

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**
Civil Case No. 04-80443-CIV
The Honorable Ryskamp and Vitunac

STEWART GREENBERG

Plaintiff, pro se

v

JAMES ZINGALE, Chairman, Executive Director
Florida Department of Revenue,
in his official capacity and,

FLORIDA DEPARTMENT OF REVENUE,
Defendants.

PLAINTIFF'S MOTION FOR RECONSIDERATION

Comes now the Plaintiff, pro se, to object to the findings and conclusions in the 5 November 2004 Magistrate's Report and Recommendations.

The Plaintiff states the Report errs by a.) denying the substantive due process -- Liberty Interest and Right of Privacy-- claim; and b.) by denying the equal protection claim.

Respectfully submitted,

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Dated 15 November 2004

MEMORANDUM OF LAW TO OBJECT TO REPORT AND

RECOMMENDATIONS

Introduction

This Plaintiff's objection is to the findings, analysis and conclusions of the 5 November 2004 Report and Recommendation of the Honorable Ann Vitunac.

The Report cites the premise the court is to give lenity to a pro se plaintiff's pleading and to find (but not make for him) the kernel of legal luminescence therein to sustain the claims in the complaint against a motion to dismiss. The Report instead appears to bypass the elements expressed in the complaint to move further down the ladder of abstraction to scratch for the morsel of legal thought to breath life into, and do the heavy lifting for, the defendant's sweeping unsupported generic argument "fails to state a cause of action."

The Report itself acknowledges the Plaintiff's claim chain of legal support but then raises inapposite cases to which it attaches its conclusions to support dismissal. The Report attempts to match the complaint here with current caselaw on point and reasons that because the complaint is not on point with the case law the claim fails.

Applying this logic the report is flawed on two points. If this case was on point to the case cited then there is a valid claim to survive a motion to dismiss. The case here might not prevail on the merits but assuredly survives a motion to dismiss.

Second the report is analyzing the complaint not on the standard of a motion to dismiss but on a standard to prevail on the merits or on summary judgment. The report applies the wrong standard. Facts are adequately pled to put the defendants on notice of the issue and a claim is made from which relief can be granted—i.e. declaratory judgment of the constitutionality of a state statute's permanent alimony section. Those are the

criteria to apply to the complaint.

Pro se plaintiff

“...pro se pleadings are held to a less stringent standards than pleadings drafted by attorneys and will, therefore, be *liberally* construed.” Tannenbaum v. United States, 148 F. 3d 1262, 1263 (11th Cir. 1998)” (emphasis added) Report p 3.

Standard for motion to dismiss

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).

“A court should grant a motion to dismiss *only* if the plaintiff fails to allege any facts that would entitle the plaintiff to relief. Conley v Gibson 355 U.S. 41 (1957)” (emphasis added) Report p 2.

Complaint’s chain of legal support

The Report agrees with the Plaintiff’s complaint and legal argument but then makes conclusions associating the conclusions with inapposite case law.

The Report completely accepts the complaint’s expression of the existence of a liberty interest, a constitutional Right of Privacy, and the existence of privacy protected zones one of which is “personal decisions relating to marriage.” Report p 3.

Precisely, and notably, the Report cites and agrees with Plaintiff, “Specifically, the Supreme Court has found that the government may not unjustly interfere with personal decisions relating to marriage.” Report p 3 citing Carey v Population Services International 431 U.S. 678, 684 (1977).

In its next paragraph it then narrowly construes the plain English meaning of the

words in the above phrase, and makes the giant leap of logic, to conclude that, "...;the Florida alimony statutes do not in any way prohibit marriage or interfere with personal decisions relating to marriage."

The Report acknowledges that the complaint challenges the alimony sections of the "Dissolution of Marriage" statute. The Plaintiff wishes to call the court's attention to the concept that the Plaintiff and the complaint challenge a section of a statute, i.e. the permanent alimony section (§61.08) of the "Dissolution of Marriage" statute.

The Plaintiff is in wonderment and at a complete loss to understand the Report's next statement, "Though the Florida alimony statutes are found within Chapter 61 which is entitled "Dissolution of Marriage; Support; Custody" §61.08 and § 61.09 do not regulate the creation or dissolution of marriage."

If Florida Statutes Chapter 61 entitled "Dissolution of Marriage," its sections and provisions do not regulate the dissolution of marriage, what do they regulate?

