

Appeal Case Number 4D06-1883

IN THE FOURTH DISTRICT COURT OF APPEALS OF FLORIDA

In Re Marriage of

WILLIAM A. CABANA

Appellant, *pro se*

v.

SHARON ANN MAYO

Appellee

Fifteenth Judicial Circuit Court of Florida

Case Number 501971DR004137XXDIFD

RECEIVED
2006 AUG -2 AM 11:33
CLERK
DISTRICT COURT OF APPEAL
FOURTH DISTRICT

APPELLANT'S JURISDICTIONAL BRIEF

William A. Cabana, *pro se*,
Prepared with assistance of counsel
1050 Capri Isles Blvd., Apt F-105
Venice, FL 34292
Telephone/Fax: 941-480-1395
Email: bcabana2@comcast.net

Jurisdiction Is Proper for This Appeal

On July 13, 2006 this court issued an opportunity to the Appellant to be heard on why it should not dismiss this appeal for lack of jurisdiction. (Notice to Show Cause for Dismissal For Lack of Appellate Jurisdiction Order.)

The Appellant argues below that the order appealed, is based on a Fl. Rules of Civ. Proc Rule 1.540 and Fl. Family Law Rule of Proc. Rule 12.540, and as such is a reviewable non-final order under Fl. Rules App. Proc. Rule 9.130 (a) (5).

In the alternative the Appellant also argues that this court should assume its granted jurisdiction to hear this appeal as a common law certiorari request under Fl. Rules App. Proc. Rule 9.030 (b)(2)(A). This case fulfills the *Belair v Drew*, 770 So.2d 1164 (Fla. 2000) elements for such jurisdiction.

Order Appealed is a Reviewable Non Final Order

Brief Statement of the Case and Facts

Thirty-four years after an eleven year marriage the Appellant's final order of dissolution of marriage was entered mandating a lifetime of alimony payments of \$25 a week. (Final Order of Dissolution July 28, 1972)

With the Appellant indigent, owning no assets, and living on an income below the poverty the level the former wife nonetheless filed contempt proceedings during which the her counsel presented bank accounts with the Appellant's name as POD (Payable on Death) for the account of his Mother. Appellee's counsel also misrepresented other facts as to the Appellant's assets, income and present ability to pay a purge amount. The trial court was misled as to accounts and assets accessible to the Appellant to secure purge monies and ordered him immediately incarcerated with purge amounts totaling of \$8830. The two commitment orders were rendered January 6, 2006.

The Appellant was immediately jailed and nineteen days later after borrowing the purge amount was freed on January 25, 2006.

The Appellant faxed a notice of Appeal to the Clerk of the Fifteenth Circuit Court of Florida on February 10, 2006 (DE 330) This court denied the appeal (Case Number 4D06-594) as untimely filed.

The Appellant filed a Motion to Vacate the Contempt/ Commitment order of January 6, 2006 based on material misrepresentation pursuant to Fl. Rules Civ. Proc Rule 1.540 After a hearing the motion to vacate was denied. (R Court Order April 17, 2006 (DE 360) denying Motion to Vacate) As part of the proceedings the Appellant again unsuccessfully raised the constitutionality of the alimony statutes.

This Appeal of the Order rendered on his Motion to Vacate was timely and properly filed May 8, 2006 (DE 368) by the Appellant. On May 16, 2006, the trial court granted Appellant's Motion to Proceed Without Prepayment of Fees to the 4th District Court of Appeals. An initial Appellant's brief was filed.

Proper Statutory Interpretation of Florida Court Rules

If this court agrees with Judge Farmer's concurring opinion in *Goldman v. Campbell*, 920 So.2d 1264 (Fla. App. 4 Dist. 2006) it will interpret the rules of appellate procedure in a manner to accept jurisdiction on either of the jurisdictional grounds submitted, i.e. the order appealed is an appealable non-final order or accept appellate jurisdiction based on requested common law certiorari.

Judge Farmer has properly noted that the Florida Rules of Court

“... shall be construed to secure the *just*, speedy, and inexpensive determination of every action.” [e.s.] Fla.R.Civ.P. 1.010. The commentary to rule 1.010 explains:

"The direction that the rules 'shall be construed to secure the just, speedy, and inexpensive determination of every action' has two courses. It is, first, a direction that if a rule needs interpretation, *the stated objective is the guide*. The direction recognizes that *procedural law is not an end in itself; it is only the means to an end*. And that end is the proper administration of the substantive law. Procedural law fulfils its purpose if the substantive law is thereby administered in a 'just, speedy, and inexpensive' manner. . . . It is, next, a direction that each rule shall be applied with that objective in mind, especially where the court may exercise a judicial discretion." [e.s.]
30 FLA. STAT. ANN. 11 (1985)."

Accepting jurisdiction here will achieve those goals. Denying jurisdiction will be counter to the intent of the rules.

Issues in the Appeal

The issues raised in this appeal are profound constitutional issues effecting the liberty interest and fundamental rights of the Appellant, who has diminishing years of life, as well as tens of thousand of Floridians. The issues here will continue to be raised by the Appellant in any further court proceeding and undoubtedly by others. This proper challenge to the constitutionality of the Florida permanent alimony statute is gaining widespread recognition and the Florida courts though failing in over seventeen proceedings will, sooner or later, render a reasoned opinion on the issues presented here. Now is proper.

Fl. Rules of Appellate Court Rule 9.130 (a) (5)

Rule 9.130 (a.) (5) Orders entered on motions filed under *Florida Rule of Civil Procedure 1.540*, Small Claims Rule 7.190, Rule of Juvenile Procedure 8.270, and *Florida Family Law Rule of Procedure 12.540* are reviewable by the method prescribed by this rule.

Commentary to the rule states,

Subdivision (a) (5) grants a right of review of orders on motions seeking relief from a previous court order on the grounds of mistake, fraud, satisfaction of judgment, or other grounds listed in Florida Rule of Civil Procedure 1.540.

As noted above, and as the trial court record reflects, the order entered was based on a motion contained in Rule 9.130 (a) (5) and is reviewable.

The Appellant followed the method in the rule.

Common Law Certiorari

This court should consider accepting jurisdiction under the common law certiorari doctrine, Fl. Rules App. Proc. Rule 9.030 (b)(2)(A). This Appeal fulfills the common law certiorari elements noted in *Belair v. Drew*, 770 So.2d 1164 (Fla. 2000) and *Fassy v. Crowley*, 884 So.2d 359. 362 (Fla. App. 2 Dist. 2004) "A petitioner must establish (1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the trial (3) that cannot be corrected on post-judgment appeal." *Parkway Bank v. Fort Myers Armature Works, Inc.*, 658 So.2d 646, 648 (Fla. 2d DCA 1995)

