

IN THE CIRCUIT COURT OF THE 15th JUDICIAL CIRCUIT IN AND FOR
PALM BEACH COUNTY, FLORIDA

Family Division
Case No. 501971DR004137XXDIFD

In Re Marriage of
WILLIAM A. CABANA
Petitioner, Former Husband, pro se

and

SHARON ANN MAYO f/k/a
SHARON ANN CABANA
Respondent/Former Wife.

Motion And Memorandum Of Law To Deny Contempt of Court

COMES NOW WILLIAM A. CABANA, *pro se*, respectfully requesting that this court Deny former Wife's Motion for Contempt for not paying alimony arrearages or attorney's fees because he has been shown to have no present ability to pay attorney's fees or contempt purge amounts.

In support he offers:

1. Former Wife filed a Motion for Contempt on July 17, 2008. (DE 419)
2. Former Wife filed a Motion for Contempt for non-payment of attorney fees on April 24, 2006. (DE 364)
3. Former Husband filed a Motion to Deny Contempt May 17, 2006 (DE 380)
 - a. On August 28, 2006, Magistrate Leonard Hanser recommended that the former Wife's Motion for Contempt and request for an award of attorney's fees for bringing forth said motion both be denied. (DE 398)
 - b. On October 26, 2006, the Court ratified and adopted the Magistrate's recommendations. (DE 406)

4. The former husband was declared indigent on May 16, 2006, when the Honorable Judge Martin Colin granted Former Husband's Motion to Proceed Without Prepaying the 4th DCA appeal fees. (DE 379)

5. The former Husband's indigent status was ratified on August 28, 2006, when Magistrate Leonard Hanser denied a Former Wife's Motion For Contempt for not paying attorney's fees. (DE 398)

6. Former Husband is currently receiving public welfare in the form of HUD housing assistance, Medicaid and food stamps. [See Financial Affidavit]

7. The former Wife's request for fees and contempt must be denied because she comes to this court with unclean hands. On January 6, 2006, the trial court found she "deliberately and intentionally undervalued the assets contained in her financial affidavit and failed to reveal the existence of bank checking account monies." The court opted not to penalize her for committing fraud and perjury on her financial affidavit. (Exhibit #1 Transcript pgs. 398, line 19 thru pg. 399, line 25)

8. The "Amended Motion for Rehearing and Motion to Vacate Orders: Appendix" (DE 345) lists each account presented to the court, the facts evident about the account in the court record of the proceedings and the material misrepresentations by opposing counsel that may have led the Court to error in its conclusion that the former Husband had misrepresented his financial status and present ability to pay at the time of the Order Adjudicating former Husband in Contempt and Containing Judgment (DE 308.) A subsequent order confirms the error when the Honorable Judge Martin Colin granted Former Husband's Motion to Proceed Without Prepaying the 4th DCA appeal fees. (DE 379)

9. *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."

10. The former Wife's request for fees and contempt must be denied because in the Order Adjudicating Former Husband in Contempt and Containing Judgment (DE 308) on page 4, ¶ 5., the court has stated that "former Wife, is awarded a judgment" for the alimony arrearages. It thereby reduced them to a money judgment, which cannot be considered support. Therefore, incarceration is impermissible and cannot be invoked through contempt proceedings. See *Whelan v. Whelan*, 736 So.2d 732 (Fla.App. 4 Dist. 1999) where it states that incarceration is not permissible for debts not involving support:

"If an obligation is in the nature of settlement of property rights as opposed to alimony, support or maintenance of one to whom the duty is owed, the contempt power of the court cannot be invoked." *Filan v. Filan*, 549 So.2d 1105 (Fla.4th DCA 1989) (citing *Pabian v. Pabian*, 480 So.2d 237 (Fla.4th DCA 1985)). The
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enforcement through contempt of debts not involving support violates Article I, section 11 of the Florida Constitution, the provision prohibiting imprisonment for debt." *Schminkey v. Schminkey*, 400 So.2d 121, 122 (Fla.4th DCA 1981).

11. 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).

12. *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 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.

13. Prevailing case law also shows that incarceration for enforcement of attorney's fees is improper and contrary to Article I Section 23 Fla. Const. and *Connor v. Southwest*, 668 So. 2d 175, (Fla. 1995). In *Bresch v. Henderson*, 761 So.2d 449 (Fla.App. 2 Dist. 2000) it states:

“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, (Fla. 2nd DCA 2000) [Emphasis added]

14. The former Wife's request for fees and contempt must be denied because at the time of the order to pay the \$250.00 per month towards alimony arrearages, former Husband's main source of income was from Social Security payments of \$750.00 per month. Ordering payment of the \$250.00 per month was an impossible requirement for former Husband to comply with and is even more so today. The fact remains that he has been “unable” to pay the arrearages since January, 2006 and still maintain a minimum standard of living. Former Husband made payments as required from January, 2006 thru July, 2006, at which time he was financially unable to continue doing so, all the while

suffering an extreme hardship in doing so. There is no willful intent on his part not to pay, just an inability.

