

**IN THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA**

Division FM-E
Case No.: 16-2003-DR-009665-FM

IN RE: THE MARRIGE OF

DOUGLAS KEVIN PHILLIPS, Husband

and

CARRIE MARIE PHILLIPS, Wife

**MEMORANDUM OF LAW
§ 61.08 Fla. Stat. Impermissibly Infringes
Fla. Const. art. I § 23 Right of Privacy and
Fla. Const. art. I § 2 Basic Rights**

“The Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses.” Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, (1992)

“it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage...” *Carey v. Population Serv. Int’l.*, 431 U.S. 678, 684-685 (1977)

A. The Alimony Statute is Within the Zone of the Right of Privacy

There is no common law right to alimony. It is merely a statute, part of Chapter 61 Fla. Stat.. *Pacheco v. Pacheco*, 246 So.2d 778 (Fla. 1971); See also *Cornelius v. Cornelius*, 382 So.2d 710 (Fla. 1st DCA 1979). Quite simply, as a statute it must conform to the constraints set forth in the Florida Constitution. This would not be the first time a provision of Chapter 61 was found to impermissibly infringe the Fla. Const. Right of Privacy. See

Richardson v. Richardson, 766 So. 2d 1036 (Fla. 2000) (§ 61.13 (7) Fla. Stat. is facially unconstitutional as it violates Art. I § 23, Fla. Const., Right of Privacy).

§ 61.08 et al Fla. Stat., alimony provisions are part of the Fla. Stat. titled Chapter 61 “Dissolution of Marriage.” As such they regulate the personal decision of Floridians to divorce, i.e. dissolve their Marriage. The alimony provisions are written within that privacy protected zone of divorce.

See *LittleJohn v. Rose*, 768 F. 2d 765, 768 (6th Cir. 1985) citing (*Zablocki*_434 U.S. at 385) for the rule that divorce falls within the umbrella of the right of privacy,

"Decisions of the Supreme Court have firmly established that "matters relating to marriage [and] family relationships" involve privacy rights that are constitutionally protected against unwarranted governmental interference. E.g., *Roe v. Wade*, 410 U.S. 113, 152-53, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973). The Court has "routinely categorized [these matters] as among the personal decisions protected by the right to privacy [and, in addition] has long recognized 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." *Zablocki v. Redhail*, 434 U.S. 374...

The Supreme Court has established broad protection for matters relating to the marital relationship including the availability of due process in seeking adjustments to the marital relationship. *Boddie v. Connecticut*, 401 U.S. 371, 28 L. Ed. 2d 113, 91 S. Ct.780 (1971). Given the "associational interests that surround the establishment and dissolution of [the marital] relationship", such "adjustments" as divorce and separation are naturally included within the umbrella of protection accorded to the right

of privacy. See Zablocki, 434 U.S. at 385; U.S. v. Kras, 409 U.S. 434, 444, 34 L. Ed. 2d 626, 93 S. Ct. 631 (1975)."

Also see *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 847 (1992),

"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)."

B. Art I. § 23, Fla. Const., Right of Privacy

N. Fla. Women's Health & Counseling Servs., Inc. v. State, 866 So. 2d 612, 635 (Fla. 2003) is controlling on the Right of Privacy. It states that a statute that infringes the fundamental right of privacy is presumptively unconstitutional unless the state proves a compelling state interest minimally applied and that the statute in fact furthers that interest.

Winfield v. Division of Pari-Mutual Wagering, 477 So2d 544,548 (Fla. 1985). (See also *N. Fl. Women's Health* 866 So.2, 620) describing the far-reaching impact of the Florida amendment:

The citizens of Florida opted for more protection from governmental intrusion when they approved article I, section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, section 23, was intentionally phrased in strong terms. The drafters of the amendment rejected the use of the words "unreasonable" or

"unwarranted" before the phrase "governmental intrusion" in order to make the privacy right as strong as possible. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right to privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.

C. Standard of Analysis—Strict Scrutiny

N. Fl. Women's Health, 866 So.2d, n16 reiterates the oft cited standard of analysis that must be applied when a challenge is raised that a statute infringes a fundamental right, here the Right of Privacy,

“Under ‘strict’ scrutiny, which applies inter alia to certain classifications and fundamental rights, a court must review the legislation to ensure that it furthers a compelling State interest through the least intrusive means. The legislation is presumptively unconstitutional. The standard of proof is as follows: the State must prove that the legislation furthers a compelling State interest through the least intrusive means. See generally *In re T.W.*, 551So. 2d 1186, 1193 (Fla. 1989).”

