

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.

MEMORANDUM OF LAW IN SUPPORT OF FORMER HUSBAND'S
MOTION TO VACATE ALIMONY ARREARAGES

" Judicial discretion is defined as: The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court." *Canakaris v. Canakaris*, 382 So.2d 1197 (Fla. 1980)

Introduction

The court is presented with a case where Former Wife has alimony arrearages that are vested and have been reduced to money judgment. The question facing the court is whether or not a trial court has the judicial discretion to issue an order vacating the arrearages or make such ruling that, in effect, grants former Husband the release from any further obligation to make any future payment arrearages.

Such a modification is permitted as declared in the case of *Ford v. Ford*, 700 So.2d 191 (Fla. App. 4 Dist. 1997) that allowed the arrearages to be vacated upon motion to the court and based upon compelling circumstances. Alternately, in the case of *Denby*

v. *Department of Revenue*, 685 So.2d 982 (Fla.App. 5 Dist. 1997), the trial court did not require the former husband to make any payments of arrearages.

The compelling circumstances of this case are that the former wife has accumulated substantial wealth and assets estimated to be in excess of \$1,000,000, is capable of self-sufficiency and has no need of support or alimony arrearages for the necessities of life. Former Husband has suffered post dissolution financial and physical reversals with changed and compelling circumstances among which are:

- a. Former Husband, aged 71 years old and retired.
- b. Former Husband is indigent and is not in good health and is currently being treated for anxiety resulting from ongoing legal proceedings, ulcers, gastritis, diverticulitis, colon polyps, vision problems, high cholesterol levels, and high blood pressure.
- c. He is unable to make court ordered alimony arrearage payments and maintain a minimum standard of living.
- d. Former Husband has been a ward of the Florida State Welfare system receiving Medicaid, food stamps and HUD housing assistance since July, 2002.
- e. 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 due to his indigent status. (DE 379)
- f. 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 due to his indigent status. (DE 398)
- g. Due to a post dissolution reversal of spousal financial status, former Husband now has a greater need of support to provide for basic necessities of life and former Wife has the greater ability to pay.

Statement of the Case and of the Facts

The parties in this dispute were married for about eleven years before their marriage was dissolved over thirty-six years ago on July 28, 1972. Former Husband was ordered to pay \$25 per week alimony forever – without any conditions to end payments. Both homes owned by them jointly were awarded to the Former Wife. (See Final Judgment Dissolving Marriage). No minor children are at issue in this case.

Former Husband, aged seventy-one years old (71), retired, has no assets, and is living below the poverty level. He receives public assistance in the form of HUD housing payments, Medicaid, and food stamps. (See Financial Affidavit DE 429)

He was married for eleven years to the former Wife and paid alimony for over thirty years. He was in arrearages on his alimony payments owing to an inability to pay. On February 4, 2004, the former Wife filed a motion for contempt and commitment (DE 79).

Former Husband filed a Petition for Modification on March 19, 2004 (DE 89) to terminate alimony and in an order dated January 24, 2006 (DE 324), the court found the former Wife had no need for alimony for which it terminated future alimony payments, eliminated all further accruals of alimony, and established the arrearages at the \$87,661 figure and reduced it to a money judgment.

At the contempt hearing on January 6, 2006, the trial court erroneously concluded he had an ability to pay a purge and incarcerated him. (DE 308, 309, 311). After 20 days incarceration, former Husband borrowed the purge amount from his Mother and was released. This loan still hasn't been repaid.

This court had previously ordered former Husband to make payments on the alimony arrearages, which had been reduced to a money judgment, at a starting balance of \$87,661 payable at the rate of \$250 plus a \$5.25 service charge per month until they are paid in full (DE 308). At this specified payment rate including the statutory interest that is to be added, it is impossible to service the debt or interest and the arrearages can never be paid in full and would extend into perpetuity.

This court needs to understand the fact that the stated alimony arrearages consist mainly of accrued interest and not alimony. The \$87,661 amount is derived from a present balance of an actual alimony arrearage in the amount of approximately \$9,500 while the balance of approx. \$78,161 represents accumulated statutory interest that has been compounding on a weekly basis from its inception until January 6, 2006 and is even greater now due to the inability to pay the \$255 per month as ordered.

