

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION**

Case Number 2:04-CV-417

MICHAEL S. GOGOLA
Plaintiff, pro se

vs.

JAMES ZINGALE, et al
Defendants.

PLAINTIFF'S CROSS MOTION TO DENY MOTION TO DISMISS

Now comes the Plaintiff, MICHAEL GOGOLA, pro se, to request this court Deny Defendant Florida Department of Revenue and James Zingale's Motion to Dismiss. In support he offers,

- a. Rooker Feldman Doctrine is inapplicable as the Plaintiff has made a general challenge to the constitutionality of F.S. §61.08. (Complaint at 15)
- b. Ankenbrandt v. Richards, 504 U.S. 689, (1992) is inapplicable as Plaintiff is not requesting a divorce decree, alimony, child custody, or other family law decision from this Court. (Complaint at 16)
- c. This court has supplemental jurisdiction, 28 U.S.C. 1367, to hear the state claims raised because of sufficiently pled federal questions claims pursuant to 28 U.S.C. 1331. (Complaint at 12)
- d. Plaintiff agrees with Defendant for this court to refer the state claims herein to the Florida Supreme Court pursuant to Mosher v. Speedstar Div. AMCA

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FORT MYERS DIVISION

- e. The equal protection federal question is sufficiently pled to survive dismissal. The claim is not a gender based claim. Plaintiff argues that marital status has legal recognition as a protected class and as such the strict scrutiny standard of review is applicable. In the alternative, if marital status is not viewed as a protected class then the state must offer a rationally related interest for the challenged statute. All elements are adequately pled. (Complaint at 51-58)
- f. The Federal Liberty Interest claim is not challenged by the Defendants.
- g. All necessary elements are sufficiently pled for valid 13th Amendment and 14th Amendment Liberty Interest and Right to Privacy in the Privacy Protected Zone of “personal decisions relating to marriage” claims. (Complaint at 111-120, 98-103)

WHEREFORE Plaintiff requests this court to grant his Motion to Deny Dismissal and to Deny Defendant’s Motion to Dismiss.

Dated October 22, 2004

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MEMORANDUM OF LAW

“It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the

confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty.' "Chief Justice Marshall in Cohen v. Virginia, 6 Wheat. 264-404, 5 L. ed. 257-291 cited in Ex Parte Young, 209 U.S. 123, 143, 1908.

Introduction

Defendants argue for dismissal based upon,

- a. Rooker Feldman Doctrine;
- b. Ankenbrandt;
- c. State claims should be referred to the Florida Supreme Court;
- d. The equal protection claim fails because the challenged statute is gender neutral;
- e. The Right to Privacy (federal and state) is a right to marry not a right to dissolve a marriage;
- f. The Thirteenth Amendment claim fails because the amendment is not invoked "simply because the possibility exists that the ex-spouse has to work to pay court ordered payments [alimony];"
- g. F.S. §61.08 alimony statute "does not violate public policy or case law since the award of alimony may be proper, in given instances, and indeed, required by equity.

Plaintiff disagrees and argues,

- a. Rooker-Feldman is inapplicable as a general challenge to the permanent alimony statute is made. (Complaint at 15);

- b. Ankenbrandt is inapplicable as the Plaintiff is not requesting a divorce decree, alimony, child custody, or other family law decision from this Court. (Complaint at 16)
- c. Plaintiff agrees with Defendant for this court to refer the state claims herein to the Florida Supreme Court pursuant to Mosher v. Speedstar Div. AMCA Internat'l, Inc., 52 F. 3d 913, 916-917 (11th Cir. 1995)
- d. Equal Protection-Plaintiff does not argue gender discrimination he argues similarly situated married or divorced Floridians are all not subject to the alimony statute being levied against them, only against Floridians whose divorcing spouse pleads the statute in a divorce proceeding.
- e. The 14th Amendment Liberty Interest and Right to Privacy includes the Privacy Protected Zone of “personal decisions relating to marriage.” The scope of that zone includes entering marriage on one end of the spectrum and dissolving a marriage on the other end of the spectrum. Plaintiff has pled the necessary elements for a valid substantive due process claim under the 14th Amendment.
- f. Plaintiff has pled the necessary elements of a 13th Amendment violation as the challenged statute is legal coercion to induce involuntary servitude in the Plaintiff, and other Floridians, to forever work for their former spouses.
- g. Connor v. Southwest Florida Regional Medical Center, Inc., 668 So. 2d 175 (Fla. 1995) does create public policy and establish that

