

IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA
CIVIL DIVISION

WILLIAM A. CABANA, pro se,

Plaintiff,

Case No.: 06-CA-5063 SC

vs.

JAMES ZINGALE, EXECUTIVE
DIRECTOR, DEPARTMENT OF
REVENUE, etc.,

Defendant.

DEFENDANT'S MOTION TO DISMISS OR, ALTERNATIVELY,
MOTION FOR SUMMARY JUDGMENT

Defendant, James Zingale, Executive Director, Department of Revenue,¹ by undersigned counsel, hereby moves pursuant to Fla. R. Civ. P. 1.140 (b)(6) to dismiss this cause for failure to state a cause of action. Alternatively, this Defendant moves pursuant to Fla. R. Civ. P. 1.510(b) for summary judgment in his favor, as there is no dispute issue of material facts, and this Defendant is entitled to judgment as a matter of law.

At issue here is Plaintiff's challenge to Florida's alimony statute, §61.08, Fla.

¹Under Florida law, the Department is not charged with enforcing the state's alimony statutes, and has no role in establishing alimony payments. The Department's role is limited to when alimony is owed to a former spouse for whom child support is also owed. To this end, Plaintiff makes no allegations that he owes child support or that the Department is enforcing a child support and/or alimony obligation in this case.

Stat. In his Complaint, Plaintiff avers that this statute (1) violates Art. I, §23, Fla. Const., the Privacy Amendment (Count I); (2) violates Art. I, §2, Fla. Const., basic rights of equal protection, the fruits of his labor and right to property (Count II); encroaches upon the judicial power in violation of the Separation of Powers guarantee in Art. II, §3, Fla. Const.; and (4) conflicts with Connor v. Southwest Florida Regional Medical Center, Inc., 668 So. 2d 175 (Fla. 1995), which abrogated the common law doctrine of necessities.

As demonstrated below, Plaintiff's claims are without merit, justifying either dismissal with prejudice, or summary judgment in the Defendant's favor.

At the outset, Plaintiff's challenge 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.

In Pacheco v. Pacheco, 246 So. 2d 778, 782 (Fla. 1971), the Court held that the alimony statute was a valid exercise of the State's police power and does not contravene constitutional assurances of due process and equal protection. And 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 were so frivolous as to support the award of attorney's fees against the party asserting it.

More recently, 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 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.²

It is against this backdrop that each of Plaintiff's four claims is to be examined, and rejected.

First, with regard to Plaintiff's **right to privacy** claim, it is not surprising that not a single case cited in the annotations to Art. I, §23, Fla. Const., mentions alimony as one of the personal rights protected by this amendment. To the extent, however, that privacy considerations are in any way implicated, they are addressed in Daniel v. Daniel, 922 So. 2d 1041 (Fla. 4th DCA 2006), which discusses this amendment in the context of the financial affidavit required by the Family Law Rules of Procedure. The court, in considering both Fla. Fam. L.R.P. 12.285's mandatory disclosure in light

²In 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.

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., at 1045. 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.³

In sum, there is no principled basis in fact or law that gives any credence to a privacy claim directed to Florida's alimony provisions. Accordingly, Plaintiff's first claim must fail.

As to Plaintiff's **basic rights** claim, the cases cited above demonstrate that a host of constitutional claims under the basic rights umbrella have been uniformly rejected. The alimony provision is a reasonable exercise of the State's police power and allows for the judiciary to "do the right thing" in discharging its constitutional

³This 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.

duties to do justice. Plaintiff's basic rights claim is without merit and must therefore fail.

