Appeal Case Number 4D09-10 & 4D09-1386

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IN THE FOURTH DISTRICT COURT OF APPEALS OF FLORIDA

In Re Marriage of

WILLIAM A. CABANA
Appellant, *pro se, with assistance of pro bono counsel*

v.

SHARON ANN MAYO
Appellee

Fifteenth Judicial Circuit Court of Florida

Case Number 501971DR004137XXDIFD

APPELLANT'S AMENDED INITIAL BRIEF

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PREFACE

The Appellant, William A. Cabana, will be referred to as the Appellant, Mr. Cabana, or the former husband. The Appellee, Sharon Ann Mayo, will be referred to as Appellee, Ms. Mayo or the former wife.

The Record will be referred to as R and the Circuit Court Document Name.

The Transcript will be referred to as T and the page number.

STATEMENT OF THE CASE AND OF THE FACTS

The parties are before this court because, thirty-six years after a final judgment of dissolution, Ms. Mayo alleges Mr. Cabana has alimony payment arrearages and requests a contempt finding and incarceration. Mr. Cabana argued to the magistrate and the trial judge that his having been thrice adjudicated to be indigent was evidence he lacked the ability to purge; the record was totally devoid of evidence of a source from which to purge thus showing no present ability to purge; and that the record contains direct evidence of his lack of present ability to purge. The magistrate found Mr. Cabana in contempt and ordered incarceration. The trial court affirmed with an order dated prior to the date of the hearing on the matter.[1]

[1] It is important to note that the hearing for the consideration of the Former Husband's Exceptions to the Magistrate's Report on Contempt Hearing was scheduled for December 19, 2008. Yet, the entry of the order by the Honorable Elizabeth T. Maass to overrule the Appellant's Exceptions to the Magistrate's

Mr. Cabana had requested the trial court to award him alimony as there had been a substantial, material, involuntary, permanent, change of circumstances, i. e. his living below the poverty level on welfare payments and the former wife having an ability to pay. This motion for modification was denied as procedurally barred by the doctrine of the law of the case.

FACTS: The parties in this dispute were married for about eleven years before their marriage was dissolved over thirty-six (36) years ago on July 28, 1972. (R. - D.E. 16 -Final Judgment of Divorce) William A. Cabana was ordered to pay $25 per week alimony forever--without any conditions to end payments. No minor children are at issue in this case.

The parties have been engaged in endless litigation since the final judgment mostly related to Ms. Mayo's motions for contempt because of alleged alimony arrearages of Mr. Cabana.[2]

Mr. Cabana, whose income is below the poverty level (R. DE 523 - Financial Affidavit submitted with Motion to Proceed Without Prepayment of Fees to 4DCA and Affidavit) and who has no assets, was married for eleven years and paid alimony for over thirty (30) years when he was working and then, at about age

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Report (D.E. 450) was generated and signed on December 18, 2008, the day before the scheduled hearing on December 19, 2008. This suggests that a ruling was created *before* the hearing, thereby denying Mr. Cabana due process.

[2] (D.E. 27 – Order of Contempt), (D.E. 308 – Order Adjudicating F/H in Contempt and Containing Judgment), (D.E. 449 – Order of Contempt), Cabana v. Mayo, 953 So. 2d 587 (Fla 4th DCA 2007) review denied 969 So. 2d 1011 (Fla 2007)

sixty-six (66) was unable to make payments and was retired.

Ms. Mayo filed for contempt on February 5, 2004. On January 6, 2006, the trial court ruled that Ms. Mayo had no further need of alimony, terminated it and reduce the arrearages to a money judgment. (R. D.E. 308 – Order Adjudicating Former Husband in Contempt and Containing Judgment)

Mr. Cabana was found in contempt of court and was incarcerated immediately directly from the courtroom on January 6, 2006 without being offered a reasonable amount of time to comply with the purge amount. Mr. Cabana was forced to borrow the purge amount from his Mother to secure his release after three weeks in jail.[3]

Mr. Cabana is now alleged to be approximately two years in arrears and continues to lack the ability to purge alimony. His only recourse is to incur more debt and beseech the benevolence of his 92 year old mother again to grant his a loan that he will be unable to repay. (T. page 31)

On July 16, 2008, Ms. Mayo filed a motion for contempt for non-payment of alimony arrearages and attorney fees. (R. D.E. 419 – Motion for Contempt)

[3] In the order filed January 6, 2006, in an earlier proceeding, Mr. Cabana contended the trial court had based its determination of his ability to pay on a misrepresentation of evidence supplied by opposing counsel. Contrary to representation by opposing counsel, no specific bank accounts nor current balances or other assets were positively identified to show that Former Husband had a present ability to pay pursuant to Bowen v. Bowen 471 So.2d 1274, 1279 (Fla. 1985).

The proceedings upon which the orders rendered that are the subject of this appeal began October 1, 2008, before Magistrate Goodwin. Ms. Mayo alleged arrearages and Mr. Cabana argued she offered no evidence of arrearages and no evidence of assets or accounts from which he could purge alleged arrearages; also, his being adjudicated indigent was evidence of his inability to purge. He further argued that because he offered evidence of his being in poverty (T. page 13), and despite the alimony arrearages being vested, the trial court has the power to vacate the arrearages as well as to not find him in contempt and to certainly not incarcerate him.

The former husband then argued his motion for modification that because he was now in poverty, on welfare, and the former wife had considerable assets that his need and her ability to pay warranted an award of alimony to him. In the original proceedings he had not pled for alimony and he was not awarded alimony. The order of final judgment was silent on his need for alimony.

Mr. Cabana was unable to persuade both the magistrate and the trial court judge of his lack of income, his lack of assets, and ability to purge alleged arrearages, and for them to award him alimony. He now appeals their ruling.[4]

[4] Mr. Cabana's payments are now current and in compliance with the lower tribunals order finding him in contempt. (R. DE 449 - Order of Contempt). He has had to borrow money to be current. He is incurring ongoing debt without assets and ability to pay to have standing to request relief in this appeal, and to retain his liberty.

ISSUES PRESENTED

I. Whether the trial court abused its discretion by affirming the magistrate's finding of contempt against the former husband for alleged alimony arrearages when,

a. the former husband's inability to purge is proven by thrice being adjudicated indigent, Bowen v. Bowen, 471 So.2d 1274, 1279 (Fla. 1985)

b. the record contains no evidence of the former husband's present ability to purge contrary to Bowen v. Bowen 471 So.2d 1274, 1279 (Fla. 1985);

c. the magistrate was not a neutral adjudicator but instead was an advocate for the former wife contrary to State Dept. of Highway v. Griffin, 909 So.2d 538 (Fla.App. 4 Dist. 2005); and

d. the magistrate ordered the 71 year old former husband to work contrary to Pimm v. Pimm, 601 So.2d 534 (Fla. 1992).

