

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY,
FLORIDA

Family Division

Case No. 501971DR004137XXDIFD

In Re Marriage of
WILLIAM A. CABANA
Petitioner, Former Husband, pro se

and

SHARON ANN MAYO f/k/a
SHARON ANN CABANA
Respondent/Former Wife.

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Former Husband's Second Amended Motion To Vacate Orders:
Appendix

COMES NOW WILLIAM A. CABANA, *pro se*, to supplement his Second Amended Motion to Vacate Orders with an original service date of March 22, 2006, with this Appendix detailing the misleading exhibits and transcript that may have led the court to its errors.

Opposing counsel's circumlocution merely created the illusion that the exhibits and oral statements offered represented assets available to the former husband when in fact they were not his assets and he did not have access to use them. Examination of the exhibits and the hearing transcript fail to provide the court any evidence of a specific bank account or current balance available to the former husband with which he had/has the ability to purge now or the ability to purge in the future.

In support he offers:

1. Opposing counsel's Contempt Notice of Hearing dated November 18, 2005 was defective per Fam. Law R. P. 12.615 in lacking a mandatory clause regarding a court reporter, which thereby invalidates all the contempt rulings. (Exhibit 1)

The Fam. Law R. P. 12.615 states:

"The notice must specify the time and place of the hearing and must contain the following language.....**This notice must also state whether electronic recording or a court reporter is provided by the court or whether a court reporter, if desired, must be provided by the party.**" (Emphasis added)

This language was not contained in the "notice of hearing" for the January 5, 2006 trial.

See *Martyak v Martyak*, 881 So. 2d 48, 49-50 (Fla. 4th DCA 2004).

2. Upon application by the Former Husband for Indigent Status for filing purposes, the Clerk of the 15th Circuit Court determined Former Husband to be Indigent on March 15, 2006. (DE 347)
3. This appendix lists each account presented to the court, the facts evident about the account in the court record of the proceedings and the material misrepresentation by opposing counsel that may have led the Court to error in its conclusion that the former husband had an ability to purge and to pay arrearage. (Exhibit 2 – Transcript pages 384 thru 406)
4. Opposing counsel made the admission to the Court that it was "an impossibility" for her to show any current bank accounts with any current balances. (Transcript pg. 392, lines 13 – 19) She was thereby unable to show that Former Husband had a present ability to purge. From this admission, this court therefore could not have made a factual determination of ability to pay and should not have ordered the incarceration.
5. In the case of *Bowen v. Bowen*, 471 So.2d 1274 (Fla. 1985) it states that: "Consistent with the *Faircloth v. Faircloth*, 339 So.2d 650 (Fla. 1976) decision, in *Garo v. Garo*, 347

So.2d 418 (Fla. 1977) we held that an order finding a husband in contempt for willful nonpayment of alimony was fatally defective in that it lacked specific findings regarding his ability to pay the amount due.”

6. The court had repeatedly asked opposing counsel to identify what portion of Former Husband’s money was in any account and could be positively identified as his money. (Transcript pgs. 384, lines 13 – 14; pg.397, lines 14 – 16; pg. 390, lines 1 – 2; pg. 391, lines 9 – 12 and lines 22 – 24; 392, lines 13 – 19) The court was unable to get an answer to any of these queries and erred in the determination of his ability to pay a combined purge of \$8,830. (Transcript Pg. 402, lines 12 – 15; pg. 404, lines 8 - 13)
7. From Wachovia Bank, f/k/a SouthTrust Bank, at a Deposition Duces Tecum held on July 8, 2005, opposing counsel obtained all of Florence Cabana’s bank records, as mentioned below. It was opposing counsel’s duty to the court to honestly present the court with accurate and current information on the accounts. By selectively choosing part of the information out of context she deliberately created the illusion of availability of assets to the former husband which in fact were not his and to which he had no access.
8. Opposing counsel failed to disclose that Former Husband was only titled as a joint tenant on SouthTrust Bank account x2506 and that all the others were titled as “Pay On Death” (POD) for which he had no access. (Exhibits 3, 4 & 5)
9. Opposing counsel was well aware of the legal requirements of what constituted a “present ability to pay” and had a duty to present to the court accurate and timely information required for it to factually find Former Husband as having the present ability to pay. By presenting inaccurate and outdated banking information out of context, she

deliberately created the false illusion of Former Husband having a present ability to pay a contempt purge.

