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Ex-Spouses Get Even: Proposal for Use of Contempt in Florida's Equitable Distribution Decree

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EX-SPOUSES GET EVEN: PROPOSAL FOR USE OF CONTEMPT IN FLORIDA’S EQUITABLE DISTRIBUTION DECREE

JEANNETTE WATKIN*

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I. INTRODUCTION

Article I, section 11 of the Florida Constitution states: “No person shall be imprisoned for debt, except in cases of fraud.”¹ This provision has been

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judicially interpreted to exempt child support and alimony.² The public policy rationale behind this exception is that it is a duty owed to the child, the spouse, and to society as a whole.³ Florida does not enforce equitable distribution awards through contempt because such awards are considered debt among spouses and the Florida Constitution prohibits imprisonment for debt.⁴ Other states—like Arkansas, Iowa, Texas, North Carolina, New York, Oklahoma, and Ohio—have constitutional prohibitions against imprisonment for debt, but differ from Florida’s judicial interpretation of debt and the use of contempt for the willful violation of an equitable distribution award, within the context of child support and alimony.⁵ This paper proposes the idea that equitable distribution awards in Florida should not fall within the constitutional definition of “debt” and should therefore not be exempted from being enforced through contempt proceedings.

In 1981, Florida Fourth District Court of Appeal (“DCA”) tried to obtain some guidance as to what “debt” means for purposes of family law.⁶ The court certified the question to the Supreme Court of Florida as one of great public importance: Whether a spouse can be held in contempt of court for failing to pay a bank loan that was unrelated to alimony.⁷ The high court did not issue an opinion.⁸ Without any guidance as to this matter, Florida’s district courts have interpreted the constitutional provisions to include equitable distribution in the definition of “debt.”⁹

ance in writing this paper. Lastly, the author wishes to thank the *Nova Law Review* for their hard work.

1. FLA. CONST. art. I, § 11.

2. *Gibson v. Bennett*, 561 So. 2d 565, 570 (Fla. 1990) (citing *State ex rel. Krueger v. Stone*, 188 So. 575, 576 (Fla. 1939)).

3. *Fishman v. Fishman*, 656 So. 2d 1250, 1252 (Fla. 1995) (citing *Gibson*, 561 So. 2d at 570).

4. *Kea v. Kea*, 839 So. 2d 903, 904 (Fla. 1st Dist. Ct. App. 2003) (citing *Schminkey v. Schminkey*, 400 So. 2d 121, 122 (Fla. 4th Dist. Ct. App. 1981)); *see also* FLA. CONST. art. I, § 11; *Burke v. Burke*, 336 So. 2d 1237, 1238 (Fla. 4th Dist. Ct. App. 1976); Jeff Lefkowitz, Note, *Property Division Obligations and the Constitutional Prohibition of Imprisonment for Debt*, 58 TEX. L. REV. 1307, 1310 (1980).

5. *Compare Kea*, 839 So. 2d at 904 (citing *Schminkey*, 400 So. 2d at 122), *with* ARK. CONST. art. II, § 16, *and* IOWA CONST. art. I, § 19, *and* OHIO CONST. art. I, § 15, *and* OKLA. CONST. art. II, § 13, *and* *Intrator v. Intrator*, 929 N.Y.S.2d 587, 589 (App. Div. 2011), *and* *Cobb v. Cobb*, 282 S.E.2d 591, 594 (N.C. Ct. App. 1981) (citing N.C. CONST. art. I, § 28), *and* *Ex parte Anderson*, 541 S.W.2d 286, 288 (Tex. Civ. App. 1976) (citing TEX. CONST. art. I, § 18; *Ex parte Sutherland*, 526 S.W.2d 536, 539 (Tex. 1975)).

6. *See Schminkey*, 400 So. 2d at 121–22; *see also* FLA. CONST. art. I, § 11.

7. *Schminkey*, 400 So. 2d at 122.

8. *See id.*

9. *See Kea*, 839 So. 2d at 904 (citing *Hobbs v. Hobbs*, 518 So. 2d 439, 440–41 (Fla. 1st Dist. Ct. App. 1988); *Marks v. Marks*, 457 So. 2d 1137, 1138 (Fla. 1st Dist. Ct. App. 1984);

Florida's rationale for disallowing contempt for equitable distribution is based on the concept that transfer of money among spouses in the form of cash,¹⁰ securities and bonds,¹¹ repayment of a mortgage,¹² or repayment of a debt to a third party¹³ pursuant to a final judgment, is considered debt among spouses.¹⁴ The end result is an unfair situation where spouses—who have jointly acquired assets throughout the duration of their marriage—are afforded only creditor-debtor remedies to enforce otherwise equitable distribution awards.¹⁵

II. THE TERM “SUPPORT” PURSUANT TO THE FLORIDA CONSTITUTION

For more than a century, the Supreme Court of Florida has recognized child support and alimony as exceptions to the no imprisonment for debt clause.¹⁶ As early as 1901, the court in *Bronk v. State*,¹⁷ recognized the right of alimony and child support as the responsibility of the spouse with the higher ability to maintain the other spouse “arising out of the duties incident to the marital status.”¹⁸ These exceptions are enforced through contempt because the court is not enforcing a debt, rather a duty owed to the former spouse,¹⁹ the children, and a “personal duty” from the payor spouse to society as a whole.²⁰

Ball v. Ball, 440 So. 2d 677, 679 (Fla. 1st Dist. Ct. App. 1983)); *La Roche v. La Roche*, 662 So. 2d 1018, 1019 (Fla. 5th Dist. Ct. App. 1995) (citing *Hertrich v. Hertrich*, 643 So. 2d 115, 116 (Fla. 5th Dist. Ct. App. 1994) (per curiam); *Veiga v. State*, 561 So. 2d 1335, 1336 (Fla. 5th Dist. Ct. App. 1990)).

10. See *Braswell v. Braswell*, 881 So. 2d 1193, 1198–99 (Fla. 3d Dist. Ct. App. 2004).

11. See *Lakin v. Lakin*, 901 So. 2d 186, 189–90 (Fla. 4th Dist. Ct. App. 2005) (citing FLA. STAT. § 61.075(6) (2012)).

12. *Kea*, 839 So. 2d at 904.

