

IN THE FOURTH DISTRICT COURT OF APPEALS

HUSBAND
Appellant (Plaintiff)

v.

FLORIDA STATE OFFICIAL DESIGNATED TO ENFORCE FLORIDA STATUTES
CHAPTER 61, TWENTIETH JUDICIAL CIRCUIT COURT
Appellee

FORMER WIFE
(Interested Party Appellee Side)

On Appeal from the Circuit Court of the Twentieth Judicial District, Fort Myers, Florida

CASE NO 98- CA C

INITIAL BRIEF OF APPELLANT

Counsel for the Appellant As Cooperating Attorneys for the Alliance for Freedom From Alimony, Inc.

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Statement of the Case

May 31, 2002 Appellant, FORMER HUSBAND, filed a Chapter 86 Declaratory Judgment and Injunctive Relief Motion challenging the facial constitutionality of Florida Statutes Section 61.08 permanent alimony provisions as impermissibly infringing on Privacy Rights protected by Article I Section 23 of the Florida Constitution. The motion was filed in the open proceeding In RE Marriage of FORMER WIFE and FORMER HUSBAND (Circuit Court Case Number CD 00-534 FZ). The former wife, FORMER WIFE, and the Attorney General (Assistant Attorney General NAME) were noticed as interested parties.

As part of the Chapter 86 motion the Appellant raised the issue of whether the Circuit Court retaining jurisdiction to enforce his dissolution proceeding was the proper defendant of the constitutional challenge. If the Circuit was the proper defendant then he asked the Trial Court to disqualify itself because of conflict of interest as defendant and adjudicator and to certify the constitutional challenge question to this or a higher court.

At a hearing July 8, 2002 with FORMER WIFE's counsel appearing and the Attorney General declining to appear, the Honorable Hugh Stearns heard arguments, and subsequently July 25, 2002 ruled to deny the Declaratory Judgment and Injunctive Relief Motion. No record of the hearing was made.

The Final Judgment of Dissolution Order between Mr. And Mrs. [NAME] which contained the order, based on an agreement, for payment by Mr. [NAME] to Mrs. [SPOUSE'S NAME] of permanent alimony of \$AMOUNT monthly, and which established the case and issue in controversy, had been entered [DATE FINAL JUDGMENT].

Statement of the Facts

The marriage of [SPOUSE'S NAME AND NAME], entered into over fifteen years earlier was dissolved by the state of Florida in a Final Judgment of Dissolution entered by the Honorable Hugh Stearns July 25, 2002. The couple had [CHILD]. The State of Florida, through its judiciary, based on an agreement ordered FORMER HUSBAND to pay child support and to pay \$AMOUNT monthly permanent alimony to FORMER WIFE. On May 31, 2002 FORMER HUSBAND, through a Chapter 86 Declaratory Judgment and Injunctive Relief Motion challenging the facial constitutionality of Florida Statutes Section 61.08 permanent alimony provisions as impermissibly infringing on Privacy Rights protected by Article I Section 23 of the Florida Constitution. Section 61.08 and the Final Order of Judgment serve as the basis for the State action.

Summary of the Argument

I. Is Section 61.08 permanent alimony provision facially unconstitutional because it impermissibly infringes on Privacy Rights protected by Article I Section 23 of the Florida Constitution?

There is a Federal and State Constitutionally guaranteed fundamental Right to Privacy. Personal decisions related to marriage are included in the Federally and State protected fundamental Right to Privacy. Dissolution is a personal decision related to marriage. The fundamental Right to Privacy attaches to the personal decision of dissolution relating to marriage. The personal decision of dissolution is governed by the equity provisions of Florida Statutes Chapter 61.

Florida demands that the compelling state interest applied in the least intrusive manner standard be applied to all statutes which infringe the protected fundamental Right to Privacy. Florida law mandates that the Courts must look to the wording of the challenged statute and cannot change the wording of that statute. The words of Section 61.08 (and related permanent alimony sections) establish the State's interest to be *Equity* as the standard to be used when the Courts apply the statutory provisions. *Equity* is not a judicially recognized compelling state interest, therefore the challenged provisions are unconstitutional.

Section 61.08 also fails the second prong burden of the compelling state interest being applied *in the least intrusive manner* when the state invades the protected Privacy zone of marriage to "...consider any other factor necessary to do equity and justice between the parties."

