

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

FAMILY DIVISION

CASE NO. 501971DR004137-FD

IN RE: THE FORMER MARRIAGE OF
SHARON ANN MAYO
f/k/a SHARON ANN CABANA,
Former Wife,

vs.

WILLIAM ARMAND CABANA,
Former Husband.

REPORT OF MAGISTRATE

The Former Wife's Motion for Contempt (DE 364) and the Former Husband's Motion to Deny Contempt (DE 380) came before Magistrate Leonard Hanser on August 2, 2006. The Former Wife appeared and was represented by Cathy L. Kamber, Esq. The Former Husband appeared pro se. Based on the testimony and evidence presented, and the Court being otherwise fully advised in the premises, the Court finds as follows:

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW:

1. The Court entered an Order Granting Former Wife Attorneys Fees and Costs Containing Money Judgment on February 16, 2006 (DE 334). That Order required the Former Husband to reimburse the Former Wife \$5000.00 for attorney fees to be paid within 30 days from the date of that Order. In addition, the Court granted a judgment in favor of the Former Wife, or her attorney, against the Former Husband, for \$5000.00.

2. The Former Husband has not paid the Former Wife \$5000.00 as required under the February 16, 2006 Order.

3. On May 16, 2006 the Court entered an Order Grating [sic] Former Husband's Motion to Proceed Without Prepayment of Fees to 4th District Court of Appeals and Affidavit (DE 379). That Order is based on the Former Husband's Motion to Proceed Without Prepayment of Fees to 4th District Court of Appeals and Affidavit (DE 369) in which the Former Husband alleged his indigency.

4. The instant motion seeks to hold the Former Husband in contempt for failing to pay the

attorney's fees ordered to be paid in its February 16, 2006 Order and requests immediate incarceration of the Former Husband pending payment of the \$5000.00 ordered to be paid. The motion also seeks an award of attorney's fees for bringing the instant motion.

5. It is well settled that incarceration for civil contempt cannot be imposed without finding that the alleged contemnor has the present ability to purge himself of contempt. Bowen v. Bowen, 471 So.2d 1274 (Fla. 1985).

6. Bowen is the seminal case on the application of incarceration in a civil contempt proceeding. In Bowen, the trial court ordered an obligor incarcerated and set a \$916 purge payment. The trial court's order did not contain a finding that the obligor had the present ability to pay the purge amount; without this finding the civil contempt proceeding became an impermissible criminal contempt proceeding. Furthermore, the trial court found the obligor indigent for the purpose of appealing the same order which held him in contempt. *Id.* at 1274. The Bowen court determined that the finding of the trial court that the obligor was indigent for the purpose of appealing the trial judge's order affirmatively established that the obligor had no present ability to pay the ordered purge. *Id.* at 1279.

7. The Court finds the instant situation is similar to the obligor's position in Bowen. This Court's order of May 16, 2006 is based on a finding that the Former Husband was indigent for purposes of appealing a court order. This finding was made exactly three months after the order which is the subject of the instant motion. The hearing on the instant motion comes before the Court approximately two and a half months after the May 16, 2006 Order.

8. Despite the efforts of Former Wife's counsel, no source of income or asset was identified from which a purge payment could be ordered. See *id.* at 1279. The litigation between these parties carries an extensive history. However, the undersigned has not been made aware of any change in the Former Husband's financial position in the last two and a half months that would provide a sufficient factual basis for finding a present ability to purge necessary for the remedy of contempt.

9. The Former Wife seeks an award of attorney's fees for bringing the instant proceeding based on the Rosen doctrine.¹ In light of the Court's finding herein, the Rosen analysis does not

¹Rosen v. Rosen, 696 So.2d 697 (Fla. 1997).

apply and the Court has no basis for an award of attorney's fees against the Former Husband.

II. RECOMMENDATIONS:

The Court should enter an order denying the Former Wife's Motion for Contempt and denying her request for an award of attorney's fees for bringing said motion.

SHOULD YOU WISH TO SEEK REVIEW OF THE REPORT AND RECOMMENDATION MADE BY THE MAGISTRATE, YOU MUST FILE EXCEPTIONS IN ACCORDANCE WITH RULE 12.490(f), FLA. FAM. L.R.P. YOU WILL BE REQUIRED TO PROVIDE THE COURT WITH A RECORD SUFFICIENT TO SUPPORT YOUR EXCEPTIONS OR YOUR EXCEPTIONS WILL BE DENIED. A RECORD ORDINARILY INCLUDES A WRITTEN TRANSCRIPT OF ALL RELEVANT PROCEEDINGS. THE PERSON SEEKING REVIEW MUST HAVE THE TRANSCRIPT PREPARED IF NECESSARY FOR THE COURT'S REVIEW. EXCEPTIONS MUST BE FILED WITHIN FIFTEEN (15) DAYS FROM THE DATE BELOW.

RESPECTFULLY SUBMITTED,



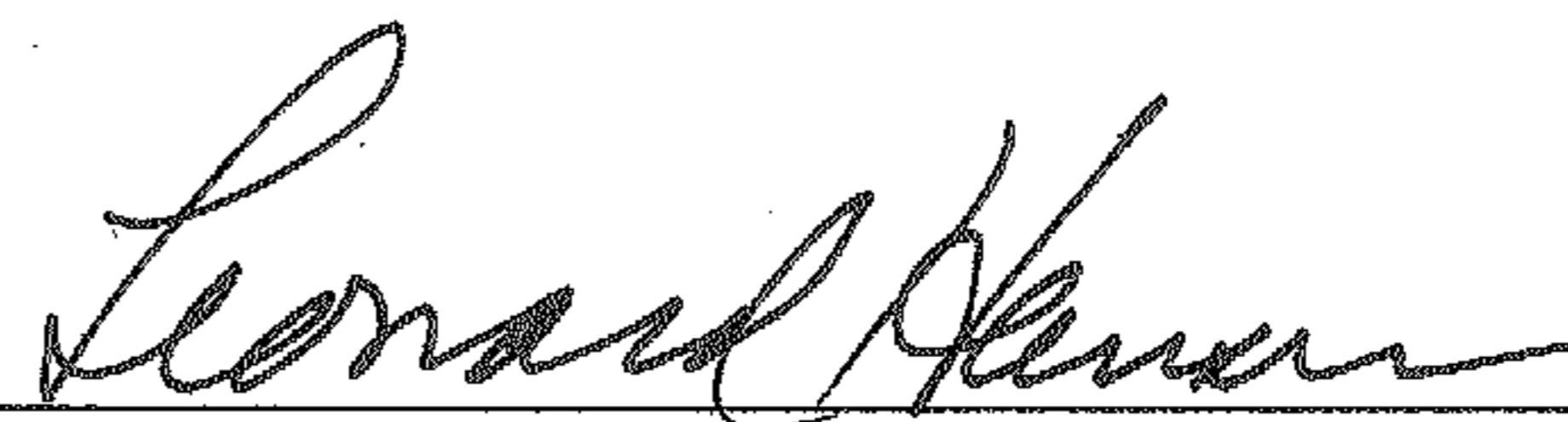
LEONARD HANSER
MAGISTRATE

DATE: 8/28/06

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular mail on August 28, 2006, to the following parties:

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LEONARD HANSER
MAGISTRATE

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