13. *Schminkey*, 400 So. 2d at 122.

14. *Kea*, 839 So. 2d at 904; *Schminkey*, 400 So. 2d at 121.

15. *Kadanec v. Kadanec*, 765 So. 2d 884, 886 (Fla. 2d Dist. Ct. App. 2000) (citing *DeSantis v. DeSantis*, 714 So. 2d 637, 638 (Fla. 4th Dist. Ct. App. 1998)).

16. See, e.g., *Bronk v. State*, 31 So. 248, 252 (Fla. 1901) (analyzing FLA. CONST. art. I, § 11).

17. 31 So. 248 (Fla. 1901).

18. See *id.* at 251–52.

19. *Riley v. Riley*, 509 So. 2d 1366, 1368–69 (Fla. 5th Dist. Ct. App. 1987) (citing *State ex rel. Krueger v. Stone*, 188 So. 575, 576 (Fla. 1939); *Bronk*, 31 So. at 252; *Howard v. Howard*, 118 So. 2d 90, 94 (Fla. 1st Dist. Ct. App. 1960)).

20. Thomas C. Marks, Jr. & Alfred A. Colby, *Some Proposed Changes to the Florida Constitution*, 18 NOVA L. REV. 1519, 1521–22 (1994).

Equitable distribution in Florida is enforced through contempt when the basis is in the nature of support,²¹ or in cases that include transfer of real property.²² Over the years, Florida has broadened its contempt powers but not far enough to include equitable distribution awards.²³ In *Pabian v. Pabian*,²⁴ the Fourth DCA found that car payments pursuant to the final judgment were in the form of support.²⁵ The husband was held in contempt for failure to make the car payments and the court explained that a car is in the nature of support, just like food and shelter, because of the important “role which an automobile plays in our daily lives.”²⁶ In *Cummings v. Cummings*,²⁷ the Fourth DCA found the first two lump sum equitable distribution payments were contemplated as support payments for the wife and the children.²⁸ The husband had the ability, but willfully failed to pay, and therefore, contempt was appropriate.²⁹

III. CONTEMPT OF TRANSFER OF MONEY PAYMENTS VS. PROPERTY INTEREST

In Florida, when enforcing equitable distribution awards, relief is usually limited to the ordinary claims between debtor and creditor.³⁰ However, many courts will use contempt when the interest being conveyed is a property interest, and not a monetary payment.³¹ Florida Rule of Civil Procedure 1.570(c)(2) allows a court to enforce its orders, requiring performance of an act through contempt.³² Florida Family Law Rule of Procedure 12.570 incorporates Florida Rule of Civil Procedure 1.570, which means that a family

21. *E.g.*, *Cummings v. Cummings*, 37 So. 3d 287, 290 (Fla. 4th Dist. Ct. App. 2010) (citing *Pabian v. Pabian*, 480 So. 2d 237, 238 (Fla. 4th Dist. Ct. App. 1985)); *Zuccarello v. Zuccarello*, 429 So. 2d 68, 69 (Fla. 3d Dist. Ct. App. 1983).

22. *See, e.g.*, *Pennington v. Pennington*, 390 So. 2d 809, 809–10 (Fla. 5th Dist. Ct. App. 1980).

23. *See* Marks & Colby, *supra* note 20, at 1525–26.

24. 480 So. 2d 237 (Fla. 4th Dist. Ct. App. 1985).

25. *Id.* at 238.

26. *Id.*

27. 37 So. 3d 287 (Fla. 4th Dist. Ct. App. 2010).

28. *Id.* at 290–91.

29. *Id.* at 291.

30. *Carlin v. Carlin*, 310 So. 2d 403, 403 (Fla. 4th Dist. Ct. App. 1975) (per curiam) (citing *Howell v. Howell*, 207 So. 2d 507, 511 (Fla. 2d Dist. Ct. App. 1968)).

31. 3 BRETT R. TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY* § 9:17, at 64–65 (3d ed. 2005).

32. FLA. R. CIV. P. 1.570(c)(2).

judge “may hold a spouse in contempt for fail[ure] to [abide by] a specific act” as stated in a final judgment.³³

For example, in *Riley v. Riley*,³⁴ the trial court held the husband in contempt for failing to abide by the settlement agreement that required the husband to name the “former wife, as [the] beneficiary of a life insurance policy.”³⁵ The Fifth DCA affirmed that contempt was appropriate because the husband was required to do a specific act as required by the final dissolution of marriage, rather than pay money.³⁶ Likewise, in *Burke v. Burke*,³⁷ the final judgment of dissolution ordered the husband to execute and deliver various documents necessary to release the wife’s interest in a note and mortgage and to transfer securities to the wife.³⁸ The husband was held in contempt for failing to execute and deliver the documents.³⁹ The Fourth DCA affirmed, stating that “the trial court’s order of compliance, was in effect a mandatory order for the specific performance of that act.”⁴⁰ The husband was not required to pay money, but rather perform an act, and his refusal to abide by the court order “was willful and deliberate and not caused by his inability to comply.”⁴¹ Similarly, in *Firestone v. Ferguson*,⁴² the final judgment ordered the sale of the parties’ farm at a specific price.⁴³ The wife refused to execute the sale documents and was held in contempt.⁴⁴ The Third DCA affirmed, explaining that the wife was required to perform the act of executing the sale documents.⁴⁵

In contrast, when a final divorce judgment requires one spouse to pay monies not in the nature of support, then the constitutional provisions of article I, section 11 are implicated.⁴⁶ In *McQuady v. McQuady*,⁴⁷ the parties borrowed \$15,000 for a business loan using as collateral the wife’s separate

33. Roth v. Roth, 973 So. 2d 580, 592 (Fla. 2d Dist. Ct. App. 2008), *review dismissed*, 36 So. 3d 84 (Fla. 2010); *see also* FLA R. CIV. P. 1.570; FLA. FAM. L. R. P. 12.570.

34. 509 So. 2d 1366 (Fla. 5th Dist. Ct. App. 1987).

