

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, P.O. BOX 3315, WEST PALM BEACH, FL 33420

December 6, 2005

CASE NO.: 4D05-3906

L.T. No.: 501971DR004137XXDIF

WILLIAM A. CABANA

V.

SHARON ANN MAYO F/K/A

SHARON ANN CABANA

Appellant/ Petitioner,

Appellee/ Respondent

JURISDICTIONAL BRIEF

Comes now the Appellant, *pro se*, to respond to this court's notice to show cause to dismiss as this court expressed concern it lacked jurisdiction.

The Appellant avers this court has jurisdiction to review this appeal of a declaratory judgment motion in the trial court because it is statutorily a final judgment which is appealable (§86.001 Fla. Stat. with Art. V § 4 (b)(1) Fla. Const.), Florida Rules of Appellate Procedure Rule 9.030 (b)(1)(A) final order of trial court, and as an interlocutory appeal pursuant to Florida Rules of Appellate Procedure Rule 9.130 (a)(3)(C)(iii).

Declaratory Judgment Order is a Final Order Appealable

The order appealed is a trial court order on a motion for declaratory judgment pursuant to Chapter 86 Fla. Stat. Statutorily a declaration is to have the

force and effect of a final judgment (§ 86.001 Fla. Stat.). This court has jurisdiction to review final judgments of circuit courts pursuant to Florida Rules of Appellate Procedure Rule 9.030 (b)(1)(A).

§ 86.001 86 Fla. Stat.

86.011 Jurisdiction of trial court.--The circuit and county courts have jurisdiction within their respective jurisdictional amounts to declare rights, status, and other equitable or legal relations whether or not further relief is or could be claimed. No action or procedure is open to objection on the ground that a declaratory judgment is demanded. The court's declaration may be either affirmative or negative in form and effect and such declaration has the force and effect of a final judgment. The court may render declaratory judgments on the existence, or nonexistence:

- (1) Of any immunity, power, privilege, or right; or
- (2) Of any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists or will arise in the future. Any person seeking a declaratory judgment may also demand additional, alternative, coercive, subsequent, or supplemental relief in the same action.

History.--s. 1, ch. 21820, 1943; s. 2, ch. 29737, 1955; s. 38, ch. 67-254; s. 3, ch. 90-269.

Note.--Former s. 87.01.

§ 86.011 specifically classifies any circuit or county court ruling as having the “force and effect of a final judgment.”

This court has jurisdiction to review final judgments of circuit courts pursuant to Florida Rules of Appellate Procedure Rule 9.030 (b)(1)(A) and Art. V § 4 (b)(1) Fla. Const.,

(b) JURISDICTION.--

(1) District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the supreme court or a circuit court. They may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court.

§ 86.001 86 (2) Fla. Stat.

In addition to § 86.001, the words of § 86.001 (2) Fla. Stat. also implicate a right of appeal. Appeal may be considered additional subsequent relief beyond a trial court declaration.

86.011 Jurisdiction of trial court...

(2) Of any fact upon which the existence or nonexistence of such immunity, power, privilege, or right does or may depend, whether such immunity, power, privilege, or right now exists or will arise in the future. Any person seeking a declaratory judgment may also demand additional, alternative, coercive, subsequent, or supplemental relief in the same action.

Caselaw

The declaratory judgment statute is to be liberally construed, § 86, 101, Olive v. Maas, 811 So. 2d 644, 648 (Fla. 2002) and Higgins v State Farm, 894 So. 2d 5, (Fla. 2004).

This court is familiar with its own liberal reading of the declaratory judgment statute when it ruled in State Farm Fire & Cas. Co. v. Higgins, 788 So.

2d (Fla. Dist. Ct. App. 4th Dist., 2001) as well as the Florida Supreme Court affirmation ruling in Higgins 892 So.2d.

The same logic this court and the Florida Supreme Court used in Higgins 892 So.2d to find an insurance company was entitled to a declaratory judgment prior to further proceedings should be applied here also. Should this court rule that §61.08 does indeed impermissibly infringe Art. I § 23 Fla. Const. Right of Privacy and/or Art. III § 3 Fla. Const. Separation of Powers the parties will be spared needless further litigation.

Interlocutory Appeal

This court also has jurisdiction to review the declaratory judgment order entered by the trial court prior to completion of the modification proceedings and accompanying order pursuant to Florida Rules of Appellate Procedure Rule 9.130 (a)(3)(C)(iii). “Item (C)(iii) is intended to apply to such matters as temporary child custody or support, alimony, suit money, and attorneys’ fees.”

Grant of Appeal is Compatible with Rule 9.130

This constitutional statutory challenge appeal is entirely compatible with the purposes of Rule 9.130 and this court should exercise its jurisdiction under the rule. Thomas v. Silvers, 748 So. 2d 263, 264 , (Fla 1999),

“In considering this issue, we remain vigilant in guarding the policy underlying rule 9.130 restricting piecemeal review of nonfinal orders because allowing such a review, in most cases, only serves to waste

court resources and needlessly delay final judgment. See *Travelers Ins. Co. v. Bruns*, 443 So. 2d 959, 960 (Fla. 1984).”

A ruling by this court that the alimony statute impermissibly infringe the Florida Constitutional Right of Privacy or Separation of Powers will resolve the dispute between the parties and result in the type of finality, conservation of judicial and citizen resources that is a paramount goal of the judicial role.

Irreparable Harm to the Appellant

On the other hand, a review of this declaratory judgment at a later time may impose an undue burden on the Appellant and place his at risk of incarceration by the trial court.

The Appellant has requested the trial court stay its proceedings until this court rules on the constitutionality of the alimony statutes. The trial court has denied the motion to stay. (Trial court Order Denying Stay attached)

Prayer for Relief

WHEREFORE, Appellant, *pro se*, prays this court exercise the jurisdiction granted it in Art. V § 4 (b)(1) Fla. Const in conjunction with § 86.001 Fla. Stat., Florida Rules of Appellate Procedure Rule 9.030 (b)(1)(A) and 9.130 (a)(3)(C)(iii).

Respectfully submitted,

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December 6, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 2005, I caused a true and accurate copy of this Jurisdictional Brief to be sent by U.S. mail to:

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Nov. 28, 2005

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

IN RE: THE MARRIAGE OF

CASE NO: 501971DR004137XXDIFD

WILLIAM A. CABANA,
Petitioner/Former Husband,

FAMILY DIVISION

and

SHARON ANN MAYO f/k/a
SHARON ANN CABANA
Respondent/Former Wife.

ORDER DENYING FORMER HUSBAND'S MOTION TO STAY PROCEEDINGS

THIS CAUSE came before the Court upon Former Husband's Motion to Stay Proceedings. The Court, having considered the Motion to Stay Proceedings, argument and being otherwise fully advised in the premises,

ORDERS AND ADJUDGES as follows:

1. The Former Husband's Motion to Stay Proceedings is hereby denied. The Court finds that Former Husband has very little likelihood of success on the merits of his appeal challenging the constitutionality of the alimony provisions of Chapter 61. Since the Court has not ruled on the Motion for Contempt, a stay of the proceedings would be premature.
2. The Court retains jurisdiction to enter such other and further orders as may be proper.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this _____ day of November, 2005.

CIRCUIT COURT JUDGE
JUDGE MARTIN H. COLIN

SIGNED & DATED
NOV 28 2005

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Order Denying Former Husband's Motion to Stay Proceedings

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