Florida High School Activities Ass'n. v. Thomas, 434 So. 2d 306, 308 (Fla. 1983) (stating that the strict scrutiny is a "harsh standard [which] imposes a heavy burden of justification upon the state")

N. Fl. Women's Health, 866 So.2d, 647 and n75 says,

“Moreover, under strict scrutiny review, the State cannot meet its heavy burden *simply by stating* that the interests are compelling without *proof* from the State that the compelling interests are *in fact furthered by the statutory intrusion* into the protected fundamental rights, and that the statutory intrusion is

the least intrusive means to achieve that goal.” [Emphasis added]

“n75 . Although case law from this Court applying the strict scrutiny standard articulates the first prong of the strict scrutiny review as a single inquiry, see, e.g., *T.W.*, 551 So. 2d at 1193; *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998), in reality the first prong involves two interrelated inquiries: (a) whether the State has carried its "heavy" burden of establishing a compelling interest; and (b) whether the State has carried its "heavy" burden of establishing that the statutory scheme in fact serves or furthers that compelling state interest.”

And other quotes in *N. Fl. Women’s Health* 866 So.2d, 647,

“We have found no cases in which this Court applied . . . a narrowing construction to a statute challenged solely on the basis that its clear provisions violate a substantive constitutional right. The likely reason for this result is that the constitutionality of the statute, depending on the substantive right involved, depends solely on whether the statute passes the . . . strict scrutiny test[. . .]. . . . Such a statute is unconstitutional under any circumstance unless the State satisfies its burden of establishing a compelling state interest.” *Richardson v. Richardson*, 766 So. 2d 1036, 1041 (Fla. 2000)

“Just as our obligation to exercise restraint when reviewing statutes is paramount under rational basis review, our obligation to protect fundamental rights is paramount under strict scrutiny. Indeed, the United States Supreme Court has specifically held that ‘when we are reviewing [*93] statutes which deny some residents [a fundamental right], the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' . . . are not applicable.’” *Kramer v. Union Free School District*, 395 U.S. 621, 627-28, 23 L. Ed. 2d 583, 89 S. Ct. 1886 (1969).

“The very basis of a strict scrutiny analysis is that this is the one level of review that cannot allow for deference. This Court is

'bound' to construe constitutional rights, which 'operate[] in favor of the individual, against government,' so as to 'achieve the primary goal of individual freedom and autonomy.'" *Traylor v. State*, 596 So. 2d 957, 963 (Fla. 1992).

D. No Compelling State Interest

N. Fl. Women's Health 866 So.2d, 650,

"Thus, it is not sufficient for the State to merely offer important interests as justification for state interference with a protected fundamental right. The State must also establish that an actual and substantial connection exists between the statute and the interests advanced. See, e.g., *Shaktman*, 553 So. 2d at 152"

1. Consistency in Legislation of the Interest

Any interest offered by the state as "compelling" must demonstrate legislative consistency, must be minimally applied and must be proven to be further by the alimony statute.

An important judicial criterium for whether a state interest reaches the lofty threshold of compelling is consistency by the legislature in all legislation put forth that implicates that interest. *N. Fl. Women's Health* 866 So.2d, n76 and Lewis concurring,

"n79 I note that we have at least twice relied on legislative consistency in upholding statutes against claims of invasion of minors' privacy under strict scrutiny analysis. See *Jones v. State*, 640 So. 2d 1084, 1085 (Fla. 1994) *J.A.S. v. State*, 705 So. 2d 1381, 1386 (Fla. 1998). . . . Thus, Justice Wells' concern that legislation will be unable to meet the "exacting test" of legislative consistency is belied by our own precedent. . . . Thus, the legislative justification for the privacy intrusion based upon the "uniqueness" of the abortion decision is undermined

by the failure of the Legislature to consistently legislate in the area.”

“Lewis concurring;

I am compelled to concur in the result attained today only upon application of the principle originally constructed by the majority in *In re T.W.*, 551 So. 2d 1186 (Fla. 1989), requiring legislative consistency as an essential element in the "compelling interest" constitutional analysis.”

If a compelling state interest exists 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). No conceivable state interest can exist, let alone a compelling state interest to encompass the concept expresses by these three appellate courts.

2. Purposes of the Statute

The courts lack the authority to add words to a statute or in the absence of an ambiguity to go beyond the plain meaning of the words.

Richardson 766 So.2d states,

“We are also wary of actually judicially amending the statute by adding language that the Legislature so clearly did not intend to use. If this Court were to construe the statute narrowly by inserting... we would in effect be rewriting the statute and changing it in a manner not intended by the Legislature. As we have previously explained, courts should refrain from reading

elements into a statute that plainly lacks such additional elements. See Schmitt, 590 So. 2d at 414.”