If Florida Statutes Chapter 61 entitled "Dissolution of Marriage," its sections and provisions do not regulate the dissolution of marriage, what statute, sections and provisions regulate the dissolution of marriage?

I. SUBSTANTIVE DUE PROCESS: RIGHT OF PRIVACY

Right to exit marriage without an undue burden

The Honorable Kenneth Ryskamp rightly characterized the Plaintiff's substantive due process claim as "an alleged right to exit a marriage without an undue burden imposed by the state." (Order 31 August 2004) The complaint asserts the permanent alimony sections impose a staggering burden—beyond undue.

The permanent alimony (§61.08) section permits the state to rummage through all the intimacies of the Floridian's marriage and then is granted wide discretion whether to deny a Floridian property rights in the future—forever—till one of the Floridians die.

The permanent alimony (§61.08) section permits the state to place upon a Floridian a yoke of labor with threat of contempt and imprisonment to support the former spouse in the lifestyle of the marriage. (Complaint at 38) Is this not an undue burden?

The undue burden doctrine espoused by Justice O'Connor in the privacy zone of procreation, i.e. abortion, equally applied in the context of the privacy zone of personal decision relating to marriage, i.e. dissolution, is poignant.

“ As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, ipso facto, an infringement of that right. An example clarifies the point. We have held that not every ballot access limitation amounts to an infringement of the right to vote. Rather, the States are granted substantial flexibility in establishing the framework within which voters choose the candidates for whom they wish to vote. *Anderson v. Celebrezze*, [460 U.S. 780, 788](#) (1983); *Norman v. Reed*, [502 U.S. 279](#) (1992).

The abortion right is similar. Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more

difficult or more expensive to procure an abortion cannot be enough to invalidate it. *Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.* See *Hodgson v. Minnesota*, 497 U.S. 417, 458 -459 (1990) (O'CONNOR, J., concurring in part and concurring in judgment in part)" (emphasis added) *Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992)

"Justice's O'Connor's well known test of *undue burden* applies to the fundamental right at issue here just as it did in the abortion fundamental right setting. 'An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability.'" *Planned Parenthood v Casey*, 505 U833, 837 (1992)

"These measures [husband's notification before an abortion] must not be an undue burden on the right." Referring to statutory measures. *Ibid.*

If telling a husband before a woman requests an abortion is considered an undue burden, surly isn't telling the state all the intimacies of one's marriage (and including in the public record, and paying one's and the other party attorneys to do so)—an undue burden?

Is not having to labor and provide money till one dies or the former spouse dies an undue burden...physically, mentally, and emotionally?

The court is well aware of the lifetime burdens imposed by the shackles of permanent alimony when applied to a Floridian.

There can be no question the challenged permanent alimony provisions in the

“Dissolution of Marriage” statute constitute not only an undue burden to make the provisions unconstitutional...but unquestionably to survive a motion to dismiss. The burdens are all well pled to survive a motion to dismiss.

The report appears to argue based on a standard to prevail on the merits rather than the far lower standard it acknowledges to survive a motion to dismiss.

Chapter 61 does regulate the dissolution of marriage.

Plaintiff believes the report answers the wrong question when it answers that the permanent alimony provision does not interfere with the granting of a dissolution.

The report’s statement “Though the Florida alimony statutes are found within Chapter 61 which is entitled “Dissolution of Marriage;Support’Custody,”§ 61.08 and §91.09 do not regulate the creation or dissolution of marriage,” is simply erroneous.

Plaintiff accepts that the “Dissolution of Marriage”statute and permanent alimony sections do not regulate the “creation” of marriage. They do however place an undue burden on those Floridians who wish to remarry. So, though the permanent alimony sections do not regulate the creation of marriage, their existence and the consequences of the application of the sections places an undue burden on those Floridians who wish to remarry.

The underlying nature of dissolution of marriage a vinculo is to permit parties to remarry.

To conclude that Chapter 61 and all of its provisions do not “regulate” the dissolution of marriage ignores the plain meaning of the words “regulate” and

“dissolution.”

The entire point of Chapter 61 “Dissolution of Marriage” is for the state to apply its power and authority through the legislature to set terms Floridians must and may follow in order to dissolve their marriage. Yes, §61.08 is a provision available to all Floridians. However when Floridians exercises the authority contained in §61.08 the state of Florida immediately intrudes into the depths of all intimacies of Floridians’ marriages.

