IN THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

WILLIAM A. CABANA,

Appellant,

Case No. 2D06-5577
Trial Court Case No. 2006 CA 5063 SC

vs.

JAMES ZINGALE,
EXECUTIVE DIRECTOR,
FLORIDA DEPARTMENT
OF REVENUE,

Appellee.

Appeal from the Circuit Court of the Twelfth Judicial Circuit
In and For Sarasota County, Florida

APPELLEE'S ANSWER BRIEF

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SUMMARY OF THE ARGUMENT

In his initial brief, Appellant goes to great lengths in arguing that payment of alimony is a decision that is to be made solely by the divorced or divorcing spouses, and that the government is prohibited from being involved in this matter. What Appellant is actually contending is that if a spouse decides not to pay alimony, the state is powerless to address this through the Legislature and/or the courts.

Appellant premises his novel and incredible argument on three grounds: that Florida's alimony statute, §61.08, Fla. Stat., (1) infringes on the right of privacy, (2) violates the separation of powers doctrine, and (3) is contrary to the case law that abrogates the doctrine of necessaries.

In his prolix narrative, Appellant fails to cite to a single case involving alimony that supports his argument. Pointedly, with regard to two cases destructive of his privacy claim, Appellant simply says the appellate court wrongly decided those cases.

The case law set out below is uniform in rejecting a privacy claim to an alimony statute, and demonstrates the baselessness of Appellant's separation of powers and doctrine of necessaries claims.

Florida's alimony statute is a manifestation of the State's police power designed to protect the needy spouse; Appellant's notion that he–and by extension others similarly situated–has the constitutional right to decide whether or not to pay

alimony is alien to our jurisprudence.

ARGUMENT

THE TRIAL COURT CORRECTLY DISMISSED WITH PREJUDICE APPELLANT'S CHALLENGE TO THE STATE'S ALIMONY STATUTE, §61.08, FLA. STAT.; THIS POLICE POWERENACTMENT DOES NOT INFRINGE UPON THE RIGHT OF PRIVACY, ART. I, §23, FLA. CONST.; DOES NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE; AND THE ABROGATION OF THE DOCTRINE OF NECESSARIES HAS NO EFFECT ON THE AWARDING OF ALIMONY.

Stripped of its gloss, Appellant contends that the decision to pay alimony is none of the government's business; that because Florida's alimony statute, §61.08, Fla. Stat., violates the privacy amendment and the separation of powers doctrine, and is contrary to Connor v. Southwest Florida Regional Medical Center, Inc., 668 So. 2d 175 (Fla. 1995) which abrogates the common law doctrine of necessaries, it remains up to the spouses to decide the question of alimony.[1]

What Appellant overlooks initially is that, unlike marriage and decisions regarding children and child-rearing, alimony is a result of a broken marriage which necessarily involves legislation and a judicial process born of the State's police power to deal with the aftermath of this broken relationship.

As the Court said in Ryan v. Ryan, 277, So. 2d 266, 273 (Fla. 1973):

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[1]This is the clear implication of Appellant's position. See pg. 7 of Initial Brief.

the authority to regulate marriages and correspondingly to **provide for their dissolutions** is vested in the Legislature. It is inherent in the state's police power to do so in the regulation of society and its relationships, including the very essential and important family relationship within marriage. The marriage contract perhaps more than any other has a vital and essential effect on the very life and society of the State and therefore is a very proper subject of the State's police power; the subject of marriage (**and correspondingly the dissolution thereof**) has a very definite bearing upon the public interest with which the Legislature is concerned and charged with its regulation.

(Emphasis added.)

In furtherance of this fundamental obligation to protect both the marriage relationship as well as its dissolution, the Legislature adopted §61.08, Fla. Stat., informing the court to "consider all relevant economic factors, including but not limited to" several enumerated matters, along with "any other factor necessary to do equity and justice between the parties."[2] That a court has the inherent power to do what equity and justice requires is without question. See McRae v. McRae, 52 So. 2d 908 (Fla. 1951).

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[2]In Beers v. Beers, 724 So. 2d 109 (Fla. 5th DCA 1998), *reh. denied, rev. denied*, 735 So. 2d 1283 (Fla. 1998), the Court held that requiring the trial court to consider the standard of living of both spouses did not violate due process or equal protection, and the statute was not vague.

"Alimony" means nourishment or sustenance. Fort v. Fort, 90 So. 2d 313 (Fla. 1956). The sole object of alimony is to provide food, clothing, habitation, and other necessities for the support of the former spouse. Groover v. Groover, 383 So. 2d 280 Fla. 5th DCA 1980). Section 61.08, Fla. Stat., represents a balancing of the interests of the spouses by legislative directive and judicial decision making. However, this statute does not stand alone. The Supreme Court has also adopted rules governing dissolution cases, providing for confidentiality where the need is demonstrated. See R. Jud. Admin. 2.051; Fam L. R. P. 12.280 and 12.400. Whatever expectation there may be in the confidentiality of dissolution proceedings is manifested by these rules, and not the Constitution's privacy amendment.

I. Appellant's Privacy Claim is Meritless.

Appellant's privacy argument reveals confusion regarding the fact of marriage (and dissolution) on one hand, and the marital relationship on the other. There is certainly an expectation of privacy with regard to the latter; there is none with regard to the fact of marriage or divorce. In fact, §382.025(2), Fla. Stat., establishes that vital statistics records–including marriage licenses and divorce decrees–are public records.