Floridians in a marriage are economic independents. The challenged alimony statute then transforms economic independent Floridians in a marriage to economic dependents after they dissolve their marriage.

Facts

Plaintiff agrees with the facts as presented by the Defendants and as offered in the verified complaint.

Standard of Review for Dismissal

A rule 12(b)(6) motion is disfavored and rarely granted. Clark v. Amoco Prod. Co., 794 F.2d 967, 970 (5th Cir. 1986); Sosa v. Coleman, 646 F.2d 991, 993 (5th Cir. 1981). In deciding a motion to dismiss under Rule 12(b), the court accepts as true those well pleaded factual allegations in the complaint. C.C. Port, Ltd. v. Davis-Penn Mortgage Co., 61 F.3d 288, 289 (5th Cir. 1995).

“[A] complaint should be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted ‘only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.’” Gorski v. N.H. Dep’t of Corr., 290 F.3d 466, 473 (1st Cir. 2002) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L.Ed.2d 59 (1984)).

Dismissal is never warranted because the court believes the plaintiff is unlikely to prevail on the merits. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Even if it appears an almost certainty that the facts alleged cannot be proved to support the claim, the complaint cannot be dismissed so long as the complaint states a claim. Clark, 794 F.2d at 970; Boudeloche v. Grow Chem. Coatings Corp., 728 F.2d 759, 762 (5th Cir. 1984). "To qualify for dismissal under Rule 12(b)(6) a complaint must on its face show a bar to

relief." Clark, 792 F.2d at 970; See also Mahone v. Addicks Util. Dist., 836 F.2d 921, 926 (5th Cir. 1988); United States v. Uvalde Consol. Indep. Sch. Dist., 625 F.2d 547, 549 (5th Cir. 1980).

Justice O'Connor recently wrote that the Supreme Court "has frequently acknowledged the importance of having federal courts open to enforce and interpret federal rights." Idaho v. Coeur d'Alene Tribe of Idaho, 117 S.Ct. 2028, 2045–46 (1997) (O'Connor, J, concurring)

In the case of a pro se action, moreover, the court should construe the complaint more liberally than it would formal pleadings drafted by lawyers. Hughes v. Rowe, 449 U.S. 5, 9 (1980)(per curiam).

Rooker-Feldman

The Plaintiff raises a general challenge to F.S. § 61.08 permanent alimony statute which makes Rooker-Feldman inapplicable. (Complaint at 15)

“The federal district courts do have jurisdiction ‘over general challenges to state bar rules, promulgated by state courts in nonjudicial proceedings, which do not require review of a final state court judgment in a particular case.’ District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 486 (1983).

The latter portion of Plaintiff’s case comes within the distinction clearly noted in Doe v. Pringle, 550 F.2d at 599, that ‘a federal district court may exercise review of alleged federal constitutional due process or equal protection deprivations in the state’s adoption and/or administration of general rules governing admission.’ Thus in light of the general challenge by Plaintiff Johnson to the Utah Adoption laws it was error to dismiss Plaintiff’s complaint in toto since that portion of his complaint need not be construed as an attempt to appeal a particular adoption decree.” Johnson v Rodriguez et al., 226 F.3d 1103, 1108, (10th Cir. 2000)

Ankenbrandt

“The domestic relations exception divests the federal courts of power to issue

divorce, alimony, or child custody decrees." Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992), Ankenbrandt is inapplicable because the Plaintiff does not request this court to grant a divorce decree, alimony or child custody. (Complaint at 16)

The domestic relations exception has no generally recognized application as a limitation on federal question jurisdiction; it applies only as a judicially implied limitation on diversity jurisdiction. U.S. v. Johnson, 114 F.3d 476 (C.A.4 (Va.) 1997).

