

Appeal Case Number 2D06-5577

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IN THE SECOND DISTRICT COURT OF APPEALS OF FLORIDA

WILLIAM A. CABANA  
Appellant, *pro se*

v.

JAMES ZINGALE, EXECUTIVE  
DIRECTOR, FLORIDA  
DEPARTMENT OF REVENUE  
(In his official capacity)  
Appellee

Twelfth Judicial Circuit Court of Florida

Case Number 06-CA-5063-SC

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APPELLANT'S INITIAL BRIEF

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## Preface

The Appellant, William A. Cabana, will be referred to as the Appellant or Former Husband. The Appellee, James Zingale, will be referred to as Appellee or Director Zingale.

The Record will be referred to as R and the Circuit Court Document Name.

## Reservation of Federal Claims

The Appellant requests this court to consider federal law in adjudicating his state law claims. *England v Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964)

The Appellant plans to return to federal court to adjudicate federal constitutional challenge claims in the event this court rules adversely on his state claims.

The Appellant does not have federal court available to him at this time to adjudicate these state constitutional claims.

## Statement of the Case and of the Facts

The Appellant, after an eleven-year marriage, was divorced in 1972 and ordered to pay \$25 a week alimony—forever—without any terms of cessation. Thirty-four years later, with the alimony yoke around his neck, he

is still subject to Florida court jurisdiction. (R. Action For Declaratory Judgment and Injunctive Relief filed June 2, 2006)

In this action he requested a declaratory judgment as to whether a state constitutional amendment (Art. I § 23, Fla. Const.) that was enacted, and case law involving interpretation of another state constitutional amendment (Art. II 3, Fla. Const.) had subsequently invalidated the alimony statute (§ 61.08 Fla. Stat.)

The Appellant has an income below the recognized poverty level, owns no real property and minimal modest personal property. He lives on his social security income.

At the time of the Appellant's dissolution, 1972, *Canakaris v. Canakaris*, 383 So.2d 1197 (Fla.1980) was not the controlling case law on alimony; Art. I, § 23, Fla. Const. Right to Privacy had not been passed (1980); the controlling law on Florida's Right to Privacy had not been effected, (*In re T.W., A Minor*, 551 So.2d 1186 (Fla.1989) and *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So.2d 612, 635 (Fla. 2003)); divorce had not yet been formally judicially recognized as within the privacy protected zone of the Right to Privacy *Littlejohn v. Rose*, 768 F.2d 765, 768 (6<sup>th</sup> Cir. 1985)); and the doctrine of necessities had not been

abrogated by *Connor v. Southwest Florida Regional Medical Center, Inc.*, 668 So.2d 175 (Fla. 1995).

If marriage is a contract then the law as it existed at the time of the marriage should control.

If current law controls the issue relating to alimony then all of the current law should be applied, Art. I, § 23, Fla. Const., Right to Privacy, Art. II, § 3, Fla. Const., Separation of Powers, *North Florida Women's Health* 866 So.2d, *Connor* 668 So.2d, *Littlejohn* 767 F.2d and the plethora of federal and state cases on the Right of Privacy as well as the Separation of Powers.

### **Issues Presented**

- I. Whether the “Dissolution of Marriage” statute alimony provision (§ 61.08, Fla. Stat.) impermissibly infringes Art. I, § 23, Fla. Const., Right to Privacy?
- II. Whether the “Dissolution of Marriage” statute alimony provision (§ 61.08, Fla. Stat.) impermissibly infringes Art. II, § 3, Fla. Const., Separation of Powers?
- III. Whether the “Dissolution of Marriage” statute alimony provision (§ 61.08, Fla. Stat.) impermissibly infringes the ruling

and public policy established in *Connor v. Southwest*, 668 So.2d 175 (Fla. 1995)?

IV. Whether dismissal with prejudice of this Chapter 86 Fla. Stat. action is an error, i.e. an abuse of discretion, as contrary to § 86.101 Fla. Stat. and *Olive v. Maas*, 811 So. 2d 644 (Fla. 2002)?

### Jurisdiction

This court has jurisdiction to review this case pursuant to Art. V, § 4 (b) (1), Fla. Const.

