

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

**Family Division
Case No.: 71-C-4137-FD**

**WILLIAM A. CABANA
Former Husband, pro se**

vs.

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

MEMORANDUM OF LAW

**F.S. CHAPTER 61 PERMANENT ALIMONY SECTIONS IMPERMISSIBLY
INFRINGE THE U.S. and FLORIDA CONSTITUTION**

“Changing times demand reexamination of seemingly unchangeable legal dogma. Equality under law and evenhanded treatment of the sexes in the modern market place must also carry the burden of responsibility, which goes with the benefits.”¹

Introduction

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

The U.S. Constitution 14th Amendment and the Florida Constitution Article I Section 23 contain the fundamental Right of Privacy. “Personal decisions relating to marriage” is a well recognized Privacy Protected Zone. A Floridian’s personal decision

¹ Connor v. Southwest Florida Regional Medical Center, Inc., 668 So. 2d 175, 175 (Fla. 1995)

to dissolve his marriage is a personal decision relating to marriage entitled to constitutional protection.

F.S. Chapter 61 “Dissolution of Marriage; Support; Custody” is a statute intruding in the Privacy Protected Zone of William A.Cabana’s personal decision relating to his marriage to dissolve it. The permanent alimony sections of the statute (61.08 et al) are presumptively unconstitutional unless the state proves a compelling state interest is applied in the least intrusive manner and the statute, in fact, furthers the state interest.

I

F.S. Chapter 61 “Dissolution of Marriage” Permanent Alimony Provisions (F.S. §61.08 inter alia) Impermissibly Infringe the Florida Constitution Article I Section 23 Right of Privacy

“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.” Parenthood v. Casey, 505 U.S. 833, (1992)

Florida Statutes § 61.031(marriage a vinculo but not from bed and board), § 61.08 (1), (2) (post dissolution spousal support areas), and § 61.14 (1), (3), (5)(a) (post dissolution modification of spousal support areas), as well as those captioned in this section, are unconstitutional under Article I Section 23 and Article I Section 2 of the Florida Constitution.

The State lacks a compelling interest applied in the least intrusive manner to invade the privacy area of personal decisions related to marriage, i.e. dissolution, to require permanent spousal support in some marriages. The Federal and Florida Constitutionally guaranteed personal liberty interests of privacy and the Florida Constitutionally guaranteed pursuit of happiness are infringed by the State imposing

unwanted lifetime punitive monetary sanctions i.e. spousal support payments. The State further enforces these statutes and the imposed monetary sanctions with the threat of contempt, bodily arrest and imprisonment for noncompliance.

Below is argued the origin and power of the privacy amendment (Article I Section 23 Florida Constitution); judicial interpretation of the privacy amendment; the conflict between § 61.031 and the State Supreme Courts opinions; the misconceptions of the origins of the postdissolution spousal support obligation; the application of the privacy amendment to areas of privacy; the rationale for a spousal support obligation along with the demise of the rationale; the need to apply the compelling State interest test to the support statutes; the absence of a compelling State interest; the rationale and its demise used for judicial decision making under current law (i.e. partnership theory of marriage), the public policy against permanent postdissolution spousal support; approaches to judicial decision making on the subject of permanent postdissolution spousal support; the acknowledged Gender Bias of the Florida Court system; and the Affirmative Action based on Gender to Remedy Gender Bias. It is further argued that Federal and State Constitutionally guaranteed fundamental rights cannot be adjudicated in a court of chancery, with a standard of equity and a cloud of Gender Bias by judges granted wide discretionary powers.

Also it is argued that the internal inherent flaws in the permanent alimony sections and their unconstitutional nature fail for vagueness.

A. The Law --The Privacy Amendment

Florida Constitution Article I, Section 23 passed by the electorate November 1980 and implemented January 1981 provides the citizens of Florida an explicit 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 his 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.

Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544, 548 (Fla.1985).

expresses the strong will the electorate espoused in crafting the wording of the 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 of 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.”

Winfield, at 547, established the standard of review and the State burden.

“Heretofore, we have not enunciated the appropriate standard of review in assessing a claim of unconstitutional governmental intrusions into one's privacy rights under article I, section 23. Since the privacy section as adopted contains no textual standard of review, it is important for us to identify an explicit standard to be applied in order to give proper force and effect to the amendment. The right of privacy is a fundamental right, which we believe demands the compelling State interest standard. This test shifts the burden of proof to the State to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged

regulation serves a compelling State interest and accomplishes its goal through the use of the least intrusive means.”

Marriage, and personal decisions related to marriage, i.e. dissolution, fall within the scope of a protected area of privacy to which the amendment is applicable. Winfield, at 546, citing Roe v. Wade, 410 U.S. 113, 152-53, 93 S.Ct. 705, 726-27, 35 L.Ed.2d 147 (1973) and Shevin v. Byron, 379 So. 2d 633, 636 (Fla. 1980) (recognizing privacy interests in marriage, procreation, contraception, and family relationships) include marriage as a protected area of privacy.² The State has not and cannot articulate a compelling State interest applies in the least intrusive manner to invade this privacy area of marriage to mandate permanent postdissolution spousal support. The State has not and cannot articulate a compelling State interest why a former spouse—with the threat of imprisonment--should be required to provide permanent lifelong support to another person as a result of an action arising out of the privacy area of a personal decision related to marriage.

For the attachment of the Privacy Amendment to Chapter 61 (“Dissolution of Marriage”) and Section 61.08 (Alimony) we rely on the reasoning and the authority established Federally in Carey v. Population Serv. Int’l., 431 U.S. 678, 684-685 (1977) “*it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage...*”; Loving v. Virginia, 388 U.S. 1, 12, 87 S.,Ct. 1817 (1967); Zablocki v. Redhail, 434 US 374 (1978); Planned Parenthood v. Casey, 505 U.S. 833, (1992),

“Our law affords constitutional protection to *personal decisions relating to marriage*, procreation, contraception, family relationships,

² Marriage as an area of privacy is also Federally noted in Griswold v. Connecticut, 381 U.S. 479 (1965) and Carey v. Population Serv. Int’l., 431 U.S. 678, 684-685 (1977).

child rearing, and education Our precedents "have respected the private realm of family life which the state cannot enter." These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." (Emphasis Supplied)

For State case law attaching the fundamental Right of Privacy "personal decisions relating to marriage" the court attention is called to the Privacy Zone's existence noted in Winfield, at 546, citing Roe v. Wade, 410 U.S. 113, 152-53, 93 S.Ct. 705, 726-27, 35 L.Ed.2d 147 (1973) and Shevin v. Byron, 379 So. 2d 633, 636 (Fla. 1980) "*Unwarranted governmental intrusion on decisions in these 'fundamental' areas is a deprivation of the "liberty" secured by the due process clause of the fourteenth amendment.*" (recognizing privacy interests in marriage, procreation, contraception, and family relationships) and N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 635 (Fla. 2003).

The Spousal Support Provisions-§61.08

Florida Statute § 61.031 States "Dissolution of marriage to be a vinculo--No dissolution of marriage is from bed and board, but is from bonds of matrimony."

A dissolution of marriage a vinculo terminates all duties, Greenwald v. Blume, 312 So.2d 783, 785 (Fla. 3d DCA 1975).

"It was acknowledged by the Florida Supreme Court in Carson v. Oldfield, 1930, 99 Fla. 862, 127 So. 851, 855, that death of one of the parties and a decree of divorce a vinculo, have the same effect of putting an end to the marriage relation, resulting in the immediate cessation of *all* duties and obligations necessarily dependent upon the continuance of that relation." (emphasis supplied)

There is an apparent conflict between § 61.031 and what the Florida Supreme Court says in both its Greenwald and its Carson opinions. Despite the clarity of, and in

direct contravention of, the Court's words the State still mandates and enforces permanent postdissolution spousal support. The State lacks a compelling interest applied in the least intrusive manner to prevent the dissolution of marriage a vinculo from severing all duties, including bed and board.

