

30 April 2005

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY,
FLORIDA
Family Division
Case No. 50197 DR004137XXDIFD

WILLIAM A. CABANA
Former Husband, pro se

and

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

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SHARON R. BOCK
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FAMILY DIVISION

**MEMORANDUM OF LAW
IN SUPPORT OF
MOTION TO DENY CONTEMPT AND FOR TERMINATION OF ALIMONY
MOTION TO OBJECT TO REQUEST FOR PRODUCTION**

“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

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)

See LittleJohn v. Rose, 768 F. 2d 765, 768 (6th Cir. 1985) citing (Zablocki_434 U.S. at 385),

"Decisions of the Supreme Court have firmly established that "matters relating to marriage [and] family relationships" involve privacy rights that are constitutionally protected against unwarranted governmental interference. E.g., Roe v. Wade, 410 U.S. 113, 152-53, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973). The Court has "routinely categorized [these matters] as among the personal decisions protected by the right to privacy [and, in addition] has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." Zablocki v. Redhail, 434 U.S. 374...

The Supreme Court has established broad protection for matters relating to the marital relationship including the availability of due process in seeking adjustments to the marital relationship. Boddie v. Connecticut, 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct.780 (1971). Given the "associational

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

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)."

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

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).

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, 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