Chapter 61 Fla. Stat. contains a specific provision of the purposes of Chapter 61 Fla. Stat. §61.001 Fla. Stat. limits the scope of judicial inquiry as to the purposes of all of Chapter 61 Fla. Stat. In the “Dissolution of Marriage” statute the legislature, like in *N. Fl. Women’s Health* 866 So. 2d did not label the state interest as important and compelling. *N. Fl. Women’s Health* 866 So,2d, n76,

“n76 . The Legislature also identified the following purposes in enacting the parental notification statute, but did not label them as ‘important and compelling’ state interests:”

3. Coverture to Partnership to Independent Self Reliance-- The Abrogation of the Doctrine of Necessaries

“It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.” O.W. Holmes. *The Path of the Law*. 10 *Harvard Law Review* 457 (1897)

The original rationale for the obligation of spousal support has long since passed. The obligation began in a time, and because of the principle of coverture.

“At common law, a woman’s legal identity merged with that of her husband; she could not own property, enter into contracts, or receive credit as an individual. This condition, known as coverture, created a need for the doctrine of necessities because

a married woman was dependent upon her husband for maintenance and support.” Abrogating the Doctrine of Necessaries in Florida: The Future of Spousal Liability for Necessary Expenses After Connor v. Southwest Regional Medical Center, Inc. Shawn M. Wilson. Florida State Law Review 24:1031. 1997 at 1032.

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).

Whatever remnants of the tattered economic partnership model that remained after the Florida Constitution and Florida Statutes gave women equal property rights with men were further frayed by the institution of the gender neutral character to the dissolution of marriage statute. Any shred of basis for an economic partnership model of marriage was torn asunder by the abrogation of the doctrine of necessaries in *Connor v. Southwest Florida Regional Medical Center, Inc.*, 668 So. 2d 175 (Fla. 1995).

In *Connor* 668 So.2d , the Florida Supreme Court, when given the option of applying the doctrine of necessaries (the responsibility of the husband for the debts of the wife to third parties) equally to husbands and wives or abrogating the doctrine chose the latter. The Court determined it should abolish the doctrine. It determined it was the duty of the legislature, if it so chose, to applied the doctrine equally to husbands and wives.

The final demise of economic partnership and the firm establishment of the model of economic independent parties in a marriage was cemented when the legislature, in 1996, with two different bills tried unsuccessfully to reinstate the doctrine. See Fla. HB 1211 (1996); Fla. SB 906 (1996).

Judge Overton's dissenting cry did *not* prevail in the *Connor* 668 So.2d opinion. We do not need to interpret the consequences of the *Connor* 668 So.2d opinion, Judge Overton himself tells us the effect and meaning of the decision. ..“In this day and age, we should not weaken the obligation of marriage by eliminating the spousal duty to care for one another.” He also tells us...“The majority's decision to abrogate the common law doctrine of necessities departs from the partnership theory of marriage...”

Critically important is the clarion significance Judge Overton recognized the *Connor* 668 So.2d opinion to be...

“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.”

Overton recognized the *Connor* 668 So.2d opinion eliminated the spousal duty to care for one another. He recognized the opinion departed from the partnership theory of marriage. He recognized the opinion changed the policy of the State to require each spouse to care of himself or *herself*.

He recognized the reduction of the legal obligations of the marriage contract.

This Court must do the same.

The parties within a marriage have been declared economically independent by the Florida Supreme Court. After dissolution of the marriage § 61.08 Fla. Stat. makes the prior economically independent parties economically dependent.

4. The Search for a Compelling State Interest

In the Law

After *Connor* 668 So.2d , and independent of *Connor* 668 So.2d, there is no legal doctrine supporting a compelling State interest for lifetime support of one spouse to another. The above noted legal origins of spousal support provide no legal basis, let alone a legal doctrine, for statutorily mandated lifetime spousal support after the dissolution of marriage.

Certainly the State cannot articulate a compelling reason to require permanent postdissolution spousal support, let alone set a standard of support to a former spouse to be at the level of *the lifestyle of the marriage* as held in *Canakaris*, 383 So.2d (Fla.1980). There is no evidence in the opinion that the *Canakaris* standard was anything but an arbitrary choice made to resolve the conflict of a multiplicity of standards established by district courts prior. There is no statement of public policy or expression

why that standard was chosen over the others. More important, the ruling now violates the Privacy Amendment.

The Supreme Court in *Cankaris* 383 So.2d changed the standard it established only six years earlier in *Kennedy v. Kennedy*, 303 So.2d 629, 631 (Fla. 1974) when it interpreted the public policy of the State to be if a spouse had the capacity to *make her own way through the remainder of her life* without her spouse's assistance the courts could not require alimony other than for rehabilitative purposes. In six short years, in *Canakaris* 383 So.2d, the court ratcheted up the standard to *the lifestyle of the marriage*. In light of the Privacy Amendment it is not the place of the State, and especially the judicial branch, to determine and assume whether a former spouse *can make her own way through the remainder of her life*. Now with the subsequent passage of the Privacy Amendment and the *Connor* 668 So.2d opinion such rulings and the statutes upon which they are based do not muster to a compelling State interest. The rulings and the Statutes fail the compelling State interest test and are therefore unconstitutional.