### Standard of Review

The standard of review for issues of law in a declaratory judgment order is *de novo*. See *Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126 (Fla. 2000).

Chapter 86, Fla. Stat. Declaratory Judgment is to be liberally construed. See § 86.01 Fla. Stat. and *Olive v. Maas*, 811 So. 2d 644 (Fla. 2002).

### Summary of Argument

“The Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses.” *Planned*

*Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847 (1992)

Divorce is entitled to the protections of Art. I, § 23, Fla. Const. Right of Privacy. Any statute written within that privacy protected zone of Dissolution of Marriage, i.e. the alimony provision § 61.08, Fla. Stat., is presumptively unconstitutional unless the state proves a compelling state interest minimally applied to validate the statute. *Littlejohn v. Rose*, 786 F.2d 785, 786 (6<sup>th</sup> Cir. 1985); *Carey v. Population Serv. Int'l.*, 431 U.S. 678, 684-685 (1977); *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So.2d 612, 635 (Fla. 2003). There is no compelling state interest to validate the alimony statute.

Art. II, § 3, Fla. Const., Separation of Powers, prohibits the legislature from delegating its exclusive law making powers via unbridled discretion to the judiciary as it does in § 61.08 (2), Fla. Stat. inter alia. The amendment also prohibits the legislature delegating authority to another branch of government which it itself does not have, i.e. the dissolution of marriage statute violates Art. I, § 23, Fla. Const. Right to Privacy and cannot be the subject of legislation in its current form.. *Bush v. Schiavo*, 885 So.2d 321, (Fla. 2004) (legislature cannot delegate authority it does not have).

*Connor* at 668 So.2d abrogated the doctrine of necessities making parties in a marriage economic independents. § 61.08, Fla. Stat. cannot

convert their economic independence to economic dependence because they exercise their liberty interest to alter their associational status, i.e. dissolve their marriage.

Chapter 86, Fla. Stat. is to be liberally construed. A motion to dismiss is not a substitute for a motion on summary judgment. Dismissal with prejudice without a reasoned opinion is an abuse of discretion.

### Argument

“it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage...” *Carey v. Population Serv. Int’l.*, 431 U.S. 678, 684-685 (1977)

**I. Whether the “Dissolution of Marriage” statute alimony provision (§ 61.08, Fla. Stat.) impermissibly infringes Art. I, § 23, Fla. Const., Right to Privacy?**

The Alimony Statute Impermissibly Infringes  
Art. I, § 23, Fla. Const., Right of Privacy

**A. The Alimony Statute is Within the Zone of the Right of Privacy**

There is no common law right to alimony. *Pacheco v. Pacheco*, 246 So.2d 778 (Fla. 1971). Alimony is merely a statute, part of Chapter 61 Fla. Stat.. See also *Cornelius v. Cornelius*, 382 So.2d 710 (Fla. 1st DCA 1979). Quite simply, as a statute, it must conform to the constraints set forth in the Florida Constitution. This would not be the first time a provision of Chapter

61 was found to impermissibly infringe the Fla. Const. Right of Privacy.

See *Richardson v. Richardson*, 766 So.2d 1036 (Fla. 2000) (§ 61.13 (7), Fla. Stat. is facially unconstitutional as it violates Art. I, § 23, Fla. Const., Right of Privacy).

§ 61.08, Fla. Stat., alimony provisions is part of the Florida Statutes titled Chapter 61 "Dissolution of Marriage." As such it regulates the personal decision of Floridians to divorce, i.e. dissolve their Marriage. The alimony provisions are written within that privacy-protected zone of divorce.

See *LittleJohn v. Rose*, 768 F.2d 765, 768 (6<sup>th</sup> Cir. 1985) citing *Zablocki v. Redhail*, 434 US 374, 385 (1978) for the rule that divorce falls within the umbrella of the right of privacy,

"Decisions of the Supreme Court have firmly established that "matters relating to marriage [and] family relationships" involve privacy rights that are constitutionally protected against unwarranted governmental interference. E.g., *Roe v. Wade*, 410 U.S. 113, 152-53, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973). The 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 U.S. 374...

