**IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA**
**Family Division**
**Case No. 501971 DR004137XXDIFD**

**In Re Marriage of**
**WILLIAM A. CABANA**
**Petitioner, Former Husband, pro se**

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SHARON R. BOCK
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FAMILY DIVISION

**and**

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

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**Memorandum of Law F.S. § 61.08 Impermissibly Infringes Florida Constitution Separation of Powers (Art. II Sec. 3)**

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## Memorandum of Law F.S. § 61.08 Impermissibly Infringes Florida Constitution Separation of Powers (Art. II Sec. 3)

Comes now the respondent, *pro se*, to file this memorandum of law in support of his motions that Fla. Stat § 61.08 alimony provisions impermissibly infringe the Florida Constitution Article II Section 3 Separation of Powers.

### A. Infringement of F.S. § 61.08 on Art. II Sec 3

Fla. Stat. § 61.08 improperly delegates authority to the judicial branch without proper restrictions. The improper delegation of unbridled authority is further compounded because the authority delegated takes place in the constitutionally protected zone of the right of privacy, namely the privacy protected right of citizens to exercise their personal decisions relating to their marriage, i.e. to dissolve it. Both legislative actions violate the Separation of Powers.

This memorandum discusses Art. II Section 3, the Fla. Stat. § 61.08 provisions which create the improper delegation of authority, case law on improper delegation of power, and finally delegation of power in an area prohibited by the Fl. Constitution.

## B. Separation of Powers Article II Section 3

The Florida Constitution Separation of Powers provision is a safeguard designed precisely to prevent the concentration of power in the hands of one branch. In re Advisory Opinion to the Governor, 276 So.2d 25 (Fla.1973).

Bush v. Schiavo, 885 So. 2d 321, (Fla. 2004) is the most recent culmination of Florida law related to Separation of Powers. Bush states,

> "The cornerstone of American democracy known as separation of powers recognizes three separate branches of government--the executive, the legislative, and the judicial--each with its own powers and responsibilities. In Florida, the constitutional doctrine has been expressly codified in article II, section 3 of the Florida Constitution, which not only divides state government into three branches but also expressly prohibits one branch from exercising the powers of the other two branches:
>
> Branches of Government.--The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.
>
> 'This Court . . . has traditionally applied a strict separation of powers doctrine," State v. Cotton, 769 So. 2d 345, 353 (Fla. 2000), and has explained that this doctrine "encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. [*19] The second is that no branch may delegate to another branch its constitutionally assigned power' Chiles v. Children A, B, C, D, E, & F, 589 So. 2d 260, 264 (Fla. 1991) (citation omitted)."

The danger sought to be remedied is best captured by Daniel Webster (1782-1852), who is widely credited with observing:

> Good intentions will always be pleaded for every assumption of authority. It is hardly too strong to say that the Constitution was made to guard the people against the dangers of good intentions. There are men in all ages

who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters.

## C. Caselaw on Separation of Powers

Most case law on Florida Separation of Powers deals with legislatively improper delegation of authority, authority without proper restrictions, or authority in a constitutionally prohibited zone to the executive and executive agencies. This case focuses on these improper delegations of authority from the legislature to the judiciary to affect the purposes of Fla. Stat. Chapter 61 Dissolution of Marriage alimony provisions.

The Florida Legislature is vested with the plenary authority to enact laws, subject only to limitation by the state constitution. (Fla. Const. Art. III, § 1; Bd. of Pub. Instruction v. Wright, 76 So. 2d 863, 864 (Fla. 1955) (en banc)).

The legislative branch bears the responsibility to protect the rights of citizens, Satz v. Perlmutter, 379 So. 2d 359, 361 (Fla. 1980). It has the exclusive obligation to enact social policy. (Krischer v. McIver, 697 So. 2d 97, 104 (Fla. 1997). Most importantly for present purposes, the legislature defines and administers the regulation of dissolution of marriage. See, e.g., Fla. Stat. Chapter 61 Part I (2003). The judicial branch, by contrast, enjoys the exclusive power to "administer justice and resolve disputes within the common law and the laws established by the legislature." (Fla. Const. Art. V, § 3). (citings generally from Bush 885 So.2d)

There are essentially two ways in which the principle of separation of powers can be violated: (1) if one branch encroaches upon or nullifies the powers of another; or (2) if one branch improperly delegates its own, or another branch's, constitutionally-assigned authority to a separate branch of government. Chiles v. Children, 589 So. 2d 260, 264 (Fla. 1991).

To determine whether a given power is exclusive to one branch, one must consider the constitutional text and history, along with the nature of the activity in question. Simms v. State, 641 So. 2d 957, 961 (Fla. 3d DCA 1994).

