

**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:
SHARON ANN MAYO f/k/a SHARON ANN CABANA
Petitioner,**

and

**WILLIAM A. CABANA
Respondent , pro se.**

**FORMER HUSBAND'S MOTION TO DISQUALIFY
GENERAL MAGISTRATE LINDA S. GOODWIN**

COMES NOW the Former Husband WILLIAM CABANA, ,*pro se*, pursuant to Rule 2.330, Disqualification of Trial Judges, Florida Rules of Judicial Administration, hereby moves that the magistrate disqualify herself for the reasons that the former husband has a well founded concern the Magistrate Goodwin has not acted as a neutral adjudicator in a prior proceeding concerning the Former Husband. Affidavit of Bias, Prejudice, and Abuse of Discretion submitted herewith.

In support he offers:

1. Former Husband has filed an appeal with the 4th District Court of Appeals, case number 4D09-10 regarding a contempt of court ruling recommended by Magistrate Goodwin resulting from a hearing on October 1, 2008.
2. Former Husband objects to Magistrate Goodwin based on the handling of a previous contempt of court hearing on January 3, 1991 and subsequent order of incarceration by her. (D.E.

24 – Letter of Correspondence, D.E 26 – Report of Master, D.E. 27 – Order of Contempt, & D.E. 29 – Order of Commitment)

The problem arose from Former Husband's attempt to explain his inability to attend the hearing. In his correspondence with the magistrate, he felt he had a legitimate reason for not attending the hearing and attempted to get it reset. His lack of legal representation, inability to afford counsel, and lack of legal knowledge at the time denied him an opportunity to adequately represent himself in court.

3. Former Husband reasonably fears that Magistrate Linda S. Goodwin will engage in conduct prejudicial to the administration of justice and he fears that he will not receive a fair trial or hearing because of prejudice or bias of the magistrate who acts as an advocate for Former Wife and not as a neutral adjudicator.

4. When a magistrate abuses her discretion and ignores or distorts the facts favorable to the Former Husband while at the same time accentuating facts in favor of the Former Wife, she thereupon transfers the burden of proof from the Former Wife to herself thereby becoming an advocate for the Former Wife.

5. The record shows the magistrate abused her discretion by the fact of her introducing new evidence sua sponte, de novo and not simply clarifying existing evidence, thereby assuming the role of an advocate for the Former Wife and not a neutral adjudicator in the proceeding.

6. The magistrate strayed from being a neutral adjudicator of the law to one of being an advocate for Former Wife in examples such as proclaiming Former Husband's ability to work and stating that he should obtain employment without providing any supporting evidence from certified vocational or medical experts. (D.E. 435 - Report and Recommendation of the Magistrate, page 5, ¶ 10)

In ¶ 12 of the same document, the magistrate abused her discretion and ignored the law when she made the statement “The Former Husband continues to have the ability to make Court-Ordered Payments to the accrued and vested arrears....each and every month” without ever identifying a source of funds from which this could be paid. Bowen v. Bowen 471 So.2d 1274, 1279 (Fla. 1985). No present ability to pay a purge or evidence that the Former Husband had the “keys to his cell” were ever produced by the magistrate. This requirement was essentially incumbent upon the Former Wife to prove.

Merely stating that someone has the ability to do something does not make it so unless that statement is supported with a factual finding. With the magistrate’s conclusion that the Former Husband’s alleged refusal to make payments is “willful and contemptuous,” she was concluding that Former Husband’s state of retirement, existing as an indigent below the poverty level, and inability to make payments was an intentional effort to avoid making payments. This erroneous conclusion requires a giant leap of faith.