The Supreme Court has established broad protection for matters relating to the marital relationship including the availability of due process in seeking adjustments to the marital relationship. *Boddie v. Connecticut*, 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct.780 (1971). 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. See *Zablocki*, 434 U.S. at 385; *U.S. v. Kras*, 409 U.S. 434, 444, 34 L. Ed. 2d 626, 93 S. Ct. 631 (1975)."

Also see *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847 (1992),

"It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights... but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in *Loving v. Virginia*, 388 U.S. 1, 12 (1967)."

**B. Art I., § 23, Fla. Const., Right of Privacy**

Article I Section 23. Right of privacy.--Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

*N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So.2d 612, 635 (Fla. 2003) is controlling on the Right of Privacy. It states that a statute that infringes the fundamental right of privacy is presumptively unconstitutional unless the state proves a compelling state interest minimally applied and that the statute in fact furthers that interest.

*Winfield v. Division of Pari-Mutual Wagering*, 477 So2d 544,548

(Fla. 1985). ( See also *N. Fl. Women's Health* 866 So.2d, 620) describing the far-reaching impact of the Florida amendment:

“The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision, which declares the fundamental right to privacy. Article I, section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words ‘unreasonable’ or ‘unwarranted’ before the phrase ‘governmental intrusion’” in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right to privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.”

### **C. Standard of Analysis—Strict Scrutiny**

The Right of Privacy having attached to the alimony provision, § 61.08, Fla. Stat., it is presumptively unconstitutional, and requires strict scrutiny review.

*N. Fla.. Women's Health*, 866 So.2d, n16 reiterates the oft cited standard of analysis that must be applied when a challenge is raised that a statute infringes a fundamental right, here the Right of Privacy,

“Under ‘strict’ scrutiny, which applies inter alia to certain classifications and fundamental rights, a court must review the legislation to ensure that it furthers a compelling State interest through the least intrusive means. The legislation is

presumptively unconstitutional. The standard of proof is as follows: the State must prove that the legislation furthers a compelling State interest through the least intrusive means. See generally *In re T.W.*, 551 So. 2d 1186, 1193 (Fla. 1989).”

*Florida High School Activities Ass'n. v. Thomas*, 434 So.2d 306, 308

(Fla. 1983) (stating that the strict scrutiny is a "harsh standard [which] imposes a heavy burden of justification upon the state")

*N. Fla. Women's Health*, 866 So.2d, 647 and n75 says,

“Moreover, under strict scrutiny review, the State cannot meet its heavy burden *simply by stating* that the interests are compelling without *proof* from the State that the compelling interests are *in fact furthered by the statutory intrusion* into the protected fundamental rights, and that the statutory intrusion is the least intrusive means to achieve that goal.” [Emphasis added]

“n75 . Although case law from this Court applying the strict scrutiny standard articulates the first prong of the strict scrutiny review as a single inquiry, see, e.g., *T.W.*, 551 So. 2d at 1193; *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998), in reality the first prong involves two interrelated inquiries: (a) whether the State has carried its "heavy" burden of establishing a compelling interest; and (b) whether the State has carried its "heavy" burden of establishing that the statutory scheme in fact serves or furthers that compelling state interest.”

And other quotes in *N. Fla. Women's Health* 866 So.2d, 647,

“We have found no cases in which this Court applied . . . a narrowing construction to a statute challenged solely on the basis that its clear provisions violate a substantive constitutional right. The likely reason for this result is that the constitutionality of the statute, depending on the substantive right involved, depends solely on whether the statute passes the . . . strict scrutiny test[. . .]. . . . Such a statute is unconstitutional

under any circumstance unless the State satisfies its burden of establishing a compelling state interest.” *Richardson v. Richardson*, 766 So. 2d 1036, 1041 (Fla. 2000)

“Just as our obligation to exercise restraint when reviewing statutes is paramount under rational basis review, our obligation to protect fundamental rights is paramount under strict scrutiny. Indeed, the United States Supreme Court has specifically held that ‘when we are reviewing statutes which deny some residents [a fundamental right], the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a ‘rational basis’ . . . are not applicable.’” *Kramer v. Union Free School District*, 395 U.S. 621, 627-28, 23 L. Ed. 2d 583, 89 S. Ct. 1886 (1969).