Appellant's privacy claim is not new. Other disappointed litigants have

challenged §61.08, Fla. Stat., on a host of constitutional grounds, which have just as many times been rejected. The following cases put a nail in the coffin of Appellant's privacy claim.

In In Re: Commitment of Duane Edwin Sutton, 884 So. 2d 198 (Fla. 2d DCA 2004), the Court reiterated the principle that in order for Florida's right of privacy to attach, there must be a legitimate expectation of privacy. Appellant fails to cite to a single case from any jurisdiction to the effect that a constitutional right of privacy attaches to an alimony decision based on statute and a court's inherent equitable powers.

In Pacheco v. Pacheco, 246 So. 2d 778, 782 (Fla. 1971), the Court held that the alimony statute is a valid exercise of the State's police power and does not contravene constitutional assurances of due process and equal protection.

In Barna v. Barna, 850 So. 2d 603, 604 (Fla. 4th DCA 2003), the Court found that a constitutional attack on Florida's alimony provisions was so frivolous as to support the award of attorney's fees against the party asserting it. As the Court said:

> In the context of dissolution proceedings, appellant asserted his constitutional challenge to the alimony statutes. While appellant represented to the court that his actions did not require the former wife's participation, the trial court found otherwise. In addition, the trial court found that appellant's counsel's attack on the alimony

> statutes was irrelevant, frivolous, and brought only to advance the cause of an unrelated client, the Alliance for Freedom from Alimony, Inc. As a result, the court awarded fees to the former wife for pursuing frivolous litigation brought without regard for the cost burden to the former wife.

Id. The Court concluded that, based upon the facts of the case, the trial court's decision was proper.

Daniel v. Daniel, 922 So. 2d 1041 (Fla. 4th DCA 2006)–a case somewhat similar to the one at bar–the appellate court addresses a trial court order in a dissolution proceeding involving a request for permanent financial relief. The trial court required the husband to file a financial affidavit, to which he objected on privacy grounds. The Court, in addressing Article I, §23, Fla. Const., in the context of the financial affidavit required by the Family Law Rules of Procedure, reiterated the principle set out in Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 547 (Fla. 1985) that "(t)he right of privacy does not confer complete immunity from governmental regulation and will yield to compelling governmental interests" in those instances in which there is an expectation of privacy. Daniel, 922 So. 2d at 1044. The Court then recognized that "marriage is of vital interest to society and the state, (and) it has frequently been said that in every divorce suit the state is a third party whose interests take precedence over the private interests of the spouses."

Daniel, 922 So. 2d at 1045.[3]

The Daniel Court, in considering both Fla. Fam. L.R.P. 12.280's mandatory disclosure in light of Fla. Fam. L.R.P. 12.400's confidentiality protections, concluded that "(a) financial affidavit is central to the job of a court trying to do justice in a divorce case. The property divisions made and obligations imposed by a final decree turn on the financial conditions of the parties. A court cannot do the right thing without sufficient information about the parties' finances." Id.. After discussing in detail the import and impact of the financial affidavit, the Court held that "the husband's expectation that he may avoid filing a financial affidavit ... is not one that society is prepared to consider as reasonable. Florida's right of privacy is not implicated in this case." Id.[4] This holding is directly applicable to, and destructive of, Appellant's privacy claim.

In Greenberg v. Zingale, 138 Fed. Appx. 197 (11th Cir. 2005), the Court rejected due process, equal protection and involuntary servitude claims directed to Florida's alimony statute. And in Gogola v. Zingale, 141 Fed. Appx. 839 (11th Cir. 2005), the

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[3]That Barna and Daniel compel rejection of Appellant's privacy claim is tellingly demonstrated by his cavalier dismissal of these cases as having been "wrongly decided."

[4]This follows Peyton v. Browning, 541 So. 2d 1341 (Fla. 1st DCA 1989), holding that the provision for sealing financial affidavits reflects the established public policy espoused by the Florida Supreme Court as an exception to the presumption of openness of all judicial proceedings.

court noted that the 20th Judicial Circuit entered an order rejecting Gogola's claims that the alimony statute, inter alia, violated his constitutional right to privacy and equal protection, inalienable basic rights and Florida Supreme Court precedent. The Second District Court of Appeal dismissed Gogola's appeal on the grounds that it was nonappealable.[5]

Appellant's argument for privacy protection from alimony obligations is also contrary to the openness which is the hallmark of the Florida judiciary. Barron v. Florida Freedom Newspapers, 531 So. 2d 113 (Fla. 1988), demonstrates that both civil and criminal court proceedings are public events; there is a well-established common law right of access to court proceedings and records; and in light of the strong presumption of openness of all judicial proceedings, closure of those proceedings or records should occur only when necessary and under appropriate circumstances.

In sum, there is no principled basis in fact or law that gives any credence to Appellant's privacy claim directed to Florida's alimony provisions. Accordingly, Appellant's privacy claim is without merit.

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[5]In Martyak v. Martyak, 378 F. Supp. 2d 1365 (S.D. Fla. 2005), a similar scenario took place in which a disappointed husband ordered to pay alimony challenged the award on virtually the same grounds as asserted in the case at bar. Just as with the other cases cited herein, those constitutional claims were rejected.