

**IN THE CIRCUIT COURT OF THE
FIFTEENTH 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.**

Former Husband's Second Amended Motion To Vacate Orders

COMES NOW WILLIAM A. CABANA, *pro se*, pursuant to F. R. Civ. P Rule 1.540(b)(3) respectfully moves the Court vacate its orders of January 6, 2006 and February 16, 2006 by the Honorable Martin Colin and to grant a rehearing on the grounds that there were misrepresentations by Opposing Counsel of Former Husband's present ability to pay a purge which may have caused the court to error when it improperly incarcerated the Former Husband..

In support he offers:

1. This motion incorporates prior filed "Amended Motion for Rehearing and Motion to Vacate Orders" hereinafter referred to as Amended Motion" and "Appendix to Amended Motion for Rehearing" hereinafter referred to as "Appendix." (DE 341 and 345 respectively)

2. Opposing counsel's misrepresentations to the court created an illusion of assets that led to error. The alleged assets opposing counsel presented to the court, via exhibit and oral argument as those of Former Husband were not his and he had no access to them.
3. The Former husband had no ability to purge an amount entered by the court in its order of January 6, 2006.
4. The Court Contempt Order (DE 308) and Incarceration Orders of January 6, 2006 (DE 309 and 311) erred in the determination of the former husband's ability to purge. Whether the error resulted from the court's independent error or whether the court was misled by opposing counsel is not known to the Former Husband. The error, however, is supported by the record, i.e. opposing counsel's exhibits and transcript of her oral argument.
5. The Former Husband was wrongfully incarcerated. He had to borrow funds to secure his release from jail.
6. Sworn affidavit from Florence Cabana, Mother of Former Husband, swearing and affirming that she was not sheltering any monies for him as alleged by opposing counsel nor did he have any access to the funds in her accounts other than as indicted therein. (See affidavit attached to Amended Motion DE 341)
7. SouthTrust Bank Securities Account x4520 was presented to the court as sheltering Former Husband's money. It was presented to the court as the Former Husband's funds when in fact they were not. Additionally he did not have access to the funds to purge arrearages. (See transcript in Appendix page 386, line 9) (DE 345) In fact, the affidavit of Florence Cabana shows it was an account for her sole use. Former Husband's only interest with it was as a beneficiary "Pay On Death" (POD).

8. SouthTrust Bank Account number x3190 was presented to the court as receiving deposits from Former Husband. (See transcript in Appendix page 392, line 8) (DE 345) In fact the deposits were made by Florence Cabana and Former Husband's only interest with it was as a beneficiary POD. These accounts were not Former Husband's assets or assets to which he had access or control. Opposing counsel stretched the credulity of this court by representing that deposits made as far back as 2001 to accounts in which Former Husband had no interest were, in fact, evidence of his present ability to pay a purge. Deposits were never proven to be from the Former Husband. In fact he never made deposits to the account. No evidence was offered to show that deposits to the account were from the Former Husband.
9. On January 6, 2006, the only current accounts where Former Husband had a present ability to pay a purge were submitted by him to the court as being those of Paypal with a balance of \$391, US Bank account no.x2357 with a balance of \$403 and Colonial Bank account no. x4501 with a balance of approx. \$900.
10. At the January 5-6, 2006 trial and the resultant order on January 6, 2006, this Court erroneously concluded that the Former Husband's had ability to purge totaling \$8,830 plus sheriff's fees. Other than those accounts mentioned in paragraph 8 above, no specific bank accounts nor current balances, to which the Former Husband in fact had access to purge, were identified by this court to show that the Former Husband had a present ability to pay as required for Civil Contempt proceedings. The fact is the Former Husband did not hide, nor attempt to deceive the court in any fashion about his current assets. The bank accounts presented by opposing counsel were not assets of the Former Husband nor did he have access to the funds.

11. F. R. Civ. P Rule 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.

12. 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.”

This court never made an affirmative factual finding of any present ability to pay that supports the purge amounts imposed on Former Husband.

13. Opposing counsel’s obfuscations to the court may have led it to error in a finding and issuance of a subsequent order dated February 16, 2006 that Former Husband had a present ability to pay attorney fees. The case of *Rubin v. Rubin*, 204 Conn. 224, 527 A.2d 1184 (1987) prevails in this instant case where it states, “that in order to pay attorney fees, Former Husband would need to have the ability to pay.” This court has not made a factual determination of his having the ability to pay. The Former Husband did not and does not have the ability to pay the attorneys fees assigned by the court against him.

WHEREFORE WILLIAM A. CABANA prays that the Court enter such orders as are appropriate to expedite consideration of this motion as follows:

1. Vacate the Court Orders of January 6, 2006 and February 16, 2006,
2. Require that Former Wife refund to Former Husband the monies he had to borrow to pay the purge in the amount of \$4,700.

3. Award Former Husband compensation and costs incurred by Former Husband associated with his 20 day incarceration over this order,
4. Award Former Husband all costs pursuant to Fla. Sta. §86.011, §57.041, §57.105 and other applicable law for the defense of this motion,
5. Award such 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
Email: bcabana2@comcast.net

March 30, 2006

Certificate of Service

I certify that a copy of this Former Husband's Second Amended Motion To Vacate Orders was mailed to Sharon Ann Mayo, 220 Almeria Rd, West Palm Beach, FL 33405 this 30th Day of March, 2006_ this 30nd day of March, 2006

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