15. In ordering a payment of \$250.00 per month on an arrearage of \$87,660 that would be compounding at the statutory interest rate [approximately 9%], the court was aware that amount could never be paid off with the specified monthly payment. It is unreasonable, inconceivable, and inequitable for the court to specify a purge that will continue on into perpetuity. [See Order Adjudicating Former Husband in Contempt and Containing Judgment (DE 308) page 3, ¶ (B) where the payments are specified to be paid “until the full amount has been satisfied together with accumulated interest.”] At the former Husband’s age of seventy-one years old (71), being retired, unemployed and unemployable there is no possibility of the arrearages ever being paid off. The monthly interest alone, at 9% on the principal of \$87,660, is \$7,889 per year or \$657 per month. It is impossible for the \$250 payment amount to cover even the interest let alone reduce the principal.

16. The trial court ignored the fact that the purpose of alimony is required as a matter of public policy to keep a spouse off the public dole yet it knowingly forced former Husband deeper into that position in ordering a payment to former Wife that guaranteed he would stay on the dole. In *Duttenhofer v. Duttenhofer*, 474 So.2d 251 (Fla.App. 3 Dist. 1985) it states at 258:

"The courts are charged with an obligation to protect spouses[fn*] — not only women — when considering the equitable distribution of marital assets and the award of alimony in connection with the dissolution of a marriage. See *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980). The reason that courts and legislatures become concerned with the plight of a divorcing spouse is not, as Judge Pearson suggests, the expression of gallantry or paternalism, but is instead the product of a practical motive: *society's interest in insuring that individuals — male or female — are*

not summarily dismissed and tossed into the streets to become wards of society dependent upon the public dole. [emphasis added] The purpose of alimony is to render a spouse self-supporting or to offer rehabilitation until the newly independent spouse is able to earn a livelihood."

In *Braswell v. Braswell*, 881 So.2d 1193 (Fla.App. 3 Dist. 2004) it states:

"The purpose of support is to prevent a dependent party from "becoming a public charge or an object of charity." *Killian v. Lawson*, 387 So.2d 960, 962 (Fla. 1980).

17. The former Wife's request for attorney fees and contempt must be denied because the former Husband prevailed on his Motion to Deny Contempt May 17, 2006 (DE 380) and his financial situation has not improved since then. Former Wife has not presented any evidence to demonstrate former Husband's present ability to purge. The former Husband's has no present ability to purge arrearages and his financial condition is, in fact, even worse today than on May 17, 2006 due to escalated costs of living, price increases and inflation. Incarceration is not an option for his inability to pay. See Bowen, *Supra*.

Fam. Law. R. P 12.615(e) Purge states:

"If the court orders incarceration, a coercive fine, or any other coercive sanction for failure to comply with a prior support order, the court shall set conditions for purge of the contempt, based on the contemnor's present ability to comply. *The court shall include in its order a separate affirmative finding that the contemnor has the present ability to comply with the purge and the factual basis for that finding.* (emphasis added) The court may grant the contemnor a reasonable time to comply with the purge conditions.

18. Former Wife has not identified any source of income or asset from which a purge payment can be ordered nor has this court ever made an affirmative factual finding any evidence of any present ability to pay a purge. Former Husband's Financial Affidavit and

supporting documents affirmatively show that former Husband lacks an ability to pay a purge. Due to his financial situation, there can be no presumption of an ability to pay.

In the case of *Pompey v. Cochran*, 685 So. 2d 1007 (Fla. 4th DCA 1997) it states:

“the presumption of ability to pay which exists in the first step...is not a substitute for the separate, affirmative finding of ability to pay required for incarceration.”

