

Appeal Case Number 2D06-5577

IN THE SECOND DISTRICT COURT OF APPEALS OF FLORIDA

WILLIAM A. CABANA
Appellant, *pro se*

v.

JAMES ZINGALE, EXECUTIVE
DIRECTOR, FLORIDA
DEPARTMENT OF REVENUE
(In his official capacity)
Appellee

Twelfth Judicial Circuit Court of Florida

Case Number 06-CA-5063-SC

APPELLANT'S INITIAL BRIEF

William A. Cabana, *pro se*,
With assistance of counsel
1050 Capri Isles Blvd., Apt F-105
Venice, FL 34292
Telephone/Fax: 941-480-1395
Email: bcabana2@comcast.net

Table of Contents

Table of Contents	ii
Table of Citations.....	v
Preface.....	1
Reservation of Federal Claims.....	1
Statement of the Case and of the Facts	1
Issues Presented	3
I. Whether the “Dissolution of Marriage” statute alimony provision (§ 61.08, Fla. Stat.) impermissibly infringes Art. I, § 23, Fla. Const., Right to Privacy?.....	3
II. Whether the “Dissolution of Marriage” statute alimony provision (§ 61.08, Fla. Stat.) impermissibly infringes Art. II, § 3, Fla. Const., Separation of Powers?.....	3
III. Whether the “Dissolution of Marriage” statute alimony provision (§ 61.08, Fla. Stat.) impermissibly infringes the ruling and public policy established in <i>Connor v. Southwest</i> , 668 So.2d 175 (Fla. 1995)?	4
IV. Whether dismissal with prejudice of this Chapter 86 Fla. Stat. action is an error, i.e. an abuse of discretion, as contrary to § 86.101 Fla. Stat. and <i>Olive v. Maas</i> , 811 So. 2d 644 (Fla. 2002)?.....	4
Jurisdiction.....	4
Standard of Review.....	4
Summary of Argument	4
Argument.....	6

I. Whether the “Dissolution of Marriage” statute alimony provision (§ 61.08, Fla. Stat.) impermissibly infringes Art. I, § 23, Fla. Const., Right to Privacy?.....	6
A. The Alimony Statue is Within the Zone of the Right of Privacy	6
B. Art I., § 23, Fla. Const., Right of Privacy	8
C. Standard of Analysis—Strict Scrutiny	9
D. No Compelling State Interest	11
1. Consistency in Legislation of the Interest	11
2. Purposes of § 61.08, Fla. Stat., contained in § 61.001, Fla. Stat.	13
E. The Abrogation of the Doctrine of Necessaries.....	14
F. The Search for a Compelling State Interest	15
G. <i>Barna v. Barna</i> —Wrongly Decided	19
H. <i>Daniel v. Daniel</i> --Inapposite and Wrongly Decided.....	21
II. Whether the “Dissolution of Marriage” statute alimony provision (§ 61.08, Fla. Stat.) impermissibly infringes Art. II, § 3, Fla. Const., Separation of Powers?.....	22
A. Infringement of § 61.08, Fla. Stat. on Art. II, § 3, Fla. Const.....	22
B. Separation of Powers Art. II, § 3, Fla. Const.....	22
C. Caselaw on Separation of Powers	24
D. Impermissible Delegation-Uncertain Implementation.....	27
E. § 61.08, Fla. Stat.	28
F. Unbridled Authority Improperly Given to the Judiciary	29

G. Judiciary Cannot Implement the Impermissibly Delegated Authority	32
H. Legislative Delegation of an Authority It Lacks.....	35
III. Whether the “Dissolution of Marriage” statute alimony provision (§ 61.08, Fla. Stat.) impermissibly infringes the ruling and public policy established in <i>Connor v. Southwest</i> , 668 So.2d 175 (Fla. 1995)?	36
IV. Whether dismissal with prejudice of this Chapter 86 Fla. Stat. action is an error, i.e. an abuse of discretion, as contrary to § 86.101 Fla. Stat. and <i>Olive v. Maas</i> , 811 So. 2d 644 (Fla. 2002)?.....	38
Conclusion	41
Prayer for Relief.....	43
Certificate of Service	43
Certificate of Font and Type Size	44

Table of Citations

Cases

<i>Askew v. Cross Key Waterways</i> , 372 So.2d 913 (Fla. 1978).....	25, 29, 31, 33
<i>Barna v. Barna</i> , 850 So.2d 603 (Fla. 4th DCA 2003).....	20, 21
<i>Belcher v. Belcher</i> , 271 So.2d 7 (Fla. 1972).....	39
<i>Bowers v. Hardwick</i> , 478 US 186 (1986).....	21
<i>Bronk v. State</i> , 43 Fla. 461(1901)	40, 41, 42, 44
<i>Bush v. Schiavo</i> , 885 So.2d 321, (Fla. 2004).....	6, 23, 25
<i>Canakaris v. Canakaris</i> , 383 So.2d 1197 (Fla.1980)	3, 16, 17, 39
<i>Carey v. Population Serv. Int'l.</i> , 431 U.S. 678, (1977).....	6, 7
<i>Carnival Leisure Indus., Ltd., v. Holzman</i> , 660 So. 2d 410 (Fla. 4th DCA 1995).....	20
<i>Chiles v. Children</i> , 589 So.2d 260 (Fla. 1991).	23, 25
<i>Chiles v. Phelps</i> , 714 So. 2d 453, 456 (Fla. 1998).....	27
<i>Conner v. Joe Hatton, Inc.</i> , 216 So. 2d 209 (Fla. 1968).....	26, 29
<i>Connor v. Southwest Florida Regional Medical Center, Inc.</i> , 668 So.2d 175 (Fla. 1995).....	passim
<i>Cornelius v. Cornelius</i> , 382 So.2d 710 (Fla. 1st DCA 1979).....	7
<i>Daniel v Daniel</i> , 922 So.2d 1041 (Fla.App. 4 Dist. 2006).....	21
<i>Department of Insurance v. Southwest Volusia Hospital Dist.</i> , 438 So.2d 815 (Fla. 1983).....	33