A court of Equity, a proceeding in chancery, and a standard of equity applied with a judicial standard of discretion do not meet the rigor of the burden necessary to overcome a State and Federal constitutionally guaranteed fundamental right.

The economic rationale upon which permanent alimony is based has long since ceased to exist.

II. Is the Circuit Court, as the state official designated to enforce Section 61.08, the proper defendant for a Chapter 86 Declaratory Judgment motion challenging the constitutionality of Section 61.08 permanent alimony provisions?

The Attorney General has expressed the opinion that the state official designated to enforce a statute is the proper defendant to the constitutional challenge of a statute. This position is supported by Federal and State case law.

The state Legislature in Chapter 61 repeatedly empowers the trial court as the state official designated to enforce the provisions of Chapter 61 at issue. The Trial Court retaining jurisdiction in a Chapter 61 dissolution proceeding is the state official designated to enforce Section 61.08 and is the proper defendant to a constitutional challenge of Section 61.08 in a Chapter 86 motion.

III. Does the Circuit Court as the state official designated to enforce Section 61.08 violate The Code of Judicial Conduct Canon 3 E. (1) (d) (i) when it fails to disqualify itself and certify the question to a higher Court?

We seek guidance on this novel issue from this Court.

An anomaly in Florida law created a conflict of interest, and a violation of Canon 3 E (1) (d) (i) for the Circuit Court when the Circuit Court became both the defendant and the adjudicator of a Chapter 86 constitutional challenge to Section 61.08.

The Code of Judicial Conduct Canon 3 E (1) (d) (i) states a Florida Judge must disqualify herself if she is a party to the proceeding. Here the Circuit Court was on notice it was considered the defendant to the Chapter 86 motion via the filed written motion. The Circuit Court erred by not addressing the issue of its being a defendant. It erred by not disqualifying itself and certifying the question to a higher Court.

Standard of Review

The standard of review for this Court on all issues presented is de novo. Reinish v Clark, 765 So. 2d 197, (Fla. 1st DCA 2000) (de novo review of Chapter 86 constitutional challenge); Ocala Breeders' Sales Co. v. Fl. Gaming Ctrs., 731 So. 2d 21, (Fla. 1st DCA 1999) (de novo review of Chapter 86 constitutional challenge); Kond et al. v. Mudryk et al., 769 So. 2d 1073 (Fla 4th DCA 2000) (de novo review of motion to dismiss a Chapter 86 proceeding).

Argument

The passage of the Privacy Amendment in 1980 established a new test for state statutes to which the Amendment attaches. We first show the Privacy Amendment attaches to the dissolution of marriage because dissolution is one of the personal decisions related to marriage which is afforded the protection of Privacy by both Federal and State case law. Section 61.08's permanent alimony provisions must, but cannot, pass the requirement of a

compelling state interest applied in the least intrusive manner in order to remain constitutionally viable.

I. Is Section 61.08 permanent alimony provision facially unconstitutional because it impermissibly infringes on Privacy Rights protected by Article I Section 23 of the Florida Constitution?

“By enacting the Privacy Amendment, the people of this state chose to make their ‘right to be let alone and free from government intrusion’ superior to any power of the legislature. They have that right. (See Article 1 Section 1 Florida Constitution); Taylor v. State, 596 So. 2d 957, (Fla. 1992). That being so, the people of Florida enacted the Privacy Amendment in our generation certainly have more power than a 19th Century Legislature, which, in the State’s view, controls today’s decision from beyond the Grave.” Supreme Court Answer Brief in Krischer v. McIver Case No. 89,837

We rely on the reasoning and authority offered in our Memorandum of Law (M.O.L.) before the trial court for the full argument offered by us on this issue. In the interest of brevity we merely summarize and supplement the M.O.L.

The rule of law that the Privacy amendment trumps and invalidates the antiquated permanent alimony statute is an unsettling conclusion to the multitude of good faith legal laborers who have toiled in the fields of family law for many decades with the misperception that permanent alimony was etched in stone and came down from the Mount.

