

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

Case Number 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.

MOTION TO STAY PROCEEDINGS

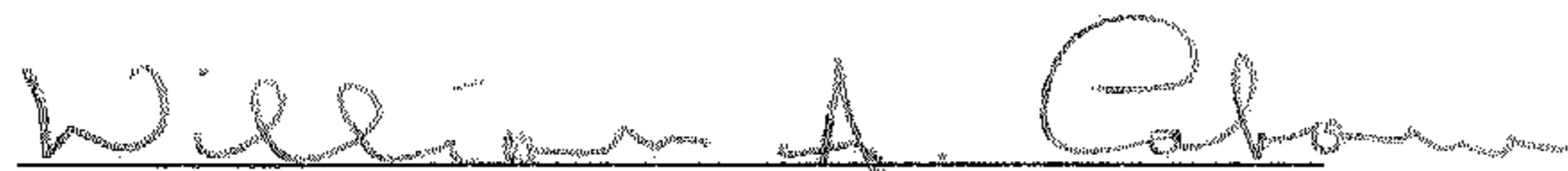
Comes now the former husband WILLIAM CABANA, *pro se*, pursuant to Fl. Rules of Civ. Proc. Rule 1.550 (b) inter alia, to move this court to stay proceedings in this contempt and modification proceeding relating to alimony payments pending outcome of appeal to the 4th DCA in Case Number 4D05-3906.

1. On September 29, 2005 the Petitioner filed 4th DCA Court Case No. 4D05-3906 appealing this trial court's order denying his Chapter 86 Fla. Stat. declaratory judgment constitutional challenge to Chapter 61 alimony provisions as impermissible infringing Art. I § 23 and Art. II § 3 Fla. Const.
2. The declaratory judgment order appealed is a final order appealable. (86.011 Fla. Stat.)
3. The 4th DCA has accepted the Petitioner's appellate filing for review.

4. Irreparable harm is likely to befall the Petitioner if stay of proceedings in this court is not granted.
5. The Respondent will not be prejudiced by a stay in proceedings.
6. Other portions of Chapter 61 Fla. Stat. have been found as violative of Art. I § 23 Fla. Const. Right of Privacy.
7. There is a likelihood the Petitioner will prevail on the merits.
8. A positive district court of appeals ruling will render all further trial court proceedings moot and unnecessary.

Wherefore the Petitioner prays this court grant a stay in proceedings until a ruling in 4th DCA Case Number 4D05-3906 is rendered.

Respectfully submitted,



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Dated October 31, 2005

Memorandum of Law

William A. Cabana's appeal of this court's denial without reasoned opinion of his declaratory judgment motion that Chapter 61 Fla. Stat. alimony provision impermissibly infringe Art. I § 23 and Art II § 3 Fla. Const. are the basis of his appeal.

Ordinarily, there are two principal considerations that courts must take into account when deciding whether to vacate a stay: the likelihood of irreparable harm if the stay is not granted and the likelihood of success on the merits by the entity seeking to maintain the stay. Mitchell v. State of Florida, No. SC03-1210 (Fla. September 8, 2005).

Irreparable Harm if Stay is Not Granted

It cannot be disputed that irreparable harm can befall William A. Cabana if stay is not granted. There is the possibility that despite his proven inability to pay arrearages and to continue to pay alimony the trial court may find him in contempt as well as issue a commitment order.

There is always the chance of error in trial court proceedings despite the best intents of all involved.

Florida Judicial Circuit Courts have erred in prior family law and alimony contempt proceedings as evidenced by Florida District Court of Appeals reversal of circuit court contempt, modification and termination of alimony orders.

Mitchell v. State of Florida (Fla 2005),

“As noted by Judge Padovano and as we said in Goode, ‘[c]ivil commitment proceedings involve a serious deprivation of liberty and, thus, such proceedings must comply with the due process clauses of the Florida and United States Constitutions.’ State v. Goode, 830 So. 2d 817, 825-26 (Fla. 2002) (citing Addington v. Texas, 441 U.S. 418, 425 (1979)).”

Likelihood of Success on the Merits

Divorce afforded Right of Privacy Protections

Divorce, i.e. Dissolution of Marriage has been recognized as afforded the protections of the Federal Right of Privacy.

The United States Supreme Court has "routinely categorized [these matters] as among the personal decisions protected by the right to privacy [and, in addition] has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."

Zablocki v. Redhail, 434 US 374 (1978)

See Littlejohn v. Rose, 786 F.2d 785, 786 (6th Cir. 1985),

"Given the 'associational interests that surround the establishment and dissolution of [the marital] relationship', such 'adjustments' as divorce and separation are naturally included within the umbrella of protection accorded to the right of privacy."

Other Chapter 61 Provisions Declared Unconstitutional

Other portions of Chapter 61 Fla. Stats. have been declared unconstitutional as violating Art. I § 23 Fla. Const. Right of Privacy. Richardson v. Richardson, 766 So. 2d 1036 (Fla. 2000).

No contrary rulings

There are no reasoned opinions of Florida courts denying the constitutional challenges raised.

Further Trial Court Proceedings will be Moot

The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose;

since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it. No one is bound to obey an unconstitutional law, and no courts are bound to enforce it. -- 16 Am Jur 2d, Sec 177 late 2d, Sec 256.

When the 4th District Court of Appeals rules that the alimony provisions violate the Right of Privacy and Separation of Powers clauses of the Florida Constitutions the statutes will be void ab initio. Further proceedings before this court will be unnecessary and moot.

Conclusion

A stay in this court's proceedings is proper as irreparable harm to the liberty interest and property rights of the Petitioner are likely to occur. The 4th DCA has accepted his appeal. He is also likely to prevail on the merits of his appeal.

Prayer for Relief

Wherefore the Petitioner prays this court grant a stay in proceedings until a ruling in 4th DCA Case Number 4D05-3906 is rendered.

Respectfully submitted,

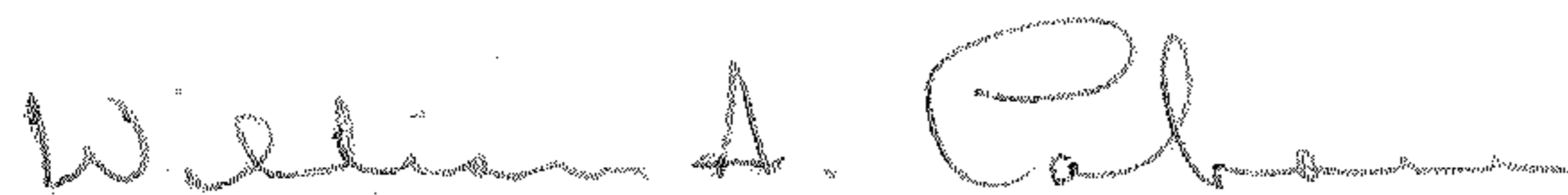


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Dated October 31, 2005

Certificate of Service

I certify that a copy of this Motion to Stay Proceedings was faxed and mailed to Cathy L. Kamber, Esq., 1675 Palm Beach Lakes Boulevard, The Forum, Tower A, Suite 700, West Palm Beach, FL 33401, this 31th day of October, 2005



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