The legislature is constitutionally prohibited from assigning its own exclusively held power to other branches through excessive delegation. See Askew v. Cross Key Waterways, 372 So. 2d 913, 918-19 (Fla. 1978). To be sure, legislatures may, and routinely do, delegate authority to the executive branch to administer a statutory scheme; in so doing they often times provide to the relevant agency a measure of discretion to flesh out the underlying law's contours. Id. At 924. To pass constitutional muster, however, such authority may not be utterly open-ended and must provide "some minimal standards and guidelines ascertainable by reference to the [underlying] enactment." Id . at 925. In short, the executive official must be given guidance as to the intention of the act itself, so as not to cede the "discretion as to What the law shall be," which, of course, is the province of the legislature alone. Conner v. Joe Hatton, Inc., 216 So. 2d 209, 211 (Fla. 1968).

Does the Dissolution of Marriage statute and its alimony provisions vest in the judiciary powers that are exclusively reposed in the legislative branch? To answer the question, one must "consider the essential nature and effect of the governmental activity to be performed." Simms 641 So. 2d at 961. In fact, Fla. Const Art. I. Section 23 Right of Privacy prevents *any* branch of government from imposing undue burdens on the right of privacy of citizens to dissolve their Marriage. Littlejohn v. Rose, 786 F.2d 785, 786 (6th Cir. 1985) (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.).

## D. Fla Stat. § 61.08-Unauthorized Delegation-Uncertain in Implementation

The flaws in the alimony statute which create the unauthorized delegation of authority, and the unbridled decision making authority to the judiciary are the multiplicity of factors in the statute that "shall" be weighed and the closing statement in (2) which creates unbridled authority. Further, the improper authority given to the judicial to make a decision of whether and how much alimony will be given cannot even be discerned by the judiciary---even they cannot figure out the statute. The judiciary just does not even know how to implement the statute by its own admission.

### *1. Fla. Stat. § 61.08*

The highlighted areas in the provision below represent the improper unbridled authority delegated to the judiciary to create law. The line of code concluding (2), i.e. "The court *may* consider *any other factor* necessary to do *equity* and *justice* between the parties." Represents this unauthorized delegation of authority without restraints or limits. Both factors violate the Separation of Powers Fl. Const. directive.

**61.08 Alimony.--**

(1) In a proceeding for dissolution of marriage, the court ***may grant alimony*** to either party, which alimony ***may be rehabilitative or permanent*** in nature. In any award of alimony, the court ***may order*** periodic payments or payments in lump sum or both. The court may consider the adultery of either spouse and the circumstances thereof in determining the amount of alimony, if any, to be awarded. In all dissolution actions, the court shall include findings of fact relative to the factors enumerated in subsection (2) supporting an award or denial of alimony.

(2) In determining a proper award of alimony or maintenance, **the court shall consider *all* relevant economic factors, including but *not limited to***:

(a) The standard of living established during the marriage.

(b) The duration of the marriage.

(c) The age and the physical and emotional condition of each party.

(d) The financial resources of each party, the nonmarital and the marital assets and liabilities distributed to each.

(e) When applicable, the time necessary for either party to acquire sufficient education or training to enable such party to find appropriate employment.

(f) The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education, and career building of the other party.

(g) All sources of income available to either party.

**The court *may* consider *any other factor* necessary to do equity and justice between the parties.**

(3) To the extent necessary ***to protect*** an award of alimony, the court ***may order*** any party who is ordered to pay alimony to purchase or maintain a life insurance policy or a bond, or ***to otherwise secure*** such alimony award with any other assets which may be suitable for that purpose.

**History.**--ss. 7, 12, Oct. 31, 1828; RS 1484; GS 1932; RGS 3195; CGL 4987; s. 1, ch. 23894, 1947; s. 1, ch. 63-145; s. 16, ch. 67-254; s. 10, ch. 71-241; s. 1, ch. 78-339; s. 1, ch. 84-110; s. 115, ch. 86-220; s. 2. ch. 88-98; s. 3, ch. 91-246.

**Note.**--Former s. 65.08.

### 2. *Unbridled Authority Improperly Given to the Judiciary*

A legislative delegation of power to another branch of government without proper standards and guidelines violates Florida's separation-of-powers prohibition because it permits the other branch the discretion to decide what the law shall be. See Askew 372 So.2d at 913; Conner 216 So. 2d. This concept is so fundamental and universally accepted that the Florida Supreme Court considers it "hornbook law." Lewis v. Bank of Pasco County, 346 So.2d 53 (Fla.1976).

The Florida Supreme Court Gender Bias Study Commission in their (1990) Report as an authoritative body admits the judiciary is granted almost unlimited discretion to apply Fla. Stat. § 61.08. (Infra 3.)