Prior to the trial, former Husband was living below the poverty level, which for one person in 2006 was \$9,800 per year according to the U.S. Department of Health and Human Services (HHS). With the court's erroneous finding of a present ability to pay, it ordered him to pay \$255 per month to Former Wife. In doing so, it placed an undue burden and hardship on former Husband and forced him deeper into poverty, as shown by the attached Financial Affidavit.

I

Jurisdiction

This court has the jurisdiction to hear this case. In the last order of this court (DE 324), entered January 24, 2006, paragraph 4 stated: "Jurisdiction of this cause and of the parties is hereby retained for the purpose of entering such further orders as the court may deem necessary."

§ 61.14, Fla. Stat (2005) states:

Enforcement and modification of support, maintenance, or alimony agreements or orders. (partial)

(1)(a) When the parties enter into an agreement for payments for, or instead of, support, maintenance, or alimony, whether in connection with a proceeding for dissolution or separate maintenance or with any voluntary property settlement, or *when a party is required by court order to make any payments, and the*

circumstances or the financial ability of either party changes....the court may modify an order of support, maintenance, or alimony by increasing or decreasing the support, maintenance, or alimony retroactively to the date of the filing of the action or supplemental action for modification as equity requires, giving due regard to the changed circumstances or the financial ability of the parties.....[Emphasis added]

II

Wife's Ability To Support Herself

Former Wife is healthy, self-sufficient, and was employed by Florida Power and Light with generous retirement benefits. Former Wife has a more than adequate cash flow as indicated by her Wachovia bank records as submitted for the January 6, 2006 contempt and modification of alimony hearing. Her bank deposits summary shows deposits for a period from 1/28/03 through 6/27/05 totaling \$151,686, for an average income of \$63,141 per year, or \$5,262 per month. Former Wife currently has property and assets with a value that is estimated to be in excess of \$1,000,000.

Her present home and combined rental unit on 220 Almeria Rd., in West Palm Beach that was listed on her July 11, 2005 financial affidavit, in the amount of \$330,000 now has an appraised 2008 market value of \$526,825. In addition she has several savings and retirement accounts plus other personal investments amounting to a substantial sum.

Former Wife comes to court with unclean hands. The evidence shows that there were material misrepresentations on her financial statement submitted for the January 6, 2006 trial. The trial court found she egregiously and deliberately under-represented her income and assets and concealed bank accounts. (Transcript pgs. 398, line 19 thru pg. 399, line 25, from former Husband's Motion to Deny Contempt – Exhibit #1 (DE 380)).

The court opted not to penalize her in any manner for committing fraud and perjury on her financial affidavit.

Since the hearing on January 6, 2006, she has sold one of her properties in October, 2006, located at 4401 Saturn Ave., in West Palm Beach, FL that was listed on her financial affidavit, dated July 11, 2005 in the amount of \$84,000, for the recorded amount of \$250,000. It is doubtful that the value of the residence appreciated that greatly in the interim time period of fifteen months. Therefore it is apparent that the entry was another fraudulent one further demonstrating unclean hands.

III

Former Husband's Needs

The former Husband has suffered post dissolution financial and physical reversals and has been forced to live substantially below the poverty level, which in 2008 for one person is \$10,400 per year, according to the income guidelines published in the Federal Register.

With the court's erroneous finding of a present ability to pay, it ordered him to pay \$255 per month to former Wife. In doing so, it placed an undue burden and hardship on former Husband and forces him deeper into poverty and will keep him in a state of poverty from which he will be unable to emerge should he have to make payments.

The additional imposition of the court ordered monthly payments of \$255 per month exacerbates his diminished financial condition and creates an impossible condition for him with which to comply. This burden needs to be removed.

