IN THE CIRCUIT COURT
OF THE [NUMBER] JUDICIAL CIRCUIT
IN AND FOR _____COUNTY
FLORIDA
CIVIL DIVISION

CASE NO. 2003

[NAME],

v.

THE [NUMBER] CIRCUIT COURT OF FLORIDA

MEMORANDUM OF LAW

FLORIDA STATUTES CHAPTER 61.08 IMPERMISSIBLY INFRINGES THE FLORIDA CONSTITUTION

There is a myth that alimony is a concept etched in stone that came down from the Mount. The myth is that alimony has been around forever, i.e. that it is a right long established in the common law. It is not.

On the contrary, there is no common law basis for alimony. It is merely a statute created by the legislature and as such is subject to the restraints of the Florida Constitution. The alimony statutes are unconstitutional because they impermissibly infringe the liberty interests and privacy rights of Floridians emblazoned in the Florida Constitution Article I Section 23, Right to Privacy.

Below we point out the Privacy Amendment, The Florida Supreme Court law applying the Privacy Amendment to a statute, the attachment of the Privacy Amendment to the alimony statute, the presumptive unconstitutionality of the alimony statute and the State's overwhelming burden to validate the alimony statute. It should be noted, this

State burden has never been successfully borne when the Privacy Amendment has attached to a statute.

> "Finally, I cannot ignore the majority's statement that the issues in this case must be left to the legislature. Such a statement ignores fundamental tenets of our law. 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.
>
> I think we must be mindful of the history that led the American states to interpose their courts as a bulwark between majority will and the basic rights of individuals."[1]

I

ARTICLE I SECTION 23 RIGHT TO PRIVACY

> **"**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."[2]

North Florida Women's Health & Counseling Services, Inc., et al. v. State of Florida. (Case No: SC01-843, July 10, 2003) is now the sentinel case controlling the application of the Privacy Amendment (Article I Section 23) to Florida law.

[1] Justin Kogan dissenting in *Krischer v. MvIver* , 697 So.2d 97 (Fla. 1997)
[2] Florida Constitution Article I Section 23

North Florida Women's solidifies strict scrutiny as the standard of review to be applied when the constitutional nature of a statute is challenged under the Privacy amendment.

> "A legislative act impinging on this right [Privacy] is presumptively unconstitutional unless *proved* valid by the State…This is the settled law that we applied in T.W. and that we again apply today." (Emphasis added) page 25.

A challenging plaintiff's burden is to attach the Privacy amendment to the challenged statute. Once done the statute is presumed unconstitutional. The burden shifts to the State to *prove* a compelling state interest applied in the least intrusive manner. *North Florida Women's* crystallizes the State's burden,

> "…the State cannot meet its heavy burden simply by stating that the interests are compelling without proof from the State that the compelling interests are in fact furthered by the statutory intrusion into the protected fundamental rights, and that the statutory intrusion is the least intrusive means to achieve that goal." (Emphasis is not added) page 71.[3]
> If the State does not fulfill that burden the statute remains unconstitutional and

unenforceable. The State has never met that burden in any case challenged under the Privacy Amendment.

II

The Privacy Amendment Attaches to Chapter 61

A. Privacy Protected Zone of "Personal Decisions Relating 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),

[3] Citing *Chiles v. State Employees Attorneys Guild*, 734 So. 2d 1030, 1033 (Fla. 1999) (quoting *Florida Bd. of Bar Examiners Re: Applicant*, 443 So. 2d 71, 74 (Fla. 1983));

> "…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)and; Planned Parenthood v. Casey, 505 U.S. 833, 859 (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 the State attachment of the fundamental Privacy Right to marriage we note Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544, 548 (Fla.1985)., 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)."

B. "Dissolution of Marriage" is a "Personal decision relating to Marriage"

It cannot be disputed that a decision by a Floridian to get married, stay married or dissolve a marriage is a personal decision relating to marriage. Such a fundamental freedom, a liberty interest, is guaranteed by Article I Section 23 and Article I Section 2 of the Florida Constitution.

Chapter 61 is entitled "Dissolution of Marriage; Support; Custody." It cannot be disputed that Chapter 61 Dissolution of Marriage provisions specifically target legislation by the State at the Privacy protected zone of a "personal decision relating to marriage."

All provisions of the dissolution of marriage statute must not infringe Article I Section 23 right to Privacy unless the State proves a compelling state interest applied in the least intrusive manner and proving that the statute furthers that interest.

C. The Title of the Statue is the Test for a Constitutional Challenge

The State itself has acknowledged a linking principle between the title of the challenged statute and its constitutional invalidity to be the test to be applied in its Brief of the Attorney General in *Butler v Harris, Butterworth*. No. SC00-2403 Florida Supreme Court,[4]

> "[T]he vice of constitutional invalidity must inhere in the very terms of the title or body of the act. If this cannot be made to appear from argument deduced from its terms or from matters of which the court can take judicial knowledge, we will not go beyond the face of the act to seek grounds for holding it invalid. Crandon v. Hazlett, 157 Fla. 574, 26 So.2d 638, 643 (1946), quoting State v. Armstrong, 127 Fla. 170, 172 So. 861, 862 (1937) (Terrell, J.)."