The state, through the permanent alimony section, can make one of the parties to the dissolution bear the enormous financial and emotional burden –an undue burden--to defend himself against the threats of property loss the permanent alimony section imposes on him. The provision forces the prospective payor of alimony to incur his own attorney fees and almost always the attorney fees of the spouse utilizing the alimony provision against her spouse—another undue burden.¹

§61.08 is part of the Dissolution of Marriage statute, a statute written in the privacy protected zone of “personal decisions relating to marriage.” As such 14th Amendment Liberty interest and Right of Privacy rights are being “regulated” by the statute. To state Chapter 61 and § 61.08 do not regulate the Dissolution of Marriage, a personal decision relating to marriage results in an otherwise absurd conclusion. Absurd results, conclusions, and consequences are to be avoid in statutory interpretation. United

¹ Rosen v Rosen, 696 2 So 2d 697, 700 (Fla 1997) contains a litany of factors the court can apply with wide discretion in assigning attorney fee awards. With the laundry list the opinion contains the catch all phrase “ Thus, section 61.16 [attorney fees] should be liberally — not restrictively — construed to allow consideration of any factor necessary to provide justice and ensure equity between the parties.”

States v. Kirby, 7 Wall. 482, 486 (1869) ("All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence").

Statute intrudes a Privacy Zone

The Plaintiff has already, in his complaint, in his Motion to Deny Dismissal, and in his Motion for Reconsideration, already covered this point and will not reiterate the argument to belabor the court with redundancy, i.e Chapter 61 is entitled "Dissolution of Marriage," §61.08 permanent alimony section is part of the statute, a Floridian's decision to dissolve his marriage is a "personal decision relating to marriage," "personal decisions relating to marriage" is a well recognized Privacy Protected Zone entitled to the protections of the 14th amendment Liberty interest doctrine and the Right of Privacy. The report accepts this legal chain.

Alimony;during marriage, after marriage

The complaint at 41, 42 and 53 distinguishes how the provisions of §61.08 applying "permanent alimony" after the dissolution of a marriage differ from the §61.09 provisions applying alimony (not permanent alimony) during a marriage. There is a class distinction to its application. The same principle of alimony is applied with different provisions depending on whether the Floridian is making the personal decision to stay married or to dissolve his marriage. Both §61.08 and §61.09 are statutory sections written in a privacy protected zone. They must meet the compelling interest (strict scrutiny) standard.

Further more the complaint at 73, 74 stresses the Connor v. Southwest Florida Regional Medical Center, Inc., 668 So. 2d 175 (Fla. 1995) ruling, its effect and its shift

of state public policy to make parties in a marriage economic independents.

If the magistrates' report implies that §61.09 is permissible then it conflicts with Connor.

In Connor the Florida Supreme Court abrogated the doctrine of necessities and effectively made parties in a marriage economic independents. This is diametrically opposed to the plain English and supposed intent of §61.09 to make one party in a marriage support the other and be responsible for the third party debts of the other spouse.

If §61.08 and §61.09 are similar then §61.08 also is contrary to the ruling in Connor, the shift in public policy and the creation of economically independent spouses effected by the Connor ruling.

The Report Conclusion

The report states, "...the statutes do not interfere with a person's decision to exit a marriage." To say that the permanent alimony provisions do not interfere with a Floridian's decision to exit a marriage is simply erroneous. The statement is flawed in two ways.

First, the permanent alimony provision places not an undue burden but a herculean procedural burden on Floridians to disclose all the intimacies of their marriage, pay attorney fees and costs and perhaps for the rest of their life labor for the benefit of a former spouse. The thought of the consequences of invoking or being subjected to the permanent alimony statute are an oppressive interference in a person's decision to exit a marriage. To think otherwise is simply to deny reality.

And what if the spouse to be burdened with the ball and chain of permanent

alimony is the respondent in the dissolution of marriage process? The report could be right on that point....the respondent did not make a decision to dissolve his marriage and initiate proceedings...so it did not interfere with “his” decision to be compelled to be a respondent in a lawsuit over the other spouse’s decision to dissolve his marriage. It most certainly did interfere with the decision that dissolved his marriage...i.e. a personal decision relating to his marriage.

Second, in addition to the procedural interference, the substantive interference to a Floridian spouse having the permanent alimony section applied against him is an interference because he cannot exit his marriage without fear and reality of having the statute levied against him.

