

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

Case No. 04-80443-CIV- Ryskamp/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.

**NIGHT BOX  
FILED**

**NOV 17 2004**

CLERK, USDC / SDFL / WPB

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**PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

The Plaintiff, pro se, pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the standard of review set forth in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), moves this Court for an Order granting summary judgment in favor of the Plaintiff as against the Defendants on the claim the Florida Statutes Chapter 61 "Dissolution of Marriage" permanent alimony provision (§61.08) impermissibly infringes Floridians' Liberty interest and Right of Privacy in the Privacy Protected Zone of "personal decisions relating to marriage."

Plaintiff also moves for summary judgment that the state claims, i.e. that the challenged permanent alimony provisions ( §61.08), impermissibly infringe Florida Constitution Article 1 Section 23 Right of Privacy and Article I Section 2 Basics Rights as well as conflict with the Florida Supreme Court ruling and public policy effected in Connor v. Southwest Florida Regional Medical Center, Inc., 668 So. 2d 175 (Fla. 1995).

This motion is made on the following grounds.

**NON-COMPLIANCE OF S.D. Fla. L.R. 7.1.2**

Pursuant to the standard set forth in Celotex, there is no genuine issue as to any material fact and the moving party, the Plaintiff, is entitled to a judgment as a matter of law. Id. at 322. In support he offers,

**A. Federal Question: Infringement on Liberty interest and Right of Privacy**

The existence of the constitutional 14<sup>th</sup> Amendment Liberty interest doctrine is well settled. (Lawrence v. Texas, 539 U.S. 558 (2003); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479(1965); Carey v Population Services International 431 U.S. 678, (1977); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992))

The existence of a constitutional 14<sup>th</sup> Amendment Right of Privacy is well settled. (Griswold v. Connecticut, 381 U.S. 479(1965); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992); Carey v Population Services International 431 U.S. 678, (1977)).

Within the right of privacy there exist well established privacy zones one of which has been repeatedly deemed the zone of “personal decisions relating to marriage.” Casey Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992); Carey v Population Services International 431 U.S. 678, 684 (1977); Roe v. Wade, 410 U.S. 113 (1973); Skinner v Oklahoma, 316 U.S. 535 (1942).

Dissolution of a marriage is a personal decision relating to marriage and as such is entitled to the constitutional protections afforded a fundamental Liberty interest and the fundamental Right of Privacy.

F.S. Chapter 61 is entitled “Dissolution of Marriage” and contains a section (§ 61.08) for the state to have the wide discretion to award the harsh lifetime burden of

permanent alimony against a Floridian only if his spouse pleads for it.

The challenged provision sits squarely within the privacy zone of a “personal decision relating to marriage”, i.e. to dissolve a marriage and the strict scrutiny standard applies making the provision unconstitutional unless rehabilitated by the state of Florida proving a compelling state interest applied in the least intrusive manner and that the provision in fact furthers the compelling state interest.

“It is well settled that . . . if a law ‘impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional.’”  
Harris v. McRae, 448 U.S. 297, 312 (1980) (quoting City of Mobile v. Bolden, 466 U.S. 55, 76 (1980))

No compelling state interest exists to rehabilitate F.S. §61.08. It therefore impermissibly infringes the Liberty interest and federal right of privacy of Floridians and is unconstitutional.

#### **B. Florida Constitution Article I Section 23 Right of Privacy**

Florida Constitution Article I Section 23 affords Floridians a broader Right of Privacy than that afforded them in the U.S. Constitution. North Florida Women's Health & Counseling Services, Inc. v. State, 866 So.2d 612 (Fla. 2003); In re T.W., 551 So. 2d 1186 (Fla. 1989)

The same Right of Privacy and Zone of Privacy argument above is reiterated herein to invalidate F.S. §61.08.

#### **C. Florida Constitution Article I Section 2 Basic Rights**

Florida Constitution Article I Section 2 affords Floridians an “inalienable” set of basic rights.

The same legal argument on Liberty Interest above is reiterated herein to

invalidate F.S. §61.08.