10. The monies deposited in the accounts show below had been in existence for many years prior and represented funds accumulated by Florence Cabana, and her now-deceased husband, from years of saving and investing. It was her practice to move money between the various accounts in the course of managing her retirement investments for higher-yielding income.

11. Regarding SouthTrust joint account x2506 titled as Florence Cabana, William Cabana and Jeannette Picard, the sister of Florence Cabana, as joint tenants:

a. **Fact No. 1:**

- i. Former Husband was titled on the account as a joint tenant for the sole purpose of administering the account in the event of Florence Cabana's death or incapacity. This was the only account of Florence Cabana to which Former Husband had access and in which no funds of his were commingled in with any of the other joint owners.

b. **Support in record for the facts:**

- i. The affidavits of Florence Cabana and statement from the bank regarding POD accounts. (Exhibits 3, 4 and 5)

c. **Trial Misrepresentations:**

- i. This SouthTrust joint account was represented to the court as Former Husband having control over it. (Transcript pg. 385, lines 12 – 16)

- ii. Opposing Counsel represented that just because Former Husband's name was on the account that he had "access to the whole balance" for his personal use. (Transcript pg. 391, lines 18 – pg. 392, line 2)
- iii. Opposing counsel was unable to show evidence that any of the money in the joint account was his. (Transcript pg. 392, lines 13 – 19)

d. Fact No. 2:

- i. The only personal use he ever exercised was to deposit funds to cover an immediate and concurrent same day wire transfer. This was done as a matter of convenience since his personal bank was located about 5 miles further distant.

e. Support in record for the facts

- i. Copies of a wire transfer transaction record. They indicate there was an immediate and concurrent transaction on the same day, February 1, 2005.
(Exhibit 6 - taken from Former Wife's January 6, 2006 trial Exhibit #16)

f. Trial Misrepresentations:

- i. Husband added monies to or withdrew funds from that account.
(Transcript pgs. 391, line 13 thru pg. 392, line 2)

g. Fact No. 3:

- i. There were 2 separate checks totaling \$2,200, written a month apart (10/24/02 and 9/25/02) and deposited on December 3, 2002 These checks represented repayments of loans to Florence Cabana.

h. Support in record for the facts:

- i. Copies of \$2,200 deposit transaction. (Exhibit 7 - taken from Former Wife's January 6, 2006 trial Exhibit #16)

i. Trial Misrepresentations:

- i. Opposing counsel represented \$2,200 as being deposited by Former Husband in SouthTrust Securities account x4520 when in fact it was deposited by Florence Cabana in account x2506 as shown by Exhibit 7 above. (Transcript pg. 392, line 3 – 7)

j. Fact No. 4:

- i. Florence Cabana's funds represented existing monies accumulated by Florence Cabana, and her now deceased husband, from years of saving and investing.

k. Support in record for the facts:

- i. Copies of bank statement of December 22, 2003 showing an existing balance of \$108,267.56 on page 1 and a debit memo from the x2506 account to the SouthTrust Securities account x4520 in the amount of \$103,152.12 on page 2. (Exhibit 8 - taken from Former Wife's January 6, 2006 trial Exhibit #16)

l. Trial Misrepresentations:

- i. Opposing counsel represents an incorrect amount of money allegedly belonging to Former husband as being in this account and that it was transferred from a joint account to a securities account for his benefit. (Transcript pg. 384, lines 8 thru pg. 385, line 24)

m. Court's Mistaken Conclusion

- i. That Former Husband's monies were commingled in with the other joint owners, that this account was used for personal purposes, contained his money and was a source of funds representing his present ability to pay a purge. No factual evidence showing a current balance representing Former Husband's funds in this account was ever produced by opposing counsel.