Thirdly, when it is levied against a Floridian who is part of a personal decision to dissolve his marriage (willingly or unwillingly) if the permanent alimony section is applied against him it interferes with his ability and personal decision relating to marriage of whether to enter marriage again. Thus, in fact, it does interfere with a Floridian’s personal decision to enter into marriage. The state imposed economic and labor burden he must carry into a new marriage is formidable---again, far beyond undue.

The report concludes because the statutes (permanent alimony §61.08 and §61.09) do not prevent a person from dissolving his or her marriage and do not interfere with a person’s decision to exit a marriage the plaintiff has failed to state a due process claim. The report asks and answers the wrong question and even in so doing errors in its conclusion.

The Plaintiff shows above that even if the questions answered in the report are the correct questions the report answers them incorrectly .

More importantly the right question the complaint has posed is whether the challenged permanent alimony sections of F.S. Chapter 61 “Dissolution of Marriage:Support and Custody” are written within the Right to Privacy protected zone of “personal decisions relating to marriage,” namely the personal decision to dissolve a marriage. If they are, and the report concludes they are, then a valid claim is effected. Any argument beyond that point is an argument on the merits not on a motion to dismiss.

Furthermore simply attaching the Right of Privacy to the challenged statute and its provisions strict scrutiny applies and the statute is automatically unconstitutional. A valid claim therefore exists. The burden is on the state defendants to resurrect the statute and the specifically challenged section to give it life.

II. EQUAL PROTECTION

The report concludes the challenged alimony provisions are available to all persons dissolving their marriage and that the Plaintiff has not alleged the alimony statutes on their face create classifications between similarly situated people. Accordingly, the report says, the Plaintiff has failed to state an equal protection claim.

This conclusion overlooks the pleadings asserting four types of equal protection claims, marital status as suspect class, facial, as applied and class of one.

The Plaintiff states that all four equal protection claims are adequately pled to survive a motion to dismiss.

Suspect Class

The pleading raises a suspect class claim, i.e. marital status which the report does not address. Complaint at 49.

“Marriage has achieved the status of a suspect class. Federal statutes routinely classify marital status along with suspect classes. See, e.g., 12 U.S.C. § 3106a (1) (b)(foreign banks must conduct operations in compliance with laws prohibiting discrimination on the basis of race, national origin, marital status); 5 U.S.C. § 7204(b) (“...[D]iscrimination because of race, color, creed, sex, or marital status is prohibited with respect to an individual or a position held by an individual”); 15 U.S.C. § 1691(a)(1)(unlawful for creditor to discriminate on the basis of sex, race, religion, national origin, or marital status); 20 U.S.C. § 1087tt(c)(unlawful to discriminate in loaning money on basis of sex, race, religion, national origin, or marital status); 20 U.S.C. § 1071(a)(2)(same, for credit or insurance).” Complaint at 49

The report completely overlooked the assertion pled of marital status being a suspect class. The pleadings support this as a reasonable issue. i.e. is marital status a suspect or quasi-suspect class, for this court to decide in the dissolution of marriage context when property rights are going to be forever stripped from a Floridian.

As Applied

The pleadings assert an applied claim which the report recognizes. Complaint at

127

“The Plaintiff asserts that the criteria for burdening a spouse with permanent alimony annunciate over 2¹⁷ permutations then includes the phrase “may consider any other factor necessary to do equity and justice between the parties. They are applied in a court of chancery with a standard of equity by a judiciary given wide discretion such that similarly situated Floridians could not conceivably be equally treated under the alimony provision.” Complaint at 127

Facial

The same pleadings create a facial equal protection claim which the report does

not see or accept C127.

“The Plaintiff asserts that the criteria for burdening a spouse with permanent alimony annunciate over 2¹⁷ permutations then includes the phrase “may consider any other factor necessary to do equity and justice between the parties.” They are applied in a court of chancery with a standard of equity by a judiciary given wide discretion such that similarly situated Floridians could not conceivably be equally treated under the alimony provision.” C 127

The report views §61.08 and §61.09 as available to all dissolving their marriage.

The report fails to recognize the overbreath of the factors permitted to the court when the court applies the statute. The ambiguity of the statute, written in a zone of a fundamental right, constitutes a facial violation of equal protection.

Further evidence of facial inequality is the uncertainty created by the statute such that not even the appellate courts can “figure it out.”