19. The former Wife’s request for attorney fees and contempt must be denied because, the magistrate’s ruling in a previous and similar motion for contempt on January 24, 2006 (DE 364) is res judicata to former Wife’s claims in the instant case. As stated in the case of *Dept. of H & R Serv. V. Beckwith*, 624 So.2d 395 (Fla.App. 5 Dist. 1993):

“When a fact in issue or a cause of action has been finally decided by a court of competent jurisdiction, neither of the parties shall be allowed to relitigated so long as the judgment or decree stands unreversed. This principle applies to default judgments, issues raised in defense, and matters raised by motion. *AGB Oil Co. v. Crystal Exploration and Production Co.*, 406 So.2d 1165 (Fla. 3d DCA 1981), rev. denied, 413 So.2d 875 (Fla. 1982). As to the particular motion for contempt and for determination of arrearage which prompted the 1990 order, the judge made a "final" decision — no other judicial labor remained to be done on that motion. The order, then, was res judicata as to the issues decided by it. *Thompson v. Petherbridge*, 472 So.2d 773 (Fla. 1st DCA 1985).

20. The court has designated the former Husband as having indigent status pursuant to Fla. Stat. Rule 57.082 – Application for Determination of Civil Indigent status. The Honorable Judge Martin Colin, with an Order Granting Former Husband’s Motion to Proceed Without Prepayment of Fees to 4th District Court Of Appeals and Affidavit, affirmed the indigent status designation on May 16, 2006 (DE 379).

21. The former Husband did not then and does not now have the ability to pay the monthly payment of \$250.00 per month for alimony arrearages nor attorneys fees assigned by the court against him.

22. In the case of *Satter v. Satter*, 709 So.2d 617 (Fla.App. 4 Dist. 1998) it states:

“the supreme court cases make clear that financial need is the hidden notion in the statutory term "financial resources of both parties." Applying the Supreme Court's definitive construction of the statute, we therefore conclude that the party seeking to recover fees under section 61.16 must show some need for such relief.”

Based on the evidence presented to the trial court at the January 6, 2006 hearing, former Wife's 3-year average bank deposits of \$63,141.94 per year and assets in excess of \$750,000, it is clear that she has no need for relief and has the financial resources to pay an attorney.

23. In *Rosen v. Rosen*, 696 So. 2d 697 (Fla. 1997), the court said that:

“to ensure that both parties have similar access to competent legal counsel, the trial court must look to each spouse's need for suit money versus each spouse's respective ability to pay.”

24. From the inception and throughout all these proceedings, former Husband has not had the financial resources to retain competent legal counsel and has had to represent himself on a Pro Se basis.

25. In *Robbie v. Robbie*, 683 So.2d 1131 (Fla.App. 4 Dist. 1996), Farmer, Judge, concurring specially, succinctly addresses the use of incarceration as a means of enforcing the collection of attorney fees through contempt proceedings:

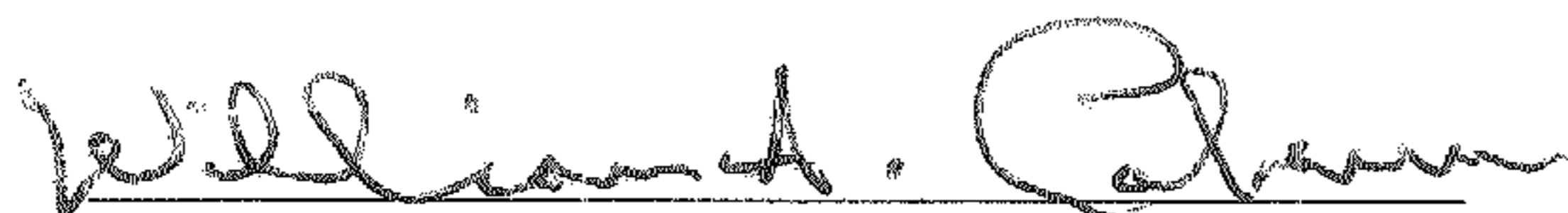
“Using contempt after the fact to compel payment of fees appears to give lawyers preternatural collection remedies for their fees that no other professional can claim. No one seriously suggests that the remedy for nonpayment of a bill for medical services, or for food, or for shelter, should be contempt. Neither has the court in *Fishman* explained why courts should so construe this statute when its text lacks an express provision so requiring. I am afraid that this use of contempt powers threatens to give the impression that divorce lawyers have some special standing in the courts to be paid upon penalty of jail, which no other lawyer, professional person, or creditor enjoys.”

26. It is still former Husband's position that Fla. Stat. § 61.08 is void because it violates Art. I Sec. 23 and Art. III Sec. 3 of the Florida Constitution and is contrary to the abrogation of the doctrine of necessities in *Connor v. Southwest Florida Regional Medical Center, Inc.* 668 So. 2d 175 (Fla. 1995).

