Appeal Case Number 2D06-5577

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IN THE SECOND DISTRICT COURT OF APPEALS OF FLORIDA

WILLIAM A. CABANA
Appellant, *pro se*

v.

JAMES ZINGALE, EXECUTIVE DIRECTOR, FLORIDA DEPARTMENT OF REVENUE
(In his official capacity)
Appellee

Twelfth Judicial Circuit Court of Florida

Case Number 06-CA-5063-SC

APPELLANT'S INITIAL BRIEF

William A. Cabana, *pro se*,
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Preface

The Appellant, William A. Cabana, will be referred to as the Appellant or Former Husband. The Appellee, James Zingale, will be referred to as Appellee or Director Zingale.

The Record will be referred to as R and the Circuit Court Document Name.

Reservation of Federal Claims

The Appellant requests this court to consider federal law in adjudicating his state law claims. *England v Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964)

The Appellant plans to return to federal court to adjudicate federal constitutional challenge claims in the event this court rules adversely on his state claims.

The Appellant does not have federal court available to him at this time to adjudicate these state constitutional claims.

Statement of the Case and of the Facts

The Appellant, after an eleven-year marriage, was divorced in 1972 and ordered to pay $25 a week alimony—forever—without any terms of cessation. Thirty-four years later, with the alimony yoke around his neck, he

is still subject to Florida court jurisdiction. (R Action For Declaratory Judgment and Injunctive Relief filed June 2, 2006)

In this action he requested a declaratory judgment as to whether a state constitutional amendment (Art. I § 23, Fla. Const.) that was enacted, and case law involving interpretation of another state constitutional amendment (Art. II 3, Fla. Const.) had subsequently invalidated the alimony statute (§ 61.08 Fla. Stat.)

The Appellant has an income below the recognized poverty level, owns no real property and minimal modest personal property. He lives on his social security income.

At the time of the Appellant's dissolution, 1972, *Canakaris v. Canakaris,* 383 So.2d 1197 (Fla.1980) was not the controlling case law on alimony; Art. I, § 23, Fla. Const. Right to Privacy had not been passed (1980); the controlling law on Florida's Right to Privacy had not been effected, (*In re T.W.,A Minor*, 551 So.2d 1186 (Fla.1989) and *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So.2d 612, 635 (Fla. 2003)); divorce had not yet been formally judicially recognized as within the privacy protected zone of the Right to Privacy *Littlejohn v. Rose*, 768 F.2d 765, 768 (6th Cir. 1985)); and the doctrine of necessaries had not been

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

If marriage is a contract then the law as it existed at the time of the marriage should control.

If current law controls the issue relating to alimony then all of the current law should be applied, Art. I, § 23, Fla. Const., Right to Privacy, Art. II, § 3, Fla. Const., Separation of Powers, *North Florida Women's Health* 866 So.2d, *Connor* 668 So.2d, *Littlejohn* 767 F.2d and the plethora of federal and state cases on the Right of Privacy as well as the Separation of Powers.

Issues Presented

I. Whether the "Dissolution of Marriage" statute alimony provision (§ 61.08, Fla. Stat.) impermissibly infringes Art. I, § 23, Fla. Const., Right to Privacy?

II. Whether the "Dissolution of Marriage" statute alimony provision (§ 61.08, Fla. Stat.) impermissibly infringes Art. II, § 3, Fla. Const., Separation of Powers?

III. Whether the "Dissolution of Marriage" statute alimony provision (§ 61.08, Fla. Stat.) impermissibly infringes the ruling

and public policy established in *Connor v. Southwest*, 668 So.2d 175 (Fla. 1995)?

IV. Whether dismissal with prejudice of this Chapter 86 Fla. Stat. action is an error, i.e. an abuse of discretion, as contrary to § 86.101 Fla. Stat. and *Olive v. Maas*, 811 So. 2d 644 (Fla. 2002)?

Jurisdiction

This court has jurisdiction to review this case pursuant to Art. V, § 4 (b) (1), Fla. Const.

Standard of Review

The standard of review for issues of law in a declaratory judgment order is *de novo*. See *Volusia County v. Aberdeen at Ormond Beach*, 760 So. 2d 126 (Fla. 2000).

Chapter 86, Fla. Stat. Declaratory Judgment is to be liberally construed. See § 86.01 Fla. Stat. and *Olive v. Maas*, 811 So. 2d 644 (Fla. 2002).

Summary of Argument

> "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." *Planned*

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

Divorce is entitled to the protections of Art. I, § 23, Fla. Const. Right of Privacy. Any statute written within that privacy protected zone of Dissolution of Marriage, i.e. the alimony provision § 61.08, Fla. Stat., is presumptively unconstitutional unless the state proves a compelling state interest minimally applied to validate the statute. *Littlejohn v. Rose*, 786 F.2d 785, 786 (6th Cir. 1985); *Carey v. Population Serv. Int'l.,* 431 U.S. 678, 684-685 (1977); *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So.2d 612, 635 (Fla. 2003). There is no compelling state interest to validate the alimony statute.

Art. II, § 3, Fla. Const., Separation of Powers, prohibits the legislature from delegating its exclusive law making powers via unbridled discretion to the judiciary as it does in § 61.08 (2), Fla. Stat. inter alia. The amendment also prohibits the legislature delegating authority to another branch of government which it itself does not have, i.e. the dissolution of marriage statute violates Art. I, § 23, Fla. Const. Right to Privacy and cannot be the subject of legislation in its current form.. *Bush v. Schiavo*, 885 So.2d 321, (Fla. 2004) (legislature cannot delegate authority it does not have).

Connor at 668 So.2d abrogated the doctrine of necessaries making parties in a marriage economic independents. § 61.08, Fla. Stat. cannot

convert their economic independence to economic dependence because they exercise their liberty interest to alter their associational status, i.e. dissolve their marriage.

Chapter 86, Fla. Stat. is to be liberally construed. A motion to dismiss is not a substitute for a motion on summary judgment. Dismissal with prejudice without a reasoned opinion is an abuse of discretion.

Argument

"it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage..." *Carey v. Population Serv. Int'l.*, 431 U.S. 678, 684-685 (1977)

I. Whether the "Dissolution of Marriage" statute alimony provision (§ 61.08, Fla. Stat.) impermissibly infringes Art. I, § 23, Fla. Const., Right to Privacy?

The Alimony Statute Impermissibly Infringes
Art. I, § 23, Fla. Const., Right of Privacy

A. The Alimony Statue is Within the Zone of the Right of Privacy

There is no common law right to alimony. *Pacheco v. Pacheco*, 246 So.2d 778 (Fla. 1971). Alimony is merely a statute, part of Chapter 61 Fla. Stat.. See also *Cornelius v. Cornelius*, 382 So.2d 710 (Fla. 1st DCA 1979). Quite simply, as a statute, it must conform to the constraints set forth in the Florida Constitution. This would not be the first time a provision of Chapter