B. The Legal History of Postdissolution Spousal Support

Merely Statutory Origin—Not Common Law Origin

“The great enemy of the truth is very often not the lie - deliberate, contrived and dishonest - but the myth - persistent, persuasive and unrealistic. Too often we hold fast to the clichés of our forbearers. We subject all facts to a prefabricated set of interpretations. We enjoy the comfort of opinion without the discomfort of thought.”³

A brief review of Florida legal opinions related to postdissolution spousal support is necessary to show there is no common law origin for the mandated application of the concept of post dissolution permanent spousal support. Spousal support after dissolution did not come down from the Mount etched in stone. It is merely a creation by statute whose nature has varied because of a variety of judicial rulings. Toward this purpose Judge Ervin's opinion in Cornelius v. Cornelius, 382 So.2d 710 (Fla. 1st DCA 1979) is illuminating...

“We think it necessary, because of the apparent confusion over what criteria are to be considered when awarding alimony, to review briefly the origin and history of alimony prior to the 1971 Marital Dissolution Act. First, it should be noted that alimony is a creature of statute. While there was no right at common law to a divorce from the bonds of marriage, the ecclesiastical courts could annul a marriage if it was found initially defective. 1 W. Blackstone, Commentaries Ch. 15, 439 (Sharswood ed. 1859). If, during the marriage, a husband committed adultery or deserted his wife, the wife could seek a judicial order equivalent to a separation decree, and the court had discretion to order that the husband provide for the wife's support as a continuation of his marital obligation to supply her needs. Id. at 439-41. Historically, and in its literal sense, alimony meant nourishment or sustenance. Floyd v. Floyd, 91 Fla. 910, 108 So. 896, 898

³ President John F. Kennedy, 1962

(1926). It was the allowance, which a husband could be compelled to pay the wife for her maintenance when living apart from him, and had for its sole object the provisions of food, clothing, habitation and other necessities for the support of the wife during her lifetime. *Id.*

The right to alimony connected with divorce was permitted by statute in what was then the Florida territory by Section 7, Act of October 31, 1828 (McClellan's Digest, Laws of Florida (81)), and provided: '(T)he court shall and may, . . . take such order, . . . touching the maintenance and alimony of the wife, or any allowance to be made to her, . . . , as from the circumstances of the parties and nature of the case may be fit, equitable and just.' In interpreting the above statute, the Florida Supreme Court observed: 'Permanent alimony is not a sum of money or Specific proportion of the husband's estate given absolutely to the wife. It is a continuous allotment of funds payable at regular intervals for her support from year-to-year.' (e.s.) Phelan v. Phelan, 12 Fla. 449, 456 (1868). The concept that permanent alimony was to be paid only periodically persistent until 1947, when Chapter 23894, Laws of Florida (1947), amended Section 65.08 by authorizing permanent alimony to be paid either periodically or in a lump sum. Finally, in 1963, the statute was amended by adding the words: '(P)eriodic payments or payment in lump sum or both.'"

The Fourth District Court of Appeals so valued the Cornelius dictum above by citing it in Geddes v. Geddes, 530 So.2d 1011, 1017 (4th DCA 1988) and adding ...

"Modern alimony really has very short historical roots...To a great extent the courts' struggle with the modern day concept of alimony simply reflects society's own struggle with the problem of providing equal economic opportunities to all, and the related concept of individual rights in the context of marriage and family."

The Florida Supreme Court in Pacheco v. Pacheco 246 So.2d 778, 780 (Fla.1971) said...

"At common law there was no right to alimony at all. Divorce was not a function of the judiciary. Winstone v. Winstone (1861) 2 Swabey & T. 246, 164 English Reprint 989...

We are not here confronted by a statutory deprivation of a common law right. The so-called 'right' to alimony does not exist as an incident to divorce *A vinculo* unless it is granted by statute. The Florida Legislature has simply decided that the benefit of alimony shall not be available to an

adulterous wife, just as it has declined to allow alimony to husbands except in cases of insanity.”

The Pacheco opinion is enlightening for its history of alimony but also as an indicator of who was eligible and ineligible for alimony under the dissolution statute at the time. It is noteworthy that at the time of the Pacheco ruling, 1971, the Florida Statutes and the Florida Supreme Court rulings clung to the age old concept of alimony and its profound gender basis...a bias sweepingly struck down in subsequent equal protection rulings to come at the Federal level. The wave of Federal and State equal protection gender neutral rulings led Florida, finally, in 1973 to change its dissolution statutes to be gender neutral. I ask, how effective was such a mere language change to a sea of rulings, attitudes, biases and mores obligating husbands to wives for over one and one half centuries up until the equal rights statute changes passed in 1973?

During the movement to an attempted application of the gender neutral revisions of Chapter 61 by the judiciary a series of District Court of Appeals opinions led the Florida Supreme Court to try to resolve incongruities and conflicting opinion in the bellwether 1980 ruling Canakaris v. Canakaris, 383 So.2d (Fla.1980). Canakaris, known to all in Florida Family Law, became law in March 1980. Canakaris became the judicial spousal support beacon eight months *before* the electorate voted Article I Section 23, the powerful privacy amendment, into the State Constitution. Canakaris continues today as the linchpin for spousal support rulings.

During the ensuing over two decades from Canakaris and the passage of Florida Constitution Article I Section 23 to date, for unknown reasons, the unconstitutional conflict between the Florida Constitution Privacy Amendment and the Marriage

Dissolution Statutes has yet to be examined by the Florida Courts. Today this Court is asked to address the conflict in the narrow area of the permanent alimony sections.

C. Application of Article I Section 23 to Areas of Privacy

“Soon after the amendment's passage, the Florida Supreme Court formally recognized that marriage and other "family rights" fall within the general right of privacy. Since that time, the court has recognized a piecemeal of privacy interests, including the right to refuse medical treatment, abortion rights, the right of a minor to have sexual intercourse with another minor, and confidentiality rights.”⁴

Marriage, Family and Parenting

The State's intervention into the privacy area of marriage, family and parenting has been successfully challenged in recent years. The Florida courts have consistently upheld the primacy of the Privacy Amendment over Statutes regulating such things as grandparent visitation rights.⁵ Florida Statutes §752.01 (1) (a) and (b), relating to grandparent visitation rights, were found unconstitutional for lack of a compelling State interest applied in the least intrusive manner. (Beagle v. Beagle, 678 So.2d 1271, 1275 (Fla.1996) and Von Eiff v. Azicri, 720 So.2d 510, (Fla.1998)). As an indication of

⁴ [78] See Shevin v. Byron, 379 So. 2d 633, 636 (Fla. 1980) (recognizing privacy interests in marriage, procreation, contraception, and family relationships). [79] See Public Health Trust of Dade County v. Wons, 541 So. 2d 96, 98 (Fla. 1989) (recognizing the fundamental right to refuse a life-saving blood transfusion); In re Browning, 568 So. 2d 4, 17 (Fla. 1990) (finding the right to terminate feeding pursuant to patient's prior instructions); Singletary v. Costello, 665 So. 2d 1099, 1110 (Fla. 4th DCA 1996) (acknowledging the right to refuse medical treatment). [80] See In re T.W., 551 So. 2d at 1193. [81] See B.B., 659 So. 2d at 259. [82] See Rasmussen v. South Fla. Blood Serv., 500 So. 2d 533, 538 (Fla. 1987) (finding a privacy interest in not being named as a blood donor).

For Better Or For Worse: A Critical Analysis of Florida's Defense of Marriage Act. Michael J. Kanotz. 25 Florida State University Law Review 439, 448 (1998)

⁵ The U.S. Supreme Court ruled similarly in Troxel v. Granville, 530 US 57, 120 S.Ct. 2054 (2000) when it found parents right of privacy violated by a Washington State statute permitting child visitation counter to parents wishes.

the power of the Privacy Amendment trumping family values Judge Overton expressed in Beagle⁶ ...

“[I]t is not our judicial role to comment on the general wisdom of maintaining intergenerational relationships. We must refrain from expressing our personal thoughts as either grandparents or future grandparents.”

Judge Overton’s attention to judicial exclusion of personal thoughts was so noteworthy in Beagle that the court reiterated them again in Von Eiff.⁷ In addition to noting the State has no say in family values via Statutes, or the Courts, the above rulings significantly raised the State’s burden to intervene in marriage, the family and parenting. The above rulings change the standards the Courts must use when they intervene in the family for the sake of children from the standard of “best interest of the child” to “showing of demonstrable harm to the child.”⁸ It is noteworthy the rulings are phrased “showing of demonstrable harm,” and not “potential of harm.” The rulings express the compelling State interest is present when *harm exists*, not when there is the *potential for harm*.