WHEREFORE WILLIAM A. CABANA prays that the Court take jurisdiction over this matter, enter such orders as are appropriate to expedite consideration of this motion, and as follows:

1. Deny former Wife's Motion for Contempt with prejudice in order to prevent future harassment of former Husband, abuse of the legal processes and wasting of court resources.
2. Awarding former Husband all costs pursuant to F.S. §57.041, F.S. §57.105 and other applicable law for the defense of this motion.
3. For such and other relief that may be proper.

Respectfully submitted,



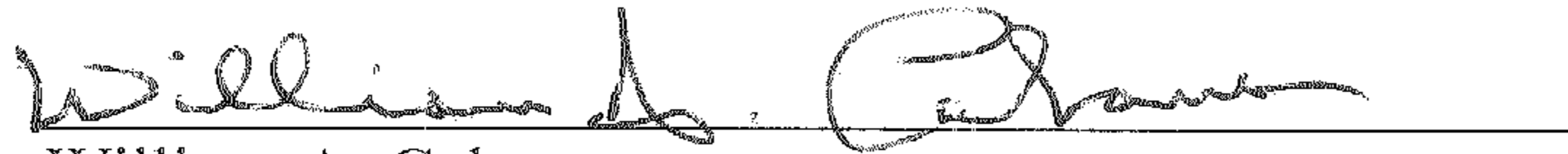
William A. Cabana, *pro se*
1050 Capri Isles Blvd., Apt F-105
Venice, FL 34292
Telephone/Fax: 941-480-1395

Date: September 15, 2008

Certificate of Service

I hereby certify that on this 15th day of September 2008, I caused a true and accurate copy of this Motion to Deny Contempt of Court to be sent by U.S. mail to:

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

A handwritten signature in cursive script, appearing to read "William A. Cabana", is written over a horizontal line.

William A. Cabana, pro se
1050 Capri Isles Blvd., Apt F-105
Venice, FL 34292
Telephone/Fax: 941-480-1395

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IN THE FIFTEENTH JUDICIAL CIRCUIT COURT
IN AND FOR PALM BEACH COUNTY, FLORIDA
CASE NO.: 501971DR004137XXDIFD

IN RE: MARRIAGE OF
WILLIAM A. CABANA,
Petitioner/Former Husband, Pro Se
v.
SHARON ANN MAYO f/k/a
SHARON ANN CABANA,
Respondent/Former Wife.

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PROCEEDINGS HELD BEFORE THE
HONORABLE MARTIN H. COLIN
TAKEN AT THE INSTANCE OF THE PETITIONER/FORMER HUSBAND
VOL. 1

January 5, 2006
10:40 a.m. - 5:00 p.m.
West Palm Beach, Florida

EXHIBIT # 1

1 currently has a full-time job in which she
2 earns between income and -- earned income and
3 interest income and rental income -- enough
4 money to meet her reasonable needs, many of
5 which have been created subsequent to the
6 divorce by investments and other things that
7 she has done properly for herself in order to
8 enhance her financial position.

9 But in looking at what her circumstances
10 are now versus what I was told they were then
11 at the time of the judgment, the former wife's
12 overall financial circumstances are vastly
13 improved as shown in her financial affidavit
14 which is Exhibit No. 2 of the former husband's
15 She has a very valuable single-family home.
16 She has another rental property that's
17 valuable. She has two lots that's valuable
18 and -- but she pays for all four of them.

19 Problematic to the former wife's case was
20 the Court is finding that the former wife
21 deliberately and intentionally undervalued the
22 assets contained on her financial affidavit
23 which is Exhibit No. 2.

24 Now, each and every time that there was an
25 opportunity for the former wife to give

Exhibit # 1

1 truthful evidence concerning the value of a
2 property, the substantial competent evidence
3 showed that the values that she asserted on her
4 financial affidavit were far less than that
5 which was shown to exist through other much
6 more credible, substantial, competent evidence,
7 and that's due to the value of her home, the
8 value of rental property of the value of the
9 lots.

10 She also failed to reveal the existence of
11 bank checking account monies at Goldcoast Trust
12 when they were there in an amount over \$6,000.
13 She puts in her household expenses an \$395
14 payment as an expense of her household when
15 it's clear that although she borrowed on her
16 home, that expense was in order to pay for the
17 cost of a mortgage on other property.

18 The Court finds that the former -- that
19 the totality of the former wife's assets over
20 her liabilities are substantial to the -- as
21 well as her income -- to the extent that she no
22 longer has the need, and it would be
23 inequitable and improper to require the former
24 husband to be paying \$25.00 a week or \$107.50 a
25 month towards her support.