

IN THE CIRCUIT COURT OF THE 15th 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.

MEMORANDUM OF LAW IN SUPPORT OF FORMER HUSBAND'S
MOTION TO VACATE ALIMONY ARREARAGES

" Judicial discretion is defined as: The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court." *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980)

Introduction

The court is presented with a case where Former Wife has alimony arrearages that are vested and have been reduced to money judgment. The question facing the court is whether or not a trial court has the judicial discretion to issue an order vacating the arrearages or make such ruling that, in effect, grants former Husband the release from any further obligation to make any future payment arrearages.

Such a modification is permitted as declared in the case of *Ford v. Ford*, 700 So.2d 191 (Fla. App. 4 Dist. 1997) that allowed the arrearages to be vacated upon motion to the court and based upon compelling circumstances. Alternately, in the case of *Denby*

v. Department of Revenue, 685 So.2d 982 (Fla.App. 5 Dist. 1997), the trial court did not require the former husband to make any payments of arrearages.

The compelling circumstances of this case are that the former wife has accumulated substantial wealth and assets estimated to be in excess of \$1,000,000, is capable of self-sufficiency and has no need of support or alimony arrearages for the necessities of life. Former Husband has suffered post dissolution financial and physical reversals with changed and compelling circumstances among which are:

- a. Former Husband, aged 71 years old and retired.
- b. Former Husband is indigent and is not in good health and is currently being treated for anxiety resulting from ongoing legal proceedings, ulcers, gastritis, diverticulitis, colon polyps, vision problems, high cholesterol levels, and high blood pressure.
- c. He is unable to make court ordered alimony arrearage payments and maintain a minimum standard of living.
- d. Former Husband has been a ward of the Florida State Welfare system receiving Medicaid, food stamps and HUD housing assistance since July, 2002.
- e. Former Husband was declared indigent on May 16, 2006, when the Honorable Judge Martin Colin granted Former Husband's Motion to Proceed Without Prepaying the 4th DCA appeal fees due to his indigent status. (DE 379)
- f. Former Husband's indigent status was ratified on August 28, 2006, when Magistrate Leonard Hanser denied a Former Wife's Motion For Contempt for not paying attorney's fees due to his indigent status. (DE 398)
- g. Due to a post dissolution reversal of spousal financial status, former Husband now has a greater need of support to provide for basic necessities of life and former Wife has the greater ability to pay.

Statement of the Case and of the Facts

The parties in this dispute were married for about eleven years before their marriage was dissolved over thirty-six years ago on July 28, 1972. Former Husband was ordered to pay \$25 per week alimony forever – without any conditions to end payments. Both homes owned by them jointly were awarded to the Former Wife. (See Final Judgment Dissolving Marriage). No minor children are at issue in this case.

Former Husband, aged seventy-one years old (71), retired, has no assets, and is living below the poverty level. He receives public assistance in the form of HUD housing payments, Medicaid, and food stamps. (See Financial Affidavit DE 429)

He was married for eleven years to the former Wife and paid alimony for over thirty years. He was in arrearages on his alimony payments owing to an inability to pay. On February 4, 2004, the former Wife filed a motion for contempt and commitment (DE 79).

Former Husband filed a Petition for Modification on March 19, 2004 (DE 89) to terminate alimony and in an order dated January 24, 2006 (DE 324), the court found the former Wife had no need for alimony for which it terminated future alimony payments, eliminated all further accruals of alimony, and established the arrearages at the \$87,661 figure and reduced it to a money judgment.

At the contempt hearing on January 6, 2006, the trial court erroneously concluded he had an ability to pay a purge and incarcerated him. (DE 308, 309, 311). After 20 days incarceration, former Husband borrowed the purge amount from his Mother and was released. This loan still hasn't been repaid.

This court had previously ordered former Husband to make payments on the alimony arrearages, which had been reduced to a money judgment, at a starting balance of \$87,661 payable at the rate of \$250 plus a \$5.25 service charge per month until they are paid in full (DE 308). At this specified payment rate including the statutory interest that is to be added, it is impossible to service the debt or interest and the arrearages can never be paid in full and would extend into perpetuity.