Retirement is a valid "change of circumstance" as indicated in *Pimm v. Pimm*, 568

So.2d 1299 (Fla. 2d DCA 1990), in which the district court of appeal certified the following question as a matter of great public importance:

“IS THE POSTJUDGMENT RETIREMENT OF A SPOUSE WHO IS OBLIGATED TO MAKE SUPPORT OR ALIMONY PAYMENTS PURSUANT TO A JUDGMENT OF DISSOLUTION OF MARRIAGE A CHANGE OF CIRCUMSTANCE THAT MAY BE CONSIDERED TOGETHER WITH OTHER RELEVANT FACTORS AND APPLICABLE LAW UPON A PETITION TO MODIFY SUCH ALIMONY OR SUPPORT PAYMENTS?”

Id. at 1301. *We have jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution, and answer the question in the affirmative.*” [EMPHASIS ADDED]

Removing the burden of alimony arrearages to insure that former Husband does not pass from prosperity to misfortune or to be shortchanged, as in the instant case, is in agreement with *Bucknam v. Shelton*, App. 5 Dist., 849 So.2d 1204 (2003), where the trial court, in determining whether alimony award is appropriate, need not equalize the financial positions of the parties, *but must ensure that neither spouse passes automatically from misfortune to prosperity or from prosperity to misfortune, and, in viewing the totality of the circumstances, one spouse should not be shortchanged.* [Emphasis added] *See also Fontana v. Fontana*, App. 1 Dist., 617 So.2d 418 (1993).

IV

Discretion Of The Court

It is established that the alimony arrearages are vested and cannot be modified. In the case of *Dykes v. Dykes*, 712 So.2d 1189 (Fla.App. 1 Dist. 1998), it states:

“Past-due installments of alimony become vested property rights of the recipient.” *See Kennedy v. Kennedy*, 464 So.2d 1289, 1292 (Fla. 1st DCA 1985). “A trial court is not authorized to modify the arrearages involving alimony installments due and owing prior to the filing of a petition for

modification.” See *Brisco v. Brisco*, 355 So.2d 506, 508 (Fla. 2d DCA 1978); *Steinau v. Steinau*, 343 So.2d 631, 632 (Fla. 2d DCA 1977).

In the instant case, former Husband herein motions the court that the arrearages be vacated on the compelling grounds of his indigent financial status that is a permanent change of circumstance which was unforeseen at the time of dissolution and has little likelihood of changing in the future. In the alternative he asks the court that it eliminate the requirement for him to make any further payments ab initio to the court order of January 6, 2006 (DE. 308).

First, the question facing the court is whether or not an order for alimony arrearages can be vacated. In the case of *Ford v. Ford*, 700 So.2d 191 (Fla.App. 4 Dist. 1997) on page 195, there is the following statement:

“The court noted the husband's arrearages for child support and alimony totalled \$4,978.75, and vacated the spousal support portion of the arrearage, awarding the wife a credit of \$2,461.00 against her child support payments.”

It further stated that:

“We also reverse that portion of the final judgment vacating the husband's arrearages of temporary alimony in the absence of any motion seeking to vacate those arrearages. [Emphasis added] Grant v. Grant, 603 So.2d 68 (Fla. 1st DCA 1992). The former wife's right to the temporary alimony payments vested, and could not be altered by the trial court absent compelling circumstances not present here.”

The trial court in *Ford*, Supra, had vacated the alimony arrearages. The appellate court reversed that ruling because the former husband had not filed a motion seeking to vacate them.

The appellate ruling plainly shows that alimony arrearages, even though temporary in this case, can be vacated upon a motion to the trial court along with

a finding by the court of compelling circumstances with which to justify vacating them.

In the instant case, the appropriate motion is herewith filed citing the compelling circumstances as follows:

- 1.) Former Husband's financial affidavit shows an indigent financial status with no future prospects of improving.
- 2.) The trial court has terminated Former Husband's alimony payments (DE 89 & 324);
- 3.) The trial court has on two occasions determined that Former Husband has indigent status;
 - a. 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 due to his indigent status. (DE 379)
 - b. Ratified his indigent status on August 28, 2006, when Magistrate Leonard Hanser denied a Former Wife's Motion For Contempt for not paying attorney's fees due to his indigent status. (DE 398)
- 4.) The trial court needs to comply with the public policy of not allowing court-imposed conditions to exist that force a spouse onto public welfare. "The purpose of support for a spouse is to prevent a dependent party from becoming a public charge or an object of charity." *Braswell v. Braswell*, App. 3 Dist., 881 So.2d 1193 (2004);
- 5.) The trial court needs to ensure that neither spouse passes automatically from misfortune to prosperity or from prosperity to misfortune, *Bucknam*, Supra.;