It appears the only way the State has of entering the privacy area of marriage, family and parenting is through the application of the doctrine of *parens patriae*. The State must be cautious in entering these privacy areas, being selective when and under what circumstances it applies *parens patriae*. Even after it implicitly applied the doctrine of *parens patriae* the courts through the above grandparent visitation rulings have

⁶ Beagle at 1277.

⁷ Von Eiff v. Azicri, 720 So.2d 510, (Fla.1998) at 516.

⁸ Von Eiff v. Azicri, 720 So.2d 510, (Fla.1998) at 515. Beagle v. Beagle, 678 So.2d 1271, (Fla.1996) at 1274.

seriously altered the judicial standard for determining a ruling, i.e. changing the standard from “best interest of the child” to “showing demonstrable harm to the child.”

In applying the doctrine of *parens patriae* the State halts its intercession into privacy areas of marriage and child rearing on a child's behalf at the child's age of eighteen years. The legislature, through its child support statutes, mandates that when the child becomes an adult, age eighteen years, she no longer needs the mantle of State protection offered by the doctrine of *parens patriae*.⁹ The statutes reflects the legal concept and public policy that the passage from childhood to adulthood imparts personal responsibility--thereby further restricting State intervention into the private life of the individual!

Personal Autonomy

Another area demonstrating the enormous power of the Privacy Amendment is in the area of personal autonomy. In a series of cases relating Article I Section 23 to personal health decisions the Florida Supreme Court found the State lacked the power to prohibit a minor from concealing the fact of her abortion from her parents *In re T.W., A Minor*, 551 So.2d 1186 (Fla.1989)). The statute regarding parental consent prior to an abortion by a minor was deemed unconstitutional because the State lacked a compelling reason applied in the least intrusive manner to invade the privacy area of personal autonomy—even as it relates to a minor, and more importantly as it relates to a minor on the issue of abortion!

Even more noteworthy is that a teenage Floridian minor can have an abortion without even informing her parents. *N. Fla. Women's Health & Counseling Servs., Inc. v.*

⁹ There are limited situations in which the State extends parental obligations to children beyond age eighteen. Such situations are not our focus here.

State, 866 So. 2d 612, 635 (Fla. 2003). That's the power of the Florida Constitution Right of Privacy Amendment.

The State, also, could not prove a compelling interest, applied in the least intrusive manner, to prevent a 27 year old man who was paying court ordered minor child support from refusing a blood transfusion without which he would die. *St. Mary's v. Ramsey*, 465 So.2d 666, (Fla. 4th DCA 1985).

Still further, the State could not prove a compelling interest to prevent a post partum mother of four minors from refusing a blood transfusion even considering the third party interest of the minors. "Parenthood, in and of itself, does not deprive one of living in accord with one's own beliefs." *In re Matter of Patricia Dubreuil*, 629 So.2d 819, 826, (Fla.1994). The court was uncomfortable in its ruling and tried to reach some degree of comfort by carefully dissecting the issue of abandonment of minors to balance it against autonomy and privacy. In this case the Privacy Amendment prevailed.

Through the above rulings, and in similar cases, the Florida Supreme Court has found various statutes unconstitutional as violative of the privacy amendment. The interests at stake, i.e., parenting, parental decision making, family values, intergenerational relationships, death of a parent of a minor, self imposed refusal of medical care by a supporting parent of a minor, sex between minors, nondisclosure of abortion plans by a minor to her parent all failed to be important enough for the court to permit the State to interfere via statute into the privacy area of marriage and the family.

As to the permanent alimony sections, how can the courts permit the State to intrude in a privacy area for the purpose of money when it could not do so for the other stated reasons (family values, intergenerational relationships, self imposed refusal of

medical care of a parent of a minor, self imposed refusal of medical care by a supporting parent of a minor, sex between minors, and nondisclosure of abortion plans by a minor to her parent)? Is money to a former spouse a compelling interest, applied in the least intrusive manner, superior to the above noted interests?

Is the State remedy of “taking” and transferring money (i.e. William A. Cabana’s property interest) from one former spouse to another for life with the threat of contempt, arrest and imprisonment without an articulated compelling State interest applied in the least intrusive manner sufficiently justified to overcome the unconstitutional nature of the support statutes?

Furthermore, is it proper that the State “take” the money from one citizen and give it to another in a court of chancery, with a standard of equity operating in a cloud of Gender Bias where the judges have wide discretionary powers? No.

D. Coverture to Partnership to Independent Self Reliance-- 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.”¹⁰

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.”¹¹

¹⁰ O.W. Holmes. The Path of the Law. 10 Harvard Law Review 457 (1897)

¹¹ 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.

The Florida legislature, on Valentine's Day, February 14, 1835 passed the divorce law *a vinculo*.

61.031 Dissolution of marriage to be a vinculo.--No dissolution of marriage is from bed and board, but is from bonds of matrimony.
History.--s. 3, Feb. 14, 1835; RS 1479; GS 1927; RGS 3190; CGL 4982; s. 16, ch. 67-254; s. 4, ch. 71-241.
Note.--Former s. 65.03.

The statute contains the words "No dissolution of marriage is from bed and board..."

Times were different in Medieval England. Times were different in 19th century Florida.

Times are different today in 21st century Florida where the doctrine of necessities has been abrogated!

In Florida a woman, as a party in a marriage, has seen her economic rights progress from none to co-equal economic independent. The economic status of a woman in a marriage has gone from coverture to the judicially created fiction of "economic partnership" to, now, the judicially created co-equal economic independent. The Florida Courts "legislated" the economic partnership model of marriage in the 1970's. It was nothing more than a judicial fiction upon which to apply the then newly created tool of Applied Economics to Law developed by the Chicago University Schools of Economics and Law. As applied to the privacy area of marriage economics is in actuality merely a judicial tool without any legal doctrine, or statute to support its application. The tool has gained a life of its own because it has become the only tool with which the Courts can resolve the antediluvian and unconstitutional nature of the spousal support and property distribution provisions of the dissolution statutes.

The vestigial economic partnership model of marriage as currently applied by the Courts has no statutory or common-law basis. The Civil Courts arrived late to the privacy area of marriage. As noted above, the privacy area of marriage was historically restricted to the Ecclesiastical Courts. When the Civil Courts were statutorily given dissolution authority by the legislature it was amid the traditional specter used by the Ecclesiastical Courts but for the purpose to permit the States citizens to remarry. In the late twentieth century the Civil Courts latched on to the use of the economic tool to resolve elements of marriage dissolution law. Having found a tool the courts needed an entity within the private area of marriage upon which to use the tool. Thus the Court created the economic partnership model of the privacy area of marriage.

The Courts have continued the application of the economic tool to dissolution statutes based on a rationale for doing so that has long since become antiquated. Coverture died with Article XI Section 2 Florida Constitution, Section 708 (Married Women's Property), and Merchant's v. Cain, 9 So. 2d 373, 375 (Fla. 1942). In addition to the loss of rationale, i.e. coverture, Article I Section 23, the Privacy Amendment, trumps the economic partnership model.

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 by the institution of the gender-neutral character to the dissolution of marriage statute. Any shred of basis for an economic partnership model of marriage was torn asunder by the abrogation of the doctrine of necessities in Connor v. Southwest Florida Regional Medical Center, Inc., 668 So. 2d 175 (Fla. 1995).

In Connor, the Florida Supreme Court, when given the option of applying the doctrine of necessities (the responsibility of the husband for the debts of the wife to third parties) equally to husbands and wives or abrogating the doctrine chose the latter. The Court determined it should abolish the doctrine. It determined it was the duty of the legislature, if it so chose, to applied the doctrine equally to husbands and wives.¹²

The final demise of economic partnership and the firm establishment of the model of economic independent parties in a marriage was cemented when the legislature, in 1996, with two different bills tried unsuccessfully to reinstate the doctrine.¹³

The parties within a marriage were declared economically independent!

The abrogation of the doctrine of necessities and the failure of the legislature to reinstate it forcefully argue that if marriage had been viewed as a partnership, i.e. an economic partnership, each party now has his and her own personal responsibilities and liabilities. After dissolution the State cannot create a model or entity, which did not exist in the marriage.