This court needs to understand the fact that the stated alimony arrearages consist mainly of accrued interest and not alimony. The \$87,661 amount is derived from a present balance of an actual alimony arrearage in the amount of approximately \$9,500 while the balance of approx. \$78,161 represents accumulated statutory interest that has been compounding on a weekly basis from its inception until January 6, 2006 and is even greater now due to the inability to pay the \$255 per month as ordered.

Prior to the trial, former Husband was living below the poverty level, which for one person in 2006 was \$9,800 per year according to the U.S. Department of Health and Human Services (HHS). With the court's erroneous finding of a present ability to pay, it ordered him to pay \$255 per month to Former Wife. In doing so, it placed an undue burden and hardship on former Husband and forced him deeper into poverty, as shown by the attached Financial Affidavit.

I

Jurisdiction

This court has the jurisdiction to hear this case. In the last order of this court (DE 324), entered January 24, 2006, paragraph 4 stated: "Jurisdiction of this cause and of the parties is hereby retained for the purpose of entering such further orders as the court may deem necessary."

§ 61.14, Fla. Stat (2005) states:

Enforcement and modification of support, maintenance, or alimony agreements or orders. (partial)

(1)(a) When the parties enter into an agreement for payments for, or instead of, support, maintenance, or alimony, whether in connection with a proceeding for dissolution or separate maintenance or with any voluntary property settlement, or *when a party is required by court order to make any payments, and the*

circumstances or the financial ability of either party changes....the court may modify an order of support, maintenance, or alimony by increasing or decreasing the support, maintenance, or alimony retroactively to the date of the filing of the action or supplemental action for modification as equity requires, giving due regard to the changed circumstances or the financial ability of the parties.....[Emphasis added]

II

Wife's Ability To Support Herself

Former Wife is healthy, self-sufficient, and was employed by Florida Power and Light with generous retirement benefits. Former Wife has a more than adequate cash flow as indicated by her Wachovia bank records as submitted for the January 6, 2006 contempt and modification of alimony hearing. Her bank deposits summary shows deposits for a period from 1/28/03 through 6/27/05 totaling \$151,686, for an average income of \$63,141 per year, or \$5,262 per month. Former Wife currently has property and assets with a value that is estimated to be in excess of \$1,000,000.

Her present home and combined rental unit on 220 Almeria Rd., in West Palm Beach that was listed on her July 11, 2005 financial affidavit, in the amount of \$330,000 now has an appraised 2008 market value of \$526,825. In addition she has several savings and retirement accounts plus other personal investments amounting to a substantial sum.

Former Wife comes to court with unclean hands. The evidence shows that there were material misrepresentations on her financial statement submitted for the January 6, 2006 trial. The trial court found she egregiously and deliberately under-represented her income and assets and concealed bank accounts. (Transcript pgs. 398, line 19 thru pg. 399, line 25, from former Husband's Motion to Deny Contempt – Exhibit #1 (DE 380)).

The court opted not to penalize her in any manner for committing fraud and perjury on her financial affidavit.

Since the hearing on January 6, 2006, she has sold one of her properties in October, 2006, located at 4401 Saturn Ave., in West Palm Beach, FL that was listed on her financial affidavit, dated July 11, 2005 in the amount of \$84,000, for the recorded amount of \$250,000. It is doubtful that the value of the residence appreciated that greatly in the interim time period of fifteen months. Therefore it is apparent that the entry was another fraudulent one further demonstrating unclean hands.

III

Former Husband's Needs

The former Husband has suffered post dissolution financial and physical reversals and has been forced to live substantially below the poverty level, which in 2008 for one person is \$10,400 per year, according to the income guidelines published in the Federal Register.

With the court's erroneous finding of a present ability to pay, it ordered him to pay \$255 per month to former Wife. In doing so, it placed an undue burden and hardship on former Husband and forces him deeper into poverty and will keep him in a state of poverty from which he will be unable to emerge should he have to make payments.

The additional imposition of the court ordered monthly payments of \$255 per month exacerbates his diminished financial condition and creates an impossible condition for him with which to comply. This burden needs to be removed.

Retirement is a valid "change of circumstance" as indicated in *Pimm v. Pimm*, 568