II. Whether the court misapplied Phelan v. Phelan, 12 Fla. 449 (1868) to create the judicial rule that alimony is a duty when, in fact, it is a debt for which incarceration is impermissible?

III. **Whether, even if alimony was considered a duty of the husband to his wife and society, the duty is invalidated by Art. I Sec 23, Fla. Const. Right of Privacy and by the abrogation of the doctrine of necessaries in Connor v. Southwest Florida Regional Medical Center, Inc., 668 So. 2d 175 (Fla. 1995)?**

IV. Whether the former wife was estopped from seeking equity pursuant to the "unlean hands" doctrine?

V. Whether the trial court had jurisdiction to vacate alimony arrearages as a modification permitted by Ford v. Ford, 700 So.2d 191 (Fla. App 4 Dist 1997) rather than being barred by the

doctrine of the law of the case?

VI. Whether the trial court had the jurisdiction to not require the former husband to make any payments of arrearages as shown in the case of Denby v. Department of Revenue, 685 So.2d 982 (Fla.App. 5 Dist. 1997)?

IV. Whether the trial court is now procedurally barred from awarding alimony to the former husband when it awarded alimony only to the former wife in its final judgment?

JURISDICTION

This court has jurisdiction to review this case pursuant to Fla. R. App. P. R. 9.030 (b)(1)(A).

STANDARD OF REVIEW

This Court's standard of review is abuse of discretion or substantial departure from the essential requirements of law as to have committed fundamental error. See DeMello v. Buckman, 914 So.2d 1090, 1093 (Fla.App. 4 Dist. 2005).

> "A judgment of contempt comes to the appellate court clothed with a presumption of correctness and will not be overturned unless a clear showing is made that the trial court either abused its discretion or departed so substantially from the essential requirements of law as to have committed fundamental error.' See Northstar Invs. & Dev., Inc. v. Pobaco, Inc., 691 So. 2d 565, 565 (Fla. 5th DCA 1997).

SUMMARY OF ARGUMENT

Magistrate Goodwin and the trial court ruling abused discretion and substantially departed from essential law as to cause fundamental error when they,

a. failed to recognize and rule that Ms. Mayo offered no evidence of Mr. Cabana's

arrearage, and no evidence of assets, funds or accounts from which he had the present ability to purge pursuant to Bowen v. Bowen 471 So.2d 1274, 1279 (Fla. 1985) and Martyak v. Martyak, 873 So.2d 405, 407 (Fla.App. 4 Dist. 2004);

b. failed to recognize and rule Mr. Cabana lacked the ability to purge by having three times been adjudicated indigent status; (R. - D.E. 442 – Motion for Judicial Notice & D.E. 487 – Motion to Proceed Without Prepayment of 4th DCA Fees) Bowen v. Bowen, 471 So.2d 1274, 1279 (Fla. 1985);

c. failed to recognize Magistrate Goodwin did not act as a neutral adjudicator clarifying facts and evidence but as an advocate introducing evidence de novo contrary to State Dept. of Highway v. Griffin, 909 So.2d 538 (Fla.App. 4 Dist. 2005);

d. failed to recognize and rule Ms. Mayo came to the trial court with unclean hands and therefore she must be denied equitable relief pursuant to Epstein v. Epstein, 915 So.2d 1272, 1275 (Fla.App. 4 Dist. 2005);

e. misapplied a statement in Phelan v Phelan, 12 Fla 449 (1868) as a holding that in fact is dicta (without precedential power);

f. whether, even if the magistrate and trial court misapplied the dicta of Phelan at 12 Fla. and gave it precedential power, Phelan's precedential power has been invalidated by Art. I Sec 23, Fla. Const. Right of Privacy and by the abrogation of the doctrine of necessaries in Connor v. Southwest Florida Regional Medical

Center, Inc., 668 So. 2d 175 (Fla. 1995);

g. failed to recognize and rule Phelan at 12 Fla. and its progeny were no longer valid law alimony (and alimony arrearages) must be viewed as a debt for which incarceration is impermissible pursuant to Art. I, Section 11, Fla. Const.;

h. failed to vacate alimony arrearages when the former husband met the necessary elements in Ford v. Ford, 700 So.2d 191 (Fla. App 4 Dist 1997).

ARGUMENT

> "We are deeply troubled that circuit courts continue to illegally incarcerate people for civil contempt in the face not only of ample case law, but also a rule which clearly delineates the procedures that should be followed in order to ensure that the due process rights of alleged contemnors are protected. As the Supreme Court noted when issuing a public reprimand to a judge found to have improperly exercised his contempt powers, '[a]lthough the contempt power is an extremely important power for the judiciary, it is also a very awesome power and is one that should never be abused.' See In re Inquiry Concerning Perry, 641 So. 2d 366, 368 (Fla. 1994). We therefore once again repeat our admonishment that there are dangers not only to litigants but to trial judges as well when contempt powers are abused. See Conley v. Cannon, 708 So. 2d 306 (Fla. 2d DCA 1998); Blalock v. Rice, 707 So. 2d 738 (Fla. 2d DCA 1997)." Bresch v Henderson, 761 So. 2d 449, 451 (Fla. 2nd DCA 2000)

I. Whether the trial court abused its discretion by affirming the magistrate's finding of contempt against the former husband for alleged alimony arrearages.

A. The former husband's inability to purge is proven by thrice being adjudicated indigent, Bowen v. Bowen, 471 So.2d 1274, 1279 (Fla. 1985).

> Bowen v. Bowen, 471 So.2d 1274, 1279 (Fla. 1985),
> "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."

The magistrate abused her discretion and overlooked the facts of Mr. Cabana's indigent status as evidence of his lack of an ability to purge. His indigent status is firmly established on three occasions and evidenced in the trial court record. (R. D.E. 442 – Motion for Judicial Notice & D.E. 487 – Motion to Proceed Without Prepayment of 4th DCA Fees)

There was one adjudication of indigency in May of 2006 (R. D.E. 379 - Order Granting Motion to Proceed Without Prepayment of Fees to 4DCA) and a second one in August of 2006 when the magistrate, in a contempt hearing, found that Mr. Cabana was indigent and had no present ability to pay a purge (R. D.E. 398 - Report and Recommendation of General Master & D.E. 406 - Order on Report of Magistrate).

