

STATE OF NEW YORK
FAMILY COURT

COUNTY OF SARATOGA

ARLENE CARELLA,
(formerly Arlene Collins,)

Petitioner,

-against-

AFFIDAVIT IN
OPPOSITION
Docket #672-F-86

CHARLES E. COLLINS, III,

Respondent.

STATE OF NEW YORK)
) SS.:
COUNTY OF RENSSELAER)

JEROME K. FROST, being duly sworn, deposes and says:

1. I am the attorney for the Respondent Charles E. Collins, III, and am fully familiar with the facts set forth herein. I make this Affidavit in Opposition to the motion of the Petitioner to have the Respondent committed to the Saratoga County Jail for 15 weekends in accordance with the Order of Saratoga County Family Court Judge L. Foster James dated April 15, 1987.

2. The motion of the Petitioner should be denied for a host of reasons.

3. First, the Petitioner seeks to enforce provisions of Orders that have effectively been reversed by the Appellate Division, Third Department. These Orders, dated April 22, 1986, and April 15, 1987, require the Respondent to provide his former wife and three children occupancy of a residence known as 189 Wooddale Drive, Ballston Lake, New York, and to make other payments on account of support. Together, they imposed an obligation to pay approximately \$1500.00 a month support when the

Respondent was not earning \$1300.00 per month net. On January 25, 1988, Hon. John A. Simone, Jr., Acting Saratoga County Family Court Judge, made an Order granting the Petitioner's Petition to commit the Respondent for 15 weekends in the Saratoga County Jail for failure to comply with his support obligation. Judge Simone's Order of Commitment was granted over the Respondent's Cross-Petition for a modification and his defense that he was financially unable to comply with the Orders of April 22, 1986, and April 15, 1987.

4. The Respondent appealed from Judge Simone's Order and denial of his Cross-Petition. The Appellate Division reversed, noting specifically:

By way of answer and cross petition, respondent asserted the defenses that the Hearing Examiner was without jurisdiction to entertain the issues and that he was financially unable to comply with the orders sought to be enforced. Matter of Carella v. Collins, 144 A.D. 2d 78, 81.

5. The Appellate Division accepted the Respondent's proof of financial inability to comply with the very Orders that the Petitioner now again seeks to enforce:

There is merit, however, to respondent's contention that he has shown his financial inability to comply with the terms of the support order and thus should be relieved of the commitment order. Id. at 83

6. In particular, the Appellate Division determined that the Order sought to be enforced impermissibly took into consideration the assets and income of the Respondent's mother.

Family Court's emphasis on respondent's alleged access to funds is not well founded in this record. There was much testimony concerning

the financial status of respondent's mother from which the court could have assumed that funds were available to him, including the fact that respondent had resided with his mother rent free from 1981 and that she appears willing to offer financial assistance to him. However, the mother's financial status cannot be said to be respondent's status. Id. at 83.

7. Upon reversing, the Appellate Division remitted the matter to Family Court for a new trial on the issue of the Respondent's support obligations. This remitter calls for a trial de novo on the issue of Respondent's support obligations. The Orders of April 22, 1986, and April 15, 1987, are thus no longer in the case. They cannot be the subject of enforcement by contempt.

8. Furthermore, payments made by Mr. Collins and paid on his account establish that far from being in arrears in his support obligations, he has actually paid in advance. For more than the past 2 years, he has either directly paid or Support Collection has deducted from his earnings or unemployment benefits regular periodic payments. As a result of these payments, arrears in the sum of \$1694.00 determined by the April 15, 1987 Order, were, by the Support Collection Unit's own records, reduced to \$408.00 by July 20, 1989. This figure of \$408.00 as of July 20, 1989, does not even take into consideration the \$1,032.00 the Support Collection Unit attached from Mr. Collins' 1988 income tax refund. Taking all these payments into consideration, Mr. Collins has overpaid by more than \$600.00.