We are not asking the court to expand the recognized zone of Privacy. We merely ask the court to apply the law of Privacy rights to the legally protected personal decisions related to marriage, i.e. dissolution decisions. When that is done it becomes evident the statute impermissibly infringes the fundamental rights of thousands of Florida citizens. This infringement betrays the State’s duty to ensure to each of its citizens that it will not interfere

with his Article I Section 2 Basic rights without a compelling reason applied in the least intrusive manner.

Thousands of Floridians have made the personal decision to dissolve their marriage. The decision is predicated upon the premise they wish to sever their relationship and go independent paths in life in pursuit of happiness. Instead of permitting this personal decision to be exercised unimpeded, the State shackles some of the parties together for life with the permanent alimony statute. This denial of Basic rights, pursuit of happiness unimpeded by the State, and the invasion of the fundamental right to Privacy is done without the State having established a compelling interest, minimally applied. On the contrary, the State riddles through the marriage on the parties to examine every iota of evidence in its pursuit of any factor necessary to do equity and justice between the parties. After the State has ransacked the marriage and the family in order to determine if it will shackle the parties forever, it then applies the shackles with the threat of contempt and imprisonment. If the paying party cannot bear the shackle for any reason, economic or psychological, the State will seize his property, interfere with his already hampered pursuit of happiness and jail him with the euphemism that he controls the keys to his cell. All of this is done to achieve the legislatively stated goal of equity or justice. Equity or justice has never been deemed a compelling interest to supersede a State and Federally guaranteed constitutional right!

To begin we think it necessary to remove the misplaced shrouds of sanctity to often cloaking the legal concept of alimony. Alimony is only a potential interest and merely a creature of statute without any common law authority!

Alimony and judicial rulings related to it are based only on statute, i.e. Section 61.08 Pacheco v. Pacheco 246 So.2d 778, 780 (Fla.1971) “*At common law there was no right*

to alimony at all.”; Cornelius v. Cornelius, 382 So.2d 710, 712 (Fla. 1st DCA 1979) “*The right to alimony connected with divorce was permitted by statute*”; Geddes v. Geddes, 530 So.2d 1011, 1017 (4th DCA 1988) “*Modern alimony really has very short historical roots*”;

Alimony is only a statutorily permitted and a discretionary judicially granted entitlement. Ryan v. Ryan, 277 So. 2d 266, 270 (Fla. 1973) “*Such a potential equitable interest as alimony is not yet vested but arises upon subsequent judicial determination...*”.

The underlying economic rationale utilized by the Court when it exercises a discretionary standard and chooses to grant permanent alimony has long since passed into antiquity. Coverture died with Article XI Section 2 Florida Constitution, Section 708 (Married Women’s Property) and Merchant’s v. Cain, 9 So. 2d 373, 375 (Fla. 1942)

“The disability of coverture is a hangover from the old common law and has no more place in present day equity practice than the old “Pleas Roll” of the early day.”

“So if there was ever sound reason for the disability of coverture, that reason disappeared, *every* element on which it was predicated has been outmoded and discarded.” [Emphasis supplied]

“The reason ceasing, the law itself ceases is a well settled legal maxim.”

We also rely on the opinion, the dicta and the rationale of Merchant’s as an independently adequate legal argument to do away with the equitable doctrine of alimony.

More judicial recognition of economic independence in marriage is found in Manatee Conv. Ctr. v. McDonald, 392 So. 2d 1356, 1357 (Fla. 2nd DCA 1980), “*The rigidity of the common law in dealing with interspousal rights and liabilities was broken by the Supreme Court of Florida in Gates v. Foley, 247 So. 2d 40 (Fla. 1971)*”

However, our main issue is the application of the Privacy Amendment to the permanent alimony statute via the alimony, dissolution, personal decision related to marriage

protected zone of Privacy legal stairs. The attachment of Privacy to an issue requires that all law related to that issue must pass through the prism of the Privacy Amendment unscathed to remain viable. A statute and all case law related to it must now be refiltered through the Privacy Amendment prism when Privacy attaches. All case law in existence prior to the passage of the Privacy Amendment must be reprocessed through the Privacy prism. We offer that Section 61.08, related statutes and related case law do not pass through the prism intact but become so refracted as to lose their vitality.