A third declaration of indigency was by the 12th circuit court in January 2007 where the trial court granted Appellant's Motion to Proceed Without Prepayment of 2DCA Appeal Fees. (R. D.E. 442 - Motion for Judicial Notice)

Documents further indicating Mr. Cabana's indigency and his current receipt of public welfare were evidenced in the record in the form of authorizations for help from HUD housing assistance, Department of Children and Families Medicaid and food stamps attached to his financial affidavit. (R. DE 429 -

Financial Affidavit)

An updated financial affidavit, filed with a declaration of indigency in the trial court for this appeal (R. DE 523 - Motion to Proceed Without Prepayment of Fees to the 4DCA) shows a worsening financial situation now that Mr. Cabana is current with the trial court ordered alimony arrearage purge payments. To keep current, he is using borrowed funds from his 92 year-old ailing Mother to pay the FLSDU to retain his liberty. There is no assurance Mr. Cabana will be permitted to borrow further monies. Creating debt to retain liberty, i.e. avoid being jailed, is neither "equitable" or "justice." Wendel v. Wendel, 875 So.2d 820, 823 (Fla. App. 2 Dist. 2004),

> "Mr. Wendel is not required to borrow beyond his means of repayment in order to pay a support order which is excessive because it is not based on his actual financial resources. See Breitenbach v. Breitenbach, 838 So.2d 1266, 1268 (Fla. 2d DCA 2003), citing Perez v. Perez, 599 So.2d 682, 683 (Fla. 3d DCA 1992) (stating that theory that husband had a present ability to pay an order by obtaining a loan from relatives was "outrageous")."

Even more significant is the fact that the Honorable Elizabeth Maass granted Mr. Cabana's Motion to Proceed Without Prepayment of Fees to the 4DCA (R. D.E. 487 - Order on Former Husband's Motion to Proceed Without Prepayment of Fees to the 4DCA). The significance of the granting of this motion is that the trial court maintains a contradictory and inconsistent position when, on one hand Mr. Cabana is adjudicated indigent by the trial court, while on the other hand, he is

adjudicated to have assets and income to pay a purge that amounts to approximately 35% of his already below poverty level of income. [Note: the 2008 Census Bureau level of poverty threshold for Mr. Cabana is $10,326 per year.]

It is apparent that the trial court is making rulings forcing Mr. Cabana deeper into poverty thereby compelling him to become more of a ward of society and dependent on the public dole, which present caselaw shows is contrary to public policy and for which policy the trial court is empowered to enforce.

The consequence of the trial court's actions is to sanction the transfer of money from the State to Ms. Mayo via subsidies to Mr. Cabana in the form of increase welfare in order to allow him to make the purge payments—all to a former spouse in no peril of poverty but with a documented net worth of near one million dollars. (R. D.E. 504 Former Husband's Exceptions to Magistrate's Report on Commitment and Motion Hearing)

In order to justify a recommendation of contempt, the magistrate abused her discretion when she overlooked the facts and applicable caselaw by formulating a report that was comprised of cherry-picked ancient and historic allegations totally unrelated to the issue currently before her. The cherry-picking of old facts was meant to distract and to prejudice the trial court against Mr. Cabana and divert its attention from the Fam. Law. R. P 12.615(e) and caselaw that govern these actions as prescribed in Bowen, 471 So. 2d, supra. Caselaw and the rules of procedure

clearly indicate the criteria by which one can be held in contempt, none of which are present in the instant case or mentioned in the magistrate's report.

All the historical statements made by the magistrate do not reflect Mr. Cabana's present ability to purge arrearages. It is too easy for the trial court to imply a "willful" effort to not make payments in order to prejudice the record when the realities of the situation are otherwise. No matter what has happened in the past…it is the present, right now, which is relevant and should be the only thing the trial court considered. Andrews v. Andrews, 867 So.2d 476, 479 (Fla. App. 5 Dist. 2004):

> "Past average income, unless it reflects current reality, simply is meaningless in determining a present ability to pay. Past average income will not put bread on the table today."

Trial court's imputation of an ability to pay a purge by Mr. Cabana required competent, substantial evidence of support from the Appellee in the form of named bank accounts, assets or other identified income--which she failed to provide.

B. The record contains no evidence of the former husband's present ability to purge contrary to Bowen v. Bowen 471 So.2d 1274, 1279 (Fla. 1985).

In Garcia v. Garcia, 743 So.2d 1225, 1226 (Fla.App. 4 Dist. 1999) this court stated:

> "Where a general master has been appointed for fact-finding and to recommend disposition of pending issues, the trial court is bound by the general master's factual *findings unless they are not supported by competent substantial evidence* or are clearly erroneous.**"**

The former wife failed to prove the former husband had incurred alimony arrearages.

Magistrate Goodwin overlooked the fact that Ms. Mayo failed to carry her burden of demonstrating a present source of income or asset from which a purge payment could have been paid. Ms. Mayo only alluded to and alleged hypothetical sources of speculative income. She offered no new evidence to alter the trial court's adjudicated indigent status of Mr. Cabana.

The trial court's imputation of a present ability to pay a purge by Mr. Cabana required competent, substantial evidence of support from the Ms. Mayo in the form of named bank accounts, assets or other identified income, which she failed to provide.

Even when the magistrate advocated on Ms. Mayo's behalf, her report fails to state a source of income or assets from which Mr. Cabana could purge the current arrearages. See Bowen at 1279. Andrews v. Andrews, 867 So.2d 476, 478 (Fla.App. 5 Dist. 2004),

> "However, where, as here, the court imputes income in an amount which is not apparent from the record, the court must specifically indicate the amount and source. [Emphasis added] Zanone v. Clause, 848 So.2d 1268, 1271 (Fla. 5th DCA 2003). See also Zubkin v. Zubkin, 823 So.2d 870 (Fla. 5th DCA 2002); Batson v. Batson, 821 So.2d 1141 (Fla. 5th DCA 2002); Vitek v. Vitek, 661 So.2d 965 (Fla. 5th 1995); Strickland v. Strickland, 639 So.2d 149 (Fla. 5th DCA 1994). In determining the amount of income to impute, the court must consider the spouse's recent work history, his or her occupational qualifications, and the prevailing earnings in the community for that

class of available jobs. Clayton v. Lloyd, 707 So.2d 407, 408 (Fla. 4th DCA 1998); Neal v. Meek, 591 So.2d 1044 (Fla. 1st DCA 1991); Cushman v. Cushman, 585 So.2d 485 (Fla. 2d DCA 1991). "

Mr. Cabana filed in the trial court, as required for a contempt hearing, a financial affidavit (R. DE 429 - Financial Affidavit) showing a negative cash flow, heavy debt load, no assets and an inability to pay a purge, which went unchallenged in its accuracy or validity by either the magistrate or Ms. Mayo.