**D. Connor v. Southwest Florida Regional Medical Center, Inc.**

The Florida Supreme Court in Connor v. Southwest Florida Regional Medical Center, Inc., 668 So. 2d 175 (Fla. 1995) abrogated the doctrine of necessities making parties in a marriage economic independents and shifted the public policy of the state “requiring each spouse to take care of himself or herself.” Connor 668 Overton dissent. F.S. § 61.08 effectively reverses, and ignores this shift in public policy without invoking the legislative process. Two attempts were made by the Florida legislature to reinstate the doctrine of necessities after the issuance of the Connor opinion-both attempts were unsuccessful. Fla. HB 1211 (1996); Fla. SB 906 (1996)

WHEREFORE for the above stated reasons the Plaintiff moves this Court to find Florida Chapter 61 “Dissolution of Marriage” permanent alimony section (F.S. § 61.08) impermissibly infringes the U.S. Constitution 14th Amendment Liberty interest and Right of Privacy and is unconstitutional.

Furthermore, the challenged sections impermissibly infringe Florida Constitution Article I Section 23 Right of Privacy and Article I Section 2 Basic Rights and impermissibly conflict with Florida Supreme Court Ruling in Connor and the public policy therein effected and, thus, are unconstitutional.

Respectfully submitted,



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Dated November 17, 2004

## MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

“While the outer limits of this aspect of [protected liberty] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions ‘relating to marriage, procreation, contraception, family relationships, and childrearing and education.’” Carey v Population Services International 431 U.S. 678, 684 (1977)

### BACKGROUND

This lawsuit is a federal question and state constitutional claims challenging Florida’s “Dissolution of Marriage” statute permanent alimony provisions (F.S. §61.08).

This court has ruled it has subject matter jurisdiction to hear Plaintiff’s general challenge to the permanent alimony statute on 14<sup>th</sup> Amendment substantive due process Right to Privacy in the Privacy Protected Zone of “personal decisions relating to marriage.” (Order of the Honorable Kenneth Ryskamp 31 August 2004).

The facial equal protection claim was referred back to magistrate the Honorable Ann Vitunac for re-analysis. The magistrate’s report and recommendation denied all claims on November 5, 2004. The Plaintiff filed a timely objection to the report November 17, 2004. The plaintiff’s 13<sup>th</sup> Amendment and procedural due process claims had been dismissed without prejudice. Additional defendants had been dismissed with prejudice.

### MATERIAL FACTS

Stewart and Elaine T. Greenberg’s personal decision to enter marriage together

was fulfilled in Brookline Massachusetts, November 23 1982. (Complaint ¶82 and supporting affidavit.) After about sixteen years, they made a personal decision to dissolve their marriage. April 17, 2000 the final order of the dissolution of their marriage was entered by the Fifteenth Judicial Circuit Court of Florida in Palm Beach County, Florida. (C ¶82) The couple were blessed with two healthy children, David now 20, a college student and Heather now 19, a college student. (C ¶82)

Elaine T. Greenberg is a healthy 50 year old with a master's degree in social work. (C ¶87) She has worked as a school teacher at Spanish River High School in Boca Raton. (C ¶87) In the dissolution proceedings she had testified that she can and wants to work. (C ¶87)

Mrs. Greenberg has no impediments to economic independence. (C ¶87)

Stewart Greenberg is a healthy 50 year old physician. (C ¶80)

At the dissolution proceedings the State of Florida divided the couple's marital property such that Elaine T. Greenberg received over a million dollars in liquids assets. She lives and owns a home in a gated community and drives a 2003 luxury sedan. (C ¶86)

During the dissolution proceedings, because of the mandates of F.S. § 61.08, the State of Florida invaded Stewart Greenberg's marriage to examine, evaluate, determine and conclude the terms and nature of the interpersonal relationship, spousal roles, spousal conduct, parental decision making, parenting conduct, parental spending, economic standard of living, occupations, education, savings, assets, charitable contributions and most importantly the intimate emotional, psychological and physical details of the parties and family during their marriage. (C ¶38)

In applying F.S. §61.08 permanent alimony provisions against STEWART GREENBERG the State of Florida was supposed to apply 2<sup>17</sup> permutations of factors and consider “may consider any other factor necessary to do equity and justice between the parties” in reaching a conclusion whether to award permanent alimony. (C ¶41, 42) It did award permanent alimony against STEWART GREENBERG until he dies, ELAINE T. GREENBERG dies or she remarries. (C ¶88)