The elements of the Article I Section 23 prism through which a statute and all case law must pass are a compelling state interest applied in the least intrusive manner. The Privacy prism test elements have been judicially established in Winfield v. Division of Pari-Mutuel Wagering, 477 So.2d 544, 548 (Fla.1985). We rely on the Supreme Court's analytic methodology and the defined State burden the Court requires therein,

“The right of privacy is a fundamental right which we believe demands the compelling State interest standard. This test shifts the burden of proof to the State to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling State interest and accomplishes its goal through the use of the least intrusive means.”

For the attachment of the Privacy Amendment to Chapter 61 (“Dissolution of Marriage”) and Section 61.08 (Alimony) we rely on the reasoning and the authority established Federally in 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...*”; Loving v. Virginia, 388 U.S. 1, 12, 87 S.Ct. 1817 (1967); Zablocki v. Redhail, 434 US 374 (1978); Planned Parenthood v. Casey, 505 U.S. 833, (1992),

“Our law affords constitutional protection to *personal decisions relating to marriage*, procreation, contraception, family relationships, child rearing,

and education. Carey v. Population Services International, 431 U.S. at 685.
... ..Our precedents "have respected the private realm of family life
which the state cannot enter." Prince v. Massachusetts, 321 U.S. 158, 166,
88 L. Ed. 645, 64 S. Ct. 438 (1944). These matters, involving the most
intimate and personal choices a person may make in a lifetime, choices
central to personal dignity and autonomy, are central to the liberty
protected by the Fourteenth Amendment. At the heart of liberty is the right
to define one's own concept of existence, of meaning, of the universe, and
of the mystery of human life. Beliefs about these matters could not define
the attributes of personhood were they formed under compulsion of the
State." (Emphasis Supplied)

For the State attachment of the fundamental Privacy Right to marriage we note
Winfield, at 546, citing Roe v. Wade, 410 U.S. 113, 152-53, 93 S.Ct. 705, 726-27, 35
L.Ed.2d 147 (1973) and Shevin v. Byron, 379 So. 2d 633, 636 (Fla. 1980) "*Unwarranted
governmental intrusion on decisions in these 'fundamental' areas is a deprivation of the
"liberty" secured by the due process clause of the fourteenth amendment.*" (recognizing
privacy interests in marriage, procreation, contraception, and family relationships).

Dissolution is a personal decision relating to marriage and thus a protected
fundamental constitutionally guaranteed right mandating a State burden of strict scrutiny, i.e.
a compelling state interest applied in the least intrusive manner to validate any statute
impacting it. Chapter 61 is titled Dissolution of Marriage and Section 61.08 permanent
alimony provisions are contained therein. They require the above strict scrutiny analysis to
survive this constitutional challenge.

We acknowledge it is the Court's duty to try to save an infirm statute when possible.
However, the Courts have established rules and limitations within which they must work to
save a statute. We rely on the Court to follow the rules it established in the only other
Chapter 61 constitutional challenge, Richardson v. Richardson, 766 So. 2d 1036, 1042 (Fla.
2000),

“there is no need (nor is it permissible) to consider hypothetical consequences of a statute that allegedly violates a substantive, fundamental right. Such a statute is unconstitutional under any circumstance unless the State satisfies its burden of establishing a compelling state interest.”

“...courts should refrain from reading elements into a statute that plainly lacks such additional elements.”

“this Court is without authority to change the wording of Section 61.13 (7) by inserting a harm to the child element where the legislature clearly has not done so.”

The Court must use the words of the Statute and the standard therein expressed, i.e. equity. It cannot change the word or the standard. Equity has never been deemed a compelling state interest and cannot now be raised to that level.

The Court is further constrained when it attempts to save construction by consideration of the purposes of Section 61.08. Because of the Court’s own self imposed restraints when it attempts to save the statute it must accept as Purposes of the statute only those specified in Section 61.001. If the legislature intended more purposes, they would have included them. We contend Section 61.08 does not address any of the stated purposes of the statute. We cannot find a rationally related interest let alone a compelling interest in the Purposes section of the statute that is satisfied by permanent alimony. Though not at issue here we believe equitable distribution and much of the child support portions of Chapter 61 do not fulfill the purposes noted in Section 61.011 nor do they meet the compelling state interest burden.