“ ‘However, it is not clear, based on appellate decisions, whether a trial judge must consider all the statutory factors and give equal weight to all, or just the relevant ones.’ Quote addressing the § 61.08 2¹⁷ criteria for awarding alimony (page 7) in Gender Bias—Then and Now, Continuing Challenges in the Legal System, The Report of the Gender Bias Study Implementation Commission (1996) Commission of the Florida Supreme Court.” Complaint at 42

Class of One

The pleadings raise a class of one equal protection class based on the myriad of permutations the statute invokes shall and may be applied to deny a Floridian of future property rights. Admittedly this is not pled with the term of art “class of one” equal protection claim. Nonetheless the elements for such a claim are evident in the pleadings.

When fully viewed the complaint asserts the complete panoply of factors (2¹⁷

factors plus all other factors...) may be applied with wide judicial discretion de facto resulting in a statute which a Floridian cannot discern . Id.

This universe of factors and their uncertain application effectively creates thousands of classes of one.

The report overlooks that the Equal Protection Clause extends not only to members of an identifiable group but also protects individuals. While the “central purpose” of the Equal Protection Clause “is the prevention of official conduct discriminating on the basis of race,” Washington v. Davis, 426 U.S. 229, 239 (1976), and “the abolition of all caste-based and invidious class-based legislation,” Plyler v. Doe, 457 U.S. 202, 213 (1982), its protections also extend to those who are in a “class of one.”

The Equal Protection Clause provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws,” which is “essentially a direction that all persons similarly situated should be treated alike.” City of Cleburne, Texas v Cleburne Living Center, 473 U.S. 472, 439 (1985); Plyler, 457 U.S. at 216; F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). The unmistakable focus of the constitutional text is on protection for the individual.

As the U.S. Supreme Court has emphasized, a “basic principle” of the Equal Protection Clause is that it “protect[s] persons, not groups.” Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995).

Consistent with the constitutional text and that basic principle, the United States Supreme Court’s cases do not suggest that the Equal Protection Clause protects only persons who are members of an identifiable group. To the contrary, as early as 1879, the Court made clear that the Equal Protection Clause “means that *no person or class of*

persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.” Missouri v. Lewis, 101 U.S. 22, 31 (1879) (emphasis added).

The Court has on several occasions confirmed that the Equal Protection affords protection to a person in a “class of one.” For example, in Atchison, Topeka & Santa Fe Railroad v. Matthews, 174 U.S. 96, 104 (1889), the Court stated that

“the equal protection guaranteed by the constitution forbids the legislature to select a person, natural or artificial, and impose upon him or it burdens and liabilities which are not cast upon others similarly situated. It cannot pick out one individual, or one corporation, and enact that whenever he or it is sued the judgment shall be for double damages, or subject to an attorney’s fee in favor of the plaintiff, when no other individual or corporation is subjected to the same rule.”

The Equal Protection Clause therefore is not wholly inapplicable to a person in a “class of one.” As Justice Frankfurter explained, “the Fourteenth Amendment does not permit a state to deny the equal protection of its laws because such denial is not wholesale.” Snowden v Hughes, 321 U.S. 1, 15 (1944) (Frankfurter, J., concurring). A violation of equal protection can occur when “conscious discrimination by a state touches the plaintiff alone.” *Id.*

The state, by the existence and the uncertain application of the permanent alimony sections is discriminating against some Floridians dissolving their marriage by applying the scourge of lifetime labor to them.

Because a universe of factors can be applied by a judge with wide discretion which deprives a Floridian of his property in effect each application of the statute is unique to each Floridian. The application of a universe of factors by the state to deny a

Floridian his properties rights represents an invidious violation of equal protection.

It is meaningless to say, as the report does, that because the alimony statutes are available to all people dissolving their marriage that therefore they are not in violation of federal and state equal protection constitutional amendments.

Conclusion

For the above stated reasons the Plaintiff objects to the conclusions of the Report and Recommendation to grant the motion to dismiss.

Prayer for Relief

WHEREFORE Plaintiff prays this court to deny Defendants motion to dismiss on the substantive due process (liberty interest and Right of Privacy infringement) claim and the equal protection claims pled.

Further to permit the Plaintiff to argue on the merits these federal and the state claims pled .

Respectfully submitted,

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Dated 15 November 2004

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above Memorandum of Law has been sent this 15th day of November, 2004 by U.S. Mail to counsel for the defendants and independently to Valerie J. Martin, Assistant State Attorney, Office of the Attorney General, 1515 N. Flagler Boulevard, Suite 900, West Palm Beach, Florida, 33401.

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