STEWART GREENBERG has continuously met his alimony obligation to the best of his physical, mental and emotional capacity. (C ¶91) Despite his best efforts to comply with the court ordered alimony edict, the plaintiff has had contempt orders and an arrest warrant entered against him from time to time for arrearages. (C ¶92)

### STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when “the pleadings... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). Once the moving party demonstrates the absence of a genuine issue of material fact, the non-moving party must “come forward with ‘specific facts showing that there is a genuine issue for trial.’” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56). Accepting this evidence as truthful, the Court must view the record and all factual inferences therefrom in the light most favourable to the non-moving party and decide whether “the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” Allen v Tyson Foods Inc. 121 F. 3d 642, 646 (11<sup>th</sup> Cir. 1997) (quoting

Anderson, 477 U.S. at 251-52).

## ARGUMENT

“It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights... but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in Loving v. Virginia, 388 U.S. 1, 12 (1967).”  
Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847 (1992)

### Liberty Interest

Liberty interest as a legal doctrine has become firmly rooted. Lawrence v. Texas, 539 U.S. 558 (2003); Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479(1965); Carey v Population Services International 431 U.S. 678, (1977); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).

So powerful has the doctrine become that Justice Kennedy chose it as his first word in the Lawrence (“Liberty protects the person from unwarranted government intrusions into a dwelling or other private places.”) and Casey (“Liberty finds no refuge in a jurisprudence of doubt.”) opinions.

The crystallization of liberty interest and its doctrinal presumptive pre-emption of government statutory intrusion on citizens is cogently analysed in Kennedy’s Libertarian Revolution, Professor Randy E. Barnett, Cato Institute.

Personal decisions relating to marriage fall within the umbra of liberty interest. A definition of those rights which fall within liberty interest is cited in Bowers v Hardwick 478 U.S. 186, 191 (1986),

“The Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In Palko v. Connecticut, . . . it was said that this category includes those fundamental liberties that are “implicit in the

concept of ordered liberty,” such that “neither liberty nor justice would exist if [they] were sacrificed.” A different description of fundamental liberties appeared in *Moore v. East Cleveland*, . . . where they are characterized as those liberties that are “deeply rooted in this Nation’s history and tradition.” . . . See also *Griswold v. Connecticut*. . . .”

Marriage, and the personal decisions relating to marriage meet those qualifications.

“Several decisions of this Court make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.” *Roe* 408 at 168

“Marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.” *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)

Now when it is asked, “Where in the Constitution is the right to sodomy?,”

“Where in the Constitution is the right to abortion?,” “Where in the Constitution is the right to use contraceptives?,” and critically here “Where in the Constitution is the right to dissolve a marriage without alimony?” we have the answer. Two places. The U.S. Constitution Ninth Amendment and the presumption of liberty inherent in the Fourteenth Amendment that requires the government to justify its restriction on liberty.

“[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This ‘liberty’ is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment. *Poe v. Ullman*, 367 U.S., at 543 (Harlan, J. dissenting from dismissal on jurisdictional grounds).” *Casey* 505 at 849 citing Harlan.

“While the outer limits of [the right of personal privacy] have not been marked by the Court, 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 (1967) ...’” Zablocki 484 U.S. at 385

“The Court's decisions have afforded constitutional protection to personal decisions relating to marriage, see, e.g., Loving v. Virginia, 388 U.S. 1...” Casey 505 at 834

“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.” Casey 505 at 851

“... includes ‘the interest in independence in making certain kinds of important decisions.’ While the outer limits of this aspect of [protected liberty] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions “relating to marriage, procreation, contraception, family relationships, and childrearing and education.”” Carey 431 at 684 -685

“These decisions make it clear that only personal rights that can be deemed “fundamental” or “implicit in the concept of ordered liberty,” Palko v. Connecticut, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, Loving v. Virginia, 388 U.S. 1, 12 (1967)...” Roe 410 at 151

“In a Constitution for a free people, there can be no doubt that the meaning of ‘liberty’ must be broad indeed.” Board of Regents v. Roth, 408 U.S. 564, 572. The Constitution nowhere mentions a specific right of personal choice in matters of marriage and family life, but the ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment covers more than those freedoms explicitly named in the Bill of Rights.” Roe 408 at 572 citing Griswold

### Scope of the Privacy Zone of “personal decisions relating to marriage”

There are two major reasons Florida’s Dissolution of Marriage statute permanent alimony section falls within the Protected Privacy Zone of personal decisions relating to

marriage.