Since Connor, neither the judiciary nor the legislature has changed this economic principle of independence of parties within the marriage. When given the opportunity to choose between making each party to a marriage independent or equalizing dependency the Florida Supreme Court chose economic independence for each! The legislature did not alter that economic independence. The Court dismantled the yoke of economic liability from a husband for his wife to a third party. The Court's action and the legislature's failure to change it emphasized the current law and public policy, i.e. the independence rather than the dependence of each party in the privacy area of marriage. If

¹² Connor at 176.

¹³ Fla. HB 1211 (1996); Fla. SB 906 (1996).

the law and public policy has become independence during marriage what compelling interest has the State articulated applied in the least intrusive manner to create dependence after marriage? How does the State invade the privacy area of marriage, in which the parties represent independent economic entities, and with dissolution statutes turn the independence into dependence with the threat of contempt, arrest and imprisonment?

Judge Overton's dissenting cry did *not* prevail in the Connor opinion. We do not need to interpret the consequences of the Connor opinion, Judge Overton himself tells us the effect and meaning of the decision. ..

“In this day and age, we should not weaken the obligation of marriage by eliminating the spousal duty to care for one another.”¹⁴

He also tells us...

“The majority's decision to abrogate the common law doctrine of necessities departs from the partnership theory of marriage...”¹⁵

Critically important is the clarion significance Judge Overton recognized the Connor opinion to be...

“The majority's abrogation of the doctrine of necessities appears to shift the policy of the State by, in effect, requiring each spouse to take care of himself or herself. It also reduces the legal obligations of the marriage contract.”¹⁶

Overton recognized the Connor opinion eliminated the spousal duty to care for one another. He recognized the opinion departed from the partnership theory of

¹⁴ Connor at 177.

¹⁵ Id.

¹⁶ Id.

marriage. He recognized the opinion changed the policy of the State to require each spouse to care for himself or *herself*. He recognized the reduction of the legal obligations of the marriage contract. This Court must do the same.

Overton acknowledges the Connor opinion destroys the underpinnings of the judicially applied theory of the marriage as partnership. The Court's basis for its Canakaris and its current progeny rulings has been swept away by Connor.¹⁷

The abrogation of the doctrine of necessities effectively eliminates the economic partnership theory of marriage. More importantly, the abrogation eliminates the application of economic partnership theory as a foundation upon which to build an argument for a compelling State interest to intervene in the privacy area of marriage and dissolution of that marriage with statutorily mandated postdissolution permanent spousal support requirements.

E. Compelling State Interest

“We must beware of the pitfall of antiquarianism, and must remember that for our purposes our only interest in the past is for the light it throws on the present. I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on the study of the ends sought to be attained and the reasons for desiring them.”¹⁸

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.* 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,

¹⁷ A 2nd DCA opinion in Fernandez v. Fernandez in 1998 noted that the Connor opinion had not yet been applied to overrule Belcher v. Belcher, 271 So. 2d 7 (Fla. 1972).

204 (Fla. 5th DCA 1998). No conceivable state interest can exist, let alone a compelling state interest to encompass the concept expresses by these three appellate courts!

In Winfield the Florida Supreme Court effectively forbids the government to infringe the fundamental liberty of privacy at all, unless the infringement is narrowly tailored to serve a compelling State interest. Winfield and Shevin v. Byron, 379 So. 2d 633, 636 (Fla. 1980) (recognizing privacy interests in marriage, procreation, contraception, and family relationships) brought marriage under the umbrella of the fundamental liberty of privacy.

Chapter 61 is entitled “Dissolution of Marriage.” The entire chapter deals in the privacy area of marriage. The at issue portion of the chapter applies to the privacy protected area of a “personal decision related to marriage,” i.e. dissolution. The purpose of the chapter stated in § 61.001 (2) (a) is “To preserve the integrity of marriage and to safeguard meaningful family relationships.” The privacy area of marriage is the target of the purposes of the statute. Because the Chapter’s title, its purposes and content are all related to the privacy area of marriage, the statutory provisions related to postdissolution permanent spousal support must pass the compelling State interest, narrowly tailored in application, test.

The nature of the concept of a compelling State interest would indicate it is self-evident, or almost self evident, and that it is based on a legal doctrine or an overwhelming public policy. Not merely a public policy but an overwhelming one! When one looks at the compelling State interest to be used to counter the unconstitutional nature of the statutes at issue one should see evidence of its universal application throughout the laws of the State, a consistency in the laws of the State related to the compelling interest and a

¹⁸ Supra at 9.

predictability of the compelling interest applied in the laws. No such compelling interest exists. Likewise, public policy—let alone an overwhelming public policy” does not offer a compelling State interest to overcome the unconstitutional nature of the statutes.

“The privacy right is explicit, it extends to *all* aspects of an individual’s private life rather than simply extending to some elusive “penumbra” of rights, and it *ensures* that the State cannot intrude into an individual’s private life absent a compelling interest.”¹⁹ (emphasis supplied)

F. The Search for a Compelling State Interest

In the Law

After Connor, and independent of Connor, 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 (Fla.1980). There is no evidence in the opinion that the Canakaris 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.

The Supreme Court in Cankaris changed the standard it established only six years earlier in Kennedy v. Kennedy, 303 So.2d 629, 631 (Fla. 1974) when it interpreted the

¹⁹ The Right of Privacy in Florida in the Age of Technology and the Twenty-First Century: A need for Protection from Private and Commercial Intrusion. Honorable Ben F. Overton, Katherine E. Giddings. 25 Fla. St. U. L. Rev 25, 40 (1997).

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, the courts ratcheted up the standard to *the lifestyle of the marriage*. In light of the Privacy Amendment it is not the place of the State 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 opinion such ruling 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 in Chancery with the mandate the doctrine of equity be applied. Equity is not a compelling State interest.

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? 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 or whether the dissolution is contested.

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 Federal and State legislation, State judicial rulings and the equal employment opportunities available in the

marketplace. If indeed this was or is 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 reasoning flows that all a party need do to avert a life of poverty is to enter marriage for a long enough period of time and thus be afforded legislative and judicial protection from poverty for life.

Another concept offered as the reason for permanent spousal support is that a former spouse should not be placed in peril of poverty if a supporting former spouse can pay, Pimm v. Pimm, 601 So.2d 534 (Fla.1992). This is not a compelling State interest. If a spouse avoiding poverty was a purpose of Chapter 61 spousal support provisions it was not listed in the purposes of the statute.

There is further evidence the legislature does not have a strong concern for spouses being placed in peril of poverty. One example is the recently repealed motorcycle headgear protective law, Florida Statutes 316.211 (b). The State permits one older than twenty-one years who carries only \$10,000 of health insurance to ride a motorcycle without a helmet. It makes no provisions for spouses or minor children whose breadwinner may die or be permanently disabled from an accident. The legislature does not require a married supporting spouse who rides a motorcycle without a helmet to carry life insurance for his spouse. If the State does not impose the duty of a life insurance policy on a married motorcyclist to protect spousal support during marriage, how can the State have a compelling reason to require him to carry life insurance for the spouse after dissolution of marriage? Under the current unconstitutional support laws it is not hard to conceive that in a court somewhere in Florida there is a dissolution proceeding pending where a supported spouse is petitioning the Court that

because the supporting spouse rides a motorcycle he should be compelled to wear a helmet or purchase life insurance to assure lifelong spousal support. If the economic survival and betterment of the married parties was a legislative concern it seems that it would have been addressed last year when §316.211 (b) was passed.

Purposes of the statute

One must look to the stated Purposes of the statute (F.S. 61.001) for guidance in determining a compelling State interest. One cannot expand upon the Purposes listed. If the legislature had intended more Purposes it would have and could have listed them. It has not.

Judicial interpretation beyond the plain language and purposes expressed in the statute is judicial activism that must now be tempered by the Privacy Amendment. The people have spoken by the passage of the powerfully worded amendment.

It is difficult at best to articulate how Florida Statutes § 61.031, § 61.08, and § 61.04 achieve a compelling State interest in the least intrusive manner to accomplish the purposes of Chapter 61 as expressed in Florida Statute §61.001, i.e. preservation of the integrity of marriage and to safeguard meaningful family relationships, amicable dispute resolution between parties to a marriage, and to mitigate harm to spouses and children caused by the *process* of legal dissolution of marriage.