7. The magistrate violated the Former Husband’s due process when she alluded to historical events and allegations and made determinations from them justifying a finding of contempt rather than rule on the factors that were pertinent to the contempt hearing for which he had been noticed, e.g. present ability to pay and factual findings of a source of funds with which to pay a purge. Brill v. Brill, 905 So.2d 948, 952 (Fla.App. 4 Dist. 2005) states:

“It is generally a due process violation for a trial court to determine matters not noticed for hearing. [Emphasis added] See Mizrahi v. Mizrahi, 867 So.2d 1211 (Fla. 3d DCA 2004) (finding trial court denied father's due process rights when it modified travel restriction contained in order during hearing on father's motion to hold mother in contempt); Fuchs v. Fuchs, 840 So.2d 449 (Fla. 4th DCA 2003) (finding trial court erred in ruling on matters concerning child custody and child support during hearing noticed for husband's motion for temporary financial relief); Fickle v. Adkins, 394 So.2d 461 (Fla. 3d DCA 1981) (finding court violated appellant's due process rights when it disposed of all pending matters,

including matters that were not noticed for hearing).”

8. The magistrate’s job is to gather facts and administer the law to those facts. Former Husband’s only contact with the magistrate was during the hearing over a period of approximately one hour. Yet during that brief encounter, the magistrate sua sponte, de novo was able to allegedly gather enough facts in that short period of time to expertly determine the present state of the Former Husband’s health, physical ability to work, that he had current undetermined marketable skills that were in demand by undetermined employment sources for an undetermined amount of salary which guaranteed that he would be able to be employed by undetermined firms thereby being able to make the purge payments in this government-declared recessionary economy that is experiencing an extremely high unemployment rate.

Competent, substantial evidence on Former Husband’s employment capabilities could only have been submitted by a certified vocational expert and not established by the unsupported opinion of the magistrate.

9. The courts have long realize that the determination of certain factors in litigation can only be reliably ascertained by the utilization of certified experts such as doctors, forensic accountants, and vocational experts, etc. giving testimony in their area of expertise. Yet, the magistrate took it upon herself to enter a position that was completely outside of her area of expertise and assume the role of a number of these certified experts to justify her recommendations for the finding of contempt against the Former Husband thereby carrying the weight of the evidence and testimony that should have been presented by the Former Wife.

10. The magistrate took no advantage of expert medical testimony to determine whether or not the Former Husband was physically or mentally capable of working at some sort of job. She

neglected to even find out if he was on any medications that might affect his employability or to have a physical examination to verify that any physical limitations to work existed. It appears that just being able to show up in court is enough evidence for the magistrate to determine that the party has the capability to work.

11. The magistrate abused her discretion by ignoring the fact that the Former Husband is 71 years old, legally retired and that Former Wife, who, having assets estimated to be worth approx. \$1,000,000 and is in no peril of poverty as a result of his not working, goes against the case law established in Pimm v. Pimm, 601 So.2d 534 (Fla. 1992).

In the case of Leonard v. Leonard, 971 So.2d 263 (Fla.App. 1 Dist. 2008), it addresses the fact that a Former Husband should not have to be required to re-enter the labor market and is able to choose voluntary retirement as long as his choice does not place the spouse in peril of poverty when it says:

“Given Mr. Leonard's retirement from JEA and his age, the court should have considered whether, and to what extent, he should be required to reenter the labor market. See Pimm v. Pimm, 601 So.2d 534, 537 (Fla. 1992) (“In determining whether a voluntary retirement is reasonable, the court must consider the payor's age, health, and motivation for retirement, as well as the type of work the payor performs and the age at which others engaged in that line of work normally retire. The age of sixty-five years has become the traditional and presumptive age of retirement for American workers. . . . Based upon this widespread acceptance of sixty-five as the normal retirement age, we find that one would have a significant burden to show that a voluntary retirement before the age of sixty-five is reasonable. ***Even at the age of sixty-five or later, a payor spouse should not be permitted to unilaterally choose voluntary retirement if this choice places the receiving spouse in peril of poverty.***” [Emphasis added]); accord Zeballos v. Zeballos, 951 So.2d 972, 973-74 (Fla. 4th DCA 2007) (finding that order reducing, rather than terminating, husband's alimony obligation was abuse of discretion where husband at age 65 wanted to retire and wife's expenses were all paid by her fiance)”.