35. *Id.* at 1367.

36. *Id.* at 1370.

37. 336 So. 2d 1237 (Fla. 4th Dist. Ct. App. 1976).

38. *Id.* at 1238.

39. *Id.*

40. *Id.*

41. *Id.*

42. 372 So. 2d 490 (Fla. 3d Dist. Ct. App. 1979).

43. *Id.* at 491.

44. *Id.*

45. *Id.* at 492.

46. *McQuady v. McQuady*, 523 So. 2d 785, 786 (Fla. 5th Dist. Ct. App. 1988) (citing FLA. CONST. art. I, § 11).

47. 523 So. 2d 785 (Fla. 5th Dist. Ct. App. 1988).

property.⁴⁸ In a separate agreement, the husband agreed to indemnify the wife and pay back the loan without any duty on her part.⁴⁹ The final divorce judgment ordered the wife to pay the loan and ordered “the husband to pay the wife \$15,000 ‘as lump sum alimony’ at \$250 per month” over five years.⁵⁰ The husband appealed and argued that he should not be forced to pay alimony “as a tool to accomplish an equitable distribution,” and the appellate court held that the husband could not be held in contempt for failing to pay the wife \$15,000 because it violated Florida’s imprisonment for debt clause, despite their prior agreement.⁵¹

IV. EQUITABLE DISTRIBUTION DECREES SHOULD NOT BE CONSIDERED “DEBTS” WITHIN THE MEANING OF ARTICLE I, SECTION 11 OF FLORIDA’S CONSTITUTION FOR PUBLIC POLICY REASONS

Successful marriages usually require spouses to forego certain career opportunities for the benefit of one another.⁵² The law recognizes those sacrifices, and therefore, acknowledges that one spouse may be more financially independent and successful than the other.⁵³ Courts usually compensate for this disparity by granting unequal property awards and any other relief they find equitable in light of the circumstances.⁵⁴ “Specific obligations of one party to deliver property to an ex-spouse should be viewed in light of this underlying purpose.”⁵⁵ The law should not view final divorce decrees as a common commercial affair, but rather take into account the nature of the marriage relationship.⁵⁶ It seems only logical that the assets accumulated through joint efforts and joint economies of the parties during their marriage be enforced in the same manner as child support and alimony.⁵⁷ Public policy supports the idea that final judgment decrees be enforced through contempt since it involves rights and obligations from one spouse to the other.⁵⁸ The reality is that without contempt of court to compel compliance with equitable distribution awards, the courts are powerless to compel transfers of

48. *Id.* at 786.

49. *Id.*

50. *Id.*

51. *Id.* 786–87 (citing FLA. CONST. art. I, § 11).

52. Lefkowitz, *supra* note 4, at 1315.

53. *Id.*

54. *Id.*; *see also* FLA. STAT. § 61.075(1)(a)–(j) (2012).

55. Lefkowitz, *supra* note 4, at 1315.

56. *Id.* at 1314.

57. *See id.* at 1313.

58. *See id.* (citing *Ex parte Davis*, 111 S.W. 394, 396 (Tex. 1908)).

cash, stocks, bonds, or property, which are unrelated to support.⁵⁹ Jailing a party who refuses to comply with a court order by contempt is “the most effective [remedy] of enforcing divorce judgments.”⁶⁰ Contempt and jail time are unpleasant affairs, and therefore, people will usually comply with a court order to avoid incarceration.⁶¹ The following are public policy reasons why the judiciary, through case law, should except equitable distribution from Florida’s no imprisonment for debt clause.

A. Delivery of an Asset Pursuant to a Final Divorce Judgment Should Not Be Considered Payment of a Debt

Florida Statute section 61.075 defines marital assets as

(a) Assets acquired . . . during the marriage, individually by either spouse or jointly by them; (b) [t]he enhancement in value and appreciation of nonmarital assets resulting either from the efforts of either party during the marriage or from the contribution to or expenditure thereon of marital funds or other forms of marital assets, or both; (c) [i]nterspousal gifts during the marriage; (d) [a]ll vested and nonvested benefits, rights, and funds accrued during the marriage in retirement, pension . . . and insurance plans and programs.⁶²

Marital assets, as defined by statute, previously belonged to both husband and wife, however titled.⁶³ Derivation of the marital property may have been from enhancement, active appreciation, non-interspousal gifts or joint efforts during the marriage.⁶⁴ Upon entry of a final judgment, Florida case law states that if the equitable distribution is not in the form of support, it is a debt, and the violating spouse cannot be incarcerated via the contempt power for non-payment.⁶⁵ The enforcement problem begins when the equitable distribution is characterized as a debt.⁶⁶ The court has previously established that debt is a marital asset for purposes of equitable distribution.⁶⁷ This cha-

59. See, e.g., *Kadanec v. Kadanec*, 765 So. 2d 884, 886 (Fla. 2d Dist. Ct. App. 2000) (citing *La Roche v. La Roche*, 662 So. 2d 1018, 1019 (Fla. 5th Dist. Ct. App. 1995)).

60. Lefkowitz, *supra* note 4, at 1307.

61. See *id.*

62. FLA. STAT. § 61.075(6)(a)1.a.–d. (2012).

63. *Id.* § 61.075(6)(a)1.a.

64. *Id.* § 61.075(6)(a)1.b.

65. See *Cummings v. Cummings*, 37 So. 3d 287, 290 (Fla. 4th Dist. Ct. App. 2010); *Kadanec v. Kadanec*, 765 So. 2d 884, 886 (Fla. 2d Dist. Ct. App. 2000).

