

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT, STATE OF FLORIDA

WILLIAM CABANA,
Appellant,

v.

CASE NO. 4D05-3906

SHARON ANN MAYO,
f/k/a SHARON ANN CABANA,
Appellee.

**APPELLEE'S RESPONSE TO APPELLANT'S JURISDICTIONAL BRIEF
AND APPELLEE'S MOTION FOR APPELLATE ATTORNEY'S FEES**

This court's order to show cause dated December 1, 2005 correctly notes that it is not apparent that any of the orders on appeal is a final judgment or appealable as a non-final order. In the Appellant's "jurisdictional brief" in response to that order, the Appellant relies entirely on one order to create appellate jurisdiction, to-wit, the order entered by the trial court on September 7, 2005 entitled "Order on Declaratory Judgment Motion to Challenge the Constitutionality of the Permanent Alimony Statute". That order simply states that the motion is denied. There is no final judgment that has been entered nor has the former husband ever filed a separate declaratory judgment action on the law side of the circuit court, but only a motion in the family court asking that court to declare the alimony statute unconstitutional. The family court denied that motion, and from that denial the former husband now claims appellate jurisdiction.

If the former husband had filed a separate declaratory judgment action and received a final order in that action denying the relief requested, there is no doubt that would be a final appealable order pursuant to section 86.011, Florida Statute (2005). The case cited by the former husband in his “jurisdictional brief”, State Farm v. Higgins, 788 So2d 992 (Fla. 4th DCA 2001) was such a case. However, just because a party files a motion in a family court proceeding involving multiple pending issues asking the court to declare a statute unconstitutional, and the court denies that motion and leaves the other issues still pending, does not turn that denial into a final judgment.

Procedurally, the Higgins case is completely different than this case. Even a non-final order denying a motion in a separate declaratory judgment action is not immediately appealable. See Nat’l Assurance Underwriters, Inc. v. Kelley, 702 So2d 614 (Fla. 4th DCA 1997).

The former husband relies on the section 86.011 language stating that “such a declaration has the force and effect of a final judgment.” However, it is well settled that the legislature is not vested with authority to declare what is and what is not immediately appealable; rather, that comes within the exclusive province of the Florida Supreme Court’s rule making authority. See State v. Gaines, 770 So2d 1221 (Fla. 2000).

A “final order” is one that “constitutes an end to the judicial labor in the cause and nothing further remains to be done by the court to effectuate a termination of the cause as between the parties directly affected.” State v. Gaines, supra. See also Howard v. Zeigler, 40 So2d 776 (Fla. 1949).

The order denying the former husband’s motion to declare the alimony statute unconstitutional is not a final order in this case, nor does it come within any of the non-final orders listed in Fla. R. App. P. 9.130 as being immediately appealable. The former husband asserts that the order is appealable under rule 9.130(a)(3)(C)(iii). That is incorrect, however, since there has been no order appealed that determines “the right to immediate monetary relief or child custody in family law matters.” The order denying the motion to declare the alimony statute unconstitutional certainly does not qualify as such an order. Neither does the order denying the former husband’s motion to terminate alimony since the order specifically states that it “shall not preclude an independent consideration of former husband’s supplemental petition for modification of alimony upon proper evidentiary hearing.”

The husband also alleges irreparable harm due to the possibility of future incarceration, but no incarceration order has been entered. Accordingly, no grounds for certiorari jurisdiction have been alleged.

Therefore, this court does not presently have jurisdiction to review this matter.

The appeal should be dismissed. Moreover, the former wife respectfully moves for appellate attorney's fees pursuant to section 61.16, Florida Statutes and Rosen v. Rosen, 696 So2d 697 (Fla. 1997).

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing document has been furnished, by U.S. mail this 30th day of December 2005 to: **Cathy Kamber, Esq.**, 1675 Palm Beach Lakes Blvd., Tower A - Suite 700, West Palm Beach, FL 33401, counsel for Appellee; **David J. Glantz, Esq.**, 110 SE 6th Street, 10th Floor, Ft. Lauderdale, FL 33301, Assistant Attorney General; **William A. Cabana**, 1050 Capri Isles Blvd., Apt. F-105, Venice, FL 34292, pro se.

RICHARD A. KUPFER, P.A.
5725 Corporate Way
Suite 106
West Palm Beach, FL 33407
(561) 684-8600
Counsel for Appellant

By: _____


Richard A. Kupfer
Florida Bar No. 238600