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 REPLY BRIEF

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Introduction

This Appeal asks this Court whether Chapter 61 "Dissolution of Marriage" statute alimony provisions (§ 61.08 Fla. Stat.) impermissibly infringe two state constitution provisions, conflict with a Florida Supreme Court ruling as well as the public policy subsequently established by the legislature. The Appellant has provided the court with apposite caselaw, detailed analysis, -no gloss- and careful examination of badly decided caselaw in support of each of his issues. The Appellee's arguments use outdated case law, contextually inapposite caselaw, and superficial reference to badly decided caselaw in attempts to validate the challenged statutory provision, § 61.08 Fla. Stat.

This lawsuit is a good faith effort to change existing law (§57.105 (2) Fla. Stat.) therefore there is no on-point caselaw. Therefore, the Appellant cannot offer direct caselaw that implicates the alimony statute and the state constitutional claims raised. There is no caselaw on point.

The flaws in Appellee's answer brief will be discussed for each issue.

I. Chapter 61 "Dissolution of Marriage" Statute Alimony Provision (§ 61.08, Fla. Stat) Impermissibly Infringes Art. I, § 23, Fla. Const., Right of Privacy

A. Question: "Does the challenged statutory provision fall within an established, recognized Zone of Privacy or is the Appellant asking this court to establish a new Zone of Privacy?"

Answer: "Dissolution of Marriage," i.e. divorce, is a "personal decision relating to marriage." Both divorce and "personal decisions relating to marriage" are recognized zones of privacy entitled to the protections of the constitutional Right of Privacy. *LittleJohn v. Rose*, 768 F.2d 765, 768 (6th Cir. 1985)

> Given the "associational 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)."

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

> "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)."

Whether it is entering into marriage or exiting from marriage, those associational interests and liberty interests are both protected by the Florida Right of Privacy Amendment.

The Appellee states that the Appellant is trying to create a new zone of privacy and that nowhere is there caselaw to support that alimony is entitled to the protections of the Right of Privacy. The Appellee, like the United States Supreme Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986) makes the wrong statement. In

Lawrence v Texas, 539 U.S. 558 (2003) the U.S. Supreme Court acknowledged it made the wrong statement in *Bowers* 478 U.S. and therefore wrongly decided the issue. In *Lawrence* 539 U.S. the Court made clear how to frame the right question,

> "The issue presented [in Bowers] is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time." *Id.,* at 190. That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake."

Here also this court must recognize the extent of the liberty at stake. It must not ask the wrong question. There is no common law right to alimony, it is merely a statutory provision written in a well-recognized zone of privacy.

In a less ethereal analysis, i.e. merely a statutory construction analysis, the Appellant argues that the challenged provision, as part of a statute must simply comport with the Florida Constitution. The statute, "Dissolution of Marriage" is written within a recognized constitutionally protected zone. As such, this court must apply the analytic process reiterated in *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So.2d 612, n16 (Fla. 2003),

> "Under 'strict' scrutiny, which applies inter alia to certain classifications and fundamental rights, a court must review the legislation to ensure that it furthers a compelling State interest through the least intrusive means. The legislation is presumptively unconstitutional. The standard of proof is as follows: the State must **prove** that the legislation furthers a compelling State interest through the least intrusive means. See generally In re T.W., 551So. 2d 1186, 1193 (Fla. 1989)." [Emphasis added]

B. <u>Question:</u> Does the Appellee prove a compelling state interest that is minimally applied and in fact is furthered by the challenged statute?

Answer: The Appellee fails his burden. The state's burden is noted,

N. Fla.. Women's Health, 866 So.2d, 647 and n75 says,

"Moreover, under strict scrutiny review, 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 added]

"n75 . Although case law from this Court applying the strict scrutiny standard articulates the first prong of the strict scrutiny review as a single inquiry, see, e.g., T.W., 551 So. 2d at 1193; Von Eiff v. Azicri, 720 So. 2d 510 (Fla. 1998), in reality the first prong involves two interrelated inquiries: (a) whether the State has carried its "heavy" burden of establishing a compelling interest; and (b) whether the State has carried its "heavy" burden of establishing that the statutory scheme in fact serves or furthers that compelling state interest."