66. See *Kea v. Kea*, 839 So. 2d 903, 904 (Fla. 1st Dist. Ct. App. 2003).

67. See *Kadanec*, 765 So. 2d at 886.

racterization is contrary to the modern conception of what a debt is.⁶⁸ First, parties to a dissolution of marriage are joint owners of certain assets classified as marital property in the equitable distribution.⁶⁹ Upon dissolution, a duty to separate assets is obligatory among the spouses and should not imply the creation of a debt because the assets previously belonged to both.⁷⁰ To comply with constitutional provisions, the court should inquire whether an ability to pay the equitable distribution exists.⁷¹ If the court finds that a spouse willfully refuses to comply, then contempt is appropriate since the payor spouse holds “the key to his [own jail] cell.”⁷²

Second, a marital duty to deliver or pay is not the same as a debtor’s obligation to a creditor.⁷³ The Supreme Court of Florida stated in *State ex rel. Lanz v. Dowling*⁷⁴ that debt is within the meaning of the Florida Constitution,⁷⁵ and debt “must be those arising exclusively from actions *ex contractu*.”⁷⁶ Black’s Law Dictionary defines *ex contractu* as “[a]rising from a contract.”⁷⁷ The general idea of dividing property belonging to spouses is very different than “the arm’s length transaction between the [commercial] debtor and creditor.”⁷⁸ “Marriage . . . is not a matter of commerce, nor . . . a contract” in which debts are incurred.⁷⁹ Rather, it “is a basic social institution of the highest type and importance, in which society at large has a vital interest.”⁸⁰ The constitutional provision against imprisonment for debt was meant to apply to debts arising under the law, not from marital status.⁸¹ The obliga-

68. Compare *id.*, with *State ex rel. Lanz v. Dowling*, 110 So. 522, 525 (Fla. 1926), and BLACK’S LAW DICTIONARY 648 (9th ed. 2009).

69. See FLA. STAT. § 61.075(6)(a)2.

70. See, e.g., *Ex parte Gorena*, 595 S.W.2d 841, 846 (Tex. 1979).

71. See *id.*

72. *Pugliese v. Pugliese*, 347 So. 2d 422, 424 (Fla. 1977) (citing *Demetree v. State ex rel. Marsh*, 89 So. 2d 498, 501 (Fla. 1956); *Faircloth v. Faircloth*, 321 So. 2d 87, 89 (Fla. 1st Dist. Ct. App. 1975); *In re S.L.T.*, 180 So. 2d 374, 379 (Fla. 2d Dist. Ct. App. 1965)); see also *Pabian v. Pabian*, 480 So. 2d 237, 238–39 (Fla. 4th Dist. Ct. App. 1985).

73. See *Dowling*, 110 So. at 525 (citing *Carr v. State*, 17 So. 350, 352 (Ala. 1895)); *Kea v. Kea*, 839 So. 2d 903, 904 (Fla. 1st Dist. Ct. App. 2003).

74. 110 So. 522 (Fla. 1926).

75. *Id.* at 525 (noting that “the [F]ederal Constitution [has] no such provision” regarding imprisonment for debt and suggesting that one must look to state definitions to interpret the definition); see also FLA. CONST. art. I, § 11.

76. *Dowling*, 110 So. at 525 (citing *Carr*, 17 So. at 352).

77. BLACK’S LAW DICTIONARY 648 (9th ed. 2009).

78. Lefkowitz, *supra* note 4, at 1315.

79. *Holloway v. Holloway*, 198 N.E. 579, 580 (Ohio 1935).

80. *Id.*

81. *Id.*; see also *In re Marriage of Lenger*, 336 N.W.2d 191, 193 (Iowa 1983) (quoting *Roberts v. Fuller*, 229 N.W. 163, 167 (Iowa 1930)); *Viajes Lesana, Inc. v. Saavedra*, 15 P.R. Offic. Trans. 927, 929 (P.R. 1984).

tion to comply with equitable distribution awards is a duty that “arises out of the marital relationship and not [from] a business [negotiation].”⁸² Therefore, when the Florida Constitution speaks about debt, the term should be construed and defined as a contract arising out of business relationships, and is not applicable *in the marriage context*.⁸³

B. Incarceration Is a Means to Punish the Willful Violation of a Court Order, Not for the Debt

The Florida Constitution currently prohibits the incarceration of a person due to debt,⁸⁴ and the courts have construed the refusal to abide by the equitable distribution within a final judgment decree as debt.⁸⁵ This is because under the judicial construction of the Florida Constitution, the surrendering of marital assets not related to support is ordinary debt.⁸⁶ Therefore, courts protect a willful violator in the same sense that they protect an indigent person from contempt regarding child support, or commercial debtors from creditors.⁸⁷

How is a court to enforce an equitable distribution award against a willful violator without contempt of court? Historically, courts need the power to enforce their own rulings; otherwise:

[W]ithout the power our judicial system would become a mere mockery for a party to a cause could make of himself a judge of the validity of orders which had been issued and by his own acts of disobedience set them aside, thereby ultimately producing the complete impotency of the judicial process.⁸⁸

As stated by the *Riley* court, “[t]oo restrictive a view of a court’s contempt powers would render it impotent like a toothless lion, who can only roar in dismay at the disobedience of his decrees.”⁸⁹

82. *California Divorce Agreements—Alimony or Property Settlement?*, 2 STAN. L. REV. 731, 739–40 (1950).

83. See FLA. CONST. art. I, § 11; *California Divorce Agreement—Alimony or Property Settlement?*, *supra* note 82, at 739–40.

84. FLA. CONST. art. I, § 11.

85. See, e.g., *Kadanec v. Kadanec*, 765 So. 2d 884, 886–87 (Fla. 2d Dist. Ct. App. 2000) (citing *DeSantis v. DeSantis*, 714 So. 2d 637, 638 (Fla. 4th Dist. Ct. App. 1998)).

86. See, e.g., *id.*

87. See *Demetree v. State ex rel. Marsh*, 89 So. 2d 498, 501 (Fla. 1956); *Kadanec*, 765 So. 2d at 886.

88. *Demetree*, 89 So. 2d at 501.

89. *Riley v. Riley*, 509 So. 2d 1366, 1370 (Fla. 5th Dist. Ct. App. 1987).

