

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

FAMILY DIVISION

William A. Cabana,
Petitioner/Former Husband,

and

CASE NO. CD 1971 DR 4137 FD

Sharon Ann Cabana, k/n/a Sharon Mayo,
Respondent/Former Wife.

REPORT ON PENDING MOTIONS

DATE OF ORDER TO BE ENFORCED: Final Judgment, July 28, 1972; Order Granting Supplemental Petition for Modification of Alimony, January 24, 2006; Order Adjudicating Former Husband in Contempt, December 18, 2008

DATE OF HEARING: The parties appeared at a Commitment hearing on **February 3, 2009**. At that time, the parties agreed to address the Former Wife's Motion for Protective Order, filed January 8, 2009. The Former Wife argued in support of her motion. The Court, as noted in the February 9, 2009, Report on Commitment and Motion Hearing, raised the issue of whether it had jurisdiction to consider the Former Husband's petition for modification of alimony which requests that the Former Wife be ordered to pay alimony to him. At the Former Husband's request, a ruling was deferred pending receipt of a memorandum of law from the Former Husband. regarding the issue. The Former Husband's Memorandum was received February 23, 2009. In the cover letter accompanying the memorandum, he requested that the Court consider the memorandum and make a recommendation on "whether or not you feel I have a valid basis for modification. In other words, if you don't feel that I am justified in asking for a modification, you can recommend a denial of my petition for modification."

The Former Husband also requested in his letter that the Court review and rule on his Motion to Vacate Alimony Arrearage (d.e. 431). The Former Husband asked that the matter be "disposed of without a hearing."

The Magistrate finds no further hearing is necessary and this recommendation is based on the February 3, 2009, Commitment/Motion hearing, as well as review of the Court file and the Former Husband's Memorandum of law received February 23, 2009.

ISSUES:

(1) Former Wife's Motion for Protective Order which asks the Court to Order that she not be

required to produce her financial records. The Former Husband filed a Notice in Response which represents that he will not disclose any of the Former Wife's financial information on the internet. However, the underlying issue is whether the Former Husband has a right to mandatory disclosure at all. There is no ongoing alimony awarded to the Former Wife; the alimony was terminated in 2006 and the current litigation concerns payment of the arrearage. It must be determined whether the court has jurisdiction to entertain the Former Husband's Petition for Modification of Alimony, which seeks an award from the Former Wife to himself. If not, then there is no pending proceeding in which discovery of the Former Wife's financial information would be permitted.

(2) Former Husband's Motion to Vacate Alimony Arrearage (d.e. 431)

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Final Judgment of Dissolution of Marriage was entered July 28, 1972. The Court required that the Former Husband pay \$25.00 a week in alimony to the Former Wife. The alimony award was terminated in 2006, when the Court ruled the Former Wife earned sufficient income from her employment to meet her reasonable needs. The only alimony currently being enforced is the arrearage that accrued prior to the termination of alimony.

The Former Husband alleges the parties' fortunes have reversed, and this entitles him to seek an alimony award thirty-six years after entry of the Final Judgment, on the theory that by retaining jurisdiction of the case, the Court has authority to entertain his petition. Section 61.14 *Florida Statutes*, authorizes the Court to enforce and modify a judgment for alimony at any time during the period provided for support. *Kelsey v. Kelsey*, 636 So. 2d 77 (Fla. 4th DCA 1994)(en banc). However, it does not provide authority to impose an alimony requirement on a former spouse who was an alimony recipient and of whom alimony was not required in the final judgment. In *James v. James*, 374 So. 2d 1085 (Fla. 5th DCA 1979), it was held that an order awarding alimony could not stand when it was not raised by the pleadings or tried by consent of the parties. There was no request before the Court in the 1972 dissolution proceeding for an alimony award to the Former Husband and the Final Judgment's alimony award was to the Former Wife. When a trial court has jurisdiction to adjudicate the respective rights and obligations of the parties, a final judgment of dissolution settles all such matters as between the spouses evolving during the marriage, whether or not these matters were introduced in the dissolution proceeding, and acts as a bar to any action thereafter to determine such rights and obligations. *Davis v. Dieujuste*, 496 So. 2d 806, 809-810 (Fla. 1986). For example, in *Rice v. Corry*, 854 So. 2d 772 (Fla. 2d DCA 2003), the Court held, citing to *Davis v. Dieujuste*, in an action for partition of real property owned by former spouses, the former husband's failure to claim a special equity during the dissolution proceedings barred him from raising the claim in the partition proceeding. Therefore, the Former Husband's Petition for Modification of Alimony Requesting Support (d.e. 432) is procedurally barred and must be dismissed. The Former Wife need not provide her financial information; there is no basis upon which the Former Husband would be entitled to disclosure.

The Former Husband's Motion to Vacate Alimony Arrearage is barred by the doctrine of law of the case. The District Court of Appeal of Florida, Fourth District, specifically held in a prior appeal involving these parties that "even if Section 61.08 violated the right to privacy, it would not relieve appellant of his liability for his alimony arrearages, because they have become vested." *Cabana v. Mayo*, 953 So. 2d 587 (Fla 4th DCA 2007), *review denied*, 969 So. 2d 1011 (Fla. 2007). The Court has considered the Former Husband's financial circumstances and ordered a payment toward the arrearage of \$250.00 a month, which is within his ability to pay.

RECOMMENDATIONS:

The Former Husband's Supplemental Petition for Modification of Alimony Requesting Support for Former Husband is denied as it is procedurally barred and the Court does not have jurisdiction to entertain it. The Former Husband therefore has no right to discovery of the Former Wife's financial information and her motion for a protective order is granted.

The Former Husband's Motion to Vacate Alimony Arrearage is denied as the arrearage is vested and the payments ordered are within the Former Husband's ability to pay as determined by the Court in its Order Adjudicating Former Husband in Contempt entered December 18, 2008.

DATED: February 26, 2009

Joy B. Shearer
JOY B. SHEARER
MAGISTRATE

Copies to:

Sharon Ann Mayo, 220 Almeria Road, West Palm Beach, Fl. 33405

William A. Cabana, 1050 Capri Isles Blvd., #F105, Venice, Fl. 34292

TAPE NO. JBS 1:32, 6F, 2/3/09

SHOULD YOU WISH TO SEEK REVIEW OF THE REPORT AND RECOMMENDATION MADE BY THE MAGISTRATE, YOU MUST FILE EXCEPTIONS IN ACCORDANCE WITH RULE 12.490 (F), FLA. FAM. L.R.P. YOUR EXCEPTIONS MUST BE FILED WITHIN TEN (10) DAYS OF THE ABOVE DATE AND SERVE A COPY ON THE OPPOSING PARTY AND THE MAGISTRATE. YOU WILL BE REQUIRED TO PROVIDE THE COURT WITH A RECORD SUFFICIENT TO SUPPORT YOUR EXCEPTIONS OR YOUR EXCEPTIONS WILL BE DENIED. THE PERSON SEEKING REVIEW MUST HAVE THE TRANSCRIPT PREPARED IF NECESSARY FOR THE COURT'S REVIEW. ELECTRONIC RECORDING IS PROVIDED IN THIS CIRCUIT AND A COPY OF THE TAPE OF YOUR HEARING CAN BE OBTAINED THROUGH THE OFFICE OF COURT ADMINISTRATION (355-3745).