State v . Griffin, 239 So. 2d 577 (Fla. 1970) states,

> "The test then became twofold: first, was a transfer of authority possible; second, if so, was it sufficiently restrictive? We quote from Bailey v. Van Pelt, 78 Fla. 337, 82 So. 789 (1919):
>
> 'In order to justify the courts in declaring invalid as a delegation of legislative power a statute conferring particular duties or authority upon administrative officers it must clearly appear beyond a reasonable doubt that the duty or authority so conferred is a power that appertains exclusively to the legislative department, and the conferring of it is not warranted by the provisions of the Constitution.
>
> 'The Legislature may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law complete in itself, designed to accomplish a general purpose, and may expressly authorize designated officials within valid limitations to provide rules for the complete operation and enforcement of the law within its expressed general purpose.'"

Smith v. Portante, 212 So.2d 298, 299 (Fla.1968) (cited in Schiavo v. Bush, No. 03-008212-CI-20, 6th Judicial Circuit Florida , (2004))states,

> "A statute which delegates power to the executive [here we argue to the judiciary] must so clearly define that power that the executive [judiciary] is precluded from acting through whim, showing favoritism, or exercising unbridled discretion. Id at 56. 'No matter how laudable a piece of legislation may be in the minds of its sponsors, objective guidelines and standards should appear expressly in the act or be within the realm of reasonable inference from the language of the act where a delegation of power is involved and especially so where the legislation contemplates a delegation of power to intrude into the privacy of citizens.'"

Standards and guidelines are also necessary to accommodate the right to judicial review. "When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency [judiciary] is carrying out the intent of the Legislature in its conduct, then, in fact, the agency [judiciary] becomes the lawgiver rather than the administrator [interpreter] of the law." Askew, 372 So.2d at 918.

### 3. ***Judiciary Cannot Implement the Improperly Delegated Authority***

The Florida Judiciary itself admits it does not know how to implement the improper delegation of unbridled authority given to it by the legislature.

The Report of the Florida Supreme Court Gender Bias Study Commission (1990), which resulted from the Florida Supreme Court's appointed commission on gender bias in the Court system, contains the follows observations and conclusions.

> "Most of Florida's circuit court judges dislike dealing with family law matters. This attitude can affect the outcome of cases." (page 6)

> "As a result of their almost unlimited discretion, trial courts distribute marital assets either as property or alimony with a lack of certainty and consistency. This may lead to inappropriate property settlements between the parties." (page 7)

The follow up Gender Bias—Then and Now, Continuing Challenges in the Legal System, The Report of the Gender Bias Study Implementation Commission (1996) states,

> "...alimony decisions, backed by competent substantial evidence to support the trial court rulings, are now required by statute, as was originally recommended.... *However, it is not clear, based on appellate decisions, whether a trial judge must consider all the statutory factors and give equal weight to all, or just the relevant ones....*" (page 7) (Emphasis added)

> "The original Commission recommended that the laws dealing with the amount of spousal support require the trial judges to set consistent amounts, in all cases, and amounts which comport with the supported spouse's marital standard of living, analogous to child support guidelines. *This has not been done*. Section 61.08 requires the trial judge to make a laundry list of fact-findings when alimony is asked for and either awarded or denied. *It is not clear whether all the statutory factors must be considered, or only relevant ones, and whether or not there is any factor or factors which should be given more weight than others*." (page 7) (Emphasis added)

The authoritative body appointed by the Florida Supreme Court offers the above opinion on the unbridled discretion and the inability of the judiciary to implement it.

In Department of Insurance v. Southwest Volusia Hospital Dist,. 438 So. 2d 815 (Fla. 1983), cites Askew as the source of the test for determining whether a statute violates the nondelegation standard:

> [T]he crucial test in determining whether a statute amounts to an unlawful delegation of legislative power is whether the statute contains sufficient standards or guidelines to enable the agency and the courts to determine whether the agency is carrying out the legislature's intent.

The above commission report proves the statute fails this test.

A measure of legislative intent is contained in the specific provision of the Dissolution of Marriage Statute Purposes. The alimony provisions in no way fulfill the purpose succinctly expressed in the statute.

> **61.001 Purpose of chapter.--**
>
> (1) This chapter shall be liberally construed and applied.
>
> (2) Its purposes are:
>
> (a) To preserve the integrity of marriage and to safeguard meaningful family relationships;
>
> (b) To promote the amicable settlement of disputes that arise between parties to a marriage; and
>
> (c) To mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage.
>
> **History.**--s. 1, ch. 71-241; s. 111, ch. 86-220.