III

Burden to the State

The Privacy amendment having attached to the Chapter 61 Dissolution of Marriage provisions the burden is now the State's. The State must prove a compelling State interest applied in the least intrusive manner, which interest is in fact furthered by the statute. Furthermore, the State must bear this burden by demonstrating legislative consistency related to the interest.

[4] http://www.flcourts.org/pubinfo/election/00-2403ansButterworth.pdf

Justice Pariente in North Florida Women's[5] emphasized the importance of legislative consistency in compelling state interest analysis under strict scrutiny,

> "…although review of other related statutes is not the only manner of analyzing whether the statute serves a compelling state interest, this method constitutes one tool in the independent review that we *must* undertake in performing a strict scrutiny analysis." (Emphasis added)

Richardson v. Richardson, 766 So. 2d 1036, 1038 (Fla. 2000), in a successful constitutional challenge to a Chapter 61 provision, states,

> "… there is no need (nor is it permissible) to consider the hypothetical consequences of a statute that allegedly violates a substantive, fundamental right. Such a statute is unconstitutional under any circumstances unless the State satisfies its burden of establishing a compelling state interest."

IV

Alimony is only a Statute

The myth shrouding the concept, the statute, the rationale and the application of alimony has for decades deprived Floridians of their fundamental constitutionally guaranteed liberty interests.

The facts of alimony are stated by the Florida Supreme Court itself in *Pacheco v. Pacheco,* 246 So.2d 778, 780 (Fla.1971),[6]

> **"At common law there was no right to alimony at all. Divorce was not a function of the judiciary…**
>
> **The so-called 'right' to alimony does not exist as an incident to divorce A vinculo unless it is granted by statute."**

[5] *North Florida Women's at p. 78.*

[6] For further support that Alimony is only a statute without common law right see Cornelius v. Cornelius, 382 So.2d 710 (Fla. 1st DCA 1979) and Geddes v. Geddes, 530 So.2d 1011, 1017 (4th DCA 1988).

Because alimony is only a statute there are no constraints on demanding it comport with the Privacy Amendment. If it does not, and it does not, then this court must declare it unconstitutional and unenforceable.

The words of President John F. Kennedy (1962) ring true in the context of the numerous myths surrounding the concept of alimony,

> "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 cliches of our forebearers. We subject all facts to a prefabricated set of interpretations. We enjoy the comfort of opinion without the discomfort of thought."

V.

The Death 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."[7]

Coverture died with Article X Section 2 Florida Constitution, Florida Statutes Section 708 (Married Women's Property) and *Merchant's v. Cain*, 9 So. 2d 373, 375 (Fla. 1942). The rationale for the alimony statute having long since died so must the statute.

> "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."[8]

VI.

[7] 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.
[8] O.W. Holmes. The Path of the Law. 10 Harvard Law Review 457 (1897)

***Connor v. Southwest*…Married Parties are Economic Independents**

Connor v. Southwest Florida Regional Medical Center, Inc., 668 So. 2d 175 (Fla. 1995) abrogated the doctrine of necessaries effectively making the parties in a marriage economic independents. The Dissolution of Marriage statute makes them economically dependent after their marriage. The statute conflicts with *Connor*.

> Judge Overton, in his dissent explains the effect of the *Connor* decision, "The majority's abrogation of the doctrine of necessaries appears to shift the policy of the State by, in effect, requiring each spouse to take care of himself or herself."

The application of *Connor* to the dissolution of marriage context was certified to the Florida Supreme Court in *Fernandez v. Fernandez*, 710 So. 2d 223 (Fla. App. 2 Dist. 1998). Before the Supreme Court could address the question the case was settled.[9]

Connor's abrogation of the doctrine of necessaries was correct because the concept of coverture had been repeatedly extinguished.

Connor offers a further sound judicial reason to invalidate the dissolution statutes.

VII.

Gender Bias

Not only do the Dissolution of Marriage statutes impermissibly infringe the Right to Privacy they are applied to deprive this fundamental right in the most remarkable forum.

Chapter 61 provisions are applied in a court of chancery, with a judicial standard of equity, applied by judges given a wide degree of discretion amid a cloud of Gender

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[9] Personal communication with attorney in the case.

Bias. To subject Floridians' constitutional rights to that judicial atmosphere is unconstitutional.

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

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

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

> "…gender bias permeates Florida's legal system today." (page 42)

"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)

"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)

Need anything more be said?

VII.

Conclusion

Based on the Privacy amendment attaching to the Chapter 61 alimony provisions and the State failing to demonstrate a compelling state interest applied in the least intrusive manner this court must declare the noted Chapter 61 alimony provisions unconstitutional, grant immediate injunctive relief by holding [NAME] no longer bound by them.

Certificate of Service

IT IS HEREBY CERTIFIED that a copy of this pleading has been mailed to , Assistant Attorney General, this day of 2003.

Respectfully submitted,

_____
[NAME], Esq.
Florida Bar Number

Cooperating Counsel for the Center for Liberty and Privacy