Copies of Mr. Cabana's present bank balances were submitted to the magistrate at the contempt hearing on Oct. 1, 2008 showing no available funds from which to pay a purge and thus having no "keys to his cell."

Mr. Cabana submitted an honest financial affidavit. Neither Ms. Mayo, Magistrate Goodwin, nor the Honorable Elizabeth T. Maass alleged or proved any material misrepresentations in Mr. Cabana's financial affidavit.

The Honorable Elizabeth T. Maass' order finding Mr. Cabana in contempt (R. DE 449 - Order Adjudicating Former Husband in Contempt), on page 1 ¶ 3, states that "The Former Husband has the ability to comply with the previous judgments and Orders of this Court to make the required payments to the alimony arrears…" yet fails to support this statement with a factual finding of a source from where this money will come. See Bowen, 471 So. 2d at 1279. Such statements by the trial court are speculative at best.

Overlooked is the fact that in past years, in compliance with trial court orders, Mr. Cabana did in fact make payments when he was able, while at the same time supporting a second family after his remarriage. In addition to making timely alimony and child support payments, as his episodic employment permitted, he managed to pay off over $40,000 of child support arrearages.

He is now burdened with alimony arrearages that consist of approximately $9,500 in principal and accumulated interest of approximately $80,000 as of 2006 [this amount is compounding further each month at the statutory interest rate] with a payment plan of $250.00 per month ordered by the trial court that will continue into perpetuity. The trial court mandating a payment plan that continues into perpetuity with no chance of the arrearage debt ever being satisfied within Mr. Cabana's capability is an abuse of discretion.

C. The magistrate was not a neutral adjudicator but instead was an advocate for the former wife contrary to State Dept. of Highway v. Griffin, 909 So.2d 538 (Fla.App. 4 Dist. 2005)

When a magistrate abuses her discretion by overlooking the facts and the law that favors the former husband while at the same time emphasizing facts in favor of Ms. Mayo, she thereupon transfers the burden of proof from Ms. Mayo and she assumes to herself the burden of proof thereby becoming an advocate for the former wife.

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 Ms. Mayo and not a neutral adjudicator in the proceeding.

The magistrate strayed from being a neutral adjudicator of the law to one of being an advocate for Ms. Mayo in examples such as proclaiming Mr. Cabana's ability to work and stating that he should obtain employment. (R. DE 435 - Report and Recommendation of the Magistrate, page 5, ¶ 10) Here are a few examples of the magistrate's comments that are advocacy and not clarification of facts presented:

a. "And why could you not do the same thing for pay?" (T. page 20)

b. "What jobs have you applied for?" (T. page 28)

c. "You can do housework for your mom, couldn't you do housework for someone else?" (T. page 29)

In ¶ 12 of the same document, the magistrate abused her discretion and overlooked 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 471 So. 2d, at 1279, supra. No present ability to pay a purge or evidence that Mr. Cabana had the "keys to his cell" were ever

produced by Ms. Mayo. In fact, even the magistrate acting as advocate did not present evidence of a source from which Mr. Cabana could purge alleged arrearages. This requirement was essentially incumbent upon the Ms. Mayo to prove…not the magistrate. Ms. Mayo failed her burden—so Magistrate Goodwin advocated for her. The reality of the situation is that Mr. Cabana simply has no assets and insufficient income on which to subsist and still pay a purge.

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 her conclusion that the Mr. Cabana's alleged refusal to make payments is "willful and contemptuous," she was concluding that Mr. Cabana's episodic periods of unemployment, state of retirement, existing as an indigent below the poverty level, and inability to make payments was somehow an intentional effort to avoid making payments. This erroneous conclusion requires a giant leap of faith and is an abuse of discretion in light of the financial information presented, and the evidence entered into the record and transcript.

The magistrate's job is to listen to and assess the evidence presented as well as apply law to the evidence. Mr. Cabana'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 sufficient facts in that short period of time to expertly determine the present state

of the Mr. Cabana's health, his 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 and make the purge payments in this government-declared recessional economy that is experiencing an extremely high unemployment rate….all in light of Mr. Cabana being 71 years old and retired.

Competent, substantial evidence on Mr. Cabana's employment capabilities could only have been submitted by a certified vocational expert and certainly not established by the unsupported opinion of the magistrate. When she solicited this information she acted as an advocate introducing new evidence contrary to her mandated role as a neutral adjudicator. No evidence was entered to show Mr. Cabana's work history or ability to work…even though such argument is precluded by caselaw, Pimm v. Pimm, 601 So.2d 534 (Fla. 1992).

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 Mr. Cabana thereby carrying the weight of the evidence and

testimony that should have been presented by Ms. Mayo. The magistrate advocated. She was not a neutral adjudicator.

As an example, the case of Schlagel v. Schlagel, 973 So.2d 672 (Fla.App. 2 Dist. 2008) clearly indicates that testimony supplied by a vocational expert's analysis of the local market provides the level of the "standard of measure" required by the trial court to determine what constitutes competent, substantial evidence when it stated:

> "The standard of review concerning a trial court's imputation of income is whether competent, substantial evidence supports the trial court's decision." Fitzgerald v. Fitzgerald 912 So.2d 363, 368 (Fla. 2d DCA 2005); Hinton v. Smith, 725 So.2d 1154, 1156 (Fla. 2d DCA 1998). Here, the parties stipulated to the vocational expert's report being admitted into evidence without his testimony at the final hearing. ***The report contains competent, substantial evidence that employment is available in the local market for a person with the Wife's qualifications*** [Emphasis added] and that the average pay is $40,000. In Fitzgerald, where the wife had an earning history of up to $57,000 per year, this court determined that a vocational expert's testimony was competent, substantial evidence that the wife could earn the imputed amount of $40,900. 912 So.2d at 368.

The former wife presented no evidence of Mr. Cabana's fitness to work, income achievable, and opportunities for employment. The magistrate took no advantage of expert medical testimony to determine whether or not Mr. Cabana was physically, emotionally, or mentally capable of working at some sort of job. She neglected to even find out if he was taking 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 trial court was enough evidence for the magistrate to determine that the former husband had the capability to work and earn an income.