To repeat, in Beagle the court offered it's thought on meaningful family relationships "Finally, it is not our judicial role to comment on the general wisdom of maintaining intergenerational relationships. We must refrain from expressing our personal thoughts as either grandparents or future grandparents." They realized the

Privacy Amendment meant the State is precluded from addressing, valuating, determining and enforcing family relationships.

The State has not been called upon to intercede, and would reject the notion, to determine what lifestyle level a married couple *should* live at based upon their income and resources. However, the State does, unconstitutionally, interject itself into the privacy area of marriage and the personal decision related to marriage of dissolution to determine the lifestyle the couple *did* live at and then mandate that at least one of them should live at that level until death or remarriage. Further the State compels one of the spouses to assure that lifestyle for the other spouse enforced by the threat of contempt and imprisonment. The State even compels the supporting spouse to insure the receiving spouse's lifestyle long after the supporting spouse dies. The State does this by sometimes requiring the supporting spouse to pay life insurance premiums *now* on his own life insurance policy for a former spouse.

More importantly, the State prevents the supporting spouse the pursuit of happiness, a right that is afforded him by the Florida Constitution Privacy Amendment and Article I Section 2. One example of a judicial denial of a right of pursuit of happiness is that a supporting spouse "would have a significant burden to show that a voluntary retirement before age sixty-five is reasonable."²⁰ The burden is on the supporting spouse to show why he should be permitted to retire before that age. A supporting spouse is denied the pursuit of happiness of voluntarily changing jobs where his income might diminish unless he can bear the burden the court places on his to continue support of a former spouse. If voluntary choices in the pursuit of happiness impact a supporting

²⁰ Pimm v. Pimm, 601 So.2d 534 at 537 (Fla. 1992).

spouse's ability to *forever* assure the receiving spouse the lifestyle of the marriage he is subject to penalty and denied the right to pursue happiness.

Judicially created purpose of permanent alimony not in §61.001

Compare these specifically legislatively stated purposes of the Dissolution of Marriage sections with the additional purpose created de novo by Fl. Supreme Court noted, and applied by the Florida 2nd DCA, “The purpose of permanent alimony is to provide the needs and necessities as they have been established by the marriage of the parties. Canakaris v Canakaris, 382 So. 2d 1197 (Fla. 1980)” Levy v Levy, (Fla. 3rd DCA 2003)

Integrity of marriage—no fault divorce

A Purpose expressed for Chapter 61 provisions is “To preserve the integrity of marriage and to safeguard meaningful family relationships.” The Beagle and Von Eiff opinions have dismissed the “safeguard meaningful family relationship” portion of that stated Purpose as not meeting the standard of a compelling State interest.

The “To preserve the integrity of marriage” is the remaining portion of the purpose not yet addressed. This portion does not meet the test of a compelling State interest applied in the least intrusive manner. Further, no fault divorce legislation passed in 1971 effectively demonstrated the State's lack of commitment to the concept of preserving the integrity of marriage. There is no nexus, rationale or reasoning that links the statutory award in some marriages—particularly the longest marriages—of permanent postdissolution spousal support with the Purpose “to preserve the integrity of marriage.” Is it the threat that if one risks dissolving the marriage one would be penalized with a

sanction of mandated lifelong support obligation to the former spouse? The absurdity is self evident and needs no further amplification or example.

Remarriage is a personal decision relating to marriage

The State cannot place barriers to *entry* or *exit* from the privacy-protected zone of marriage without a compelling interest. The permanent postdissolution spousal support provisions place an unconstitutional burden on former spouses strapped with the obligation of support. This burden unconstitutionally infringes on their right to the pursuit of happiness when they chose to reenter another marriage. The State must treat the second marriage with just as much integrity as it does the first marriage.

The only reason the State grants divorce a vinculo is to permit a citizen to remarry.

The state cannot interfere with a citizen's right to remarry without a compelling State interest. It is not the place of the judiciary to place greater value on a first as opposed to a second or third marriage. The citizens have spoken of their wishes by their demonstrated actions regarding divorce and remarriage. The fact that Florida citizens have a high frequency of divorce and a high frequency of remarriage is a reflection that the citizens of Florida desire this freedom of activity.

Government should not promote marriage

The current White House initiative to promote marriage is not so much to encourage marriage for the sake of marriage but as part of the program on welfare

reform.²¹ This element of welfare reform is to encourage people to delay childbirth until they are married. The issue is hotly debated and does not represent the overwhelming public point of view of the role of government in marriage.

Toward the idea of whether government should initiate programs to promote marriage The Pew Research Center reported the following statistically valid survey question:

Q.7 In your view, should the GOVERNMENT start up programs that encourage people to get and stay married, or should the GOVERNMENT stay out of this?

18% The government should start up programs that encourage marriage
79% The government should stay out (emphasis supplied)
3% Don't know/refused.²²

Is the governmental promotion of marriage a valuable government endeavor reflective of public policy? The survey result says resoundingly... No!

If the State had a policy promoting marriage the above survey would show the error of the State. Secondly, if the State had a policy of promoting marriage and preserving the integrity of marriage it would be reasonable to expect the State to be enforcing Florida Statutes §798.02 and §800.02.²³ It is not enforcing them!

²¹ “Rep. Fortney "Pete" Stark (D-Calif.) said marriage is less important in determining whether families escape poverty than education.” Tying Marriage Vows to Welfare Reform. Amy Goldstein, Washington Post page A01, April 1, 2002

²² Americans Struggle with Religion's Role at Home and Abroad. Released March 28, 2002. Survey February 25-March 10, 2002 Pew Center for the People and the Press and Pew Forum on Religion and Public Life 2002 Religion and Public Life Survey.

²³ **798.02 Lewd and lascivious behavior.**--If any man and woman, not being married to each other, lewdly and lasciviously associate and cohabit together, or if any man or woman, married or unmarried, engages in open and gross lewdness and lascivious behavior, they shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

If the State was interested in preserving the integrity of marriage it would not condone, even encourage, cohabitation post dissolution. It does so when cohabitation is regarded merely as an economic factor in a modification proceeding.

State has no duty to protect parties in a marriage

The Florida Constitution states that all political power is inherent in the people (Article I Section 1). The people have spoken in the above survey and the Privacy Amendment that the government should stay out of making policy in the privacy area of marriage and personal decisions related to marriage.

When the State searches for a compelling reason to overcome the privacy amendment's force it must do so in a fashion that it does not conflict with Deshaney v. Winnebago Cty. Soc. Serv. Dept., 489 US 189 (1989). The essence of Deshaney is that the United States Constitution Fourteenth Amendment Substantive Due Process Clause does not impose a special duty on the State to provide affirmative services to the public for protection against private actors as long as the State itself does not create those harms.

“The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security; while it forbids the State itself to deprive individuals of life, liberty, and property without due process of law, its language cannot fairly be read to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.”²⁴

The State must not intrude in the privacy area of marriage and personal decisions related to marriage to a degree that it is assuming a duty to protect private parties to a

800.02 Unnatural and lascivious act.--A person who commits any unnatural and lascivious act with another person commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. A mother's breastfeeding of her baby does not under any circumstance violate this section.

²⁴ Deshaney at 189.

marriage from their independent economic decisions. The State has no duty to ensure, promote, or endeavor to achieve equal economic opportunity or status, nor maintain any form of lifestyle postdissolution to the parties of a marriage.

Marriage, entering, sustaining, and departing, are part of the spectrum of personal decisions related to marriage that the judiciary must refrain from expressing policy opinion absent a compelling State interest, narrowly tailored...and there is none!

II.

Response to Procedural Arguments Precluding Granting An Unconstitutional Order

A. Fundamental Error

The unconstitutional nature of Chapter 61 postdissolution permanent spousal support provision is a valid argument for modification proceedings or appeal even when it is not having been clearly raised during initial dissolution proceedings.