The magistrate abused her discretion and ignored the law by implying and suggesting that

Former Husband find employment past the legal retirement age to compel him to make payments for a debt, not considered support. In view of the fact that forcing another to work under the threat of incarceration is a violation of his constitutional rights, she apparently ignores the fact that "Debtor Prison" has been abolished in the State of Florida.

12. The magistrate abused her discretion when she ignored the facts where in ¶ 8 of the magistrate's report (DE435 – Magistrate's Report), and alleged that on January 6, 2006, the court found that the Former Husband "either has accounts in his name or transferred to the name of relatives." The court concluded, "the Former Husband has been deceitful in his disclosure of assets and income." These findings were based on obfuscations and misrepresentations to the court by opposing counsel. The court later **retreated** from these findings when the Former Husband was declared indigent on May 16, 2006 by the Honorable Judge Martin Colin granting "Former Husband's Motion to Proceed Without Prepaying the 4th DCA Appeal Fees." (DE 379 - Motion to Proceed Without Prepayment of 4DCA Appeal Fees)

Bowen v. Bowen, 471 So.2d 1274, 1279 (Fla. 1985), states:

"where the supreme court held that "[t]he finding of the trial judge that the respondent was indigent for purposes of the appeal affirmatively established that the respondent was indigent and had no present ability to pay the purge amount."

13. Under questioning by the magistrate and as indicated in her report, no material discrepancies were found in the Former Husband's financial affidavit to dispel his claim of indigency. A lack of such findings therein and lack of prosecution for fraudulent entries is evidence of court's acceptance of the validity of the affidavit.

14. The magistrate abused her discretion and ignored the facts of Former Husband's indigent status and inability to pay. His indigent status is firmly established and evidenced in the court

record.

15. All the historical statements made by the magistrate did not reflect the present realities of the Former Husband's financial or employability status. It is too easy for the court to imply a "willful" effort to not make payments in order to prejudice the record when the realities of the situation are otherwise.

16. In her examination of the historic records, the magistrate ignored and neglected to mention the fact that the trial court which originated the final judgment of dissolution of an eleven (11) year marriage and who ordered what amounted to permanent, periodic alimony, had abused its discretion pursuant to this court's finding in the case of Peterson v. Peterson, 929 So.2d 38 (Fla.App. 4 Dist. 2006) where it stated:

*"In this case, the broad discretion rule of Canakaris is somewhat mitigated by the circumstance that we as appellate judges are in nearly as good of a position to assess the issue as the successor judge found himself. See Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980). **We find the award an abuse of discretion, at least in the sense that all of the alimony is deemed permanent and none of it rehabilitative. Given the relative youth of the parties and the fact that this is a "gray area" case for alimony purposes (14 year marriage), we do not think the record supports the decision to make all of the alimony permanent.**" [Emphasis added]*

The distribution of all Appellant's assets to the Appellee upon dissolution along with the imposition of lifetime alimony and periods of episodic employment exacerbated the Appellant's financial struggles in attempting to pay alimony and child support, and to support his second family throughout his life that lead up to and contributed substantially to the present problems he is experiencing in the instant case.

17. The magistrate ignored the fact that the Former Wife failed to carry her burden of demonstrating a present source of income or asset from which a purge payment could have been

paid. Former Wife only alluded to and alleged hypothetical sources of speculative income. She offered no new evidence to alter the court's declared indigent status of Former Husband.

18. The magistrate further abused her discretion by ignoring the egregious fact of unclean hands by Former Wife as indicated in the record and only emphasized the alleged unclean hands of the Former Husband. Bias of this sort is unwarranted in a court of chancery.

19. When the hearing officer's actions in this case strayed from her neutral role as magistrate to that of an advocate for Former Wife, Former Husband's rights of due process were violated as per State Dept. of Highway v Griffin, 909 So.2d 538 (Fla.App. 4 Dist. 2005) at 542 which states:

"In J.F. v. State, 718 So.2d 251 (Fla. 4th DCA 1998), this court considered a trial judge's actions in continuing a proceeding sua sponte and directing the state to obtain additional evidence, and "concluded that when a judge becomes a participant in judicial proceedings, 'a shadow is cast upon judicial neutrality. . . .' This neutrality is that much more impaired when the trial court actively seeks out the presentation of additional evidence in a case." (quoting Chastine, 629 So.2d at 295). This hearing officer was affording the Department an opportunity to correct a defect in the record evidence of her own accord, and thus acted impermissibly as an advocate for the Department.