It is not the burden of Mr. Cabana to show he cannot work. Pimm, 601 So.2d. Ms. Mayo filed the motion for contempt and has the burden to prove Mr. Cabana has the "present" "ability" to purge. Imputation of income to arrearages should require the same burden of proof as imputation of ability to pay present and future alimony.

The magistrate abused her discretion when she ignored the facts where in ¶ 8 of the magistrate's report (R. D.E. 435 – Magistrate's Report), and alleged that on January 6, 2006, the trial court found that Mr. Cabana "either has accounts in his name or transferred to the name of relatives." The trial 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 trial court by opposing counsel. In January 2006, Mr. Cabana, pro se, versus Ms. Mayo's attorney was not able to persuade the trial court of the simple fact that the accounts at issues were his mother's and not his. Regardless, there was no evidence to show present ability to purge and there was no refutation of the former husband's financial affidavit.

The trial court later adjudicated contrarily to its initial ruling of ability to pay

when it adjudicated the former husband indigent on May 16, 2006 when it adjudicated the former husband indigent for his appeal then. (R. DE 379 - Motion to Proceed Without Prepayment of 4DCA Appeal Fees)

Under questioning by the magistrate and as indicated in her report, no material discrepancies were found in Mr. Cabana's financial affidavit to dispel his claim of indigency. A lack of such findings therein is evidence of trial court's acceptance of the validity of the affidavit.

The magistrate's report overlooked the law and rules of procedure against prospective incarceration without due process on page 7, ¶ 2 of her report (R. DE 435 - Report and Recommendation of the Magistrate) when she specified that "The Order should provide for the Former Husband's immediate incarceration for his failure to pay a $250.00 purge payment on the first (1st) day of each and every month and the matter should be set for a Commitment hearing at the beginning of each month the Former Husband fails to make the required purge payments…..The next purge payment is due November 1, 2008. A commitment hearing should be set before the Magistrate for November 4, 2008."

Order for future incarceration

This recommendation clearly provides for incarceration based on ***future***, anticipated non-compliance with a trial court order. With the recommendation specifying a commitment hearing three days from the date the purge payment is

due, Mr. Cabana would additionally be denied the due process of the required Notice of Hearing required by the rules of procedure.

Hipschman v. Cochran, 683 So.2d 209, 211 (Fla.App. 4 Dist. 1996) states that:

> "The October 23 order allowed the husband to be held in contempt and jailed for failing to make alimony payments which were to come due after October 23. *It is clear that civil contempt orders may not provide for incarceration based on future, anticipated noncompliance with a court's periodic support order.* [Emphasis added] Phillips v. Phillips, 502 So.2d 2 (Fla. 4th DCA 1986); Miller v. Miller, 587 So.2d 601 (Fla. 5th DCA 1991). There must be a hearing before incarceration, where a contemnor may challenge the allegation of noncompliance and defend on the ground that he does not have the present ability to pay under Bowen."

Mertens v. Mertens, 596 So.2d 1285 (Fla.App. 4 Dist. 1992) indicates that:

> "Part of the contempt order, however, is impermissible to the extent that it allows for prospective incarceration without due process protection. Phillips v. Phillips, 502 So.2d 2 (Fla. 4th DCA 1986); Lang v. Lang, 404 So.2d 190 (Fla. 4th DCA 1981). As the order is now worded, the former husband is subject to incarceration without a prior hearing on his ability to purge himself of the contempt. In Thompson v. Thompson, 576 So.2d 436 (Fla. 4th DCA 1991), we held that a contempt order can defer punishment, but only so long as the trial court provides for another hearing before any imprisonment might actually begin. In this order, the trial judge failed to include this indispensable ingredient."

When the hearing officer's actions in this case strayed from her neutral role as magistrate to that of an advocate for Appellee, Mr. Cabana'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)).

On January 23, 2009, Mr. Cabana filed a motion to disqualify the magistrate (R. D.E. 489 – Former Husband's Motion to Disqualify General Magistrate Linda S. Goodwin). On January 22, 2009, the trial court issued an order recusing her. (R. D.E. 490 – Order of Recusal)

D. The magistrate ordered the 71 year old former husband to work contrary to Pimm v. Pimm, 601 So.2d 534 (Fla. 1992).

The magistrate abused her discretion by overlooking the fact that Mr. Cabana is 71 years old, legally retired and that Ms. Mayo, who, having assets estimated to be worth approx. $1,000,000 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).

Leonard v. Leonard, 971 So.2d 263 (Fla.App. 1 Dist. 2008), 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 record clearly shows that the magistrate was intimating that Mr. Cabana should find work in order to pay the alimony arrearages (T. pages 20, 28 and 29), yet she abused her discretion in attempting to impute an income to him that would accomplish this without any factual findings of a recent work history, occupational

qualifications or prevailing earnings in the community for that class of available jobs.

Prevailing case law states that in determining the amount of income to impute, the trial court must consider the spouse's recent work history, his or her occupational qualifications, and the prevailing earnings in the community for that class of available jobs. Clayton v. Lloyd, 707 So.2d 407, 408 (Fla. 4th DCA 1998); Neal v. Meek, 591 So.2d 1044 (Fla. 1st DCA 1991); Cushman v. Cushman, 585 So.2d 485 (Fla. 2d DCA 1991). The magistrate neglected to consider any of these.

The magistrate abused her discretion and overlooked the law by implying and suggesting that Mr. Cabana find employment after 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 overlooks the fact that “Debtor’s Prison” has been abolished in the State of Florida.

With the trial court ignoring the fact that Mr. Cabana is past the legal age of retirement, is not required to make any payment that can be considered support, is indigent and living on the public dole, inter alia, it has abused its discretion in attempts to coerce him to make payments under threats of incarceration.

Attempts by the trial court to force Mr. Cabana to go out and find work to make these payments while threatening him with incarceration can only be

interpreted as reinstituting "Debtor's Prison" to accommodate a former wife who has demonstrated unclean hands, misled the trial court and shown contempt for the trial court procedures. This incarceration remedy when Ms. Mayo is not in peril of poverty and is a near millionaire is not equitable or just.

II. Whether the court misapplies Phelan v. Phelan, 12 Fla. 449 (1868) to create the judicial rule that alimony is a duty when, in fact, it is a debt for which incarceration is impermissible?