The argument also has validity because it raises for the Court the issue of fundamental error as outlined in Sanford v. Rubin, 237 So.2d 134 (Fla. 1970):

“ ‘Subsequently, in reviewing other cases where issues were first being raised on appeal, we concluded that, for an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process.’ D’Oleo-Valdez v. State, 531 So.2d 1347 (Fla.1988); Ray v. State, 403 So.2d 956 (Fla.1981)”

In dissolution proceedings the entire and only reason the supporting spouse is in the position he is, despite no fault of his and causing no harm, is that he simply remained married too long and thus became subjected to the post dissolution support provision and the judicial discretion of interpretation of Chapter 61. The judicial review to which he is

subjected is inextricably intertwined with this statute, provisions of which violate Article I Section 23 of the Florida Constitution.

Fundamental error is not waived, even if not raised at the trial level. “Constitutional issues, *other than those constituting fundamental error*, are waived unless they are timely raised” (emphasis supplies) in Sanford v. Rubin, 237 So.2d 134 (Fla. 1970).

Waiver of Constitutional Rights

It may, erroneously, be argued that the parties forfeit their constitutional right to privacy by bringing a dissolution proceeding. The erroneous argument states that the filing of dissolution invites the court into the privacy area of marriage. This is the fallacious waiver type argument the Fourth District Court of Appeals considered in Spence v. Stewart, 705 So.2d 996, (Fla. 4th DCA 1998). Some would argue the waiver principle transfers to dissolution., i.e. that the parties to a marriage waive their Constitutional right to Privacy when they invite the court into the marriage by initiating a dissolution proceeding. The courts must consider the weak judicial history of Spence v. Stewart, 705 So.2d 996, (Fla. 4th DCA 1998) regarding this waiver. In Spence the Fourth District Court of Appeal said that because the unwed mother of a child born out of wedlock exercised her right of access to the courts in a paternity suit through Florida Statutes Chapter 61 she waived their Florida Constitutional right to privacy in a grandparent visitation proceeding. By exercising one Constitutional right (Florida Constitution Article I Section 21, right to the courts) she forfeited another, her Right of Privacy.

Spence is unique in the respect it holds a party forfeits one Constitutional right, i.e. the right to Privacy by exercising the very fundamental right of use of the Courts. The Spence ruling is not supported by any subsequent ruling. In fact, Judge Klein, of the same Fourth District Court of Appeals, in Brunetti v. Saul, 724 So.2d 142,143 (Fla. 4th DCA 1999), questioned the correctness of the earlier decision in Spence. Noting that he would "...write only to question the correctness of our decision in Spence v. Stewart, 705 So.2d 996 (Fla. 4th DCA 1998)" he stated,

"I am troubled by the finding of a waiver of that right by people exercising their constitutional right of access to the courts. Art. I, § 21, Fla. Const. The right of access to the courts is construed "liberally in order to guarantee broad accessibility to the courts for resolving disputes" and applies to dissolution cases." Psychiatric Associates v. Siegel, 610 So.2d 419, 424 (Fla.1992). Id. At 144.

The Supreme Court, in Psychiatric Associates v. Siegel, 610 So.2d 419, 424 (Fla.1992), found Florida Statutes 395.011 (10) (b), 395.0115 (5) (b) and 766.101 (6) (b) unconstitutional. The legislative requirement in these statutes for a physician to post a bond in order to access the courts was found unconstitutional as violative of Due Process. Likewise, to adopt the Spence argument, the spouse who becomes a defendant in a dissolution proceeding by simply exercising his right to be heard must pay the required toll of waiver of his Right to Privacy. The Florida Supreme Court said no to this principle of waiver noting,

"While article I, section 21 may not give a litigant a particular remedy, the right of access does guarantee the litigant a forum in which to be heard. Although courts generally oppose *any burden* being placed on the right of a person to seek redress of injuries from the courts, the legislature may abrogate or restrict a person's access to the courts if it provides: 1) a reasonable alternative remedy or commensurate benefit, or 2) a showing of an *overpowering public necessity* for the abolishment of the right, and finds that there is *no* alternative method of meeting such public necessity." Id. [emphasis supplied]

The legislature has done neither of the above.

The application of the Spence holding to escape the constitutional Right to Privacy argument creates a new Constitutional problem, i.e. a violation of Due Process. The Supreme Court in Lasky v. State Farm Insurance Company, 296 So.2d 9, (Fla. 1974), outlined the test for violations of Due Process,

“The test to be used in determining whether an act is violative of the due process clause is whether the statute bears a reasonable relation to a permissible legislative objective and is not discriminatory, arbitrary or oppressive. (FN10) It therefore becomes necessary for us to examine the objectives of the Legislature in enacting this statute in order to determine whether the provisions of the act bear a reasonable relation to them.”

It is argued here that Chapter 61 permanent spousal support provisions are unconstitutional for being violative of Due Process. And, it is argued instead that if the court finds a supporting spouse’s Right of Privacy was waived because he became a defendant in a court proceeding then such a ruling is violative of Due Process.

Another reason the holding in Spence lacks merit is that Spence is considered overruled by the Supreme Court in Von Eiff v. Azicri, 720 So.2d 510 (Fla.1998). The 2d DCA, in Lonon v. Ferrell, 739 So.2d 650, (Fla 2d DCA 1994), said,

“Spence was decided before Von Eiff, and relied somewhat on the "intact family" language in Beagle [Beagle v. Beagle, 678 So.2d 1271 (Fla.1996)]. We disagree with Spence, and instead agree with the First District's conclusion in S.G. v. C.S.G., 726 So.2d 806, 811 (Fla. 1st DCA 1999), that the ‘intact family’ limitation in Beagle has no vitality after Von Eiff. Thus, the constitutional protections announced in Beagle apply in dissolution actions. Id. In so holding, the S.G. court rejected the reasoning in Spence that the constitutional privacy right did not apply when parents had abandoned the right by bringing their dispute before the court. We agree with S.G.; a divorced natural parent, such as Mrs. Ferrell, should have no lesser privacy rights than a married or widowed natural parent.”

The 1st DCA in S.G. v. C.S.G., 726 So.2d 806, 811 (Fla. 1st DCA 1999), vitiated Spence when it stated,

“With respect, we are not persuaded that the analysis in Spence should apply to section 61.13(7). First, we conclude that the "intact family" limitation expressed in Beagle, 678 So.2d at 1272, on which Spence relies, has no vitality after Von Eiff. Von Eiff, 720 So.2d at 516, 23 Fla. L. Weekly at S586. Thus, the constitutional protections enunciated in Beagle and Von Eiff are applicable in dissolution and paternity actions. See Williams v. Spears, 719 So.2d 1236, 1241-1242 (Fla. 1st DCA 1998). Second, we share Judge Klein's concerns about the rationale in Spence, because it seems based on the premise that the exercise of the parents' constitutional right of access to the courts under article I, section 21, Florida Constitution, creates an implied waiver or abandonment of the constitutional familial right to privacy under article I, section 23, Florida Constitution. Brunetti v. Saul, 724 So.2d 142, 144, 23 Fla. L. Weekly D2619, D2620 (Fla. 4th DCA 1998) (Klein, J., concurring). Finally, in our view, there would seem to be no logical reason for concluding that section 61.13(7), if it did require a ‘best interest’ test, would satisfy the ‘compelling State interest’ requirement when this requirement was not satisfied in section 752.01. Beagle and Von Eiff.”

The filing of a dissolution proceeding by a party to a marriage does not violate the privacy nature of the marriage.

III.

Judicial Decision Making—Purposivism or Pragmatism—Same Result...Privacy Amendment Trumps Permanent Alimony Sections

This court can approach its judicial duty when it evaluates the issues in this case by the application of one of two judicial decision making doctrines, i.e. purposivism or pragmatism. The court can follow the more traditional role, purposivism, of viewing the issues before it with an eye toward the application of precedent and the purpose of the statute along with its constitutional challenge.²⁵

²⁵ Purposivism and pragmatism are discussed and debated (in the context of the first amendment) in Comments. Pragmatism Versus Purposivism in First Amendment Analysis. Richard Posner 54 Stanford Law Review 737 (2002)

Alternatively a judicial decision can be reached by the more iconoclastic approach of pragmatism fostered by Posner.²⁶ It is posited that a Constitutional challenge should be reviewed under the more traditional approach. Nonetheless, using either approach the rational outcome is the same, i.e. to declare the sections regarding permanent alimony unconstitutional and eliminate the support provisions or under the pragmatic approach to do away with permanent support provision as lacking rational economic grounding.