The hearing officer's actions in this case demonstrated a departure from her neutral role as magistrate, and we hold that the circuit court correctly determined that Griffin's due process rights were violated."

In Turner v. State, 745 So.2d 456 (Fla.App. 4 Dist. 1999), the court observed:

"...."Our message in McFadden nonetheless bears repeating that judges presiding over probation revocation proceedings remain mindful of the defendant's right to the "cold neutrality of an impartial judge" and the court's duty to scrupulously guard this right. Crosby v. State, 97 So.2d 181 (Fla. 1957) (quoting State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613, 615 (Fla. 1939)).

20. Magistrate Goodwin should disqualify herself in accord with RULE 2.330. Further, any hearings, rulings, or orders in the case, Magistrate Goodwin's impartiality might reasonably be questioned, and so she should disqualify herself on that account.

21. The appointment of a successor magistrate by this the Honorable Elizabeth Maass is warranted and appropriate, which will not prejudice the Plaintiff's case. Further, in granting the recusal of Magistrate Goodwin no harm will befall the Plaintiff nor the public.

22. On the other hand not to grant the recusal of Magistrate Goodwin will subject Former Husband to probable abuse of discretion, prejudicial, bias, injustice, impartial decision, and engagement of conduct prejudicial to the administration of justice.

23. In the case of Stein v. State, SC06-1505 (Fla. 9-25-2008), the Florida Supreme Court stated at 27 that:

In such situations, the appearance of impartiality is as important as actual impartiality. Both Canon 3(E)(1) and Florida case law indicate that the appearance of impartiality is as detrimental to legal proceedings as the judge's actual impartiality. See Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983) (finding that the neutrality of judges is a grave concern even as to perception); Aetna Life & Cas. Co. v. Thorn, 319 So. 2d 82 (Fla. 3d DCA 1975) ("A judge occupies such a particular position in the affairs of other men that not only must he be free of evil intent but he must also avoid the appearance of evil."); Anderson v. State, 287 So. 2d 322 (Fla. 1st DCA 1973) ("A judge must not only be impartial, but he should leave the impression of his impartiality upon all who attend court. . . . The appearance of and absolute impartiality is [sic] essential. There must be no taint of any lack of objectiveness in all acts of a judge."); see also Fuster-Escalona v. Wisotsky, 781 So. 2d 1063 (Fla. 2000) (opining that a judge may not sit in an action where her or his neutrality is questioned or shadowed).

24. When a recusal motion is presented to a trial court, the trial judge is required to immediately rule on the motion pursuant to Section 38.10, Florida Statutes (2002), and the Florida Rules of Judicial Administration, Rule 2.330. See Fuster-Escalona v. Wisotsky, 781 So. 2d 1063 (Fla. 2000); see also Florida Bar re Amendment to Fla. Rules of Judicial Admin., 609 So. 2d 465 (1992)(refusing to adopt committee recommendation which would allow ruling on a disqualification motion to be deferred). As noted in Fuster-Escalona v. Wisotsky, 781 So. 2d at 1065: "When a trial court fails to act in accord with the statute and procedural rule on a motion to disqualify, an appellate court will vacate a trial court judgment that flows from that error."

25. Allegations in a motion to recuse or disqualify a trial judge are reviewed under a de novo standard as to whether the motion is legally sufficient as a matter of law. See § 38.10, Fla. Stat. (2004); Armstrong v. Harris, 773 So. 2d 7 (Fla. 2000); Peterson v. Asklipious, 833 So. 2d 262 (Fla. 4th DCA 2002). A motion to recuse or disqualify a trial judge is legally sufficient when the alleged facts would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial. Johnson v. State, 769 So. 2d 990 (Fla. 2000); MacKenzie v. Super Kids Bargain Store, Inc., 565 So. 2d 1332 (Fla. 1990); Roy v. Roy, 687 So. 2d 956 (Fla. 5th DCA 1997).