The Court has ruled that the standard of “best in interest of the child” could not survive the Privacy Amendment prism requirement of a compelling state interest and the Court thus struck down the grandparent visitation statutes in intact and also in divorced

families. Beagle v. Beagle, 678 So. 2d 1271, 1275 (Fla. 1996), Von Eiff v. Aziri, 720 So. 2d 510 (Fla. 1998). Instead the court required the standard of threat of demonstrable harm to the child as the standard which would allow a statute to survive the Privacy Amendment prism test. Because the words “best interest of the child” were in the statutes as the standard for judicial review the statutes were deemed unconstitutional.

When we compare necessary statutory standards for children versus adults, the equity standard would fail both. Because the judicially established required standard is “threat of harm” a standard of “equity” is an insufficient standard when the State tries to meet its Privacy burden for a child. If “equity” cannot meet the State burden for a compelling state interest as to a child, then how can “equity” meet the State’s burden for an economically independent, coverture free adult former spouse? Equity cannot pass the compelling State interest test for a child or an adult. A statute which establishes Equity as a standard by its wording to operate in the interest of a child or adult is unconstitutional.

We look next to the burden of a compelling State interest. There must be consistency by the Legislature when addressing compelling State interests. We rely on the Court’s established rule in Fla. Dep’t of Health v. N. Fla. Women’s Health & Consulting Servs., Inc., 26 Fla. L. Weekly D 419, (1st DCA 2001)

“An important step in gauging whether an interest should be deemed compelling is ascertaining whether the Legislature has acted **consistently** in protecting the interest...In re T.W., 551 So. 2d at 1195, our Supreme Court has said that a “selective approach employed by the legislature evidences the limited nature of the...interest being furthered....” [Emphasis supplied]

The State must demonstrate the compelling state interest it proposes has been consistently applied by the legislature. If consistency is lacking, the interest is not

compelling. It is not a matter of the State proposing a compelling interest, the compelling interest should already exist, be self evident and be historically supported by law.

We rely on the legislature's repeal of the motorcycle protective headgear law, Section 316.211 (b) as a significant example of inconsistency in the State's asserting the compelling state interest of prevention of economic harm to a former spouse. The legislature did not provide for economic security of spouses and minor children of citizens who ride a motorcycle without protective headgear.

When one tries to integrate consistency with a compelling state interest and apply it to the Purpose of Chapter 61, i.e. to preserve the integrity of marriage, the State fails its burden. Consistency by the State is lacking as to its support of the integrity of marriage. As evidence we offer the no fault nature of marital dissolution passed in 1971 and upheld judicially in Ryan. We offer further support the State does not meet its burden of a compelling interest in the integrity of marriage by its failure to enforce Section 798.02 (Lewd and lascivious behavior) and Section 800.02 (Unnatural and lascivious act).

Consistency is absent in the State's current approach to permanent alimony. Only contested dissolutions that plead a request for permanent alimony get consideration. If the State had a compelling interest in permanent alimony it would examine all dissolutions for the interest. It does not. The Alliance for Freedom from Alimony in 2001 based on Palm Beach County Clerk of the Court records notes 1200 payers of all types of alimony. State vital statistics show approximately 8000 annual dissolutions in Palm Beach County. The total percentage of dissolutions involving permanent alimony is probably only about 5% or less of dissolutions. It is difficult to offer any State interest as compelling in light of the current low percentage of dissolutions in which alimony is awarded.

We offer that any reliance on the authority of the state to act as a party in interest to protect public welfare by interfering in personal decisions related to marriage is misplaced. [Martin v. Martin, 102 So. 2d 837, (Fla. 2ndDCA 1958);Harman v. Harman, 128 So. 2d 164, (Fla. 3d DCA 1961); Perez v. Perez, 164 So. 2d 561, (Fla. 3d DCA 1964) are inapplicable] The no fault legislation supported by Ryan reshaped the landscape and severed the state's interest as a party in the marriage. That separation was completed with the passage of the Privacy Amendment. The cases that propose that theory are all Appellate cases and lack the authority of a Supreme Court opinion, they all predate no fault legislation and implementation. The cases offered here for that reliance are incompatible with legislation and case law of the past thirty years. They reflect a premise the state had self adopted and was not granted by the people. We are at a loss to find the basis the courts have legislated themselves an additional purpose of the Dissolution statute above and beyond that explicitly stated in the statute.