“The very basis of a strict scrutiny analysis is that this is the one level of review that cannot allow for deference. This Court is ‘bound’ to construe constitutional rights, which ‘operate[s] in favor of the individual, against government,’ so as to ‘achieve the primary goal of individual freedom and autonomy.’” *Traylor v. State*, 596 So. 2d 957, 963 (Fla. 1992)

#### **D. No Compelling State Interest**

*N. Fla. Women’s Health* 866 So.2d, 650,

“Thus, it is not sufficient for the State to merely offer important interests as justification for state interference with a protected fundamental right. The State must also establish that an actual and substantial connection exists between the statute and the interests advanced. See, e.g., *Shaktman*, 553 So. 2d at 152”

##### **1. Consistency in Legislation of the Interest**

Any interest offered by the state as “compelling” must demonstrate legislative consistency, must be minimally applied and must be proven to be furthered by the alimony statute.

An important judicial criterion for whether a state interest reaches the lofty threshold of compelling is consistency by the legislature in all legislation put forth that implicates that interest. *N. Fla. Women's Health* 866 So.2d, n76 and Lewis concurring,

“n79 I note that we have at least twice relied on legislative consistency in upholding statutes against claims of invasion of minors' privacy under strict scrutiny analysis. See *Jones v. State*, 640 So. 2d 1084, 1085 (Fla. 1994) *J.A.S. v. State*, 705 So. 2d 1381, 1386 (Fla. 1998)..... Thus, Justice Wells' concern that legislation will be unable to meet the "exacting test" of legislative consistency is belied by our own precedent..... Thus, the legislative justification for the privacy intrusion based upon the "uniqueness" of the abortion decision is undermined by the failure of the Legislature to consistently legislate in the area.”

“Lewis concurring;  
I am compelled to concur in the result attained today only upon application of the principle originally constructed by the majority in *In re T.W.*, 551 So. 2d 1186 (Fla. 1989), requiring legislative consistency as an essential element in the "compelling interest" constitutional analysis.”

If a compelling state interest exists it must encompass and be applicable to a statement cited in 3 DCA opinions, “*Similarly, a receiving spouse can squander alimony payments on gambling and liquor without these acts resulting in a downward modification [of alimony]*”. See *Phillippi v. Phillippi*, 148 Fla. 393, 4 So. 465 (1941); *Horner v. Horner*, 222 So. 2d 791 (Fla.2d DCA 1969) *Springstead v. Springstead*, 717 So. 2d 203, 204 (Fla. 5<sup>th</sup> DCA 1998). No conceivable state interest can exist, let alone a

compelling state interest to encompass the concept expressed by these three appellate courts.

2. Purposes of § 61.08, Fla. Stat., contained in § 61.001, Fla. Stat.

The courts lack the authority to add words to a statute or in the absence of an ambiguity to go beyond the plain meaning of the words.

*Richardson* 766 So.2d states,

“We are also wary of actually judicially amending the statute by adding language that the Legislature so clearly did not intend to use. If this Court were to construe the statute narrowly by inserting... we would in effect be rewriting the statute and changing it in a manner not intended by the Legislature. As we have previously explained, courts should refrain from reading elements into a statute that plainly lacks such additional elements. See *Schmitt*, 590 So. 2d at 414.”

Chapter 61 Fla. Stat. contains a specific provision of the purposes of Chapter 61 Fla. Stat. § 61.001, Fla. Stat. limits the scope of judicial inquiry as to the purposes of all of Chapter 61 Fla. Stat. In the “Dissolution of Marriage” statute the legislature, as in *N. Fla. Women’s Health* 866 So 2d did not label the state interest as important and compelling when it specifically crafted its purposes in § 61.001, Fla. Stat.

*N. Fla. Women’s Health* 866 So,2d, n76,

“n76 . The Legislature also identified the following purposes in enacting the parental notification statute, but did not label them as ‘important and compelling’ state interests:”

## E. The Abrogation of the Doctrine of Necessaries

“It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” O.W. Holmes. *The Path of the Law*. 10 *Harvard Law Review* 457 (1897)

The original rationale for the obligation of spousal support has long since passed. The obligation began in a time, and because of the principle of coverture.