Incarceration (civil contempt powers) for enforcement of alimony payments is no longer proper. The grounds for incarceration (civil contempt powers) as an enforcement tool for alimony arrearages as recited in Fishman v. Fishman, 656 So.2d 1250 (Fla. 1995) (alimony arrearages are not a *debt* but a husband's *duty* of support to his wife and to society) were invalidated by Art. I, § 23, Fla. Const. and Connor v. Southwest Florida Regional Medical Center, Inc., 668 So. 2d 175 (Fla. 1995).

Article I, section 11 of the Florida Constitution specifically prohibits imprisonment for debt. However, the use of civil contempt powers for the enforcement of support payments in domestic relations cases has been approved. Bronk v. State, 43 Fla. 461, 31 So. 248 (1901); Phelan v. Phelan, 12 Fla. 449 (1868). The rationale underlying this rule is that the obligation to pay spousal or child support is a personal duty owed to both the former spouse or child and to society rather than a debt within the meaning of article I, section 11. Gibson v.

Bennett, 561 So.2d 565, 570 (Fla. 1990). The use of contempt in dissolution proceedings is premised on the "assumed necessity for the special protection and enforcement of rights growing out of the marriage relationship." Price v. Price, 382 So.2d 433, 437 (Fla. 1st DCA 1980). This rule has been extended to include the enforcement of payments of attorney's fees related to dissolution proceedings. State ex rel. Krueger v. Stone, 137 Fla. 498, 188 So. 575 (1939); Orr v. Orr, 141 Fla. 112, 192 So. 466 (1939); Heitzman v. Heitzman, 281 So.2d 578 (Fla. 4th DCA 1973)." Fishman 656 So.2d at 1252. The unique enforcement of alimony nonpayment by incarceration (civil contempt powers) is grounded in an antediluvian no longer valid ruling that a "husband" has a duty to his "wife" and to society. Phelan v. Phelan 12 Fla. 449 467 (1868); Bronk v. State, 43 Fla. 461, 475 (1901) See also Gibson v. Bennett, 561 So.2d 565, 570 (Fla. 1990).

Phelan 12 Fla. is replete with outdated superseded law that is void today.[5]

[5] Other examples of voided law in Phelan 12 Fla.: Cohabitating is criminal; Residence requirement from filing in Phelan was 2 years-- now 6 months; Required grounds for divorce "…wilful, obstinate and continued desertion for the term of a year, and the habitual indulgence of violent and ungovernable temper."--now no fault; "… the public have an interest in these suits, and the duty of the court is to protect that interests even at the expense of the wishes of the parties themselves." -- now the Right of Privacy prevails; Lump sum alimony is error; Gender bias, violation of equal protection, "Permanent alimony is not a sum of money or a specific proportion of the husband's estate given absolutely to the wife. It is a continuous allotment of sums payable at regular periods for her support from year to year. …Not only is there error in this respect; No legislative authority for alimony….judicially created lawmaking… " This court has decided that in all cases of divorce it is proper to grant alimony, 'the

Phelan 12 Fla. was decided during the turmoil of the Civil war. It was a case where the wife's petition for divorce was not even granted (the holding) as the pleading was defective.

The part of Phelan 12 Fla.--a 150 year old decision--that the Florida courts have latched onto for the validity of incarceration (civil contempt powers) as enforcement of contempt is merely a citing of a then authority. It is not a holding and probably not even dicta. Phelan 12 Fla. is relied on for the concept of a "husband" having a duty to support his "wife" during marriage. Phelan 12 Fla.,

> "There can be no serious question of the soundness of the doctrine that "the *duty of the husband to support his wife* does not depend alone upon his having tangible property; that while they are living together they are bound to contribute by their several personal exertions to a common fund which in law is the husband's, and from which the wife may claim a support; that if she is compelled to seek a divorce on account of his misconduct, she loses none of her rights in this respect, only she is to draw her maintenance in a different way, that is, under a decree for alimony based, if he has no property, upon his earnings or ability to earn money. 2 Bish., 446" [Emphasis added]

This "doctrine of necessaries" which had been codified in Florida Statutes

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right to decree alimony being held to be an incident to the power to grant divorces,…'"

> One statement rings bitterly true across the susqicentenial, "It might be very gratifying to the cupidity of a captious solicitor, who should be more intent on making money out of family dissensions than bringing their difficulties to a speedy adjustment, to try experiments in practice, and subject the husband's estate to all expenses of litigation, whether regular or irregular, and no husband should be subjected to such legalized depredations." Phelan v. Phelan, 12 Fla. 449 (1868)

was abrogated in Connor 668 So.2d and never reinstated despite two legislative attempts.

Phelan 12 Fla. and Bronk 43 Fla. arbitrarily extended the economic duty of a "husband" to support his "wife" to be a duty to society (impermissible judicial law making). This alleged duty to society was abrogated by Art. I, § 23, Fla. Const., Right of Privacy. The state by implying such a duty today to justify jailing a husband for alimony arrearages is an impermissible infringement of Art. I, § 23, Fla. Const. in the privacy protected zone of "personal decisions relating to marriage, i.e. divorce." The state cannot be a party to a marriage after the passage of Art. I, § 23, Fla. Const. A married Floridian has no duty to society simply because he chose to change his associational interest or his marital status.

III. Whether, even if alimony was considered a duty to a spouse and society, the duty is invalidated by Art. I Sec 23, Fla. Const. Right of Privacy and by the abrogation of the doctrine of necessaries in Connor v. Southwest Florida Regional Medical Center, Inc., 668 So. 2d 175 (Fla. 1995)

> "The Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses." Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847 (1992)

After Connor 668 So.2d and Art. I, § 23, Fla. Const. the state no longer can tout an economic interest in the marriage or divorce of two Floridians.

The statement, not dicta and certainly not holding, in Phelan 12 Fla. at 465 that,

> "the doctrine running through all matrimonial suits and bringing into subserviency all other law on the subject, that the proceeding, though upon its face a controversy between the parties of record only, is in fact a triangular suit, '*sui generis,*' the government or public occupying the position of a third party without counsel, it being the duty of the court to protect its interest."

was overturned by Art. I, § 23, Fla. Const., Right of Privacy. "**ART I § 23** -Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein."

The statement, not dicta and certainly not holding, in Phela*n* 12 Fla. at 464 that,

> "This is one of the many differences between divorce suits and other chancery cases, which has led most elementary writers to designate is as a suit *sui generis;* and this, like many other of its peculiar incidents, arises from the fact that the public have an interest in these suits, and *the duty of the court is to protect that interests even at the expense of the wishes of the parties themselves."* [Emphasis added]

is likewise invalidated by Art. I, § 23, Fla. Const. The state has no place in the recognized privacy protected zone of the personal decision relating to marriage to dissolve it, i.e. divorce. "**ART I § 23** -Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein."