The adoption of Harman and Perez cited in Barron v. Fla. Freedom Newspapers, 531 So. 2d 113, 119 (Fla. 1988) is distinguished because in Barron the Privacy Amendment at issue is in the information disclosure context, not the autonomy context. We align ourselves with Justice McDonald in the dissent that the dissolution proceedings warrant respect for privacy. The public does not suffer, or at most very minimally, from nondisclosure of the proceedings.

Barron is also noteworthy for the inconsistent application of the rule set forth in Canakaris v. Canakaris, 382 So. 2d 1197, 1202 (Fla. 1980) defining judicial abuse of discretion as if reasonable men could differ then there is no abuse of discretion. In Barron

the Supreme Court had reasonable men differ yet it overturned the trial court's discretionary ruling.

A final word on the nature of a compelling state interest. Whatever that interest is it must encompass and be applicable to a statement cited in 3 DCA opinions, "*Similarly, a receiving spouse can squander alimony payments on gambling and liquor without these acts resulting in a downward modification.* See Phillippi v. Phillippi, 148 Fla. 393, 4 So. 465 (1941); Horner v. Horner, 222 So. 2d 791 (Fla.2d DCA 1969)" Springstead v. Springstead, 717 So. 2d 203, 204 (Fla. 5th DCA 1998).

Canakaris became law in March 1980. The Privacy Amendment was added to the Florida Constitution in November 1980.

Section 61.08 and its related statutes are facially unconstitutional because of the inability to rehabilitate the statute.

We next address the economic context of Section 61.08 permanent alimony provisions. Though the Court is not permitted to view hypothetical consequences of the statute in reaching its constitutional ruling, nonetheless, judicial history indicates the Court's frequent and historical use of the economic tool to achieve the goal of the statute—Equity. Because equity does not meet the state burden, the need for economic analysis is less necessary. A crucial judicial economic premise, the doctrine of necessities, has been abrogated in Connor v. Southwest Florida Regional Medical Center, Inc., 668 So. 2d 175 (Fla. 1995).

The effect of the abrogation of the doctrine of necessities is to create economic independent parties within the marriage. Judge Overton dissenting in Connor at 177 tells us the consequences of the majority ruling,

“The majority’s abrogation of the doctrine of necessities appears to shift the policy of the State by, in effect, requiring each spouse to take care of himself or herself. It also reduces the legal obligations of the marriage contract.”

This judicially recognized economic independence mitigates any attempt by the State through the Courts to establish any economic goals as a compelling state interest in the dissolution process. Connor is a serious impediment to the State to interfere in the privacy area of marriage/dissolution with the permanent alimony provisions of Section 61.08. In light of Connor, the State cannot offer threat of economic harm as a compelling state interest for a former spouse. The concept is not in the statute, its purposes or because of Connor even available to be applied as a legal interest.

When the judicially created economically independent parties to a marriage are couple with the legislature’s failure to change that independence (Fla. HB 1211; Fla. SB 906 both in 1996) the State cannot validate a compelling interest in Section 61.08. For this premise we further rely on the public policy as demonstrated in Florida Law ending coverture. This constellation of legal doctrine fortifies equality of responsibility of parties to a marriage.

Section 61.08 also fails the second prong burden of the compelling state interest being applied *in the least intrusive manner* when the state invades the protected Privacy zone of marriage to “...consider any other factor necessary to do equity and justice between the parties.” The state invades the protected zone of marriage to learn, weigh, and assign all economic factors between the parties with a goal of equity. After violating the information context of the Privacy Amendment without justification the State expands that invasion by giving the court the authority to consider any other factor to do equity and justice. The expansive wording “*any factor*” is the antithesis of the required “*least intrusive manner*” of

strict scrutiny as the State decides whether and how much money (alimony) to burden a citizen with—for the rest of his life!

Though Richardson prohibits a review of the consequences of declaring a statute unconstitutional the positive effect on the civil litigation system would be nothing short of astoundingly positive. In Re: Report of the Commission on Family Courts, 588 So. 2d 586 (Fla. 1991) notes that 50% of the civil court jurisdiction is dedicated to family law. How much would be eliminated with the abolition of the disputes over permanent alimony? The same case also notes at 591, “*We agree that the assignment of a judge to family law cases is one of the most stressful of all responsibilities of a circuit judge.*” That judicial recognition of the tension the State has created for the parties to family law litigation, as well as the massive volume of litigation the State has created demands justification with a compelling interest minimally applied.