<i>England v Louisiana State Board of Medical Examiners</i> , 375 U.S. 411 (1964)	1
<i>Fernandez v Fernandez</i> , 710 So.2d 223 (Fla. 2d DCA 1998).....	39
<i>Fisher v. Carter</i> , 864 So. 2d 493, (Fla. 4 th DCA 2004).....	20
<i>Fishman v. Fishman</i> , 656 So.2d 1250 (Fla. 1995).....	40, 45
<i>Florida Fish & Wildlife Conservation Comm'n v. Caribbean Conservation Corp., Inc.</i> , 789 So.2d 1053, 1054 (Fla. 1st DCA 2001).....	5
<i>Florida High School Activities Ass'n. v. Thomas</i> , 434 So.2d 306 (Fla. 1983)	11
<i>Gates v. Foley</i> , 247 So.2d 40 (Fla.1971).....	48
<i>Gibson v. Bennett</i> ,561 So.2d 565, 570 (Fla. 1990).....	40, 41, 45
<i>Hillier v. Iglesias</i> , 901 So.2d. 947, (Fla 4 th DCA 2005).....	29
<i>Horner v. Horner</i> , 222 So. 2d 791 (Fla.2d DCA 1969).....	13
<i>In re Advisory Opinion to the Governor</i> , 276 So.2d 25 (Fla.1973).....	22
<i>In re T.W.,A Minor</i> , 551 So.2d 1186 (Fla.1989).....	3
<i>Jones v. Charles</i> , 518 So. 2d 445 (Fla. 4th DCA 1988)	20
<i>Kennedy v. Kennedy</i> , 303 So.2d 629 (Fla. 1974).....	16
<i>Krischer v McIver</i> , 697 So.2d 97 (Fla. Jul. 17, 1997).....	24, 46
<i>Lawrence v. Texas</i> , 539 US 558 (2003).....	21
<i>Lewis v. Bank of Pasco County</i> , 346 So.2d 53 (Fla.1976).....	29

<i>Littlejohn v. Rose</i> , 768 F.2d 765 (6 th Cir. 1985)	3, 6, 8, 26, 35
<i>Loving v. Virginia</i> , 388 U.S. 1, 12 (1967)	9
<i>Merchant's v. Cain</i> , 9 So. 2d 373 (Fla. 1942).	15
<i>N. Fla. Women's Health & Counseling Servs., Inc. v. State</i> , 866 So.2d 612 (Fla. 2003)	passim
<i>Pacheco v. Pacheco</i> , 246 So.2d 778 (Fla. 1971)	7
<i>Phelan v. Phelan</i> 12 Fla. 449 (1868).....	40, 41, 42, 43
<i>Phillippi v. Phillippi</i> , 148 Fla. 393, 4 So. 465 (1941).....	13
<i>Pimm v. Pimm</i> , 601 So.2d 534 (Fla.1992).....	19
<i>Planned Parenthood of Southeastern Pa. v. Casey</i> , 505 U.S. 833 (1992).	5, 9
<i>Read v. Taylor</i> , 832 So. 2d 219 (Fla. 4th DCA 2002).....	20
<i>Richardson v. Richardson</i> , 766 So. 2d 1036 (Fla. 2000).....	7, 11, 14, 34
<i>Satz v. Perlmutter</i> , 379 So. 2d 359, (Fla. 1980).....	24
<i>Simms v. State</i> , 641 So.2d 957 (Fla. 3d DCA 1994).....	25, 26
<i>Smith v. Portante</i> , 212 So.2d 298 (Fla.1968).....	30
<i>Springstead v. Springstead</i> , 717 So. 2d 203 (Fla. 5 th DCA 1998).....	13
<i>State v. Griffin</i> , 239 So.2d 577 (Fla. 1970).....	30
<i>Sunset Harbour Condo. Ass'n. v. Robbins</i> , 914 So.2d 925 (Fla. 2005)	5
<i>Traylor v. State</i> , 596 So. 2d 957 (Fla. 1992)	12, 46
<i>Vasquez v. State</i> , 795 So. 2d 218 (Fla. 4th DCA 2001).....	20

<i>Winfield v. Division of Pari-Mutual Wagering</i> , 477 So2d 544 (Fla. 1985). ..	9
<i>Zablocki v. Redhail</i> , 434 U.S 347 (1978).	8

Statutes and Constitutional Provisions

§ 61.001, Fla. Stat	iii, 14, 33, 34
§ 61.08, Fla. Stat.	passim
§ 61.08 (2), Fla. Stat.....	passim
§ 316.211 (b), Fla. Stat.....	19, 20
§ 708, Fla. Stat	15
Art. I, § 11, Fla. Const.....	45
Art. I, § 23, Fla. Const.....	passim
Art. II , § 3, Fla. Const	6
Art. III, § 1, Fla. Const.....	24
Art. V, § 3, Fla. Const.....	25
Art. V, § 4 (b) (1), Fla. Const.....	5
Art. XI, § 2, Fla. Const.....	15

Other Authorities

Abrogating the Doctrine of Necessaries in Florida: The Future of Spousal Liability for Necessary Expenses After <i>Connor v. Southwest Regional Medical Center, Inc.</i> Shawn M. Wilson. <i>Florida State Law Review</i> 24:1031. 1997.....	15
--	----