The judiciary has used the unbridled discretion improperly delegated to it to "legislate" a myriad of "purposes" for the alimony statute none of which exist in the Fla. Stat. § 61.001. This is further evidence the undelegated authority improperly granted the judiciary has run the gamut of indiscretion. The judiciary legislates and makes new law

because of the failure of both branches to respect the Fl. Constitution Separation of Powers.

**E. Legislative Improper Delegation of an Authority not Permitted by Fl. Con. Art. I Sec 23 Right of Privacy**

The legislature lacks authority to legislate in the privacy-protected zone of Dissolution of Marriage absent a compelling state interest minimally applied. The alimony statutes place an undue burden on Floridians seeking to alter their right of privacy and associational rights related to the personal decision to dissolve their marriage. The legislature compounds the Separation of Powers infringement by improperly delegating unrestricted authority to the judiciary in the Dissolution of Marriage alimony provisions, and on top of it, the legislature lacks that authority to exercise such regulation itself, let alone improperly delegate it to the judiciary.

The Dissolution of Marriage statute is written in the prohibited privacy zone of a personal decision relating to marriage.

Littlejohn v. Rose, 786 F.2d rules that divorce is entitled to right of privacy protections,

> " 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, 384-85, 54 L. Ed. 2d 618, 98 S. Ct. 673 (1978) (citing Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-40, 39 L. Ed. 2d 52, 94

S. Ct. 791 (1974); [**6] see also Griswold v. Connecticut , 381 U.S. 479, 486, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965); Carey v. Population Services International, 431U.S. 678, 684-85, 52 L. Ed. 2d 675, 97 S. Ct. 2010 (1971). 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). In Carey v. Population Services International, 431 U.S. at 684-85, the Supreme Court clearly held that decisions regarding marital status are protected by the constitutional right to privacy:"

In Florida North Florida Women's Health and Counseling Services, Inc., v. State, 866 So.2d 612 (Fla. 2003) is controlling on the Right of Privacy.

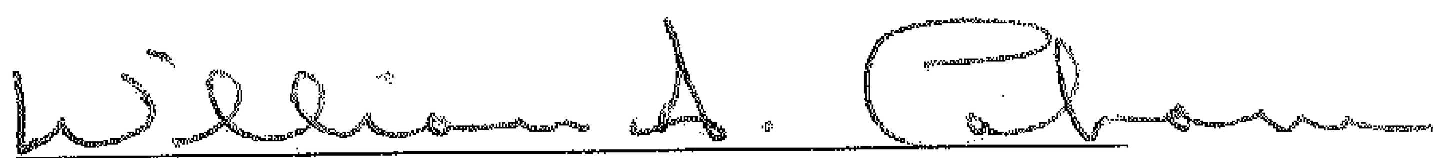
## CONCLUSION

For the above stated reasons the alimony provision in the Dissolution of Marriage statute impermissibly infringe FL. Con. Art. II Sec 3 by the legislature's improper delegation of authority with unrestricted authority in a fashion to permit the judiciary unbridled discretion in the implementation of the statute. The Separation of Powers is further impermissibly infringed because the authority the legislature improperly delegates to the judiciary, it was not permitted to assert because the alimony provisions infringe the Fl. Con. Art. I Sec 23 Right of Privacy.

## PRAYER FOR RELIEF

The respondent prays this court will find Fl. Stat § 61.08 and its enforcement provisions violate the Separation of Powers contained in the Florida Constitution and therefore are void ab initio and cannot be applied nor enforced.

Respectfully submitted,



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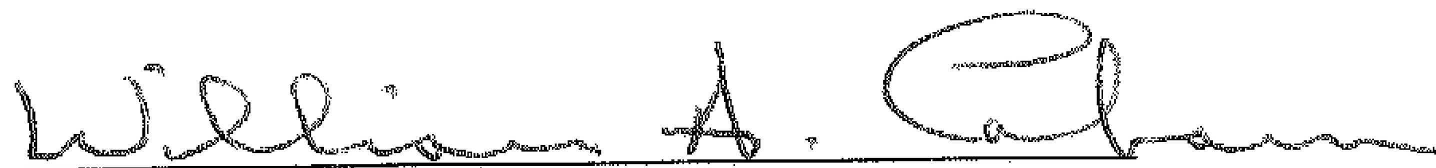
**CERTIFICATE OF SERVICE**

I certify that a copy of this Memorandum of Law that F.S. § 61.08 violates the Separation of Powers was hand delivered to Cathy L. Kamber, P.A., Attorneys for former wife., 1675 Palm Beach Lakes Boulevard, The Forum, Tower A, Suite 700, West Palm Beach, FL 33401 this 29th day of August, 2005.



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