In Johnson v. Rodrigues (Orozco), 226 F.3d 1103, 1109 (C.A.10 (Utah) 2000), where the father was not a party to the adoption proceeding, the Rooker-Feldman doctrine did not apply. Neither did the domestic relations exception apply, because the plaintiff's underlying claims general challenged the constitutionality of the Utah adoption statutory scheme and alleged a due process violation. Such claims were asserted under federal question jurisdiction, and constitutional claims do not require a federal court to make a custody determination.

The court in Catz v. Chalker, 142 F.3d 279 (C.A.6 (Ohio) 1998), held that former husband's action, seeking a declaration that the state divorce decree was void as a violation of due process, was not a core domestic relations case to which the domestic relations exception applied. The action did not seek declaration of marital or parental status, but instead presented a constitutional claim in which it was incidental that the underlying action involved a divorce.

Supplemental Jurisdiction to hear state claims

The 1990 enactment of 28 U.S.C. 1367 gave discretionary authority to the federal courts to adjudicate state claims with the prerequisite of the existence of a valid federal

question (28 U.S.C. 1331)

The Plaintiff has adequately pled federal questions pursuant to 28 U.S.C. 1331 to give this court subject matter jurisdiction over this action. 28 U.S.C. 1367 grants this court supplemental jurisdiction to here the state claims raised herein because of the action's valid 28 U.S.C. 1331 federal questions.

On the other hand, "unless a court properly invokes a [S]ection 1367(c) category in exercising its discretion to decline to entertain pendent claims, supplemental jurisdiction must be asserted." Executive Software North America Inc. v. U.S. District Court, 24 F.3d 1545, 1556 (9th Cir.1994)

Because valid federal question claims are pled this court must hear the state claims unless it determines one of the 28 U.S.C. 1367 (c) factors exist. Should this court decline the state claims it should refer them to the Florida Supreme Court because of the novel state law and the claims being claims of first impression.

Refer State Claims to the Florida Supreme Court

Plaintiff concurs with Defendants that this Court is authorized to refer the state claims raised in this action to the Florida Supreme Court. Mosher v. Speedstar Div. AMCA Internat'l, Inc., 52 F. 3d 913, 916-917 (11th Cir. 1995) Plaintiff does not challenge such a referral and will accept the referral of the state claims to the Florida Supreme Court.

Referral is reasonable because of Florida's anomalous Florida Supreme Court jurisdictional constraints imposed by its state constitution. The Florida Constitution Article V § 3 (b) (3)¹ 1980 amendment precluded the Florida Supreme Court from

¹ Florida Constitution Article V 3 (b)(3) May review any decision of a district court of appeal that

hearing cases in which its District Appellate Courts have rendered ruling without explanatory opinions. PCAs in the DCAs: Asking for Written Opinion From a Court That Has Chosen Not to Write One, Arthur J. England, Jr., Fl. Bar Journal, LXXVIII No.3, March 2004. In fact, the Florida Supreme Court has acknowledged it will not review cases without explanatory opinions. R.J. Reynolds Tobacco Company v. Kenyon, Case No. 03-1577, (Fla., 2 September 2004).

The Plaintiff is aware that the state claim raised here, i.e. the Florida Constitution Article I Section 23 Right to Privacy challenge to F.S. §61.08 alimony provisions, has been silenced by the Florida Judiciary by denying the claim without explanatory opinion at the trial court level and the Florida Appellate Court level. Barna v Barna (CD00-534 FZ, Fifteenth Judicial Circuit Court of Florida, 2003); Barna v Barna, 850 So. 2d 603 (Fla. App. 4 Dist. 2003, cert denied Barna v Barna 870 So. 2d 820 (Fla. 2004).

