

**IN THE DISTRICT COURT OF APPEALS OF FLORIDA
FOURTH DISTRICT**

In Re Marriage of
WILLIAM A. CABANA
Appellant, *pro se*

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Case Number: 4D06-1883

and

SHARON ANN MAYO
Appellee.

MOTION FOR REHEARING OR REHEARING EN BANC

The Appellant (former husband), *pro se* with assistance of counsel, pursuant to Fl. Rules App. Proc., Rule 9.330 requests this court to rehear this appeal because its order rendered March 7 2007 overlooked and misapprehended the following,

- A. The order rendered misapprehended the doctrine of res judicata it chose to apply to deny the Appellant standing to challenge the constitutionality of the alimony statutes. Other misapprehensions exist.
- B. The order rendered overlooked two issues. No order is rendered on the two issues. These issues are reachable despite this court's order denying standing to the appellant to challenge the constitutionality of the alimony statute.

The Appellant requests an en banc rehearing pursuant to Fl. Rules of App. Proc., Rule 9.331, because the case is of exceptional importance, i.e. applicability of res judicata to a single cause of action with a modifiable court order of final judgment based on equity effecting future alimony liabilities; the constitutionality

of the alimony statutes; whether the alimony statute conflicts with public policy; and whether incarceration for alimony and alimony arrearages is permissible.

MEMORANDUM OF LAW

Introduction

The first theme of this appeal was whether Florida's permanent alimony statute is no longer valid because it impermissibly infringes two state constitutional provisions as well as public policy initiated by the Florida Supreme Court ruling in *Connor v. Southwest Florida Regional Medical Center, Inc.*, 668 So. 2d 175 (Fla. 1995) (abrogation of the doctrine of necessities) and solidified by the legislature's twice failed attempts create a gender equal doctrine of necessities. (Fla. HB 1211 (1996); Fla. SB 906 (1996)).

The second theme was that incarceration (civil contempt power) is no longer proper enforcement of alimony because there is no public policy of a doctrine of necessities (i.e. spousal duty of support). It is improper also because the judicial caselaw creating an alleged duty to his wife and society of a "husband" to support his "wife". Incarceration as an enforcement remedy has been misapprehended and misapplied by courts allegedly originating in a holding of *Phelan v. Phelan*, 12 Fla. 449 (1868).

MISAPPREHENDED LAW

A. Res Judicata

This court's rendered order misapprehended res judicata. The doctrine applies to preclude a *second* action between the parties on the same issue. In this Appeal there has been only one action, albeit ongoing and open for over thirty years.

State v. McBride, 848 So. 2d 287 (Fla. 2003),

“A judgment on the merits rendered in a former suit between the same parties or their privies, upon the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action. *Juliano*, 801 So.2d at 105 (quoting *Kimbrell v. Paige*, 448 So.2d 1009, 1012 (Fla. 1984)).” [Emphasis in the original]

Further evidence of the requirement of a distinct two actions for the applicability of res judicata is evident in *Topps v. State*, 800 So. 2d 617 (Fla. 2001) (wherein a writ was deemed a separation action thus triggering res judicata),

“The doctrine of res judicata bars relitigation in a subsequent cause of action not only of claims raised, but also claims that could have been raised. See *Florida Dep't of Transp. v. Juliano*, 801 So. 2d 101, 107 (Fla. 2001).” [Emphasis added]

The lack of applicability of res judicata to this appeal renders reviewable the Appellant's constitutional challenge issues in this appeal.

B. Modifiability of Alimony creates lack of finality in Final Judgment of

Dissolution

The caselaw cited in this court's order discusses the unique modifiability of the alimony portion of a final judgment. This future alterability of the alimony judgment creates issues as to enforceability. Florida courts uniquely in marriage dissolution retain eternal jurisdiction and particularly to adjust future alimony liabilities and interests. This continued openness of the alimony issue should afford a citizen with a future alimony liability the opportunity to challenge that liability based upon new law that ensues after the rendering of a Final Judgment of Dissolution of Marriage. Part of this appeal, overlooked, deals with the enforcement of not only past but future alimony liabilities.

Modification of the alimony judgment is permitted based on new facts...there is nothing to preclude it being permitted based on new law.

C. Enforcement of Judgment via Incarceration

The Appellant has sought a ruling on relief from incarceration (civil contempt power) as the enforcement mechanism for alimony arrearages. This issue in the appeal was not addressed by the court. It has profound consequences for the Appellant and all of Florida's alimony payers. It is also of exceptional importance.

D. Relief from Liability of Alimony Arrearages v. Future Alimony

Obligations

No final order terminating the alimony obligation exists in this action. A ruling on the constitutionality of the alimony statute and a ruling on its conflicting with the public policy of an alleged spousal duty of support will effect non-vested future alimony liabilities that burden the Appellant. It is thus proper to render such a ruling in this appeal.

Conclusion

This court must rehear this appeal,

Because res judicata does not bar review;

Because the Appellant has not been relieved of future alimony liabilities by a trial court order the issues raised are not a bar to relief from ongoing and future liabilities;

Because of the unique ongoing jurisdiction of the Florida courts to modify the alimony portion of a Final Order of Dissolution, under principles of equity, as public policy and constitutional amendments change a party may properly request the new law be reviewed in the context of the fundamental issue of the judgment to properly effect future liabilities;

Because the alimony portion of the judgment is modifiable, i.e. alterable, new law that impacts that portion of the judgment may be incorporated in the action, as the new law will affect future liabilities;

Because two issues were not reviewed by this court and are reachable they must be reviewed;

Because incarceration as an enforcement is the deprivation of a state and federal liberty interest and fundamental right whether it is proper must be reviewed.

Rehearing en banc is proper because of the exceptional importance of the case and the issues in this appeal.

Respectfully submitted,

A handwritten signature in cursive script that reads "William A. Cabana". The signature is written in black ink and is positioned above a horizontal line.

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March 9, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of March, 2005, I caused a true and accurate copy of this Motion for Rehearing or Rehearing En Banc to be sent by U.S. mail to:

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