Second, the court is faced with the question of whether or not a trial court can issue an order whereby it can rule that a former Husband be not required to make any future payment of alimony arrearages. The answer to this question was confirmed in the affirmative in the case of *Denby v. Department of Revenue*, 685 So.2d 982 (Fla.App. 5 Dist. 1997) where it stated:

“In 1981, the trial court ordered the former husband to pay child support and fixed the arrearage at \$13,955. *The arrearage was reduced to judgment but the court order did not require that any payments be made toward the arrearage.* [Emphasis added] In 1996, the wife again moved to hold the former husband in contempt for failure to pay child support or the arrearage. The trial court did not hold the former husband in contempt, reasoning that he had timely paid the child support as ordered and the court order did not require him to pay any amount toward the arrearage.”

This case was concerned with child support arrearages, which is held to a stricter standard for collection than arrearages for alimony as in the instant case. In 1981, the trial court established a dollar amount of arrearages and fixed it at that point. The arrearages were reduced to a money judgment and the court did not require any payments to be made toward that arrearage. The trial court had not set any time limit for which payments were not required. This situation could have extended on indefinitely barring any further modification by the court absent a contempt of court or other similar filing by former Wife.

In 1996, after a period of non-payment lasting 15 years, the trial court, during a contempt hearing, then ordered former Husband to begin making payments in order to start paying off the arrearages. It is interesting to note that no mention is made of statutory interest being added to the arrearage amount and allowed to accrue with the arrearages as it was in the instant case.

The trial court retained jurisdiction in order to enforce the judgment as indicated by the Florida Supreme Court statement that “child support orders, including arrearage amounts which have been reduced to judgment are different from other types of judgments because there is a continuing obligation to support children”” In our view, this duty includes enforcement of a judgment of support by equitable processes of the court because a remedy at law that is ineffective in practice is not an adequate remedy.” *Denby*, *Supra*. Based on the same line of reasoning, it therefore would apply to alimony support arrearages.

The appellate court found no fault with the fact that payments on the arrearages for the fifteen year period were not required by the trial court nor that the trial court demonstrated any abuse of discretion in its ruling allowing the non-payment. If the former Wife had not started the contempt process, the period of non-payment could have continued on indefinitely.

From this precedential case cite, a reasonable person could logically reason that if the trial court judge had correctly applied their discretion to permit the non-payment of child support arrearages in view of the fact that those type of arrearages are held to a stricter standard for collection requirements, then it would logically follow that an arrearage of alimony with a less stricter standard of collection requirements could be treated in an identical manner and non-payment also be permitted.

Even though alimony arrearages is a vested right, it is clear and evident that the trial court has the jurisdiction and discretion to eliminate payment of any alimony arrearages for an unspecified period and demonstrates a permissible option to effectively abrogate and terminate said payments in its rulings.

“A decree for support is different than a judgment for money or property

[emphasis added] : It is a continuing obligation based on the moral as well as legal duty of a parent to support his or her children.” Sackler, 47 So.2d at 294 (quoting Rule v. Rule, 313 Ill. App. 108, 39 N.E.2d 379 (1942)). In this case cite, we can further reason that an alimony money judgment holds a subservient priority for collection requirements than that of a child- support obligation and shows additional evidence that there is no obstruction to a trial court ruling that non-payment of alimony arrearages is a viable option that is permitted within its discretion.

In the instant case, we have seen where the alimony arrearages have been reduced to a money judgment per the Order Adjudicating Former Husband in Contempt and Containing Judgment (DE 308) on page 4, ¶ 5. where it 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.

In the last order of this court, entered January 24, 2006, paragraph 4 (DE 324), it stated: “Jurisdiction of this cause and of the parties is hereby retained for the purpose of entering such further orders as the court may deem necessary.” In that the court has stated that it has jurisdiction in the instant case, it can therefore make modifications as required and can make a ruling whereby the former Husband be not required to make any payments towards arrearages.