And aother quote in *N. Fla. Women's Health* 866 So.2d, 647,

" 'We have found no cases in which this Court applied . . . a narrowing construction to a statute challenged solely on the basis that its clear provisions violate a substantive constitutional right. The likely reason for this result is that the constitutionality of the statute, depending on the substantive right involved, depends solely on whether the statute passes the . . . strict scrutiny test[]. . . . Such a statute is unconstitutional under any circumstance unless the State satisfies its burden of establishing a compelling state interest.' *Richardson v. Richardson*, 766 So. 2d 1036, 1041 (Fla. 2000)"

The Appellee offers as a compelling state interest protecting a needy spouse.

He offers *Ryan v. Ryan*, 277 So. 2d 266, 273 (Fla. 1973) and *Pacheco v. Pacheco*,

246 So.2d 778 (Fla. 1971) for the premise that this interest can be implemented by the "police power" of the state. The statute, § 61.08 Fla. Stat., he says is justified by the "police power" of the state. That analysis belies the real question, i.e. whether "protecting a needy spouse" is a *compelling* state interest.

The argument furthers fails to recognize that there are limits on the police power of the state namely, constitutional amendments, just as there are the same limits on statutes. The argument fails to review this cited "compelling state interest"--the state protecting the needy spouse-- through the lens of the Florida Constitution Privacy Amendment which was passed in 1980 long after *Ryan* 277 So. 2d and *Pacheco* 246 So. 2d were viewed as well settled case law.

1980- Art. I, § 23, Fla. Const., Right of Privacy

The Right of Privacy Amendment passage in 1980 created a new lens through which all case law relating to "Dissolution of Marriage" alimony provision must be viewed. This is so because the Right of Privacy has been attached to divorce and personal decisions relating to marriage. Case law prior to 1980 relating to the alimony provision upon which this court and the Appellee rely must now be reexamined through the Privacy prism and its analytic framework before accepting its validity.

***Pacheco v. Pacheco*, 246 So. 2d 778 (Fla. 1971)**

Pacheco 246 So. 2D is a case in which the court *denies* alimony to an adulterous wife. The state's police power is seen as a rationale to ***not*** grant alimony to the former wife.

The case has no discussion of protecting a needy spouse. The case does not even discuss a balance between denial of alimony based on adultery and granting of alimony based on need (except for one of the dissents). If providing for a needy spouse were a "compelling" state interest surely there would have been a balancing. Also, *Pacheco* 246 So. 2d was decided in 1971-long before the passage of the Right of Privacy Amendment…and also now long before this challenge that § 61.08 Fla. Stat. Infringes Art. I § 23, Fla. Const.

***Ryan v. Ryan*, 277 So. 2d 266 (Fla. 1973)**

Ryan 277 So. 2d did not deal with any of the issues or claims presented to this court. It was a constitutional challenge to the new no-fault dissolution statute.

***Daniel v. Daniel*, 922 So. 2d 1041 (Fla. 4th DCA 2006)**

The Appellee wrongly offers *Daniel*, 922 So.2d as support that the Right of Privacy amendment does not apply to the alimony statute. In this Appeal the Right of Privacy in the context of autonomous decision making in one's private life is at issue. In *Daniel* 922 So. 2d the Right of Privacy context at issue was that of information disclosure and the privacy of disclosure of personal financial information. This context distinction is covered in the Appellant's Initial Brief.

Daniel's 922 So. 2d misplaced reliance on *Posner v Posner*, 233 So. 2d. 381 (Fla. 1970) as its rationale is in error. The *Daniel* 922 So. 2d ruling hangs solely on a particularly onerous quote from *Posner* 233 So. 2d that today would never pass muster in light of the Privacy Amendment.

> " 'Since marriage is of vital interest to society and the state, 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***.' *Posner v. Posner*, 233 So. 2d 381, 383 (Fla. 1970); *Wall v. Wall*, 134 So. 2d 288, 289 (Fla. 2d DCA 1961)."
> *Daniel* 922 So. 2d at 1045 [Emphasis added]

It is inconceivable to the Appellant that this court could endorse this statement today in light of the caselaw offered to support the Zone of Privacy surrounding personal decisions relating to marriage…beginning with *Griswold v. Connecticut*, 381 U.S. 479 (1965) federally and in light of the stream of state Privacy cases culminating in *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So.2d 612 (Fla. 2003).

Bad caselaw is too easily perpetuated when the prior source is simply reiterated over time without care. *Daniel*'s 922 So. 2d (2006) reliance on *Posner's* 233 So. 2d (1970) reliance on a 1961 case--*Wall* 134 So. 2d--shows the perpetuation of a poor point of law because of the failure to see and apply the intervening law change noted in *Griswold* 381 U.S. and its progeny that effectively nullified *Wall* 134 So. 2d and the subsequent cases that relied on it.