For the traditional approach, purposivism the above arguments on the law and public policy demonstrate the unconstitutional character of the support provisions. To say more is to be repetitive.

For the pragmatic approach the consequences of eliminating the spousal support section benefits society enormously.

If the goal of the married parties is to no longer be married and interact over important issues then applying support provisions prevents the parties from going their separate ways in the constitutionally guaranteed pursuit of happiness. They are otherwise forever burdened and subject to court appearance in adversarial confrontations—State mandated! Without support provision the parties go their separate ways except when minor children are involved.

There is no uncontroverted evidence that the lack of permanent postdissolution spousal support creates economic devastation for either party. Men and women advocacy groups offer data to show how each is economically maligned by judicial rulings. Each

²⁶ Id Pragmatism...encourages the thought that the object of adjudication should be to help society to cope with its problems, and so the rules that judges create as a by-product of adjudication should be appraised by a “what works” criterion rather than by the correspondence of those rules to truth, natural law, or some other high-level abstract validating principle.

has their bias. One of the best, most recent and neutral report to address the consequences of no-fault divorce on the parties (“Divorce Reform in California: From Fault to No-Fault...and back again?” Prepared by Donna S. Hershkowitz and Drew R. Liebert Counsel, Assembly Judiciary Committee California State Legislature. November 1997) comments...

“However, the causal relationship between divorce and adult health problems remains, as with children, unclear...

Rather than the divorce itself, it might be the *conflict* present in divorcing families that is responsible for the onset of such problems for children of divorced parents...many of the problems observed among children of divorce are actually caused by the conflict between parents that precedes and accompanies marital dissolution, not the legal act of formally ending what has already informally collapsed.”²⁷

The importance of this is to show that there does not appear to be a demonstrable harm to third parties, children, related to postdissolution permanent spousal support provisions. Even if there was, the child support provisions address this issue and spousal support should not be linked to child support conceptually, or as a State interest.

There are no unbiased analyses to show that the effect of dissolution on the parties universally creates lasting harm. If there was such evidence the legislature should have acted to instruct the judiciary to review *all* dissolution proceedings for this harm. In addition the legislature should have amended its purposes section of the statute and it has not. For these reasons the judiciary should not act to remedy any perceived social issues such as equal economic opportunities in the market place for women—that role belongs to the legislature.

Personal Responsibility

Connor put to rest judicial activism applied to the privacy protected zone of marriage to remedy any perceived social or economic injustices. The Connor court said personal responsibility is the public policy unless the legislature wants to chance that policy. The Federal Legislature also stressed personal responsibility in 1996 when it titled its welfare reform act “Personal Responsibility and Work Opportunity Reform Act.” The benefits to society of that policy have been extremely positive to date. So, too, a pragmatic ruling to eliminate spousal support statutes will benefit society. The concept and philosophy of public entitlement died a s public policy with the passage of welfare reforms.

A pragmatic judiciary must consider Coasian transaction costs in its analysis. Can there be any doubt about the enormous economic waste devoted to the transactions costs of analyzing, ruling upon and enforcing spousal support provisions and subsequent modification.²⁸

IV.

THE PERMANENT ALIMONY SECTIONS FAIL FOR VAGUENESS

As to vagueness the Fourth District Court of Appeal has outlined the judicial review process in civil cases,

“Statutes must be clearly worded so that persons of common intelligence have fair warning of what is prohibited, required or permitted. The test

²⁷Divorce Reform in California: From Fault to No-Fault...and back again? prepared by Donna S. Hershkowitz and Drew R. Liebert Counsel, Assembly Judiciary Committee California State Legislature. November 1997) at 138, 139.

²⁸ Ronald Coase and Methodology Chapter in Overcoming Law. Richard A. Posner, Harvard University Press. 1996.

utilized to determine the vagueness of a statute, therefore, is whether the statute is specific enough to put persons of common intelligence and understanding on notice of the proscribed conduct. *State v. Hodges*, 506 So.2d 437 (Fla. 1st DCA),” *Scudder v. Greenbrier* 663 So.2d 1362, 1367 (Fla.4th DCA 1995).

Florida Statutes §61.031 is contradictory. As noted above, but worth repeating for a different purpose, a dissolution of marriage a vinculo terminates all duties, *Greenwald v. Blume*, 312 So.2d 783, 785 (Fla. 3d DCA 1975).

“It was acknowledged by the Florida Supreme Court in *Carson v. Oldfield*, 1930, 99 Fla. 862, 127 So. 851, 855, that death of one of the parties and a decree of divorce a vinculo, have the same effect of putting an end to the marriage relation, resulting in the immediate cessation of *all* duties and obligations necessarily dependent upon the continuance of that relation.” (emphasis supplied)

The text of the statute states “no dissolution of marriage is from bed and board.” A vinculo severs all duties, yet the text of the statute replaces those of bed and board. A reasonable person would be perplexed by the contradiction.

Universe of factors for judicial wanderings

Florida Statutes § 61.08 (1), (2) (post dissolution spousal support areas) is vague because, after considering over 2¹⁷ permutations to apply to the spouses trying to dissolve their marriage “The court may consider *any* other factor necessary to do equity and justice between the parties.” (emphasis supplied)

The term of the statute is too expansive to permit a reasonable person to know the factors and how they will be weighed. Also, (2) orders the court shall consider “*all* relevant economic factors” (emphasis supplied). The infinite factors do not provide the specificity needed to reasonably anticipate which factors a court will select, weigh and

apply. Case law has helped define these factors, but fact patterns coupled with the infinite number of factors has created a plethora of appeals.

“There remain, however, numerous marital situations that fall somewhere on the factual spectrum between these extreme examples, and which present difficult questions for trial courts to resolve. Appellate courts have fared little better in recognizing which of these cases should be left alone under the abuse of discretion standard set out in Canakaris, and which merit intervention pursuant to the objective criteria set out in the same case.” Geddes v. Geddes, 530 So.2d 1011 (4th DCA 1988)

As the Fourth District Court of Appeals noted in Geddes, Trial Courts and Appellate Courts have considerable difficulties to interpreting the law. Their expertise is far above the “persons of common intelligence and understanding” this Court, in Scudder supra., felt should be able to understand the statutes.

The constitutional infirmity of vagueness of the statutes unfolds in the judicial decision-making process concerning post dissolution spousal support. The court, based on the factors of the statutes, starts with an infinite number of permutations of factors to elicit, weigh, balance, and analyze. It is not argued that “standard of living during the marriage” must pass muster on the criteria of vagueness. It did not in Beers v. Beers, 724 So. 2d 109 (Fla. 5th DA 1998). On the contrary, we contend the full spectrum of options including the catchall of all other economic factors noted in § 61.08 establishes the uncertainty and lack of predictability ascertainable to a reasonable defendant. The Trial Court is given wide discretion by Canakaris. The Trial Court comes to a conclusion and issues an order based on the statutes that is highly unpredictable because of the multiplicity of factors.

Abuse of discretion standard not uniformly applied

If the Trial Court's order is appealed then the Appellate Court applies the standard of abuse of discretion. Abuse of discretion is defined as if reasonable men could disagree then there is no abuse of discretion. This decision making process is not uniformly applied because of the vagueness of the statutes.

An example brings to light these decision-making inconsistencies necessitated by the vagueness of the statutes. In Green v. Green, 672 So.2d 49 (Fla. 4th DCA 1996) the Fourth DCA reversed a Trial Court award of rehabilitative alimony. There was a dissenting opinion on the reversal. Here was a situation where reasonable men—DCA Justices--disagreed as evidenced by the dissenting opinion. Nonetheless the Trial Court was reversed. By definition there was no abuse of discretion, yet the Trial Court was reversed.

The operation of the judicial system in the realm of post dissolution support lacks consistency because the statute suffers the infirmity of vagueness. “While reluctant to suggest an exception to this generally positive and stable picture, it appears that the issue of permanent alimony remains a troubling one.” Geddes supra in 1988, eight years after Canakaris, was referring to the difficulties in interpreting the post dissolution spousal support statute even after Canakaris. Geddes is replete with dicta substantiating the claim of vagueness and inability of a reasonable person to foresee with some degree of specificity and consistency actions for which he will be responsible, adjudicated with a lifelong sentence of spousal support enforced with the threat of arrest.