Bronk 43 Fla. at 475,

> "It is regarded more in the light of a personal duty due not alone from the husband to the wife, but from him to society, that the courts of equity have the power to enforce by detention of the person of the husband in cases where he can discharge it, but will not." [Emphasis

added]

> The Bronk 43 Fla. at 475 dicta not holding, heavily relied upon for over a century, is equally invalidated by Art. I, § 23, Fla. Const. Marriage, entering and leaving, is a privacy protected zone that the state cannot intrude upon absent a compelling state interest. There is no compelling state interest to intrude in Floridians right of privacy to exercise their fundamental right to alter their marital status.

The Privacy Amendment radically changed the legal landscape of the dissolution of marriage statute. It invalidated all parts of it except those the state can prove a compelling state interest minimally applied which in fact furthers the interest. It invalidated any concept of the state being part of the marriage between Floridians. Without a spouse's duty to society or the requirement he support his spouse jailing him (civil contempt powers) is impermissible.

Simply because a Floridian makes the personal decision relating to his marriage to dissolve it, to change his associational interest by exercising his liberty interest and fundamental right by dissolving his marriage the state cannot unduly burden the exercise of his choice to divorce—without a compelling state interest that, in fact, is furthered by the state action. The state by creating and enforcing the alimony statute with incarceration (civil contempt powers) impermissibly intrudes into a Floridian's liberty interest and fundamental right of privacy.

The Florida Courts' wordsmithing to craft alimony payments as not being a debt but a "husband's" duty to his "wife" and "society" now fails. To gloss over the distinct concepts that the words husband and wife meant in the Phelan and Bronk cases and to now see them as interchangeable is wrong. This gossamer linguistic prestidigitation from debt to duty must now revert to the simple fact of what alimony and alimony arrearages are--a debt![6] Not withstanding Gibson 561 So.2d and Fishman at 656 So.2d and other courts, alimony payments (nonpayments) are a debt and as such incarceration for them is impermissible under Art. I, § 11, Fla. Const.

The judicial rationale to use physical incarceration (civil contempt powers) as an enforcement tool for alimony arrearages are extinguished by the privacy amendment and Connor 668 So.2d. With the rationale for depriving a Floridian of personal liberty no longer valid, incarceration (civil contempt powers) for enforcement of alimony payments is impermissible. Deprivation of personal liberty whether it be characterized as failing to comply with a court order, or deliberately failing to pay alimony is a distinction without a difference. It is still loss of liberty

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[6] Definition: alimony: an allowance under court order made to one spouse by the other for support pending or after legal separation or divorce. Chapter 61 Fla. Stats. has no definition for alimony.

Definition arrearage: Overdue alimony or child support payments.

Definition debt: That which is due from one person to another, whether money, goods, or services; that which one person is bound to pay to another, or to perform for his benefit; thing owed; obligation; liability.

based on an invalid statute whose grounds for incarceration (civil contempt powers) enforcement no longer exist.

IV. Whether the former wife was estopped from seeking equity pursuant to the "unlean hands" doctrine?

The Unclean Hands Doctrine is an affirmative defense against Ms. Mayo's efforts to have the trial court hold Mr. Cabana in Contempt, her ex-parte letters pleading poverty to the court, and against her dilatory actions to prevent disclosing her financial records with a Motion for Protective Order pursuant to Fla R. Civ. P. 1.140. See White v. White, 2D 07-5013, Page 3 (Fla.App. 2 Dist. 2-6-2009).

The trial court overlooked Mr. Cabana's affirmative defense arguments presented in his exceptions (R. – DE 504 Former Husband's Exceptions to Report).

V. Whether the trial court had jurisdiction to vacate alimony arrearages as a modification permitted by Ford v. Ford, 700 So.2d 191 (Fla. App 4 Dist 1997) rather than being barred by the doctrine of the law of the case?

Case law finds that res judicata is flexible and will not be invoked if it would defeat the ends of justice and result in a manifest injustice. In the case of *Florida Dept. Of Transp. v. Juliano*, 801 So.2d 101, 106 (Fla. 200) it states:

> "This Court has long recognized that res judicata will not be invoked where it would defeat the ends of justice. See *deCancino v. E. Airlines, Inc.*, 283 So.2d 97, 98 (Fla. 1973); *Universal Constr. Co. v. City of Fort Lauderdale*, 68 So.2d 366, 369 (Fla. 1953). The law of the case doctrine also contains such an exception. See *Strazulla v. Hendrick*, 177 So.2d 1, 4 (Fla. 1965). We have found no Florida case holding that such an exception applies to collateral estoppel. Federal

> courts and other state courts, however, have held that the collateral estoppel doctrine does contain such a manifest injustice exception. See, e.g., *Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591, 599 (1948); *Thompson v. Schweiker*, 665 F.2d 936, 940 (9th Cir. 1982); *Tipler v. E.I. DuPont deNemours & Co.*, 443 F.2d 125, 128 (6th Cir. 1971); *Dowling v. Finley Assocs., Inc.*, 727 A.2d 1245, 1249 n. 5 (Conn. 1999); *Kansas Pub. Employees Ret. Sys. v. Reimer & Koger Assocs., Inc.*, 941 P.2d 1321, 1333 (Kan. 1997); *State v. Harrison*, 148 Wn.2d 550, Page 292 61 P.3d 1104, 1109 (Wash. 2003). We agree. We hold that collateral estoppel will not be invoked to bar relief where its application would result in a manifest injustice."

A modification as requested by Mr. Cabana is permitted as declared in the case of Ford v. Ford, 700 So.2d 191 (Fla. App. 4 Dist. 1997) where arrearages were allowed to be vacated upon motion to the trial court and based upon compelling circumstances.

VI. **Whether the trial court had the jurisdiction to not require the former husband to make any payments of arrearages as shown in the case of Denby v. Department of Revenue, 685 So.2d 982 (Fla.App. 5 Dist. 1997)?**

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.

Support for both his arrearage arguments are contained in his memo of law (R. – DE 433A Memorandum of Law in Support of Vacating Alimony Arrearages).

VII. **Whether the trial court is now procedurally barred from awarding alimony to the former husband when it awarded**

alimony only to the former wife in its final judgment?