When a former spouse is imprisoned, it is for the willful violation of a court order, not for the inability to pay the debt.⁹⁰ The imprisonment is a consequence of the blatant disregard for a court order and does not violate constitutional provisions since he “carries the key of his prison in his own pocket.”⁹¹ This means that upon the compliance of the court order, the jailed party is immediately released.⁹²

In Florida, the courts do inquire as to whether the alleged contemnor has the ability to pay.⁹³ Recognition that the Florida Constitution allows contempt to enforce equitable distribution awards promotes respect for the courts and the judicial system.⁹⁴ Contempt powers are useful because they “enable[] courts to persuade parties to obey a prior order or decree of the court so that such prior order will not be rendered ineffectual by recalcitrant litigants.”⁹⁵ The Florida Constitution allows supreme court judges, appellate judges, and circuit court judges the jurisdiction to issue writs of habeas corpus.⁹⁶ It states that the courts “[m]ay issue . . . all writs necessary [or proper] to the complete exercise of [their] jurisdiction.”⁹⁷ Therefore, it defies logic that the courts would be rendered powerless to execute their own orders in the family context, and allow willful violators to disregard the court order without any consequence.

C. *Unjust Enrichment*

“The doctrine [of unjust enrichment] is a recognition that a person is accountable to another on the ground that if the former were not required to do so, he would unjustly benefit, or the other would unjustly suffer loss.”⁹⁸ The willful violator is unjustly enriched when he fails to comply with the equitable distribution award while the payee spouse has to spend money to enforce the award by hiring lawyers to pursue a civil remedy. Contempt of court is

90. *Id.* at 1368 (citing *State ex rel. Krueger v. Stone*, 188 So. 575, 576 (Fla. 1939); *Bronk v. State*, 31 So. 248, 251 (Fla. 1901); *Howard v. Howard*, 118 So. 2d 90, 94 (Fla. 1st Dist. Ct. App. 1960)).

91. *Id.*; *Demetree*, 89 So. 2d at 501 (quoting *In re Nevitt*, 117 F. 448, 461 (8th Cir. 1902)).

92. *Demetree*, 89 So. 2d at 501.

93. *Elliott v. Bradshaw*, 59 So. 3d 1182, 1184 (Fla. 4th Dist. Ct. App. 2011) (per curiam) (citing *Bowen v. Bowen*, 471 So. 2d 1274, 1277 (Fla. 1985)).

94. *See Ex parte Gorena*, 595 S.W.2d 841, 843 (Tex. 1979) (citing *Ex parte Browne*, 543 S.W.2d 82, 86 (Tex. 1976)).

95. *Id.* at 844 (citing *Ex parte Werblud*, 536 S.W.2d 542, 545 (Tex. 1976)).

96. FLA. CONST. art. V, §§ 3(b)(9), 4(b)(3), 5(b).

97. *Id.* § 3(b)(7); *see also id.* §§ 4(b)(3), 5(b).

98. *Golden v. Woodward*, 15 So. 3d 664, 669 (Fla. 1st Dist. Ct. App. 2009) (alterations in original) (citing *Circle Fin. Co. v. Peacock*, 399 So. 2d 81, 84 (Fla. 1st Dist. Ct. App. 1981)).

an easy remedy, for both the courts and for the spouse seeking to enforce the award. The public policy for allowing contempt is twofold: First, it would avoid unnecessary litigation in civil court to enforce a domestic matter, and second, it would allow an effective and quick remedy to enforce the courts' orders.

Civil law has carved out statutes of limitations, causes of action, and remedies for unjust enrichment.⁹⁹ The purpose of unjust enrichment is “to prevent the wrongful [custody] of a benefit, . . . money, or property [that belongs to someone else] in violation of good conscience and fundamental principles of justice or equity.”¹⁰⁰ The family court stands as the lone exception to the enforcement of unjust enrichment by failing to enforce equitable distribution awards.

It is a waste of resources for a spouse to file a civil suit to enforce a marital obligation and only be afforded a creditor-debtor remedy.¹⁰¹ Further, the payee spouse may not have the financial means to pursue a civil remedy, and therefore the equitable distribution award will be uncollectable, thereby enriching the payor spouse.¹⁰² In *Murphy v. Murphy*,¹⁰³ the Third DCA held that the husband could not be held in contempt for failing to pay over \$108,000 in special equity to the wife without explicit findings that he “had the [financial] ability to comply with the order and [had] willfully refused to do so.”¹⁰⁴ In *Kadanec v. Kadanec*,¹⁰⁵ the husband failed to pay the wife “\$20,945 as equitable distribution of the [h]usband’s profit sharing plan,” and was held in contempt by the trial court.¹⁰⁶ The Second DCA “reversed because property division awards may not be enforced by contempt.”¹⁰⁷ In the case at bar, the wife was denied alimony and only received half of the husband’s pension valued at \$20,945.¹⁰⁸ The court ordered a money payment of \$20,945, which the wife was unable to enforce through contempt.¹⁰⁹ The

99. See FLA. R. CIV. P. 1.110(a)–(b); 1 NORM LACOE, *LA COE’S PLEADINGS UNDER THE FLORIDA RULES OF CIVIL PROCEDURE WITH FORMS R. 1.110(427)*, at 590–91 (2011 ed.).

100. *Golden*, 15 So. 3d at 670 (quoting *Henry M. Butler, Inc. v. Trizec Props., Inc.*, 524 So. 2d 710, 711 (Fla. 2d Dist. Ct. App. 1988)).

101. See *Kadanec v. Kadanec*, 765 So. 2d 884, 886 (Fla. 2d Dist. Ct. App. 2000); *Murphy v. Murphy*, 370 So. 2d 403, 409 (Fla. 3d Dist. Ct. App. 1979).

102. See *Murphy*, 370 So. 2d at 409.

103. 370 So. 2d 403 (Fla. 3d Dist. Ct. App. 1979).

104. *Id.* at 409 (quoting *Adams v. Adams*, 357 So. 2d 264, 265 (Fla. 3d Dist. Ct. App. 1978)).

105. 765 So. 2d 884 (Fla. 2d Dist. Ct. App. 2000).

106. *Id.* at 886.

107. *Id.* (citing *La Roche v. La Roche*, 662 So. 2d 1018, 1019 (Fla. 5th Dist. Ct. App. 1995)).

108. *Id.* at 885.