“All matters relating to alimony are interrelated, and court should be empowered to revisit entire support plan if it is asked to clarify or reconsider part of it.” *Shiveley v. Shiveley*, App. 1 Dist., 635 So.2d 1021 (1994)

In exercising its broad discretion concerning whether to award lump sum or permanent periodic alimony, *trial court was required to consider all circumstances in order to insure equity and justice between the parties.* [Emphasis added] *Price v. Price*, App. 3 Dist., 389 So.2d 666 (1980). Equity and justice now demands that the harsh burden of alimony arrearages obligations be eliminated from former Husband by this court.

Conclusion

"The law is not static. It must keep pace with changes in our society, for the doctrine of stare decisis is not an iron mold which can never be changed." Atkins in *Gates v. Foley*, 247 So.2d 40 (Fla. 1971)

Case law precedent is sufficiently conclusive to grant this court authority to either vacate the arrearages or to permanently relieve former Husband from the further requirement of having to make any further alimony arrearage payments. All that is needed now is for this court to exercise one of these options.

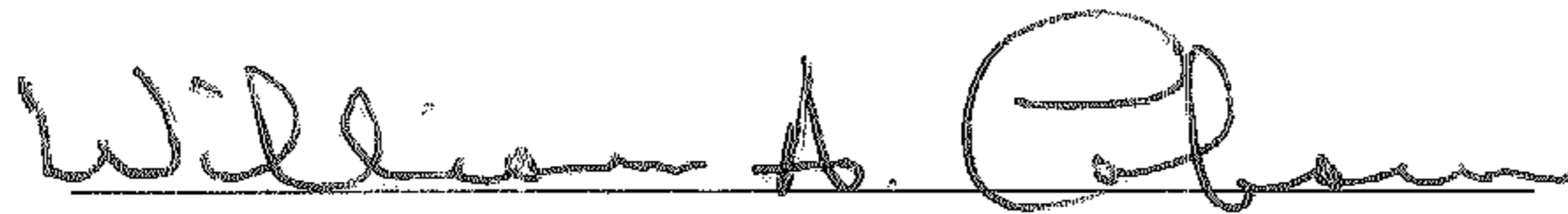
Prayer for Relief

WHEREFORE, based on the above stated laws, former Husband respectfully requests this court to:

1. Abrogate all alimony arrearages ab initio to the original order initiating them thereby vacating said order, or;
2. In the alternative to remove the requirement to make any further future payments, subsequent to the last payment made to former Wife in July, 2006 by former Husband, and;

3. Awarding former Husband costs and fees in accordance with § 61.16 (1), Fla. Stat. (2005)
4. For such and other relief that may be proper.

Respectfully submitted,



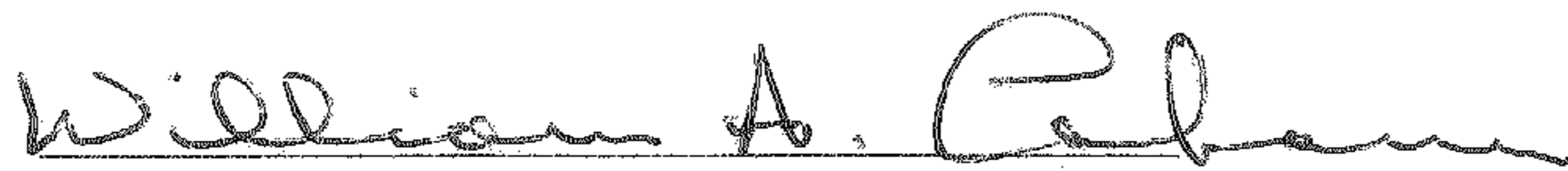
Dated: October 6, 2008

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Certificate of Service

I hereby certify that on this 6th day of October 2008, I caused a true and accurate copy of this Memorandum Of Law In Support Of Former Husband's Motion To Vacate Alimony Arrearages to be sent by U.S. mail to:

Sharon Ann Mayo
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