9 June 05

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

Case No. 501971 DR004137XXDIFD

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.

MEMORANDUM OF LAW

FLORIDA FAMILY LAW RULE 12.285 (MANDATORY DISCLOSURE) IMPERMISSIBLY INFRINGES THE FLORIDA CONSTITUTION ARTICLE I SECTION 23 RIGHT OF PRIVACY

"it seems obvious that private, sensitive, and confidential information regarding individuals is protected by the privacy clause of the Florida Constitution." Rasmussen v. S. Florida Blood Serv., Inc., 500 So. 2d 533, 536 (Fla. 1987)

The Florida Family Law Rules of Procedure Rule 12.285 Mandatory Disclosure must be viewed in the context of the Florida Constitution and other laws. Ostendorf v. Turner, 426 So. 2d 539, 544 (Fla. 1982) (quoting Sparkman v. State ex rel. Scott, 58 So. 2d 431, 432 (Fla. 1952)) ("Express or implied provisions of the Constitution cannot be altered, contracted or enlarged by legislative enactments.")

Florida courts have found personal financial information to be protected by the Florida constitutional right to privacy of the individual. As reaffirmed recently in Straub v. Matte, 805 So.2d 99, 100-101 (Fla. 4th DCA 2002), the Fourth District Court of Appeals in Woodward v. Berkery, 714 So. 2d 1027, 1035, 1036 (Fla. 4th DCA 1998) held:

> The constitution of the State of Florida contains an express right of privacy. Although there is no catalogue in our constitutional provision as to those matters encompassed by the term privacy, it seems apparent to us that personal finances are among those private matters kept secret by most people. See Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544 (Fla. 1985) (law in Florida recognizes an individual's legitimate expectation of privacy in individual's private bank account, financial records).
>
> .....
>
> the failure to analyze the need for the requested discovery under the unique circumstance of this case was a departure from the essential requirements of law which if uncorrected will lead to the kind of irreparable harm contemplated by Martin-Johnson.
>
> *Id.,* 714 So. 2d 1027(citing Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097, 1100 (Fla. 1987)); See, Straub v Matte, supra, 805 So.2d 100-101 (Fla. 4th DCA 2002)

As the Florida Supreme Court recently noted in Alterra Healthcare Corporation, Et Al., v. Estate Of Francis Shelley, etc., 827 So. 2d 936 (Fla. 2002), 'non-final' denials of motions to quash discovery involving personal financial information are subject to appeal:

> ...in Martin-Johnson, Inc. v. Savage, 509 So. 2d 1097, 1100 (Fla. 1987), this Court observed that irreparable harm such as might be occasioned by an order that would let the "cat out of the bag" and provide the opponent "material that could be used by an unscrupulous litigant to injure another person" was the governing standard for determining whether a petition for writ of certiorari would, in a particular case, be an appropriate vehicle for challenging non-final orders granting discovery. As this Court observed in Rasmussen v. South Florida Blood Service, Inc., 500 So. 2d 533 (Fla. 1987):

> In deciding whether a protective order is appropriate in a particular case, the court must balance the competing interests that would be served by granting discovery or by denying it.
> North Miami General Hospital v. Royal Palm Beach Colony, Inc., 397 So. 2d 1033, 1035 (Fla. 3d DCA 1981); Dade County Medical Association v. His, 372 So. 2d 117, 121 (Fla.3d DCA 1979). Thus, the discovery rules provide a framework for judicial analysis of challenges to discovery on the basis that the discovery will result in undue invasion of privacy. This framework allows for broad discovery in order to advance the state's important interest in the fair and efficient resolution of disputes while at the same time providing protective measures to minimize the impact of discovery on competing privacy interests.
>
> Accordingly, we must assess all of the interests that would be served by the granting or denying of discovery--the importance of each and the extent to which the action serves each interest.
> Alterra at 945 (emphasis added)

While William A. Cabana acknowledges that the right to privacy under Florida law is not absolute, it is subject to a balancing test of competing interests. See Berkeley, 699 So. 2d at 791 ("The party seeking discovery of confidential information must make a showing of necessity which outweighs the countervailing interest in maintaining the confidentiality of such information"). It is the trial court's province to weigh the competing interests in deciding whether to limit the scope of discovery to protect the right of privacy. Pyszka, Kessler, Massey, Weldon, Catri, Holton & Douberley, P.A. v. Mullin, 602 So. 2d 955 (Fla. 3d DCA 1991).

Before this court can determine the need for William A .Cabana's personal financial information it must assess the need of the movant for the information. This assessment must be predicated on a demonstration of need for alimony by the movant.

