

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

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

and

SHARON ANN MAYO
Appellee.

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: Case Number: 4D05-3906
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DISTRICT COURT OF APPEALS
FOURTH DISTRICT

MOTION FOR REHEARING

Comes now the Appellant, through counsel solely for this motion, pursuant to Fl. Rules of App. Proc. Rule 9.330 to move this court to rehear and reconsider its sua sponte dismissal order as now he has been jailed for civil contempt, suffered irreparable harm and a final order, reviewable, has been entered in the trial court contempt proceedings January 6, 2006 all based on the Florida alimony statute.

On January 12, 2006 this court sua sponte dismissed Appellant's appeal from a trial court denial of a Motion for Declaratory Judgment challenging § 61.08 Fla. Stat. alimony statute as violative of Art. I § 23 Fla. Const. (Right of Privacy). And Art. III § 3 Fla. Const. (Separation of Powers).

On January 5 and 6, 2006 prior to this court's dismissal and the trial court's denial to stay its proceedings pending this court's review the trial court entertained

a hearing on Appellant's Motion for Modification and Appellee's Motion for Contempt.

Appellant has been jailed for civil contempt for failure to pay alimony arrearages without an opportunity to review this court's dismissal order.

Appellant's Appeal challenging the constitutionality of the Florida alimony statutes is now ripe and a final order has been entered which is reviewable by this court. (Appendix A: Final Order of Contempt contained in hearing transcript.)

WHEREFORE, Appellant prays this court

1. rescind its order of dismissal; and
2. reactivate this appeal as timely filed from a final order reviewable on an issue of great importance to the Appellant and the citizens of Florida; and
3. permit the Appellant to add an additional issue with briefing, i.e. 'Whether commitment for civil contempt as enforcement for non payment of alimony arrearages and attorney fees violates the due process and right to privacy clauses of the Florida Constitution?'

Respectfully submitted,



Stephen N. Martyak, Esq.

Florida Bar Number 0066990

Counsel for Appellant for Motion for Rehearing

2305 Fairway Drive S.

Jupiter Florida 33477

January 24, 2006

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Motion for Rehearing has been mailed by U.S. Mail this 24th day of January 2006 to Cathy Kamber, Esq., 1675 Palm Beach Lakes Blvd., Tower A-Suite 700, West Palm Beach, Fl 33401, counsel for Appellee; David J. Glantz, Esq., 110 SE 6th Street, 10th Floor, Fort Lauderdale, FL 33301, Assistant Attorney General; William A. Cabana, 1050 Capri Isles Blvd., Apt. F-105, Venice, FL 34292, *pro se*.

Respectfully submitted,

Stephen N. Martyak, Esq.
Florida Bar Number 0066990
Counsel for Appellant
2305 Fairway Drive S.
Jupiter Florida 33477

14 THE COURT: The time is up. Wait a few
15 minutes, and I will give you my ruling.

16 (Judge leaves courtroom.)

17 (Judge enters courtroom.)

18 THE COURT: Okay. This is the Court
19 ruling on the Cabana matters.

20 On the former husband's supplemental
21 petition for modification of alimony, the Court
22 previously directed -- granted a directed
23 verdict as to allegations in paragraphs 4-A, B,
24 and C, because the former husband has failed to
25 present sufficient evidence to show that

1 there's been a substantial change in his
2 financial circumstance from the time of the
3 entry of the final judgment in 1972 until the
4 time that he filed his petition for
5 modification.

6 The Court kept, in effect, for the
7 remainder of the trial, paragraph 4-D in which
8 he alleged that based upon the substantial
9 change in circumstance, the respondent former
10 wife does not have the need any longer for
11 alimony payments from him to her. The alimony
12 in this case originally was \$25 a week and
13 remains \$25 a week. The Court grants the
14 former husband's supplemental petition for
15 modification. The Court finds that the former
16 wife no longer has the need for alimony from
17 the Former Husband.

18 The Court finds that there's insufficient
19 evidence -- insufficient credible evidence as
20 to what the former wife was earning at the time
21 that the Court entered its final judgment in
22 1972. The wife presented no documentation on
23 that and guessed what her income was during
24 that time.

25 There's no question, though, that the wife

1 currently has a full-time job in which she
2 earns between income and -- earned income and
3 interest income and rental income -- enough
4 money to meet her reasonable needs, many of
5 which have been created subsequent to the
6 divorce by investments and other things that
7 she has done properly for herself in order to
8 enhance her financial position.

