

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.

Motion to Deny Contempt of Court

COMES NOW WILLIAM A. CABANA, *pro se*, respectfully requesting that this court

Deny Former Wife's Motion for Contempt for not paying attorney's fees because he has

been shown to have no present ability to pay attorney's fees or contempt purge amounts.

In support he offers:

1. Former Wife filed a Motion for Contempt on April 24, 2006. (DE 364)
2. The following filings are incorporated hereto:
 - a. (DE 341) 03/09/06 - Amended Motion for Rehearing and Motion to Vacate Orders
 - b. (DE 345) 03/13/06 - Amended Motion for Rehearing and Motion to Vacate Orders: Appendix
 - c. (DE 347) 03/15/06 - Determination of Indigent Status
 - d. (DE 354) 03/24/06 - Second Amended Motion to Vacate Orders

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MAY 17 2006

SHARON R. BOCK
CLERK & COMPTROLLER
FAMILY DIVISION

e. (DE 359) 04/12/06 - Second Amended Motion to Vacate Orders:

Appendix

3. The former wife's request for fees and contempt must be denied because she comes to this court with unclean hands. The trial court found she deliberately and intentionally undervalued the assets contained in her financial affidavit and failed to reveal the existence of bank checking account monies. (Exhibit 1, Transcript pgs. 398, line 19 thru pg. 399, line 25 from Former Husband's Second Amended Motion To Vacate Orders: Appendix (DE 359))
4. The former wife's request for fees and contempt must be denied because the Former Husband prevailed on his Motion to Modify or Terminate. In the Court's Order on Former Husband's Supplemental Petition for Modification of Alimony and Former Wife's Prayer for Attorney's Fees (DE 324), it found the former wife had no need for alimony and terminated future alimony payments.
5. The trial court's rule on the Former Husband's ability to purge arrearages is purported to be erroneous. The trial court record does not show ability to purge.
6. The Former Husband has requested the trial court to vacate its Motion for Contempt based on record absence of ability to pay or purge. The trial court denied the Motion to Vacate (DE 360) and the Former Husband has appealed the erroneous trial court conclusion to the 4th DCA. (DE 368)
7. Fam. Law. R. P 12.615(e) Purge states:

"If the court orders incarceration, a coercive fine, or any other coercive sanction for failure to comply with a prior support order, the court shall set conditions for purge of the contempt, based on the contemnor's present ability to comply. The court shall include in its order a separate affirmative finding that the contemnor has the present ability to comply with the purge and the factual

basis for that finding. (emphasis added) The court may grant the contemnor a reasonable time to comply with the purge conditions.

8. Pursuant to Rule 12.615 the Former Husband lacks the ability to pay the former wife's attorney fees and therefore cannot be held in contempt.

9. The clerk of the court has designated the Former Husband as having indigent status pursuant to Fla. Stat. Rule 57.082 - Determination of civil indigent status. (DE 347)

10. Former Husband has filed a current Financial Affidavit along with his Motion to Proceed Without Prepayment of Fees to the 4th District Court of Appeals and Affidavit (DE 370), which shows he has no current ability to pay attorney fees.

11. In the case of *Pompey v. Cochran*, 685 So. 2d 1007 (Fla. 4th DCA 1997) it states:

“the presumption of ability to pay which exists in the first step...is not a substitute for the separate, affirmative finding of ability to pay required for incarceration.”

This court has never made an affirmative factual finding of any present ability to pay that supports the purge amounts imposed on Former Husband.

12. The “Amended Motion for Rehearing and Motion to Vacate Orders: Appendix” (DE 345) lists each account presented to the court, the facts evident about the account in the court record of the proceedings and the material misrepresentations by opposing counsel that may have led the Court to error in its conclusion that the Former Husband had a present ability to pay.

13. Opposing counsel's obfuscations to the court may have led it to error in a finding and issuance of a subsequent order dated February 16, 2006 that Former Husband had a present ability to pay attorney fees. This court has not made a factual determination of his having the ability to pay. The Former Husband did not then and does not now have the ability to pay the attorneys fees assigned by the court against him.