109. *Id.* at 886.

consequence of lack of contempt was to deprive the wife of the asset, as if she had not received anything at all, and to unjustly enrich the husband by keeping the full pension valued at \$41,890.¹¹⁰ Contempt is an efficient and effective tool for enforcing family court laws.¹¹¹ When contempt is unavailable, the remedies become very expensive for the payee spouse (i.e. hiring an attorney to enforce through specific performance or creditor-debtor remedy, or even worse, not enforcing at all).¹¹²

D. *Undermining Settlement Agreements*

Under certain circumstances, parties in mediation or in private agreements waive certain benefits to obtain others.¹¹³ For example, a spouse may waive years of alimony for a quicker and more immediate equitable distribution payment.¹¹⁴ However, if enforcements of property settlement agreements are not upheld by Florida courts, the quicker and more immediate payment of money, as originally bargained for, is a fictitious proposition. The spouse that trades his right to alimony forever waives the claim, and is left with neither alimony nor equitable distribution monies.

In *Randall v. Randall*,¹¹⁵ the former wife, in an open court agreement, waived alimony in exchange for a one-half ownership and one-half equity value in the parties' business valued at \$500,000, which was titled in the husband's name.¹¹⁶ The husband was responsible for getting the business "in order," otherwise, the wife would take over the operations.¹¹⁷ The husband was given permission to pay certain debts of the parties from the cash flow of the business.¹¹⁸ Five months after the final judgment was ordered, the court entered an order finding that the husband had "violated virtually every provision of the final" divorce decree, and left the business worthless.¹¹⁹ The court ordered the husband to report whether he had paid the wife \$250,000 or

110. See *Kadanec*, 765 So. 2d at 886.

111. See *Family Law Blog: Power of Contempt in Post Judgment Enforcement Cases*, L. OFFS. JAMES S. CUNHA, P.A. (June 26, 2012), http://jcunhalaw.com/lawyer/2012/06/26/Post_Judgment_Enforcement/Power_of_Contempt_in_Post_Judgment_Enforcement_Cases_bl4488.htm.

112. E.g., *Kadanec*, 765 So. 2d at 886 (citing *DeSantis v. DeSantis*, 714 So. 2d 637, 638 (Fla. 4th Dist. Ct. App. 1998)).

113. See *Randall v. Randall*, 948 So. 2d 71, 71 (Fla. 3d Dist. Ct. App. 2007).

114. See *id.*

115. 948 So. 2d 71 (Fla. 3d Dist. Ct. App. 2007).

116. *Id.* at 71.

117. *Id.*

118. *Id.* at 71–72.

119. *Id.* at 72.

sold the warehouse.¹²⁰ If he did not, he would be held in contempt and could only purge himself of contempt by complying with the order.¹²¹ In *Randall*, we see a spouse who took advantage of the fact that his wife waived alimony for a larger equitable distribution award.¹²² The husband sought to avoid paying his wife by making the asset worthless.¹²³ In this case, the appellate court provided equity to the wife.¹²⁴ Had the court not used its contempt power, the husband would have been able to take advantage of his wife and the court by simply not complying with the agreement without any repercussion.

V. ALLOWING CONTEMPT FOR FINAL DIVORCE DECREES—THE EQUITABLE SOLUTIONS

In Florida, there are minimal remedies available to enforce equitable distribution,¹²⁵ and therefore the wise thing to do is to include the source of payment in the final judgment. Another possible solution is to enter an injunction preventing dissipation of those assets when one spouse owes money to the other or when a judge makes findings as to the existence of property or assets.¹²⁶ These remedies would enforce the payment to the payee spouse, and save the judicial system time from hearing these matters. In addition, the *Florida Statutes* should enforce equitable distribution with the same remedies available for child support and alimony: “Attachment or garnishment,”¹²⁷ “suspension or denial of professional licenses and certificates,”¹²⁸ and “[s]uspension of driver’s licenses and motor vehicle registrations.”¹²⁹ Enforcement of equitable distribution awards is unnecessarily problematic without action by the courts or the legislature.

120. *Randall*, 948 So. 2d at 72–73.

121. *Id.* at 73.

122. *See id.* at 71–72.

123. *Id.* at 72.

124. *See id.* at 74–75.

125. 2 JUDGE RENEE GOLDENBERG, *FLORIDA FAMILY LAW & PRACTICE* § 21:05, at 21-8 (rev. 6 2011).

126. *See* Benjamin M. Ellis, Note, *Protecting the Right to Marital Property: Ensuring a Full Equitable Distribution Award with Fraudulent Conveyance Law*, 30 *CARDOZO L. REV.* 1709, 1740 (2009).

127. *FLA. STAT.* § 61.12 (2012).

128. *Id.* § 61.13015.

129. *Id.* § 61.13016.

VI. CONTEMPT ARISING OUT OF PROPERTY SETTLEMENT AGREEMENTS IN OTHER STATES DO NOT VIOLATE THE STATE CONSTITUTION'S "NO IMPRISONMENT FOR DEBT" CLAUSE

Various states endorse the view that contempt proceedings should be enforced when one party willfully fails to comply with an equitable distribution award.¹³⁰ In *Brown v. Brown*,¹³¹ an Arkansas case, the parties had "incorporat[ed] a property settlement agreement" into the divorce decree, which required the husband to pay the wife \$50,000.¹³² "[P]rior to [the] divorce, [the husband] filed for voluntary Chapter 11 bankruptcy" and claimed that he was financially unable to pay his wife, but he never rendered a Chapter 11 plan, nor informed the court about a farming partnership he held with his mother.¹³³ The trial court found that the husband "willfully fail[ed] to comply with" the order and held him in contempt of court.¹³⁴ The husband appealed, arguing that his imprisonment violated article II, section 16 of the Arkansas Constitution for imprisonment of debt.¹³⁵ The Supreme Court of Arkansas stated that "neither the bankruptcy [court] nor, . . . the chancellor, believed" that the husband was unable to pay the wife.¹³⁶ The husband created his own inability to pay; therefore contempt was proper and did not violate the Arkansas Constitution.¹³⁷

The Supreme Court of Iowa similarly found in *In re Marriage of Lenger*,¹³⁸ that the husband was in contempt of court when he willfully failed to pay any part of the property settlement agreement to the wife, which consisted of a car and \$55,000 payable in installments.¹³⁹ The court held that contempt was appropriate and would not violate article I, section 19 of the Iowa Constitution for imprisonment of debt because it is necessary to enforce provisions of a divorce decree, despite it being independent from child support and alimony matters.¹⁴⁰ The court reasoned that a debt, as referenced in

130. *E.g.*, *Brown v. Brown*, 809 S.W.2d 808, 809 (Ark. 1991); *Intrator v. Intrator*, 929 N.Y.S.2d 587, 589 (App. Div. 2011).

