer money is used to support the obligor's children in the form of public assistance. It is ironic that state money is used to care for the incarcerated respondents, but they claim they should be relieved of their support obligations because of their criminal behavior.

DOR is not the only entity that has an interest in the payment of child support. Custodial parents who support their children through their own efforts without state assistance have an interest in whether incarcerated obligors remain responsible for their support obligations. This case is not simply a "welfare reimbursement" case, nor should it be viewed solely as one involving the "collection efforts of the State." This Court's decision will reach far beyond DOR's duties under Chapter 409. It will impact the general citizenry in private domestic cases. It is a real world case that affects those persons who struggle to support the children in their care.

The respondents claim "[t]here are policy problems with the needless accrual of a large arrearage without the ability to pay it." Upon release from incarceration the obligor will have a support arrearage. However, after release when the ability to earn is once again available, the trial court will have the discretion to establish a payment schedule that is commensurate with the obligor's then ability to pay.

The respondents' argue that the accumulation of an arrearage while incarcerated is inequitable. They provide the example of an obligor sentenced to a 25 minimum mandatory sentence. This worst case scenario does not prove their "inequity" argument. It actually begs the question of the inequitable result that will occur to custodial parents if the respondents' position is adopted.

Not all obligors will receive 25 year sentences. (In the present case Mr. Tillery's term of incarceration was approximately three years. (R2-9)) So the question should be posed: What if the obligor's term of incarceration is 18 months? Is the accumulation of an arrearage still unfair? The respondents propose their own per se rule; incarceration in itself is a demonstration of inability to pay that justifies a modification of the support obligation. But this results in a custodial parent solely bearing the cost of raising the obligor's children without any prospect of reimbursement or contribution for those expenses incurred during his incarceration.

The respondents argue "there is no benefit to the child during minority in accruing a child support that cannot be paid for 25 years." This is a self-serving argument and reflects their position that the burden to them of accumulating an arrearage outweighs the purpose for paying child support. This Court has spoken to the impact that the nonpayment has upon parents and children.

Support payments are imposed upon a parent because the trial court

has determined the payments are necessary to provide for the needs of the child. When a support-obligated parent fails to make support payments, the responsibility for maintaining the child falls entirely upon the custodial parent. In many instances, the custodial parent cannot shoulder the additional burden that rightfully and lawfully belongs to the nonpaying parent. As a consequence, the family often suffers hardship that otherwise could be avoided, and in some cases they are forced to seek aid from the state... due to the delinquency of a nonpaying parent, money from a support-dependent parent's own funds or from the state has been expended to maintain the child during minority.

...

Upon emancipation of a minor child, the support-dependent parent is not magically reimbursed for personal funds spent nor debts incurred due to nonpayment of child support. Hardships suffered by a family do not disappear. A family's feelings of indignation from abandonment by the nonpaying parent or from past reliance on public assistance are not forgotten. Society's interest in ensuring that a parent meets parental obligations must not be overlooked simply because the child has attained the age of majority. The support obligation does not cease; rather it remains unfulfilled. The nonpaying parent still owes the money.

*Gibson v. Bennett*, 561 So.2d 565, 571-572 (Fla. 1990). A support order that may not be reimbursed until sometime in the future - even after the child reaches majority - is preferable to no order at all.

The respondents argue that the accrual of an arrearage creates a debt whose non-payment is a crime, and call the repayment of their support obligation "involuntary servitude." These issues have been addressed and rejected by this Court. *Gibson v. Bennett*, 561 So.2d at page 570 ("the United States Supreme Court has recognized that the obligation to pay support may be enforced by imprisonment for contempt

without violating a constitutional prohibition against imprisonment for debt.”) See also *Bowen v. Bowen*, 471 So.2d 1274 (Fla. 1985).

Respondents’ “dog law” article implies that DOR views child support enforcement as a procedure in which obligors are not entitled to human consideration. Contrary to the respondents’ theme that the enforcement of child support laws is unfairly harsh on convicted criminals, DOR’s focus is to ensure that the best interests of Florida’s most innocent and vulnerable citizens are protected. The respondents only focus on alleged harm to themselves. However, the public policy furthered by Florida’s child support enforcement laws has always been the best interests of children. The “dog law” concept does not contribute to the resolution of the issue before this Court. A helpful analysis of the law regarding the issue of the modification of an incarcerated obligor’s child support obligation is found in F. Wozniak. Annot. *Loss of Income Due to Incarceration as Affecting Child Support Obligation*, 27 A.L.R.5th 540-592 (1995), and K.R. Cavanaugh and D. Pollack, *Child Support Obligations of Incarcerated Parents*, 7 Cornell J.L. & Public Policy 531 (1998) (“when balancing the rights of convicted criminals against children who require support ..., the welfare of the children must take precedence.”).

## CONCLUSION

The petitioner respectfully requests that this Honorable Court rule that the

inability to pay child support resulting from an obligor's incarceration for a criminal offense by itself is insufficient to justify the modification, abatement, or termination of the obligor's child support obligation.

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by U.S. Mail to **PAMELA A. SCHNEIDER, ESQUIRE**, P.O. Box 1260, Gainesville, Florida 33602, **R. MITCHELL PRUGH, ESQUIRE**, Middleton & Prugh, 303 State Road 26, Melrose, Florida 32666-3906, on December 31, 2001.

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**WILLIAM H. BRANCH**

**CERTIFICATE OF COMPLIANCE**

**I CERTIFY** that this reply brief is in compliance with rule 9.210(a)(2) for computer generated briefs. The font used is Times New Roman 14-point.

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**WILLIAM H. BRANCH**