II. Is the Circuit Court, as the state official designated to enforce Section 61.08, the proper defendant for a Chapter 86 Declaratory Judgment motion challenging the constitutionality of Section 61.08 permanent alimony provisions?

A Chapter 86 constitutional challenge of Section 61.08 presents an unexpected set of legal anomalies for which we seek guidance. On our way to challenging the impermissible infringement of Section 61.08 and related sections to Article I Section 23 via the avenue of a Chapter 86 motion a series of issues of first impression have been exposed. Who is the proper defendant to a Chapter 86 constitutional challenge of a Section 61.08 and related sections provisions? If the Trial Court is the proper defendant and also the adjudicator, then what is the proper remedy to achieve an impartial ruling? If a Canon 3 E (1) (d) (i) Rules of

Judicial Conduct violation occurs because the Trial Court Judge is a party to the Chapter 86 motion and does not disqualify herself, should the alleged violation be severed and move directly to the Florida Supreme Court because it has sole jurisdiction, or should the alleged violation travel with the primary appeal of the constitutional challenge? Do the Judicial Rules of Conduct apply to the Circuit Court State official broadly or to a specific judge?

It is the position of the State as expressed in a Memorandum of Law by the Florida Attorney General that the proper defendant to a constitutional challenge is the State official designated to enforce the statute. (Memorandum of Law of the Attorney General on behalf of John Bush Governor et al, Defendants in Jerry Bainbridge, et al v. John Bush, et al, Case No. 99-2681-CIV-T-25E U.S. District Court, Middle District, Tampa, Florida, February 2000).

The Attorney General cites, and we rely upon the authority of Walker v. President of the Senate, 658 So. 2d 1200, 1200 (Fla. 5th DCA 1995) "*it is the state official designated to enforce (it) who is the proper defendant, even when that party has made no attempt to enforce (it).*"; American Civil Liberties Union v. The Florida Bar, 999 F. 2d 1486, 1491 (11th Cir. 1993) "*Under the Supreme Court precedent, when a plaintiff challenges the constitutionality of a rule of law, it is the state official designated to enforce that rule who is the proper defendant, even when that party has made no attempt to enforce the rule.*[Citing] Diamond v. Charles, 476 U.S. 54, 64, 106 S. Ct. 1697, 1704, 90 I.Ed. 2d 48 (1986)."

The State, through the legislature, has empowered the Circuit Court in a Dissolution of Marriage proceeding as the state official designated to enforce the provisions of Chapter 61 at issue here, i.e. Section 61.08 and its related Sections, 61.011, § 61.031, § 61.043, §

61.071, § 61.08, § 61.09, § 61.10, § 61.12, § 61.1301, § 61.13015, § 61.13016, § 61.14, § 61.17, § 61.18, § 61.181, § 61.1824.

The statutes indicating the Circuit Court as State enforcing agent of permanent alimony are:

“**Section 61.14** *Enforcement* and modification of support, maintenance, or alimony agreements or orders...

(2)... No court has jurisdiction to entertain any action *to enforce* the recovery of separate support, maintenance, or alimony other than as herein provided.

“**Section 61.16 (1)**...In those cases in which an action is brought for *enforcement* and the court finds”

“**Section 61.17** Alimony and child support; additional method for *enforcing* orders and judgments; costs, expenses.--

(1) An order or judgment for the payment of alimony or child support or either entered by any court of this state may be *enforced* by another chancery court in this state in the following manner:

(a) The person to whom such alimony or child support is payable or for whose benefit it is payable may procure a certified copy of the order or judgment and file it with a complaint for *enforcement in the circuit court* for the county in which the person resides or in the county where the person charged with the payment of the alimony or child support resides or is found.

“**Section 61.18** Alimony and child support; default in undertaking of bond posted to ensure payment.—

(3) If the principal or sureties or sheriff or clerk fails to pay within the time and as required by the order, the court may *enforce* the payment by contempt...”

As further indirect support for our position we offer the Position of the Florida Bar Family Law Section August 16, 2002,

“3. Opposes legislation that would seek to remove from the courts in any way the establishment, modification or enforcement of family support, and/or that would seek to place consideration, effectuation or adjudication of these issues under the jurisdiction of the Department of Revenue or any other governmental or administrative body.”

