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IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN
AND FOR PALM BEACH COUNTY,
FLORIDA

Family Division
Case No.
501971DR004137XXDIFD

WILLIAM A. CABANA
Former Husband, pro se

and

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

MEMORANDUM OF LAW
IN SUPPORT OF

WILLIAM A. CABANA'S MOTION TO DENY
SHARON ANN MAYO'S MOTION TO STRIKE
WILLIAM A. CABANA'S MOTION TO DENY CONTEMPT

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“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)

INTRODUCTION

The parties in this dispute were married for about eleven years before their marriage was dissolved thirty three years ago in 1972. William A. Cabana was ordered to pay \$25 a week alimony forever, without any conditions to end payments. At the time of the dissolution Canakaris v. Canakaris, 383 So.2d (Fla.1980) was not the controlling caselaw on alimony, the Florida Constitution Article I Section 23 Right to Privacy had not been passed (1980), the doctrine of necessities had not be abrogated by Connor v. Southwest Florida Regional Medical Center, Inc., 668 So. 2d 175 (Fla. 1995), 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).., and divorce had not yet been recognized as within the privacy protected zone of the Right to Privacy LittleJohn v. Rose, 768 F. 2d 765, 768 (6th Cir. 1985).

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 in this case then all of the current law should be applied, Article I Section 23 Right to Privacy, North Florida Women's Health, Connor, Littlejohn and the plethora of federal and state cases on the Right of Privacy.

Reasons offered to strike William A. Cabana's Motion to Deny Contempt

Sharan Ann Mayo offers the following reasons to strike William A. Cabana's constitutional challenge to the alimony statutes as a defense to contempt and as a reason to terminate alimony.

1. Because William A. Cabana did not raise his constitutional challenge in the original proceedings he waived his right to raise them pursuant to F.R.C.P. Rule 1.140 (b).
2. It is well settled that the alimony provisions of §61.08 do not violate due process, equal protection and are not unconstitutionally vague.
3. Similar constitutional attacks were previously held to be irrelevant and frivolous and the proper award of attorney fee and costs sanctions under §57.105.

Constitutional challenge not raised in original proceedings

The constitutional challenges could not have been made in the original proceedings because the original proceedings predated the clarification of the fundamental constitutional rights raised and their application to personal decisions relating to marriage such as to dissolve a marriage.

The final order of dissolution was in 1972. Fl. Con. Art. I Sec. 23, Right to Privacy Amendment was passed by Florida voters in November 1980. The doctrine of necessities was abrogated by Connor in 1995. Personal decisions relating to marriage, such as dissolution were recognized as fundamental constitutional rights in the 1970's-to now. Divorce was recognized as entitled to the Right to Privacy in Littlejohn in 1985. A statute that affects a fundamental constitutional right may be challenged at any time. The Right to Privacy as a constitutional amendment is a recognized fundamental right. "Constitutional issues, *other than those constituting fundamental error*, are waived unless they are timely raised" (emphasis supplies) in Sanford v. Rubin, 237 So.2d 134 (Fla. 1970). Sanford, further,

“ ‘Subsequently, in reviewing other cases where issues were first being raised on appeal, we concluded that, for an error to be so fundamental that it can be raised for the first time on appeal, the error must be basic to the judicial decision under review and equivalent to a denial of due process.’ D'Oleo-Valdez v. State, 531 So.2d 1347 (Fla.1988); Ray v. State, 403 So.2d 956 (Fla.1981)”

The general rule is that an unconstitutional statute, though having the form and name of law, is in reality no law, but is wholly void, and ineffective for any purpose; since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it. No one is bound to obey an unconstitutional law, and no courts are bound to enforce it. -- 16 Am Jur 2d, Sec 177 late 2d, Sec 256.

It is well settled that alimony doesn't violate the right of privacy, equal protection or vagueness

This statement is simply erroneous and unsupported. There is no reason opinion to support the statement. Sharon Ann Mayo offers no case law support for the premise made. The only equal protection caselaw addressing alimony relates to the gender bias in the pre-1973 statute that limited alimony to mostly women. The legislature changed the alimony statute to avoid gender inequality.

The Fl. Con Art. I Sec. 23 Right to Privacy constitutional challenge has never been addressed with a reason opinion.

The vagueness constitutional challenge argument raised in William A. Cabana's memo of law has never been addressed.

Similar constitutional challenged were found irrelevant and frivolous

Sharon Ann Mayo does not offer case law support for this assertion. Presumptively she relies on Barna v. Barna found frivolous without a reasoned opinion by The Honorable James Carlisle in the Fifteenth Judicial Circuit Court and affirmed without reason opinion by the 4th DCA.

Because of the peculiarity of Florida law a district court can shut down an appeal to the Florida Supreme court by finding a state statute constitutional without offering a reasoned opinion, provision (Fl. Con. Art. V Sec. (b) 3. (b). The 4th DCA relied on the Florida Constitutional, just as William A. Cabana relies on the Florida Constitution.

The Fifteenth Circuit Court and the 4th DCA erred in their conclusion particularly where neither court offered a reasoned opinion and no court to that time had addressed the issue.

As evidence that the argument is not irrelevant or frivolous the following are offered,

Greenwald v. Blume, 312 So.2d 783, 785 (Fla. 3d DCA 1975),

“It was acknowledged by the Florida Supreme Court in Carson v. Oldfield, 1930, 99 Fla. 862, 127 So. 851, 855, that death of one of the parties and a decree of divorce a vinculo, have the same effect of putting an end to the marriage relation, resulting in the immediate cessation of *all* duties and obligations necessarily dependent upon the continuance of that relation.” (emphasis supplied)

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 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)."

“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)

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...";

Conclusion

"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."

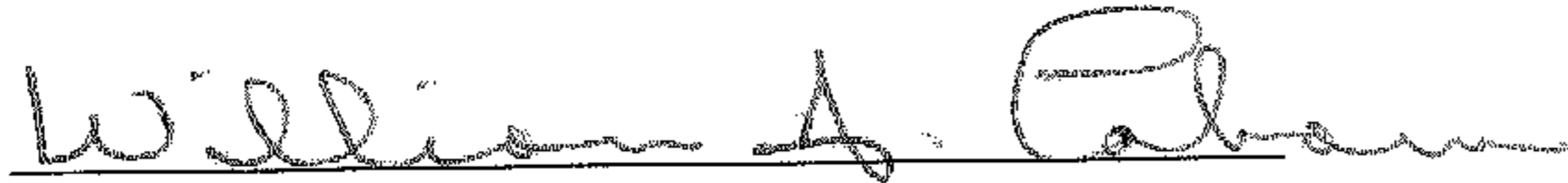
Justice Kogan dissenting in Krischer v McIver, 697 So.2d 97 (Fla. Jul. 17, 1997)

Prayer for Relief

Wherefore for the above stated reasons and law this court must deny Sharon Ann Mayo's Motion to Strike William A. Cabana's Motion to Deny Contempt and Terminate Alimony.

For the above stated reasons and those in the Memo of Law to Deny Contempt and to Terminate Alimony this court must deny motions for contempt, motion to produce and to terminate alimony.

Respectfully submitted,



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May 23, 2005

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 2005, I faxed to Cathy L. Kamber, Esq. and the Clerk of the Court Fifteenth Judicial Circuit Court, and I caused a true and accurate copy of this Motion to Deny Motion to Strike Motion for Contempt and to Terminate Alimony to be sent by mail on the 24th day of May, 2005 to:

Other party or his/her attorney:

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