9 But in looking at what her circumstances
10 are now versus what I was told they were then
11 at the time of the judgment, the former wife's
12 overall financial circumstances are vastly
13 improved as shown in her financial affidavit
14 which is Exhibit No. 2 of the former husband's
15 She has a very valuable single-family home.
16 She has another rental property that's
17 valuable. She has two lots that's valuable
18 and -- but she pays for all four of them.

19 Problematic to the former wife's case was
20 the Court is finding that the former wife
21 deliberately and intentionally undervalued the
22 assets contained on her financial affidavit
23 which is Exhibit No. 2.

24 Now, each and every time that there was an
25 opportunity for the former wife to give

1 truthful evidence concerning the value of a
2 property, the substantial competent evidence
3 showed that the values that she asserted on her
4 financial affidavit were far less than that
5 which was shown to exist through other much
6 more credible, substantial, competent evidence,
7 and that's due to the value of her home, the
8 value of rental property of the value of the
9 lots.

10 She also failed to reveal the existence of
11 bank checking account monies at Goldcoast Trust
12 when they were there in an amount over \$6,000.
13 She puts in her household expenses an \$395
14 payment as an expense of her household when
15 it's clear that although she borrowed on her
16 home, that expense was in order to pay for the
17 cost of a mortgage on other property.

18 The Court finds that the former -- that
19 the totality of the former wife's assets over
20 her liabilities are substantial to the -- as
21 well as her income -- to the extent that she no
22 longer has the need, and it would be
23 inequitable and improper to require the former
24 husband to be paying \$25.00 a week or \$107.50 a
25 month towards her support.

1 As to the former wife's amended motion for
2 contempt, that motion is granted. The Court
3 finds that the amount of the arrears that the
4 former husband owes, including interest, is as
5 of March 31, 2004, which is the last payment
6 date prior to the filing of his petition for
7 modification, to be \$87,660.92.

8 In addition to that, the former husband --
9 I have to take that separately. And
10 Miss Kamber, let me ask you something. That
11 amount which was on the ledger of your
12 accounting is inclusive of or not inclusive of
13 the amount that was in the judgment that ran
14 interest at 12 percent? Do you understand my
15 question?

16 MS. KAMBER: I do.

17 THE COURT: What's the answer?

18 MS. KAMBER: I don't know, because the
19 clerk's records don't show it. You know what?
20 I take that back. Yes.

21 THE COURT: I believe it is inclusive.
22 Okay.

23 MS. KAMBER: Yes. I take that back.

24 THE COURT: All right. The Court finds
25 that Mr. Cabana had up to March 31, 2004 the

1 financial ability to pay the alimony of \$25.00
2 a week.

3 I could take a lot of time to describe
4 what the Court deems to be a -- similar to the
5 former wife but maybe even more aggregious --
6 lack of credibility on the part of
7 Mr. Cabana in trying to describe through the
8 time that he filed his petition. His financial
9 situation, on every instance when he tried to
10 assert that he did not have income for monies,
11 the records that were his records in his
12 possession and control and bear his name, show
13 the opposite.

14 And there's no question to the Court that
15 Mr. Cabana has had the ability to pay \$25.00 a
16 week up to the time that I'm terminating it.
17 Not because he hasn't had the ability to pay
18 it, but because the wife -- former wife, no
19 longer needs it.

20 That sum is to bear interest at the
21 statutory rate and among the alternative
22 remedies, grant to the wife a money judgment in
23 her favor against the husband for that amount
24 with interest from March 31, 2004. That
25 statutory rate has changed. 2006 it's nine

1 percent. In 2005 it was seven percent. It
2 2004 it was seven percent for purposes of
3 calculation.

4 The Court finds that Mr. Cabana's refusal
5 to pay for the alimony and child support
6 arrears, total arrears, is willful and that he
7 has failed to show a reasonable excuse for
8 nonpayment of it. The amount is so small that
9 it almost begs an analysis that he did not have
10 the ability to pay that amount. He just
11 refused to do it.

12 The Court finds that Mr. Cabana is in
13 contempt. The Court finds that Mr. Cabana
14 today has the present ability of the amount
15 that he owes in arrears to pay \$7,500. That
16 sum found in bank accounts that Mr. Cabana has
17 either ownership of, or his money is in bank
18 accounts on other relatives of his that is his
19 money at a minimum from sources of income that
20 he's had either in the SouthTrust Securities,
21 AmeriTrade, U.S. Bank or Colonial Bank
22 accounts.