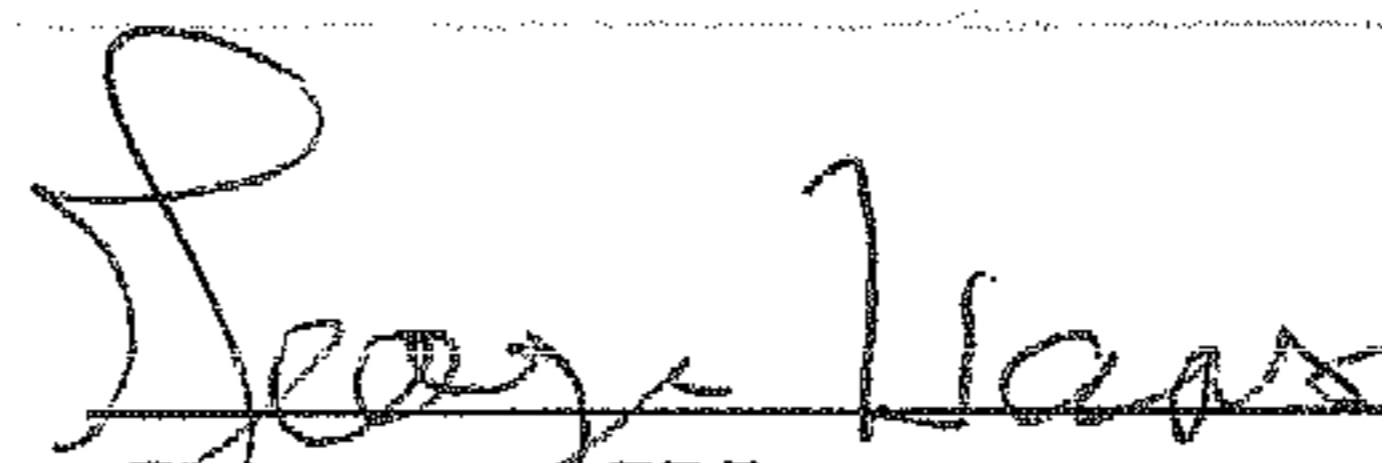
For his third claim, Plaintiff contends the alimony statute impermissibly delegates its lawmaking power to the judiciary. An **impermissible delegation** occurs when the Legislature delegates the power to make the law, as opposed to conferring an authority or discretion as to a law's execution. No valid objection can be made to the latter. See Fla. Jur. 2d, Constitutional Law, §203. Here, §61.08, Fla. Stat., directs the court to consider seven listed factors, but may consider others not mentioned, thereby leaving the authority or discretion as to the statute's execution via decision making to the judiciary. From this, Plaintiff's unlawful delegation claim is meritless.

Finally, Plaintiff contends that Connor, supra, eliminates Florida's ability to provide for alimony. Plaintiff misreads this decision. While Connor abrogates the **common law** doctrine of necessities, the Court specifically noted that by doing so, it was "thereby leaving ... to the legislature to determine the policy of the state in this area." 668 So. 2d at 177. The Court also noted that, as a result of 1993 legislation, "the responsibilities for alimony between husband and wife are now reciprocal." Id, at 176; Greenberg v. Zingale, 138 Fed. Appx. at 200 (defeating equal protection claim). Accordingly, there is no basis for Plaintiff's claim here.

Wherefore, for the reasons set out above, Plaintiff's claims are subject to dismissal with prejudice or, alternatively, the Defendant is entitled to summary judgment as a matter of law.

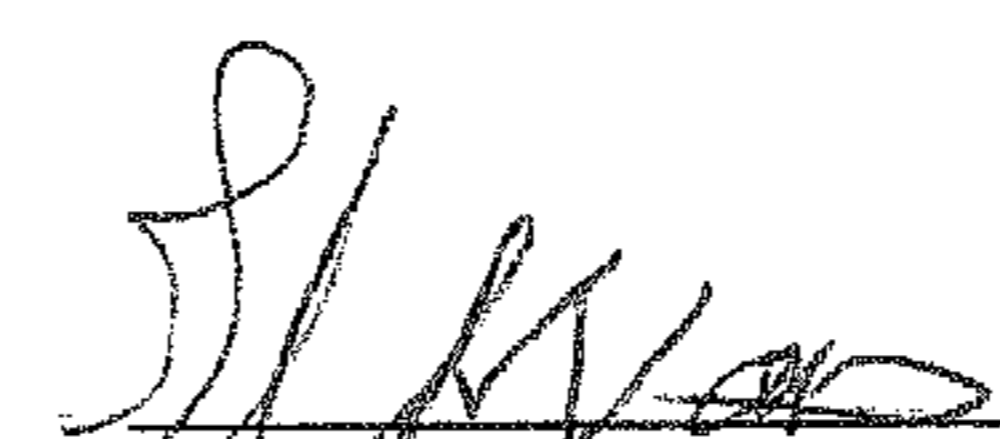
Respectfully submitted,

CHARLES J. CRIST, JR.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to William A. Cabana, Pro Se, 1050 Capri Isles Blvd., Apt. F-105, Venice, Florida 34992, this 23rd day of June, 2006.


George Waas