If the trial court was not the proper defendant it was the Attorney General’s duty as the representation of the people to instruct the Appellant who was the proper defendant. It is not unreasonable to assume that the silence of the Attorney General in all aspects of the

proceeding represented agreement with the premise in the pleadings that the Circuit Court was the proper defendant. This reasoning is supported by the Attorney General's position expressed in their Memorandum of Law noted above.

The Attorney General in the same Memorandum of Law above has excluded the Governor, and the Director of the Department of Revenue as defendants. We rely on Fl. Dept. of Education v. Glasser, 622 So. 2d 944 (Fla. 1993) for the premise, by analogy, that the Clerk of Court is not a proper defendant. (a tax collector was not a proper defendant to a Chapter 86 declaratory judgment proceeding because the tax collector had no antagonistic interest against the plaintiff.)

Further we wish to stress that our pleadings to the trial court as well as our Notice of Appeal, and this brief express our position that FORMER WIFE is not a defendant to any of the proceedings related to this Chapter 86 Declaratory Judgment Motion. The Motion was filed in good faith in the spirit of Family Law Rules of Procedure 12.010 (a) (1), (a) (2) and (b) (1). At all times FORMER WIFE has been merely an interested party. Under Section 86.091 she is merely an interested party not an obligatory party to the proceeding. She would have become a necessary party only if the declaratory judgment ruling favored the Appellant and the Court considered granting the further remedy of Injunctive relief. In that eventuality, which did not occur, her rights would have been adversely impacted by the trial court triggering Section 86.061. Since the issue of additional relief was never reached she remained only an interested, not a necessary party or defendant.

III. Does the Circuit Court as the state official designated to enforce Section 61.08 violate The Code of Judicial Conduct Canon 3 E. (1) (d) (i)

when it fails to disqualify itself and certify the question to a higher Court?

A Court which must defend and rule on the same issue cannot fulfill either task. The Court should have ruled on whether it was the defendant to the Declaratory Judgment Motion. When the trial court rendered its denial opinion without addressing a conclusion on whether it was a defendant it brought into question the integrity of the judiciary.

Because of the legal anomaly of the trial court being the defendant of a constitutional challenge to Section 61.08 the only reasonable remedy is to apply the Rules of Judicial Conduct Canon 3 E (1) (d) (i) disqualifying itself and certifying the constitutional challenge to a higher court.

Conclusion

We are only at the beginning of a philosophical reaction, and of a reconsideration of the worth of doctrines which for the most part still are taken for granted without any deliberate, conscious, and systematic questioning of their grounds...

Most of the things we do, we do for no better reason than our fathers have done them or that our neighbors do them, and the same is true of a larger part that we suspect of what we think. The reason is a good one, because our short life gives us no time for a better, but it is not the best. It does not follow, because we all are compelled to take on faith at second hand most of the rules on which we base our action and our thought, that each of us may not try to set some corner of the world in the order of reason, or that all of us collectively should not aspire to carry reason as far as it will go throughout the domain. O.W. Holmes. The Path of the Law. 10 Harvard Law Review 457 (1897)

Based on the foregoing the Appellant requests this Court,

- a. Enter a declaratory judgment that Section 61.08 and related Statutes impermissibly infringe on the protected fundamental Privacy Rights of Article I Section 23 of the Florida Constitution.

- b. Enter Permanent injunctive relief against any private party or state official seeking to enforce the permanent alimony provisions of Section 61.08 and related statutes against FORMER HUSBAND.
- c. Declare the Circuit Court is the proper defendant to a Chapter 86 constitutional challenge to a Chapter 61 provision.
- d. Declare the Circuit Court must disqualify itself and certify to this court a Chapter 86 declaratory judgment proceeding in the form of a constitutional challenge to a Chapter 61 provision.

Respectfully Submitted,

alimonyreform@hotmail.com

As Cooperating Attorneys for the Alliance for Freedom From Alimony, Inc.

IT IS HEREBY CERTIFIED that a copy of this brief has been mailed to NAME, Assistant Attorney General, Civil Litigation Division, Office of Attorney General 110 S.E. 6th Ave., Fort Lauderdale, Florida 33301 this 27th day of September, 2002 and to NAME, Esq. Attorney for interested party FORMER WIFE at ADDRESS., Florida.