Because the postdissolution spousal support statutes lack specificity the only ascertainable conduct which places a person at lifetime risk of supporting another person for a lifetime is the simple, legal, private act of marriage.

Because the judicial decision making in Florida Statutes §61.14 (1), (3), and (5)(a), i.e. modification, are so dependent on Florida Statutes §61.08 the constitutional infirmity of Florida Statutes §61.08 flows over to Florida Statutes §61.14 (1), (3), and (5)(a) in modification of spousal support provisions.

Fl. Supreme Court Commission confirms vagueness

Our case law and statutory support for vagueness of the statutes is confirmed by the Florida Supreme Court's own Commission Report.

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)

V.

Gender Bias—Equal Protection

The requirements of equal protection are well established in our Federal (U.S. Constitution, Article XIV) and State law (Florida Constitution Article I Section 2) and need not be reiterated here.

Our burden is to show the existence of bias based on a constitutionally protected basis in order to demonstrate a violation of equal protection.

The Florida Supreme Court Commission Report above is ample evidence to support a valid claim of Bias. The findings of the Commission and the Report six years later on the Implementation of the findings confirms the existence of Gender Bias.

The existence of Gender Bias and the attempt to correct it, i.e Affirmative Action based on Gender violate Floridians’ equal protection rights in the dissolution process. The violation is particularly egregious when gender bias exists in a court of chancery applying a standard of equity by judges granted wide discretionary power.

The Report of the Florida Supreme Court Gender Bias Study Commission (1990) states,

“...gender bias permeates Florida’s legal system today.” (page 42). The statement does not specify which gender is discriminated against. The implication is that women are biased against.

“After reviewing this monograph, the Chief Justice of Florida and his colleagues on the Florida Supreme Court concluded that gender bias does in fact exist in the state’s legal system.” (page 42) This acknowledgment carries with it the implicit rationale to correct the bias. This is improper. Each case carries its own facts. The Districts Courts have repeatedly they must trust in the ability of the trial judge to judge the credibility of the evidence. If bias is as prevalent as noted, the trial court and the District Court opinion value is seriously diminished.

“Without a good attorney, the woman is critically disadvantaged.” (page 45) How is it the duty of the judiciary as a State official to provide for and assess the quality of legal representation in a civil action?

“She may be unable to enforce her legal right to alimony, equitable distribution of marital assets and child support.” (page 45). How are women entitled to child support? Children are entitled to child support!

“The article..is intended to sound a warning, to stir judicial and Bar awareness of serious problems, and to urge a joint and healthy response by Bench and Bar to improve not just the public’s perceptions of the judicial resolution system in family law, but to improve the realities and help solve the problems giving rise to those perceptions which, unfortunately, appear to be well-founded and widely held.” (page 46 footnote 3 A report from the Bench-Bar Committee of the Family Law Section of the Florida Bar.)

“Unquestionable, the testimony we received focused primarily on problems in courts of Florida, not the positive occurrences.” (page 46) Such a statement shows the

invalidity of the conclusions. Without comparing the frequency and severity of the problems compared with the positive results the report is truly meaningless. Without this objective comparison the report is a self-serving document spurring invalid responses by the Courts.

Furthermore, since when are judicial decisions predicated on assuring correct public perceptions? Such a statement, and the courts heeding it diminish the objectivity of the judicial system so necessary for public trust.

The entire portion (The Economics of Divorce) of the Report demonstrates the judicial legislation the Courts have embarked beyond the purposes of the Chapter 61 statutory provisions. It is not the State's role to assess and balance economics of marriage particularly in light of Connor. No compelling state interest exists for such action.

The large portion, and the emphasis, in the report of economics of divorce imperil constitutionally protected fundamental rights in the protected sphere of personal decision relating to marriage.

The Report is replete with emotionally charged self-serving anecdotes. It is difficult to determine if the investigation led to the conclusions or the existence of predetermined conclusions led to selective reporting to support those conclusions. The Report has such little validity no conclusion can be drawn sufficient to predicate action.

As an example, Janet Reno, then state attorney for Dade County, is quoted,

“I just think that if you have this many children living in poverty, and over 50 percent of them live in female-headed houses that the law has set up a system that discriminates against women.” (page 48)

The illogic of the statement speaks for itself. No amount of post hoc ergo proctor hoc reasoning can lead to the dissociated thought and conclusion expressed.

“Dislike of family law [by the Bench and Bar] may lead to being uninformed and insensitive about family law.” (page 54) This is the atmosphere in which constitutionally guaranteed fundamental rights are adjudicated. Even better,

“Apparently, most judges really do not want to hear family law matters and it shows...It cannot be comforting to find that the one who holds the future of your access to your children and your financial future in his or her hands has, at best, little interest in that role, or, at worst, a distaste for it.” (page 54)

A conclusion in violation of the statute is so biased as to be noted,

“Thus, alimony should be considered as general compensation for the wife’s lost opportunities rather than a claim for support based upon need.” (page 58)

Conclusion

“We are only at the beginning of a philosophical reaction, and of a reconsideration of the worth of doctrines which for the most part still are taken for granted without any deliberate, conscious, and systematic questioning of their grounds...

Most of the things we do, we do for no better reason than our fathers have done them or that our neighbors do them, and the same is true of a larger part that we suspect of what we think. The reason is a good one, because our short life gives us no time for a better, but it is not the best. It does not follow, because we all are compelled to take on faith at second hand most of the rules on which we base our action and our thought, that each of us may not try to set some corner of the world in the order of reason, or that all of us collectively should not aspire to carry reason as far as it will go throughout the domain.”²⁹

Chapter 61 “Dissolution of Marriage” permanent alimony sections (61.08 et al) are violative of Article 1 Section 23 of the Florida Constitution. The State prevents a

²⁹ Supra at 9.

citizen's pursuit of happiness, subjects him to a life of indentured servitude with the threat of contempt and imprisonment without a compelling State interest narrowly tailored.

A respondent—or petitioner--brought to court in a dissolution proceeding, modification proceeding, or a related contempt proceeding cannot forfeit a constitutional right to privacy because he must defend himself in a court proceeding. Judicially noticed vagueness in the above civil statutory provisions, and Gender Bias in their application creates a morass for Florida citizens that is unconstitutional.

Floridians Federally and State constitutionally guaranteed Liberty interest and fundamental rights cannot be imperiled in a court of chancery, with a standard of equity, applied in a cloud of Gender Bias, with wide judicial discretion.

Prayer for Relief

“Constitutional rights must be enforced by courts even against the legislature's powers, and privacy in particular must be enforced even against majoritarian sentiment. Shaktman. Indeed, the overarching purpose of the Florida Declaration of Rights along with its privacy provision is to "protect each individual within our borders from the unjust encroachment of state authority--from whatever official source--into his or her life." Traylor v. State, 596 So. 2d 957, 963 (Fla. 1992).

At a fundamental level, the role of the Justices and judges of Florida is to guarantee and enforce the protection afforded by these basic rights. This is at once a judge's greatest calling and heaviest burden. It is an obligation we shoulder by our oath of office, binding ourselves to enforce individual liberty even in the face of public or official opposition. To shield the liberties of the individual from encroachment is uniquely the task of courts. In that sense, we are obliged to give sanctuary against the overreaches of government.

..... In Florida, our judiciary likewise is the one branch that emphatically must protect the basic rights of individuals against governmental overreaching. We guard liberty's sanctuary. It is our greatest duty to the people of Florida.” Justice Kogan dissenting in Krischer v McIver, 697 So.2d 97 (Fla. 1997)

WHEREFORE, based on the above stated law and public policy this court must declare the noted Chapter 61 “Dissolution of Marriage” permanent alimony sections (§61.08 et al) impermissibly infringe federal and state Liberty interest and fundamental Right of Privacy in the Privacy protected zone of “personal decisions relating to marriage,” impermissibly infringe U.S. and State constitutional equal protection substantive due process, impermissibly infringe state constitutional Basic Rights and grant immediate injunctive relief by holding William A. Cabana no longer bound by them.

Respectfully submitted,

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Dated: December 2, 2004

Certificate of Service

I hereby certify that on the 2nd day of December, 2004, I caused a true and accurate copy of the foregoing to be served in the manner specified on the following.

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