See Hillier v. Iglesais, 4th DCA, Case #4D03-4204 (May 2005), if there is no need for alimony then there is no need for William A. Cabana to disclose his personal financial information. The burden must be placed on the movant when the movant demands or compels production of personal financial information from a former spouse.

The burden upon the movant is a modest one, i.e. to provide first to the court and the non-movant her own personal financial information in order that the court may protect the Right of Privacy of the non-movant by making a preliminary determination that the movant's financial status raises a reasonable need for a determination of whether alimony will be necessary.

It is the duty of the court to protect Floridians' Right to Privacy in their personal financial information. Family Law Rules of Procedure and Chapter 61 provisions for mandatory disclosure and open discovery must give way to the Right of Privacy.

The court should determine if the personal financial disclosure requested meets a compelling need. It should not merely demand disclosure without assessing the need for disclosure. See Mogul v. Mogul, 730 So. 2d 1287 (Fla. 5th DCA 1999)(the financial information of private persons is not entitled to protection by the right of privacy where there is a relevant or compelling reason to compel disclosure). Rule 12.285 mandatory nature infringes Fl. Con. Article I Section 23 Right of Privacy.

Personal Disclosure v Public Disclosure

William A. Cabana wishes to call the court's attention to the difference between the personal disclosure of privacy protected personal financial information versus the public disclosure. The latter, i.e. Barron v. Barron (Fla. 1988) is not the issue raised.

Florida Supreme Court Committee on Privacy in the Courts

The Supreme Court Committee on Privacy and Court Records (Draft at this time) though not precedential is persuasive and reflective of public policy. It contains a section on the Right of Privacy. In the section on the Right of Privacy, once private information enters the judicial system the Right of Privacy becomes subservient to the right of public access to public information.

> "Second, the right of privacy on its own terms does not protect information in a non-exempt public record. The rule that there is no disclosural right of privacy in public records of the state was firmly settled both as a matter of tort and constitutional law in Florida prior to the creation of the present constitutional right:
>
> > We conclude that there is no support in the language of any provision of the Florida Constitution or in the judicial decisions of this state to sustain the district court's finding of a state constitutional right of disclosural privacy.
>
> Following this decision, the people of Florida amended their Constitution to create the right of privacy, but explicitly subordinated it to the right of access to public records. The Amendment provides that it "shall not be construed to limit the public's right of access to public records and meetings as provided by law" (emphasis added).
> In *Michel v. Douglas*, 464 So. 2d 545, 546 (Fla. 1985), the Court noted that "[b]y its specific wording, article 1, section 23 of the state constitution does not provide a right of privacy in public records:"

It is precisely because of this public disclosure that this court must first make the determination of the need of disclosure of William A. Cabana's personal financial information. For the court to assess this need of the movant for the information it must know whether or not the movant's financial need is such that it outweighs the non movant's Right of Privacy of his personal financial information.

> "In sum, court records are public records, and public records once created are not protected by the state right of privacy, by federal right, or by common law tort. This does not mean, however, that the state right of privacy has no relevance for purposes of the issues before this Committee. It does. While the privacy right does not protect privacy interests with

respect to information contained in public records, it does protect privacy interests with respect to information not yet disclosed. The Committee urges that the right of privacy in this context be more fully explored, and efforts taken to give it full force and effect in the protection of the personal information of Floridians.

Article I, section 23 has been interpreted to create a high burden which government must overcome when it seeks to compel a person to provide personal information about which an expectation of privacy exists:

> The right of privacy is a fundamental right, which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden of proof can be met by demonstrating that the challenged regulation serves a compelling state interest, and accomplishes its goal through the least intrusive means."

And more,

> "The power to compel disclosure of information in discovery is highly invasive, and takes on new significance in light of the potential for the electronic dissemination of the compelled information."

F.S. Chapter 61 rebuttal presumption of an ability to pay is a legislatively and judicially created creature of judicial convenience that violates due process. This point is the gravamen of Hillier. Court rules which require "only" the filing of a financial affidavit with the court in modification nonetheless expose a Floridian's personal financial information to be broadcast in cyberspace readily available to all citizens in the comfort of their living room.

Wherefore this court must deny movant's motion to compel disclosure until she provides the court with all of her financial records, responds to posed financial interrogatories and this court weighs her need for alimony and then the need for William A. Cabana to divulge his personal financial information and be deprived of his Florida Constitutional Right of Privacy.

Respectfully submitted,

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Certificate of Service

I certify that a copy of this Motion for Extension of Time was hand delivered to Cathy L. Kamber, Esq., 1675 Palm Beach Lakes Boulevard, The Forum, Tower A, Suite 700, West Palm Beach, FL 33401, this 9th day of June, 2005

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