12. Regarding SouthTrust Securities account number x4520 titled Florence Cabana with William Cabana as Pay On Death (POD):

a. Fact:

- i. The money in this account belonged to solely to Florence Cabana and that Former Husband's only interest in it was as a beneficiary POD.

b. Support in record for the facts:

- i. The affidavits of Florence Cabana and Wachovia Bank letter explaining POD. (Exhibits 3, 4 & 5)
- ii. SouthTrust Bank statement of March 10, 2005 showing withdrawals by Florence Cabana from account x3190 of \$78,131.28 and \$100,000 along with a Debit Memo showing the deposit of \$78,131.28 into account x4520. (Exhibit 9 – Debit Memo taken from Former Wife's January 6, 2006 trial Exhibit #15)

c. Trial Misrepresentations:

- i. SouthTrust Securities account x4520 was represented to the court as containing \$78,000 of Former Husband's money. No evidence was ever produced showing any connection of Former Husband with the money. (Transcript pg. 386, lines 16 – 21.) Opposing counsel concealed from the

court that the transfer of funds was from Florence Cabana's account x3190 on March 10, 2005 and subsequently deposited in account x4520.

- ii. Former Husband was represented as having money in SouthTrust Securities account x4520. (Transcript pg. 387, lines 14 – 19)
- iii. Opposing counsel erroneously asserted that accounts x4520 and x3190 were titled as joint accounts with Former Husband when in fact he was only titled as POD. She failed to produce any evidence of a current balance of his money in these accounts. (Transcript pg. 392, lines 3 – 19)

d. Court's Mistaken Conclusion

- i. That this account was used for Former Husband's personal purposes, contained his money and was a source of funds representing his present ability to pay a purge.

13. Regarding SouthTrust High Performance Money Market account x3190 titled as Florence Cabana with William Cabana POD:

a. Fact No. 1

- i. A deposit of \$8,000 was a check Florence Cabana had written to herself on 12/17/02 from Colonial Bank account x1101 from funds received in cashing in a CD. She was transferring money from Colonial, of which she was a joint owner, to account 3190.

b. Support in record for the facts:

- i. Copy of Colonial Bank credit memo dated December 13, 2002, showing \$8,024.76 from Florence Cabana's CD no. 2141 funds being transferred to account no. x1101 (Exhibit 10)

- ii. A copy of an \$8,000 check, dated 12-17-02 written in her own hand writing, drawn on Colonial Bank account x1101 which was subsequently deposited in this account x3190 (Exhibit 11).
- c. **Trial Misrepresentation:**
 - i. Opposing Counsel represents a SouthTrust account x3190 as having Former Husband depositing \$8,000 in it. (Transcript pg.392, lines 8 – 12)
- d. **Fact No. 2:**
 - i. Deposits of \$2,000 and \$3,000 attributed to Former Husband were, in fact, withdrawals by Florence Cabana from Colonial Bank account x1101 in her own handwriting and deposited in account x3190
- e. **Support in record for the facts:**
 - i. A copy of a \$2,000 and \$3,000 deposit of the checks, written by Florence Cabana on her Colonial account x1101 to herself, in her own handwriting, and subsequently deposited in account x3190 on 3/4/03. (Exhibit 12 – taken from Former Wife’s January 6, 2006 trial Exhibit #15)
- f. **Trial Misrepresentation:**
 - i. Opposing Counsel represents a SouthTrust account x3190 as having Former Husband depositing \$5,000 in it. (Transcript pg.392, lines 8 – 12)
- g. **Fact No. 3:**
 - i. On March 10, 2005, \$78,131.28 was withdrawn under a Debit Memo and transferred to SouthTrust Securities account x4520.
- h. **Support in record for the facts:**

- i. A copy of SouthTrust bank statement, dated April 5, 2005 showing the March 10, 2005 withdrawal of \$78,131.28 along with a copy of a Debit Memo showing the funds \$78,131.28 being transferred by Florence Cabana to SouthTrust Securities account x4520. (Exhibit 9)

i. Trial Misrepresentation:

- i. Opposing Counsel represents that Former Husband transferred \$78,000 from SouthTrust account x3190 to the SouthTrust Securities account x4520 without any supporting evidence that any portion of the money deposited in SouthTrust Securities belonged to him. (Transcript pg. 393, lines 21 and 22)

j. Fact No. 4:

- i. On March 10, 2005, \$100,000 was withdrawn from this High Performance Money Market account by Florence Cabana and went to purchase an annuity with SouthTrust bank in her name and for her benefit..

k. Support in record for the facts:

- i. A copy of SouthTrust bank statement, dated April 5, 2005 showing the March 10, 2005 withdrawal of \$100,000 by Florence Cabana along with a concurrent withdrawal of \$78,131.28. (Exhibit 9)

l. Trial Misrepresentation:

- i. Opposing counsel was unable to establish a connection between any withdrawals by Florence Cabana and Former Husband. Her only allegation was that the withdrawal was made. (Transcript pg. 393, lines 17 - 23)

m. Court's Mistaken Conclusion

- i. That this account was used for Former Husband's personal purposes, contained his money and was a source of funds representing his present ability to pay a purge.

14. Regarding Colonial Bank f/k/a Premier Community Bank account x1101 titled as Florence Cabana, William Cabana and Jeannette Picard as joint tenants:

a. Fact No. 1:

- i. Colonial Bank account x1101 was a joint held account of which was titled in the name of Florence and William Cabana and Jeannette Picard and had been used by Florence Cabana in a similar manner to SouthTrust account x2506. Former Husband originally was titled on the account as a joint tenant for the sole purpose of administering the account in the event of Florence Cabana's death or incapacity. This is an account Florence Cabana had used for her CD transactions.
- ii. When Former Husband started to make sales on the Internet, he needed to pay for purchases from vendors for them to drop-ship merchandise to his buyers. Since he had no credit or funds to work with, Florence Cabana made a working arrangement for him to use a US Bank credit card, number x4591 (later replaced by account number x4973) that was in the name of Premier Home Services, a corporation formed by Former Husband's father. Along with the corporation name, the name of Florence Cabana was on the card and the account.

- iii. The agreement between Florence Cabana and William Cabana was that she would loan him the use of the credit card on the basis that the total balance would be paid off each month. This was accomplished by having buyer's funds from Paypal et al transferred to Colonial Bank account x1101. From there, funds were withdrawn to pay the credit card each month.
- iv. The US Bank account indicated by opposing counsel was not a bank account at all but was, in reality, a US Bank credit card number x4591 (later replaced by account number x4973), to which payments were made.

b. Support in record for the facts

- i. Copies of Colonial Bank account x1101 statements from 12/13/02 thru 7/16/05 with a summary sheet of deposits and withdrawals. The funds allegedly "transferred to a US Bank" were shown on the bank statement for each and every withdrawal. The clearly stated account number for each withdrawal was that of a credit card and not a bank account. (Exhibit 13)
- ii. Copies of typical US Bank credit card statements for accounts number x4591 and x4973. (Exhibit 14)

c. Trial Misrepresentation

- i. What opposing counsel misrepresented as deposits to US Bank were, in fact, withdrawals for payments on the credit card balances. (Transcript Pg 387, lines 21 - 25) (Transcript pg. 388, lines 1 - 5) (Transcript Pg 389, lines 3 - 6) Opposing counsel falsely alluded to a transfer of funds as a "deposit" when, in fact, the bank statement specifically indicates "*ACH*

debit, credit card electric payment” and specifies the credit card number to which the transfer applies.

- ii. Opposing counsel represented that no account numbers were indicated on the Colonial Bank statements. In fact, the funds allegedly “transferred to a US Bank” were shown on the bank statement for each and every withdrawal. The clearly stated account number for each withdrawal was that of a credit card and not a bank account. (Transcript pg. 390, lines 14 – 18)

d. Fact No. 2:

- i. For the period from December 13, 2002 until the account was closed on July 5, 2005 the Colonial bank statements show there was a starting balance on December 13, 2002 of \$7,138, total deposits of \$48,902 and total withdrawals of \$55,578 for the period indicated. Clearly, any of the bank account statements show the current balance and in no case does it approach the \$55,000 claimed by opposing counsel.

e. Support in record for the facts:

- i. Copies of Colonial Bank account x1101 statements from 12/13/02 thru 7/16/05 with a summary sheet of deposits and withdrawals (Exhibit 13)

f. Trial Misrepresentation:

- i. Opposing Counsel represented that there was a US Bank account belonging to Former Husband into which \$55,000 was deposited. (Transcript pg 387, lines 21 thru pg. 388, line 9) In reality, withdrawals

from Colonial bank account x1101 were used to pay off the US Bank credit card balances each month.