All dissolution proceeding are in Chancery with the mandate the doctrine of equity be applied. Equity is not a compelling State interest.

In Public Policy

What public policy rises to the level of a compelling state interest to permit the state to invade the privacy area of marriage? Whatever the compelling interest, if it were compelling, all dissolution of marriages should be examined whether contested or uncontested to assure the policy was fostered. If there is a compelling state interest there should be no difference in how the courts treat parties of a marriage regardless of the length of the marriage. The compelling interest should be determinative as to permanent spousal support, not the length of the marriage or whether the dissolution is contested.

Any concern for "keeping the spouse off the public dole" undoubtedly originated at the time of coverture. Such thinking is not realistic today in light of Federal and State legislation, State judicial rulings, the equal employment opportunities available in the marketplace and *Connor* 668 So.2d. If indeed this was or is a public policy, why then is it not applied uniformly to all marriages regardless of length? Also the logical extension of the reasoning approaches absurdity because the reasoning flows that all a party need do to avert a life of poverty is to enter marriage for a long enough period of time and thus be afforded legislative and judicial protection from poverty for life—even as here if it puts the paying spouse into poverty.

Another concept offered as the reason for permanent spousal support is that a former spouse should not be placed in peril of poverty if a supporting former spouse can pay, *Pimm v. Pimm*, 601 So.2d 534 (Fla.1992). This is not a compelling State interest. If a spouse avoiding poverty was a purpose of Chapter 61 Fla. Stat. spousal support provisions it was not listed in the purposes of the statute.

There is further evidence the legislature does not have a strong concern for spouses being placed in peril of poverty. One example is the repealed motorcycle headgear protective law, § 316.211 (b) Fla. Stat. The State permits one older than twenty-one years who carries only \$10,000 of health insurance to ride a motorcycle without a helmet. It makes no provisions for spouses or minor children whose breadwinner may die or be permanently disabled from an accident. The legislature does not require a married supporting spouse who rides a motorcycle without a helmet to carry life insurance for his spouse. If the State does not impose the duty of a life insurance policy on a married motorcyclist to protect spousal support during marriage, how can the State have a compelling reason to require him to carry life insurance for the spouse after dissolution of marriage? Under the current unconstitutional support laws it is not hard to conceive that in a court somewhere in Florida there is a dissolution proceeding pending where a

supported spouse is petitioning the Court that because the supporting spouse rides a motorcycle he should be compelled to wear a helmet or purchase life insurance to assure lifelong spousal support. If the economic survival and betterment of the married parties was a legislative concern it seems that it would have been addressed when §316.211 (b) was passed.

E. *Barna v. Barna*—Wrongly Decided

Barna v. Barna, 850 So.2d 603 (Fla. 4th DCA 2003) was wrongly decided both at the circuit court level and at the Fourth District Court of Appeals. Neither court offered a reasoned opinion for denying a similar declaratory judgment constitutional challenge to the alimony statutes. At the trial level and at the appellate level colorable arguments were presented to both courts in extensive written briefs. At both the trial level and the appellate level opposing party never offered any written or oral counter argument. Both courts sua sponte arbitrarily decided the legal argument briefed was frivolous. These ruling were clearly erroneous and should not be considered in any way applicable here.

In fact, this court's affirmation of sanction of fees against the attorneys in *Barna* 850 So.2d stands as a formidable barrier to any attorney in Florida raising a constitutional challenge to a state statute. *Barna* 850

So.2d has been a deterrent to the Appellant in acquiring legal counsel. All these are lamentable consequences of a wrongly decided case.

Just as the United States Supreme Court acknowledged its error in *Bowers v. Hardwick*, 478 US 186 (1986) and reversed itself in *Lawrence v. Texas*, 539 US 558 (2003),--ironically a Right to Privacy and liberty interest ruling--- this court too should recognize and correct its past error. This court must set aside *Barna* 850 So.2d.

Conclusion

"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."

Justice Kogan dissenting in *Krischer v McIver*, 697 So.2d 97 (Fla. Jul. 17, 1997)

Prayer for Relief

Wherefore this court must find that § 61.08 Fla. Stat. impermissibly infringes Art. I § 23 Fla. Const. and is void ab initio and unenforceable. Further this court must enter

injunctive relief for Douglas Kevin Phillips such that any order of alimony entered against him is unenforceable.

Respectfully submitted,

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September 30, 2005

CERTIFICATE OF SERVICE

I hereby certify that on the 30 day of September 2005, I caused a true and accurate copy of this Motion to be send by U.S. mail to

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