

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.

---

FORMER HUSBAND'S 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 the Order Adjudicating Former Husband in Contempt and to suspend the alimony arrearage purge payments pending outcome of appeal to the 4<sup>th</sup> District Court of Appeals in Case Number 4D09-10.

1. On December 18, 2008, this court filed an order Adjudicating Former Husband in Contempt. (D.E. 449)
2. On December 29, 2008, Former Husband filed a Notice of Appeal (D.E. 470) appealing this trial court's order on the basis of the lack of a factual finding by the court of an ability to purge pursuant to Bowen v. Bowen, 471 So.2d 1274 (Fla. 1985), and of the magistrate not acting in a neutral adjudicator capacity, inter alia.
3. The 4<sup>th</sup> DCA has accepted the Petitioner's appellate filing for review under Case Number 4D09-10.
4. Incarceration and irreparable harm is likely to befall the Former Husband unless a stay of proceedings in this court is granted.

5. Former Husband is current with the court ordered alimony arrearage purge payments. He borrowed funds to do so. Having to continue paying the \$255.00 per month purge amount to avoid incarceration is causing Former Husband a severe financial hardship. He may not be able to continue to borrow monies to retain his liberty.
6. To make these purge payments, he is forced to borrow from his 92-year-old invalid Mother who can ill afford to make these loans. Making these loans is imposing a hardship on her and she cannot continue to do so.
7. Former Husband's Mother's limited financial resources have been depleted due to the present economic crisis and she needs to preserve them for her personal living and medical expenses.
8. Former Husband's financial indigent status has been verified by the court on several occasions and should be taken into consideration of his ability to make the purge payments:
  - a. At the contempt hearing on Oct. 1, 2008, neither Former Wife, the magistrate, nor the Honorable Elizabeth T. Maass presented any material misrepresentations or challenged the validity of the Former Husband's financial affidavit that indicated his indigent status.
  - b. On October 26, 2006, this court ratified (D.E. 406) Magistrate Hanser's report (D.E. 398) on his findings of Former Husband's indigent status and inability to pay a purge, which was determined at a hearing on Former Wife's Motion for Contempt.
  - c. The 12<sup>th</sup> Circuit Court declared Former Husband indigent on January 11, 2007 when it allowed him to Proceed Without Prepayment of 2DCA Fees for an appeal. (D.E. 442)



- d. This court has made findings that Former Husband was indigent on May 16, 2006 and again on January 20, 2009 when it allowed him to Proceed Without Prepayment of 4DCA Fees for his appeals. (D.E. 379 & D.E. 487)
  - e. The Clerk of the 15th Circuit Court has made a determination of Former Husband's indigency for the purpose of his appeal to the 4DCA appeal, case no. 4D09-10. (D.E. 485)
9. The Former Wife will not be prejudiced by a stay in proceedings.
  10. There is a likelihood the Petitioner will prevail on the merits.

WHEREFORE the Petitioner prays this court grant a stay in proceedings and suspend contempt purge payments until a ruling in 4<sup>th</sup> DCA Case Number 4D09-10 is rendered.

Respectfully submitted,

Dated January 30, 2009

---

William A. Cabana, pro se  
1050 Capri Isles Blvd., Apt F-105  
Venice, FL 34292  
Telephone/Fax: 941-480-1395  
Email: [bcabana2@comcast.net](mailto:bcabana2@comcast.net)

#### Memorandum of Law

Former Husband's appeal of this court's denial of his Exceptions to Magistrate's Report (D.E. 450) and issuing an Order Adjudicating Former Husband in Contempt (D.E. 449) are the basis of his appeal to the 4<sup>th</sup> District Court of Appeals.

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 Former Husband if stay is not granted. There is the possibility that despite his proven inability to pay arrearages and difficulty in borrowing money from his Mother, the trial court may find him in contempt as well as issue a commitment order if he is unable to make future monthly purge payments.

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), Supra

“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**

The Magistrate’s findings Are Not Supported By Competent Substantial Evidence.

Former Wife presented no evidence of Former Husband’s ability to pay as required. The Magistrate found no material misrepresentation in Former Husband’s financial affidavit or assets from which he had a present ability to pay a purge pursuant to Bowen v. Bowen, 471 So. 2d 1274, 1278-79.

The case of Pierce v. Pierce, 2D 08-356 (Fla.App. 2 Dist. 1-16-2009) stated that:



“However, we must reverse as to that portion of the order imposing incarceration upon Mr. Pierce; the trial court failed to make a separate affirmative finding that Mr. Pierce had the present ability to pay \$25,000 to purge himself of the contempt. See Fla. Fam. L. R. P. 12.615(e);[fn1] Bowen v. Bowen, 471 So. 2d 1274, 1278-79 (Fla. 1985) (holding that the trial court may not incarcerate a civil contemnor without an affirmative finding that he has the ability to pay the purge amount).”