131. 809 S.W.2d 808 (Ark. 1991).

132. *Id.* at 808.

133. *Id.* at 808–09.

134. *Id.* at 808.

135. *Id.*

136. *Brown*, 809 S.W.2d at 809.

137. *Id.* (citing *Ex parte Coffelt*, 389 S.W.2d 234, 237 (Ark. 1965)).

138. 336 N.W.2d 191 (Iowa 1983).

139. *Id.* at 191.

140. *Id.* at 192–93 (citing *Callenius v. Blair*, 309 N.W.2d 415, 418–19 (Iowa 1981); *Roach v. Oliver*, 244 N.W. 899, 902 (Iowa 1932) (per curiam); *Roberts v. Fuller*, 229 N.W. 163, 167–68 (Iowa 1930)); *see* IOWA CONST. art. I, § 19.

the Iowa Constitution, is defined as “an obligation growing out of a business transaction, and not to an obligation arising from the existence of the marital status.”¹⁴¹ Last, the court stated that the imprisonment was not only a punishment for the owing of monies, but also for the willful violation of a court order.¹⁴² Contempt of court was proper and not rendered a debt within the meaning of the Iowa Constitution.¹⁴³

In *Conrad v. Conrad*,¹⁴⁴ the husband failed to transfer over stock certificates and monies to the wife pursuant to a final judgment.¹⁴⁵ The Court of Appeals of North Carolina allowed the husband to be released from jail upon the transfer of the property to the wife.¹⁴⁶ The court further obliged the husband to pay for the wife’s attorney’s fees, as well as compensate her for the stock split and the dividends that occurred due to his failure to comply with the final judgment while he was incarcerated.¹⁴⁷

New York also endorses the view that contempt orders are enforceable when parties violate equitable distribution orders.¹⁴⁸ In *Intrator v. Intrator*,¹⁴⁹ the court made an equitable distribution that mandated the husband to pay the wife, among other things, half of the proceeds of their boat if sold and half of the equity if not sold.¹⁵⁰ The husband refused to do so for a period of over two years, and the wife filed for contempt of court for arrears as well as the boat payment.¹⁵¹ Subsequently, the parties entered into a stipulation where the husband was going to use his best efforts to pay the wife a settlement amount of \$131,000, as well as sell the boat.¹⁵² In the stipulation, even though the wife waived her ability to hold the husband in contempt of court for failing to pay the judgment amount, the husband’s refusal to sell the boat was not waived by the stipulation.¹⁵³ He was therefore held in contempt of court for failing to pay the wife her portion of the equal distribution.¹⁵⁴

Similarly, Oklahoma has a no imprisonment for debt clause in its constitution under article II, section 13.¹⁵⁵ In *McCrary v. McCrary*,¹⁵⁶ the Su-

141. *In re Marriage of Lenger*, 336 N.W.2d at 193 (quoting *Roberts*, 229 N.W. at 167).

142. *Id.* (quoting *Roberts*, 229 N.W. at 167); see *Roach*, 244 N.W. at 902.

143. *In re Marriage of Lenger*, 336 N.W.2d at 193 (quoting *Roberts*, 229 N.W. at 167).

144. 348 S.E.2d 349 (N.C. Ct. App. 1986).

145. *See id.* at 350.

146. *See id.* at 349–50 (citing *Blair v. Blair*, 173 S.E.2d 513, 514 (N.C. Ct. App. 1970)).

147. *Id.* at 350.

148. *See Intrator v. Intrator*, 929 N.Y.S.2d 587, 589 (App. Div. 2011).

149. 929 N.Y.S.2d 587 (App. Div. 2011).

150. *Id.* at 588.

151. *Id.*

152. *Id.*

153. *Id.* at 589.

154. *Intrator*, 929 N.Y.S.2d at 588.

155. OKLA. CONST. art. II, § 13.

preme Court of Oklahoma found no constitutional violation when the former wife filed contempt for the former husband's failure to comply with a final divorce judgment to pay the couple's back income tax liability.¹⁵⁷ The court stated that the Oklahoma Constitution expressly provides for contempt as a means of punishment, and its purpose is twofold: First, as punishment for willful violation of a court order, and second, by obtaining compliance of a court order.¹⁵⁸ Furthermore, the court explained that when a spouse has the means to comply with the final divorce decree, "and fails to do so, [the court finds] a willful disobedience" that takes it out of the constitutional provision against imprisonment for debt.¹⁵⁹

Another state supporting this proposition is Ohio.¹⁶⁰ In *Harris v. Harris*,¹⁶¹ the Supreme Court of Ohio ratified that contempt proceedings do not violate the no imprisonment for debt clause¹⁶² for willful violations of a final divorce judgment.¹⁶³ The husband failed in his obligation¹⁶⁴ to transfer a Buick automobile to the wife and pay the debts owed on the car, plus \$60,000.¹⁶⁵ The wife filed for contempt and the husband argued violation of state constitutional provisions.¹⁶⁶ The court affirmed the contempt order and reasoned that to enforce contempt based on the label of the terms in a divorce agreement, whether it is property settlement, alimony, or child support, is arbitrary and artificial.¹⁶⁷ Property settlement agreements, child support, and alimony all fall under the marital exceptions in the Ohio Constitution.¹⁶⁸ Furthermore, the use of contempt to enforce final divorce judgments supports the public policy of allowing the distribution of assets that have been accumulated throughout the marriage by the parties.¹⁶⁹

In *Ex parte Gorena*,¹⁷⁰ the Supreme Court of Texas analyzed whether its no imprisonment for debt clause in article I, section 18 of the Texas Consti-

156. 723 P.2d 268 (Okla. 1986).