26. While appellate judges reviewing a transcript may understand that trial judges have a crowded docket and frequently make statements to encourage the parties to settle, it is not our perspective that controls, but rather whether the facts alleged would place a reasonably prudent litigant in fear of not receiving a fair and impartial trial. Livingston v. State, 441 So. 2d 1083, 1087 (Fla. 1983); Hayslip v. Douglas, 400 So. 2d 553, 556 (Fla. 4th DCA 1981). It is not our function to determine how the trial judge actually feels, but rather what feeling resides in the petitioner's mind and the basis for such feeling. State ex rel. Brown v. Dewell, 179 So. 695, 697-98 (Fla. 1938); Wargo v. Wargo, 669 So. 2d 1123 (Fla. 4th DCA 1996). The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the court's own perception of its ability to act fairly and impartially. Livingston, 441 So. 2d at 1086 (Fla. 1983). A trial judge must first rule on a motion for disqualification before resolving any other matters. Fuster-Escalona v. Wisotsky, 781 So. 2d 1063, 1065 (Fla. 2000); Shah v. Harding, 839 So. 2d 765, 766 (Fla. 3d DCA 2003); Loevinger v. Northrup, 624 So. 2d 374, 375 (Fla. 1st DCA 1993); Stimpson Computing Scale Co., Inc. a Div. of Globe Slicing Mach. Co., Inc. v. Knuck, 508 So. 2d 482, 484 (Fla. 3d DCA 1987)(It is well

settled that "[a] judge faced with a motion for recusal should first resolve that motion before making additional rulings in a case.... [A] recusal motion must be heard first.").

WHEREFORE, Former Husband, WILLIAM A. CABANA respectfully moves and prays that Magistrate Linda S. Goodwin disqualifies herself as magistrate, and that the instant case be heard by a magistrate other than Magistrate Goodwin or by a judge.

Respectfully submitted,

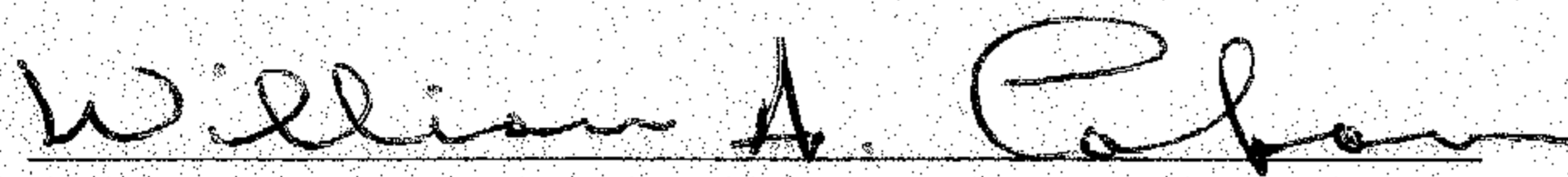


Date: January 15, 2009

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Certificate of Service

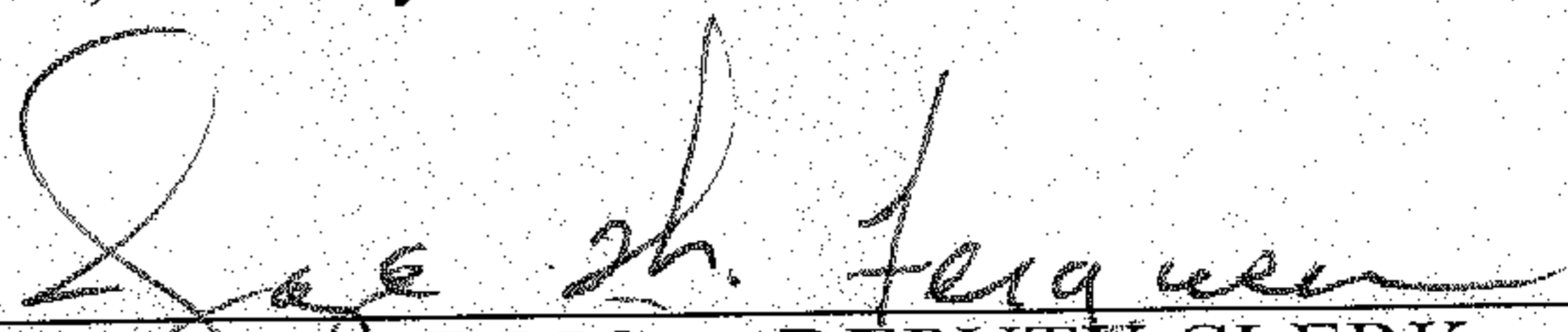
I certify that a true copy of the foregoing was furnished by U.S. Mail to Sharon Ann Mayo, 220 Almeria Ave., West Palm Beach, FL 33405, this 15th day of January, 2009.