In the case of Garcia v. Garcia, 743 So.2d 1225, 1226 (Fla.App. 4 Dist. 1999) it says:

“Where a general master has been appointed for fact-finding and to recommend disposition of pending issues, *the trial court is bound by the general master's factual findings unless they are not supported by competent substantial evidence or are clearly erroneous.* [Emphasis added] See Zdravkovic v. Zdravkovic, 684 So.2d 822, 822 (Fla. 4th DCA 1996); Dent v. Dent, 438 So.2d 903, 904 (Fla. 4th DCA 1983). The trial court should approve the master's factual findings and recommendations unless the master has "misconceived the legal effect of the evidence." Fodor v. Fodor, 379 So.2d 466, 468 (Fla. 4th DCA 1980) (citation omitted).” See also Pierce v. Pierce, 2D 08-356 (Fla.App. 2 Dist. 1-16-2009); Robinson v. Robinson, 928 So.2d 360 (Fla.App. 3 Dist. 2006).

The magistrate abused her discretion and ignored the facts of Former Husband’s indigent status and inability to pay with her recommendation for contempt and incarceration. His indigent status is firmly established and evidenced in the court record.

Bresch v. Henderson, 761 So. 2d 449, (Fla. 2nd DCA 2000) states that:

"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)

The magistrate abused her discretion by suggesting that Former Husband find



employment to pay arrearages and ignoring the fact that he is 71 years old, legally retired and that Former Wife, who, having assets estimated to be worth approx. \$1,000,000 and is in no peril of poverty as a result of his not working, goes against the case law established in Pimm v. Pimm, 601 So.2d 534 (Fla. 1992).

In the case of Leonard v. Leonard, 971 So.2d 263 (Fla.App. 1 Dist. 2008), it addresses the fact that a Former Husband should not have to be required to re-enter the labor market and is able to choose voluntary retirement as long as his choice does not place the spouse in peril of poverty when it says:

“Given Mr. Leonard's retirement from JEA and his age, the court should have considered whether, and to what extent, he should be required to reenter the labor market. See Pimm v. Pimm, 601 So.2d 534, 537 (Fla. 1992) (“In determining whether a voluntary retirement is reasonable, the court must consider the payor's age, health, and motivation for retirement, as well as the type of work the payor performs and the age at which others engaged in that line of work normally retire. The age of sixty-five years has become the traditional and presumptive age of retirement for American workers. . . . Based upon this widespread acceptance of sixty-five as the normal retirement age, we find that one would have a significant burden to show that a voluntary retirement before the age of sixty-five is reasonable. *Even at the age of sixty-five or later, a payor spouse should not be permitted to unilaterally choose voluntary retirement if this choice places the receiving spouse in peril of poverty.*” [Emphasis added]); accord Zeballos v. Zeballos, 951 So.2d 972, 973-74 (Fla. 4th DCA 2007) (finding that order reducing, rather than terminating, husband's alimony obligation was abuse of discretion where husband at age 65 wanted to retire and wife's expenses were all paid by her fiance)”.

The magistrate abused her discretion when she acted as an advocate for Former Wife and not as a neutral adjudicator.

When a magistrate abuses her discretion and ignores or distorts the facts favorable to the Former Husband while at the same time accentuating facts in favor of the Former Wife, she thereupon transfers the burden of proof from the Former Wife to herself thereby becoming an advocate for the Former Wife.

The record shows the magistrate abused her discretion by the fact of her introducing new evidence sua sponte, de novo and not simply clarifying existing evidence, thereby assuming the role of an advocate for the Former Wife and not a neutral adjudicator in the proceeding.

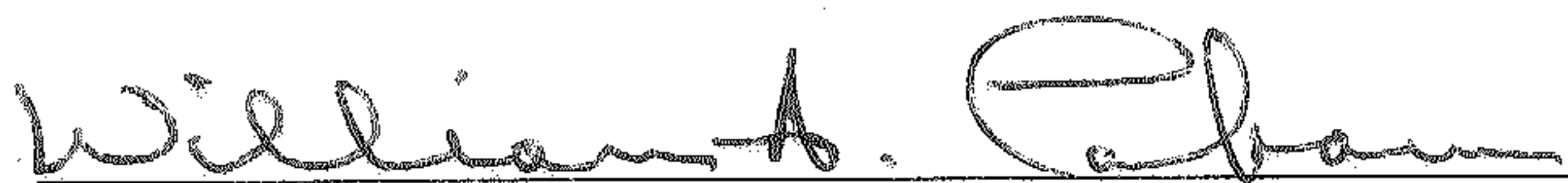
**Conclusion**

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 4<sup>th</sup> 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 and suspend contempt purge payments until a ruling in 4<sup>th</sup> DCA Case Number 4D09-10 is rendered.

Respectfully submitted,



Dated January 29, 2009

William A. Cabana, pro se  
1050 Capri Isles Blvd., Apt F-105  
Venice, FL 34292  
Telephone/Fax: 941-480-1395  
Email: [bcabana2@comcast.net](mailto:bcabana2@comcast.net)

**Certificate of Service**

I certify that a true and accurate copy of this Motion to Stay Proceedings was mailed to Sharon Ann Mayo, 220 Almeria Ave., West Palm Beach, FL 33405 this 29th day of January 2009.



William A. Cabana, pro se  
1050 Capri Isles Blvd., Apt F-105  
Venice, FL 34292  
Telephone/Fax: 941-480-1395  
Email: [bcabana2@comcast.net](mailto:bcabana2@comcast.net)