157. *Id.* at 270–71.

158. *Id.* at 271 (citing *Burnett v. State*, 129 P. 1110, 1117–18 (Okla. Crim. App. 1913)).

159. *Id.*

160. *Pugh v. Pugh*, 472 N.E.2d 1085, 1090 (Ohio 1984) (citing *Harris v. Harris*, 390 N.E.2d 789, 793 (Ohio 1979)).

161. 390 N.E.2d 789 (Ohio 1979).

162. OHIO CONST. art. I, § 15.

163. *Harris*, 390 N.E.2d at 794.

164. *Id.* at 791.

165. *Id.* at 794 n.1 (Celebrezze, C.J., dissenting).

166. *Id.* at 791 (majority opinion).

167. *Id.* at 792–94 (quoting *Hogan v. Hogan*, 278 N.E.2d 367, 368–69 (Ohio Ct. App. 1972)).

168. *Harris*, 390 N.E. 2d at 792, 794; see OHIO CONST. art. I, § 15.

169. *Harris*, 390 N.E. 2d at 793.

170. 595 S.W.2d 841 (Tex. 1979).

tion¹⁷¹ was violated in the family context.¹⁷² The former husband was incarcerated after refusing to pay the former wife almost half of his military retirement benefits every month, pursuant to a final judgment decree.¹⁷³ The judge questioned whether incarcerating him for non-payment was imprisonment for debt.¹⁷⁴ The Supreme Court of Texas reasoned that incarcerating him was not unconstitutional since the court was merely requiring him to surrender property that was previously joined by the spouses pursuant to the final divorce judgment.¹⁷⁵ Similarly, in *Ex parte Anderson*,¹⁷⁶ a Texas trial court ordered Mr. Anderson to pay his former wife a portion of his military proceeds as long as he received it.¹⁷⁷ When he failed to do so and was incarcerated, he alleged imprisonment for debt pursuant to the Texas Constitution, article I, section 18.¹⁷⁸ The court first reasoned that “he is not paying a debt to [his wife] but is surrendering the share to which [she] is legally entitled.”¹⁷⁹ Additionally, the court reasoned that his status as trustee does not change into that of a debtor when he pays directly to the wife instead of depositing directly into the court registry to then forward it to his wife.¹⁸⁰ Lastly, the court held that a huge burden would be placed on the district clerk if they were obliged to receive and disburse all payments, such as this.¹⁸¹

VII. CARVING OUT THE RELIEF THROUGH CASE LAW

Child support and alimony are exceptions, which have been carved out from the no imprisonment clause of the Florida Constitution.¹⁸² However, these basic exceptions have not yet been expressly accounted for in the Constitution.¹⁸³ They have become common knowledge and have been recog-

171. TEX. CONST. art. I, § 18.

172. *Ex parte Gorena*, 595 S.W.2d at 846; *see also* TEX. CONST. art. I, § 18.

173. *Ex parte Gorena*, 595 S.W.2d at 843.

174. *Id.* at 846; *see also* TEX. CONST. art. I, § 18.

175. *Ex parte Gorena*, 595 S.W.2d at 846 (citing *Ex parte Sutherland*, 526 S.W.2d 536, 539 (Tex. 1975)).

176. 541 S.W.2d 286 (Tex. Civ. App. 1976).

177. *Id.* at 287.

178. *Id.*; *see also* TEX. CONST. art. I, § 18.

179. *Ex parte Anderson*, 541 S.W. 2d at 287.

180. *Id.* at 288.

181. *Id.*

182. *See* Gibson v. Bennett, 561 So. 2d 565, 570 (Fla. 1990) (citing *State ex rel. Krueger v. Stone*, 188 So. 575, 576 (Fla. 1939)); Bronk v. State, 31 So. 248, 252 (Fla. 1901); *see also* FLA. CONST. art. I, § 11.

183. Marks & Colby, *supra* note 20, at 1521 n.7.

nized through case law.¹⁸⁴ Similarly, if courts recognize equitable distribution awards pertaining to support obligations as another exception to article I, section 11, the exception will be carved out through judicial interpretation until the Constitution is revised.¹⁸⁵

VIII. CONCLUSION

Florida should use contempt as a means of enforcing equitable distribution awards in the same way it allows for enforcement of child support and alimony.¹⁸⁶ It constitutes public policy to enforce the division of assets that were accumulated through joint efforts during an intact marriage.¹⁸⁷ Florida should join the numerous other states that enforce final divorce decrees through contempt.¹⁸⁸ In so doing, the Florida family courts will send a message that the surrendering of marital assets is obligatory upon a spouse and the violation of the courts' rulings will be enforced through contempt.¹⁸⁹

184. See *Gibson*, 561 So. 2d at 570 (citing *Stone*, 188 So. at 576); *Bronk*, 31 So. at 252; Marks & Colby, *supra* note 20, at 1521 n.7.

185. See Marks & Colby, *supra* note 20, at 1526–27; see also FLA. CONST. art. I, § 11.

186. See Marks & Colby, *supra* note 20, at 1521.

187. *Harris v. Harris*, 390 N.E.2d 789, 793 (Ohio 1979).

188. See, e.g., *Brown v. Brown*, 809 S.W.2d 808, 809 (Ark. 1991) (citing *Ex parte Coffelt*, 389 S.W.2d 234, 237 (Ark. 1965)); *In re Marriage of Lenger*, 336 N.W.2d 191, 192 (Iowa 1983); *Conrad v. Conrad*, 348 S.E.2d 349, 350 (N.C. Ct. App. 1986).

189. See *Brown*, 809 S.W.2d at 809; *In re Marriage of Lenger*, 336 N.W.2d at 192–93; *Conrad*, 348 S.E.2d at 350. But see *Kadanec v. Kadanec*, 765 So. 2d 884, 886 (Fla. 2d Dist. Ct. App. 2000) (citing *La Roche v. La Roche*, 662 So. 2d 1018, 1019 (Fla. 5th Dist. Ct. App. 1995)).