23 The amount is probably much more than
24 that. Mr. Cabana has tried to be deceitful to
25 the Court and not disclosed records over and

1 over again. So the Court orders Mr. Cabana
2 incarcerated in Sanford right now. And there
3 will be an order of commitment paper work that
4 follows that. And Mr. Cabana is to stay in
5 jail indefinitely until he purges himself by
6 paying \$7,500 plus the sheriff's fee. He is
7 also to pay the balance that he owes at the
8 minimum amount of \$200 a month.

9 The three prior sanction orders -- there's
10 no motion for contempt dealing with those.

11 MS. KAMBER: Yes, there is.

12 THE COURT: Oh, there is? Okay. Where is
13 that motion?

14 MS. KAMBER: It was handed to Your Honor.
15 It was set for a hearing.

16 THE COURT: Okay.

17 MS. KAMBER: Do you want me to find it?

18 THE COURT: Hold on. Is it the November
19 18th one? It is. Correct. On the former
20 wife's motion for contempt dated November 18th
21 in which it is alleged that the Court
22 previously entered three sanction orders
23 against Mr. Cabana on July 5, August 18 and
24 September 28, 2005 in the amounts of \$412.50,
25 \$450 and \$467.50 for a total of \$1,330, the

1 Court finds Mr. Cabana in contempt for failing
2 to pay. They're all overdue. He's refused to
3 pay deliberately. He has the financial ability
4 to pay. He has shown no reason, no evidence of
5 the inability to pay those sums, and he his
6 held in contempt. Mr. Cabana may purge himself
7 from contempt by paying \$1,330.

8 This Court finds he has the ability to pay
9 from the same sources as I previously
10 indicated. On that matter, the Court will
11 enter an instance order of commitment. He's to
12 be incarcerated and stay in jail indefinitely
13 until that sum of \$1,330 is paid.

14 MR. CABANA: Your Honor, a hardship
15 request, please.

16 THE COURT: As to attorney's fees. The
17 former wife has requested attorney's fees. The
18 Court grants that request in part. I'm going
19 to enter a separate order on the amount. The
20 primary basis for the fees was not that
21 Mr. Cabana has a superior financial ability to
22 pay then does the former wife. He has some
23 ability to pay fees.

24 THE WITNESS: But the primary basis is
25 that under the Rosen factors, Mr. Cabana has

1 caused by his deliberate, willful and
2 persistent failure to comply with the Court
3 rules and lying on answers to interrogatories
4 about the existence of bank accounts and
5 causing the former wife to expend more
6 attorney's fees than she otherwise would have
7 had to expend due to those -- and his conduct
8 on his part. So I'm entering a separate order
9 when I go through Miss Kamber's time sheets and
10 set forth the amount of attorney's fees that
11 will be paid thereon.

12 Okay. Anything from your side,
13 Mr. Cabana, that I did not rule on that was
14 raised in the pleadings?

15 MR. CABANA: The ruling, when you
16 determined how much was in the bank, you were
17 not ruling on. How much -- or you didn't have
18 the correct information of how much each
19 account has.

20 THE COURT: I'm not asking for argument.
21 I'm asking did I not cover the subjects.
22 Anything that I omitted to cover?

23 MR. CABANA: I lost communication when you
24 said go in jail, because I have a hardship
25 request. I would ask that the Court divulge me

1 Stay where you are, please.

2 MR. CABANA: Your Honor, my vehicle is
3 over in the garage. How do I -- I'm at a loss.
4 I'm by myself here.

5 THE COURT: It will stay there until
6 you -- we'll give you a phone call to allow you
7 to speak to whoever you want to get your money
8 over to the sheriff's office.

9 And the way this works is you've got kind
10 of a get-out-a-jail card. You can purge
11 yourself of contempt --

12 MR. CABANA: I understand, Your Honor.

13 THE COURT: -- by making that payment
14 right away.

15 MR. CABANA: I'll have to be in for a long
16 time.

17 THE COURT: Okay. All right.

18 MR. CABANA: I do not have the ability to
19 purge.

20 (Thereupon, the proceedings were
21 concluded at 12:55 p.m.)

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