9. But that is not the nub of this matter. The fact is that the Petitioner and the parties' three children could be well and

adequately supported by the actual earnings of the parties. Between the two of them, the parties have actual earnings or earnings potential totaling \$40,000.00 a year gross, and netting approximately \$30,000.00 per year. Yet, judging by her Financial Disclosure, income, and expense statement, the Petitioner herself and the parties' three children could not be supported by net earnings exceeding \$40,000.00 a year, without even considering the Respondent's modest needs. The Ballston Spa area is not a super-expensive place to live. The Petitioner's magnificent statement of expenses, coupled with her staggering indebtedness, bears witness that her extravagance, her profligacy, and her total indifference to living within anybody's means is the real crux of this case.

10. I have calculated a hypothetical statement of monthly expenses for the Petitioner and the parties' three children which I believe to be adequate, fair, and reasonable:

a. Rent	\$500.00
b. Food	\$540.00
c. Gas and Electric	\$100.00
d. Telephone	\$ 35.00
e. Water and garbage	\$ 15.00
f. Clothing	\$100.00
g. Dry cleaning	\$ 20.00
h. Medical, dental & medication	\$ 50.00
i. Car insurance	\$ 40.00
j. Transportation (gas, oil & maintenance)	\$100.00
k. Other (babysitter, recreation, and miscellaneous)	\$250.00
Total	\$1750.00

11. The Petitioner has ample earnings to support herself, and is not entitled to maintenance. She nets approximately \$15,000.00 a year, or \$1250.00 per month. Utilizing these


reasonable living expenses, she thus has a monthly shortfall in living expenses of approximately \$500.00. This shortfall could be remedied by requiring the Respondent to pay the sum of \$115.00 weekly on account of child support. Coincidentally, the proposed Legislative amendment scheduling child support would require an Order approximating that amount. ($\$20,000.00$ a year gross earnings on the part of Respondent $\times 29\% = \$5800.00$ per year or $\$112.00$ per week.)

12. The Petitioner's continual harping on the Respondent's recent employment history is no more than a red herring. Never in his adult life has the Respondent earned more than \$20,000.00 per year. He has a Bachelor's Degree in Business Administration. People with his qualifications looking for employment are a dime a dozen. When they are employed, they do not usually earn more than \$20,000.00 per year. Attempts by the Respondent to transcend the earnings limits of his employment by going into business for himself have met with dismal failure. His first venture resulted in his squandering his inheritance to the tune of a \$400,000.00 loss. Chastened by this experience, he managed to escape his second with the skin of his teeth, losing nothing but gaining nothing. He concedes an earning capacity of \$20,000.00 per year gross, and \$15,000.00 a year net, and is willing to pay child support based upon that earning capacity, whether he is employed or unemployed at any given time. Given that earning capacity, it is fruitless to harp on his current employment status. Finally, in view of the Appellate Divison

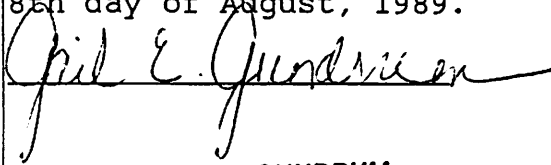
decision, it is equally futile to dwell upon his mother's assets and income.

13. The Respondent has an earning capacity of approximately \$15,000.00 per year net. This amounts to \$1250.00 a month net to contribute to his children's and his own support. If the Court orders him to make up the \$500.00 per month shortfall in the reasonable living expenses of his former wife and the parties' three children, this leaves the Respondent only \$750.00 a month to support himself. It cannot be said that allowing the Respondent \$750.00 a month for his own support is unreasonable.

14. Accordingly, I ask that the Court deny the Petitioner's motion to commit the Respondent for contempt in its entirety, hear and decide the Respondent's support obligation on the merits, and fix his child support payment at \$500.00 per month or \$115.00 per week.


JEROME K. FROST

Sworn to before me this
8th day of August, 1989.



GAIL E. GUNDRUM
NOTARY PUBLIC, STATE OF N.Y.
#4622663
RESIDING IN RENSSELAER COUNTY
COMM. EXPIRES 1/31/90