“At common law, a woman’s legal identity merged with that of her husband; she could not own property, enter into contracts, or receive credit as an individual. This condition, known as coverture, created a need for the doctrine of necessaries because a married woman was dependent upon her husband for maintenance and support.” Abrogating the Doctrine of Necessaries in Florida: The Future of Spousal Liability for Necessary Expenses After Connor v. Southwest Regional Medical Center, Inc. Shawn M. Wilson. *Florida State Law Review* 24:1031. 1997 at 1032.

Coverture died with Art. X, § 5, Fla. Const., § 708, Fla. Stat. (Married Women’s Property), and *Merchant’s v. Cain*, 9 So. 2d 373, 375 (Fla. 1942).

Whatever remnants of the tattered economic partnership model that remained after the Florida Constitution and Florida Statutes gave women equal property rights with men were further frayed when the legislature was compelled to make the dissolution of marriage statute and alimony

provisions gender neutral as to not violate constitutional equal protection rights.

**F. The Search for a Compelling State Interest**

1. In the Law

After *Connor* 668 So.2d, and independent of *Connor* 668 So.2d, there is no legal doctrine supporting a compelling State interest for lifetime support of one spouse to another. The above noted legal origins of spousal support provide no legal basis, let alone a legal doctrine, for statutorily mandated lifetime spousal support after the dissolution of marriage.

Certainly the State cannot articulate a compelling reason to require permanent postdissolution spousal support, let alone set a standard of support to a former spouse to be at the level of *the lifestyle of the marriage* as held in *Canakaris v. Canakaris*, 383 So.2d 1197 (Fla.1980). There is no evidence in the opinion that the *Canakaris* 383 So.2d standard was anything but an arbitrary choice made to resolve the conflict of a multiplicity of standards established by district courts prior. There is no statement of public policy or expression why that standard was chosen over the others. More important, the ruling now violates the Privacy Amendment and conflicts with *Connor* 688 So.2d.

The Supreme Court in *Canakaris* 383 So.2d changed the standard it established only six years earlier in *Kennedy v. Kennedy*, 303 So.2d 629, 631 (Fla. 1974) when it interpreted the public policy of the State to be if a spouse had the capacity to *make her own way through the remainder of her life* without her spouse's assistance the courts could not require alimony other than for rehabilitative purposes. In six short years, in *Canakaris* 383 So.2d, the courts ratcheted up the standard to *the lifestyle of the marriage*. In light of the Privacy Amendment and *Connor* 688 So.2d it is not the place of the State, and especially the judicial branch, to determine and assume whether a former spouse *can make her own way through the remainder of her life*. Now with the subsequent passage of the Privacy Amendment and the *Connor* 668 So.2d opinion such rulings and the statutes upon which they are based do not muster to a compelling State interest. The rulings and the Statutes fail the compelling State interest test and are therefore unconstitutional.

All dissolution proceedings are to be in chancery with the mandate the doctrine of equity be applied. (See § 61.011, Fla. Stat., § 61.08 (2), Fla. Stat.) Equity is not a compelling State interest.

## 2. In Public Policy

What public policy rises to the level of a compelling state interest to permit the state to invade the privacy area of marriage during dissolution? Whatever the compelling interest, if it were compelling, all dissolution of marriages should be examined whether contested or uncontested to assure the policy was fostered. If there is a compelling state interest there should be no difference in how the courts treat parties of a marriage regardless of the length of the marriage. The compelling interest should be determinative as to permanent spousal support, not the length of the marriage, not whether the dissolution is contested, not the 2<sup>17</sup> factors in § 61.08, Fla. Stat., and the public policy interest should be called compelling and be contained in the purposes provision of the statute .

Any concern for "keeping the spouse off the public dole" undoubtedly originated at the time of coverture. Such thinking is not realistic today in light of state constitutional and legislative death rendered to coverture. The abrogation of the doctrine of necessities in *Connor* 668 So.2d. is further reason the state is prohibited from treating spouses in marriage, or after marriage any differently....or any differently than single citizens.

If indeed concern for spousal poverty is valid as a public policy, why then is it not applied uniformly to all marriages regardless of length? Also the logical extension of the reasoning approaches absurdity because the