The first is the plain meaning of the words. To make a personal decision to enter a marriage, to stay in a marriage or to dissolve a marriage are all personal decisions relating to marriage. All of the above cases specifically define the privacy zone as "personal decisions relating to marriage." Only Loving talks about a fundamental right to marry. After Loving every Supreme Court opinion uses the words "personal decisions relating to marriage" to define the privacy zone. If the Court wished to restrict the scope of the zone in any fashion it could have perpetuated the zone as a right to marry. It did not.

This court must not restrict the scope of the privacy zone from "personal decisions relating to marriage" to the zone of a right to marry. The Supreme Court chose inclusive language not restrictive language. This court should recognize the broad scope of the liberty interest and right of privacy the Supreme Court defined.

The second reason the privacy protected zone of "personal decisions relating to marriage" includes the fundamental right to dissolve a marriage is because the scope of the zone is not settled. There is a spectrum of decisions relating to marriage as to the marriage process itself. To date cases have dealt with government infringement on the right to enter a marriage. Loving (prohibitive Virginia interracial marriage statute declared unconstitutional) and Zablocki (Wisconsin statute requiring court approval for marriage if a citizen had child support arrearages-declared unconstitutional)

This case now offers this court the opportunity to recognize the penumbra of the privacy protection afforded the personal decision at the other end of the marriage process spectrum, i.e. to dissolve a marriage.

## F.S. Chapter 61 "Dissolution of Marriage"

The title of the statute (F.S. Chapter 61 Dissolution of Marriage) containing the challenged alimony section distinctly declares it is written in the privacy protected zone.

The §61.08 provisions that the court is instructed to address when considering whether to grant a pleading for alimony are boundless, i.e. 2<sup>17</sup> permutations then the all encompassing "may consider any other factors..." is truly breathtaking in the liberty afforded the State of Florida to forever shackle a Floridian. Each spouse has decided they wish to go their own way in life but, when applied, the statute *keeps them shackled together for the rest of their lives*. The trial court's opinion is given broad discretion.

Canakeris v Canakeris, 382 So. 2d 1197 (Fla. 1980)

Compounding the unbridled freedom given the state of Florida, the law itself is acknowledged to be still unsettled as to how to apply the statute. "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 2<sup>17</sup> 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.

And let it not go unspoken that the Florida Supreme Court has acknowledged the presence of gender bias in its court and legal systems in the same report. Id at 11.

The Report of the Florida Supreme Court Gender Bias Study Commission (1990) states, "... gender bias permeates Florida's legal system today." (page 42)

Further,

"After reviewing this monograph, the Chief Justice of Florida and his colleagues on the Florida Supreme Court concluded that gender bias does in fact exist in the state's legal system." (page 42)

“Apparently, most judges really do not want to hear family law matters and it shows... It cannot be comforting to find that the one who holds the future of your access to your children and your financial future in his or her hands has, at best, little interest in that role, or, at worst, a distaste for it.” (page 54)

## Purposes of F.S. Chapter 61

The first place one can look to see whether there is a compelling state interest for the statute and the challenge alimony provisions is §61.001 Purposes. Chapter 61 is a

rare statute that specifically states its purposes. None of the purposes can be interpreted

to indicate a state interest for the alimony provision, let alone a compelling state interest.

If the state's interest was so important to reach the threshold of compelling, the

legislature had ample time in the past century and a half to include it in the purposes of

the statute. Its failure to do so speaks to the lack of importance of the alimony provision

to the citizens of Florida.

## Alimony

## Coverture

The underlying economic rationale utilized by the state 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, F.S. §708

(Married Women's Property) and *Merchant's v. Cain*, 9 So. 2d 373 (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...

The reason ceasing, the law itself ceases is a well settled legal maxim.” *Merchant's* 9 at 375. [Emphasis supplied]