There is no reason for the Plaintiff to believe that raising the same state claim, i.e. Fl. Constitution Article I Section 23 Right to Privacy, in the state court will not result in the Florida judiciary effectively squelching the claim without an explanatory opinion. Floridians deserve a judicial analysis of the conflict of F.S. §61.08 alimony provisions with the Florida Constitutional rights raised in this action.

The Plaintiff will accept this court's review of the state claims raised here because they are sufficiently pled to survive a motion to dismiss, or he will accept this Court's Referral of the state claims here to the Florida Supreme Court.

13th Amendment Involuntary Servitude

expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of

Defendant does not argue the pleading are insufficient to state a cause of action or to put Defendants on notice as to the allegations they are to defend. The Defendant is arguing the merits.

The Plaintiff has adequately pled the elements and facts necessary to raise a violation of his 13th Amendment Rights. (Complaint at 59-63, 111-130).

There appear to be shocking similarity between the character of involuntary servitude as denoted in United States v. Kozminski, 487 U.S. 931, 942 (1998) and that of a Floridian invoking F.S. § 61.08 to compel another Floridian to work for their benefit or face the coercion of law, i.e. civil contempt, and incarceration, for not so doing.

Kozminski , a 13th Amendment criminal case, in which the United States Supreme Court sought a lenity definition of involuntary servitude concluded it to be “a condition of servitude in which the victim is forced to work for [another] ...by the use of threat of coercion through law or the legal process.” Kozminski at 942.

It is a “condition in which a person lacks liberty especially to determine one’s course of action or way of life.” Kozminski at 942.

“...the Amendment’s drafters thought that involuntary servitude generally includes situations in which the victim is compelled to work by law.” Kozminski at 931

The only way a Floridian can make a spouse work for her benefit for his entire life is to dissolve their marriage and use the threat of coercion through law or the legal process. This is precisely what F.S. §61.08 and its enforcement with contempt and imprisonment grants her. Within the intact marriage a Floridian cannot force a spouse to work or support her at a certain lifestyle. A Floridian can accomplish those goals by

law.

dissolving her marriage and invoking F.S. §61.08 against her spouse thus using the legal process and the coercion of the law to force him into involuntary servitude. It is the mechanism by which the Plaintiff and other Floridians can no longer determine their action and way of life.

The Kozminski definitions and statements appear to characterize the nature of the alimony statute such that a full hearing on the issue and the right of the Plaintiff to put on evidence are paramount.

This is a case of first impression worthy of this court's review.

Equal Protection

The Plaintiff has not raised a gender discrimination claim. He alleges that not all similarly situated Floridians dissolving their marriage are subjected to F.S. §61.08. It is considered and applied by the state only against those Floridians whose spouses have pled the statute against them. (Complaint at 50-58. 104-110)

Further, the Plaintiff adequately asserts that the statute treats divorcing spouses differently than spouses in a continuing marriage by applying over 2¹⁷ permutations of factors then "may consider any other factor necessary to do equity and justice between the parties" only against some divorcing spouses without any rational state interest ever having been determined.

The Plaintiff asserts that marital status has reached the level of a protected class and thus a strict scrutiny analysis should be employed by this court when reviewing the challenged statute. (Complaint at 51)

In the alternative, should the Court not find marital status a protected class it should demand a rationally related state interest from the defendants and then determine

if the interest so raised is indeed a rationally related interest.

Liberty Interest

The Defendant does not challenge the claim that F.S. Chapter 61 “Dissolution of Marriage,” §61.08 permanent alimony provisions, impermissibly infringe the Plaintiff’s or Floridians’ Liberty Interest when they dissolve their marriage.