By saying that since Mr. Cabana didn't request alimony at the time of final dissolution of marriage is to belie the obvious fact that no one is capable of foreseeing the future enough to be able to predict that financial reversals, such as evident in the instant case, would ever occur. The attorney who represented Mr. Cabana at the trial was not even cognizant of this fact or he would have presented it were it a factor. This requirement is beyond the purview of any normal, and reasonable person. To use this argument is ludicrous and defeats the ends of equity and justice for which these courts are established.

A more pervasive problem is present and overrides any argument that the trial court might proffer. It is the fact that, while Mr. Cabana did not make the request for alimony, he is now a ward of the public and as is well known, the public interest [public policy] overrides the interest of the individual. Therefore, it is incumbent that Ms. Mayo be required to step in and rectify this situation by taking Mr. Cabana off the welfare roles by paying him alimony.

The Supreme Court of the State of Florida states in Killian v. Lawson, 387 So. 2d 960, 962 (Fla. 1980); Brackin v. Brackin, 182 So. 2d 1 (Fla. 1966), "The purpose of Alimony is to prevent a dependent party from becoming a public charge or an object of charity."

> In Canakaris v. Canakaris, 382 So.2d 1197, 1204 (Fla. 1980), the Florida Supreme Court explained:

> "We recognize that a trial court need not equalize the financial position of the parties. However, a trial judge must ensure that neither spouse passes automatically from misfortune to prosperity or from prosperity to misfortune, and, in viewing the totality of the circumstances, one spouse should not be "shortchanged."

Facing this court is the unexplored question whereby the financial status of the spouses have reversed to where one spouse is now on the public dole, the other spouse has ample "ability to pay," and where the trial court is avoiding ruling on this issue alleging that they are procedurally barred from jurisdiction.

Being a court of chancery, the trial court is not procedurally barred from jurisdiction but is, in reality, mandated and required by Florida Statutes to uphold the public policy in doing "anything" that will provide equity and justice between the parties in order to maintain the public policy.

Public policy on this matter is unambiguously stated in § 61.14 (5)(a) Fla. Sta. [which governs the modification of support orders] where it says: "the public policy of this state that children shall be maintained from the resources of their parents and as provided for in s. 409.2551, and that spouses be maintained as provided for in s. 61.08." Further, § 61.08 (2) [that governs the award of "any" alimony] indicates that: "The court may consider any other factor necessary to do equity and justice between the parties."

Mr. Cabana's memorandum of law goes into more detail as to where the court has jurisdiction and where case law supports his arguments in this matter (R.

– DE 512 Memorandum of Law in Support of Supplemental Petition for Modification of Alimony Requesting Support for Former Husband).

It is apparent that the court is making rulings forcing him deeper into poverty thereby compelling him to become more of a public charge and reliant on the public dole which present case law shows is contrary to public policy and for which the courts are empowered to enforce. The consequence of the trial court's actions is to sanction the transfer of money from the State to the Former Wife via subsidies to the Former Husband in the form of increase welfare in order to allow him to make the purge payments.

CONCLUSION

> "…..Secondly, I believe that the facts of the instant case emphasize the need for re-examination of the entire concept of alimony and the continuing viability of that concept in contemporary society. Put in different words, the question facing the Court is whether a judicially imposed system of involuntary servitude is to be continued wherein one human being is placed in bondage to another for what is effectively the remainder of his natural life….." Justice Shepard dissenting in Olsen v. Olsen, 98 Idaho 10 (1976)

The trial court has failed to accept the realities of Mr. Cabana's indigent status and the fact that he has suffered many economic misfortunes and periods of episodic employment in the past, which continue to the present—and most importantly that he lacks a present ability to purge alimony arrearages. Justice

cannot be served by incarcerating a party when they do not have the “keys to their cell.”

There are continued efforts of Ms. Mayo and the trial court to coerce payments from Mr. Cabana, who has no present ability to pay, who has been denied his motion to vacate the alimony arrearages, and who is being denied the right to remove himself from the public dole by requesting Ms. Mayo, who has an ample ability to pay, to pay him alimony. These efforts are forcing him deeper into poverty and to be more reliant on public welfare in order to survive.

The trial court and Ms. Mayo have been unable to produce any factual findings that contradict his arguments of indigency or that adequately support their reasons for holding him in contempt, for denying his request to vacate the arrearages, and for denying his request for alimony

Ms. Mayo has been shown to have unclean hands and being deceitful in her dealings with the court, which should be taken into consideration.

The sum total of all this is creating for Mr. Cabana a gross inequity and manifest injustice to him which this court needs to rectify.

PRAYER FOR RELIEF

> "At a fundamental level, the role of the Justices and judges of Florida is to guarantee and enforce the protection afforded by these basic rights. This is at once a judge's greatest calling and heaviest burden. It is an obligation we shoulder by our oath of office, binding ourselves to enforce individual liberty even in the face of public or official

opposition. To shield the liberties of the individual from encroachment is uniquely the task of courts. In that sense, we are obliged to give sanctuary against the overreaches of government." Justice Kogan dissenting in Krischer v McIver, 697 So.2d 97 (Fla. Jul. 17, 1997)

"Why then do we tolerate, continue and judicially mandate a system of lifetime serfdom upon the dissolution of a marriage relationship? I deem there to be no answer to that question except "that's the way we've always done it." The law of domestic relations requires more than placebos and patent medicines. It is long past time for judicial surgery to excise the doctrine of alimony from the body of the law of domestic relations." Justice Shepard dissenting in Olsen v. Olsen, 98 Idaho 10 (1976)

WHEREFORE the Appellant prays this court declare that:

1. The Court Order Finding Former Husband in Contempt be overturned and vacated with prejudice;
2. All arrearages be vacated;
3. All future jurisdiction of the trial court be terminated;
4. Mr. Cabana be awarded his fees and costs incurred in prosecution of this action and this appeal;
5. Mr. Cabana have all his payments to the FLSDU, made with money borrowed from his Mother, be repaid to him by Ms. Mayo along with interest accrued on the borrowed money at the statutory rate;
6. The order requiring the payment of alimony arrearages be vacated;
7. The order for incarceration be vacated;

8. This court finds that the trial court is not procedurally barred from jurisdiction in granting Mr. Cabana alimony; and

9. For such and other relief as may be proper.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of June 2009, I caused a true and accurate copy of this Appellant's Initial Brief to be sent by U.S. mail to:

Sharon Ann Mayo
220 Almeria Ave.
West Palm Beach, FL 33405

_____

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CERTIFICATE OF FONT AND TYPE SIZE

Appellant certifies that this brief was typed using font style Times New Roman type size 14.