- ii. The unsupported allegation of \$55,000 being transferred into this account and never being spent are illusory and totally false. (Transcript pg. 388, lines 1 - 9)

g. Fact No. 3:

- i. There has only been one personal US Bank account, numbered x2357, which replaced Colonial account x1101 in July, 2005. Its purpose was to receive transfers from Paypal after July, 2005, to pay for vendor purchases and personal expenses with the use of a debit card. No funds were ever transferred to from x1101 to x2357.

h. Support in record of fact:

- i. Copy of US Bank account x2357 statement (Exhibit 15)

i. Trial misrepresentation:

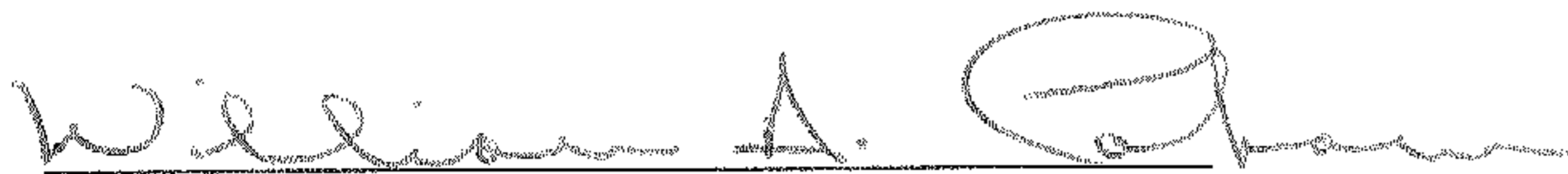
- i. Opposing counsel represented account x2357 into which \$55,000 allegedly had been deposited. (Transcript pg. 387, lines 21 – 25). In reality the \$55,000 had been withdrawn from Colonial Bank account x1101 to pay the credit card balances.

j. Court's Mistaken Conclusion:

- i. That Former Husband was concealing two US Bank accounts from the court and that Former Husband had a large current bank balances in one of these accounts.

15. Former Husband made three attempts to clarify the misrepresentations against him but the court disallowed his objections and prevented him from speaking. (Transcript pg. 386, lines 21 - 23; Pg 388, lines 13 - 16 and pg. 390, line 1 - 8)
16. This court represents Former Husband as having to pay alimony and child support of only \$25.00 per week. (Transcript pg. 399, line 24; pg. 401, line 1 - 2 and pg. 402, lines 4 - 11)
 - a. In fact, per the income deduction order of January 25, 1961 (DE 28), the payment amount was actually \$125.00 per week plus \$5.00 service charge. (Exhibit 16)
 - b. In fact, in the instant case there was no child support involved as any arrearages judgments had been satisfied as of February 5, 2004. (DE 78) (Exhibit 17)
17. The court represents that Former Husband had a present ability to pay a purge. (Transcript pg. 402, lines 12 – 22 and pg. 404, lines 3 - 13)
 - a. In fact, other than the Former Husband's Paypal account, Colonial account x4501 and US bank account x2357 that had a total of \$1703.00 in them, the court never made a factual finding either of an account number or current balance of any other funds required for him to pay a purge.
18. As further evidence of Former Husband's past financial difficulties and inability to pay is an unsatisfied judgment in Sarasota County, dated February 9, 1994 in the amount of \$66,061 that resulted from a foreclosure on a house he owned upon which he was unable to make the mortgage payments. (Exhibit 18)

Respectfully submitted,



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April 12, 2006

Certificate of Service

I certify that a copy of this Appendix to Second Amended Motion for Rehearing and Motion to Vacate Orders was hand delivered to Sharon Ann Mayo, 220 Almeria Rd, West Palm Beach, FL 33405 this 12th day of April, 2006



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