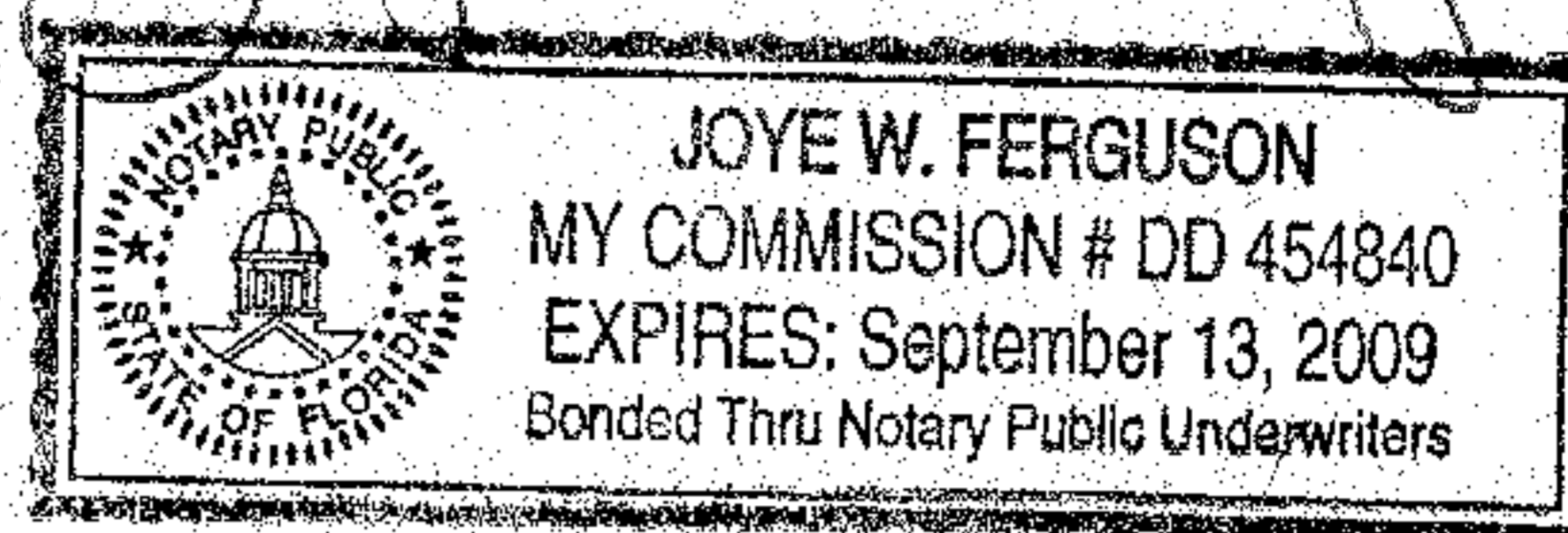


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STATE OF FLORIDA
COUNTY OF SARASOTA

Sworn to or affirmed and signed before me on January 15, 2009 by William A. Cabana


NOTARY PUBLIC or DEPUTY CLERK



[Print, type, or stamp commissioned name of
notary or deputy clerk.]

Personally known
 Produced identification
Type of identification produced _____