14th Amendment Right to Privacy

The 14th Amendment Liberty Interest doctrine has been recognized in Lawrence v. Texas 123 S. Ct. 2472 (2003) and Planned Parenthood v. Casey, 505 U.S. 833, 859 (1992). The Liberty Interest coupled with the recognized Right to Privacy contained in the substantive due process clause of the 14th Amendment includes a Privacy Protected Zone of “personal decisions relating to marriage.” Carey v. Population Serv. Int’l, 431 U.S. 678, 684-685 (1977); Loving v. Virginia, 388 U.S. 1, 12, 87 S.Ct. 1817 (1967); Zablocki v. Redhail, 434 US 374 (1978)and; Planned Parenthood v. Casey, 505 U.S. 833, 859 (1992); Roe v. Wade, 410 U.S. 113, (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

The scope of the “personal decisions relating to marriage” Privacy Protected Zone is as yet incompletely determined. Just as the Privacy Protected Zone of “procreation” has two ends of its spectrum, i.e. the use and sale of contraceptives (beginning or preventing a procreation event) on one end and the termination of a procreation event (abortion) on the other so too the Zone of “personal decisions relating to marriage” has a full spectrum.

To date federal courts have only addressed the beginning end of the spectrum (getting married) and statutes that place an undue burden on that process. (Loving and Zablocki)

In this case this court is asked to address the termination end of the personal decision relating to marriage (dissolution) and whether the challenged statute places an undue burden on the personal decision to dissolve a marriage.

A citizen's wish to dissolve his marriage is as much a "personal decision relating to marriage" as his decision to enter a marriage. Both fall within the Privacy Protected Zone.

The U.S. Supreme Court could have chosen different terms and concepts but it repeatedly chose "personal decisions relating to marriage" to define this Privacy Protected Zone.

The Plaintiff has adequately pled the substantive due process elements related to Liberty Interest and Right to Privacy to survive a motion to dismiss.

Florida Public Policy and Case Law

The Plaintiff adequately pleads the elements asserting the challenged F.S. § 61.08 permanent alimony provisions impermissibly infringe the Florida Supreme Court ruling and the public policy recognized therein. Connor v. Southwest Florida Regional Medical Center, Inc., 668 So. 2d 175 (Fla. 1995)

It is not the Plaintiff who has made the determination of the shift in public policy but the Honorable Florida Supreme Court Justice Overton who expresses his opinion on the effect of the decision in his dissenting opinion, "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." (Complaint at 42)

The Connor ruling shifts the public policy and makes married Floridians economic independents. The challenge statute F.S. § 61.08 goes counter to this ruling and makes them economic dependents after dissolving their marriage. The continued

existence and enforcement of the statute after the Connor ruling represents a statute incompatible with state public policy and a Florida Supreme Court ruling. The statute must be considered null and void as well as unenforceable.

Conclusion

“Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. Justice Kennedy, Lawrence v Texas at 2472

For the above stated reasons the Plaintiff has met his burden to survive a motion to dismiss on the grounds raised by the Defendant. The Defendant has not met his burden.

These claims are a good faith effort to change existing law.

Prayer for Relief

“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.” Florida Chief Justice Kogan Dissenting in Krischer v. McIver, 697 So.2d 97 (Fla. 1997)

WHEREFORE the Plaintiff pray's this court will grant his Cross Motion to Deny

the Motion to Dismiss and find,

- a. Rooker –Feldman is inapplicable;
- b. Ankenbrandt is inapplicable;
- c. The State Claims raised here be referred to the Florida Supreme Court;
- d. A valid Equal protection claim is pled to survive dismissal;
- e. A valid 13th amendment claim is pled to survive dismissal;
- f. A valid Right to Privacy claim is pled to survive dismissal;
- g. A valid claim exists re Connor v. Southwest to survive dismissal.

Respectfully submitted,

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Dated October 22, 2004

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 2004, I caused a true and accurate copy of the foregoing Motion and Memorandum were mailed by U.S. Mail to

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