14. In the Order to Pay Attorney Fees filed February 16, 2006 (DE 334), this Court had granted opposing counsel an hourly rate of \$300.00, which is in excess of the hourly rate opposing counsel was charging her client, i.e. \$275.00. This Court in basing its calculation of attorney fees on \$300.00 per hour has erred in the amount of attorney fees owing. (Exhibit 2, Transcript pgs. 375. lines 12 thru pg. 376, line 7)

15. In the case of *Satter v. Satter*, 709 So.2d 617 (Fla.App. 4 Dist. 1998) it states:

“the supreme court cases make clear that financial need is the hidden notion in the statutory term "financial resources of both parties." Applying the Supreme Court's definitive construction of the statute, we therefore conclude that the party seeking to recover fees under section 61.16 must show some need for such relief.”

Based on the Former wife's 3-year average bank deposits of \$63,141.94/year and assets in excess of \$750,000, it is clear that she has no need for relief and has the financial resources to pay her attorney.

16. In *Rosen v. Rosen*, 696 So. 2d 697 (Fla. 1997), the court said that:

“to ensure that both parties have similar access to competent legal counsel, the trial court must look to each spouse's need for suit money versus each spouse's respective ability to pay.”

17. From the inception and throughout all these proceedings, Former Husband has not had the financial resources to retain competent legal counsel and has had to represent himself on a Pro Se basis.

18. It is still Former Husband's position that Fla. Stat. § 61.08 is void because it violates Art. I Sec. 23 and Art. III Sec. 3 of the Florida Constitution and is contrary to the abrogation of the doctrine of necessities in *Connor v. Southwest Florida Regional Medical Center, Inc.* 668 So. 2d 175 (Fla. 1995).

WHEREFORE WILLIAM A. CABANA prays that the Court take jurisdiction over this matter, enter such orders as are appropriate to expedite consideration of this motion, and adjudicating Former Wife as follows:

1. Deny Former Wife's Motion for Contempt.
2. Awarding WILLIAM A. CABANA all costs pursuant to F.S. §57.041, F.S. §57.105 and other applicable law for the defense of this motion.
3. For such and other relief that may be proper.

Respectfully submitted,



Date: May 15, 2006

William A. Cabana, *pro se*
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Email: bcabana2@comcast.net

Certificate of Service

I hereby certify that on this 15th day of May, 2006, I caused a true and accurate copy of this Motion to Deny Contempt of Court to be sent by U.S. mail to:

Cathy L. Kamber, P.A.,
Attorney for Sharon Mayo
1675 Palm Beach Lakes Boulevard,
The Forum, Tower A, Suite 700,
West Palm Beach, FL 33401



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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

EXHIBIT # 1

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 sworn by the Court to tell the whole truth as hereinafter
2 certified, testified as follows:

3 THE COURT: Okay. Tell me your name.

4 MS. KAMBER: Cathy Kamber. My office
5 address is 1675 Palm Beach Lakes Boulevard,
6 West Palm Beach, Florida. I'm an attorney
7 licensed to practice law in the states of
8 Florida and New York. I've been a licensed
9 attorney since 1979. I represent Miss Mayo in
10 connection with this case and have rendered
11 services to her since May or June of 2003.

12 THE COURT: So the hourly rate that you
13 billed her was what?

14 MS. KAMBER: I believe 275. Let me just
15 check that.

16 MR. CABANA: Your Honor, while she's
17 looking, the bank deposit I gave you yesterday
18 are my originals, and I don't have any copies
19 for the Court.

20 MS. KAMBER: It's 275 an hour.

21 THE COURT: And the reasonable number of
22 hours that you expended in here today
23 concerning the defense of petition and bringing
24 the contempt action?

25 MS. KAMBER: I have the total fees and

EXHIBIT #2

1 costs summarized. It's in dollars.

2 THE COURT: Okay. Fine.

3 MS. KAMBER: Okay. And that's Exhibit
4 24.

5 THE COURT: Fees are \$24,660 at 275 an
6 hour. Costs are \$2,044. The total is
7 \$26,704.79?

8 MS. KAMBER: Correct.

9 THE COURT: Okay. In evidence. Any
10 questions, Mr. Cabana?

11 MR. CABANA: No, Your Honor.

12 THE COURT: All right. Each side can have
13 two minutes for closing argument. Go ahead.

14 MR. CABANA: Your Honor, I've got --

15 THE COURT: Do you want to use the
16 bathroom first?

17 MR. CABANA: My kidneys are exploding.

18 (Short break taken.)

19 (Back on the record.)

20 THE COURT: Okay. Go ahead, Mr. Cabana.

21 MR. CABANA: Okay. I've got two minutes,
22 Your Honor?

23 THE COURT: Yes.

24 MR. CABANA: Okay. Basically my change in
25 circumstances have been this. I care for my