

Appeal Case Number 5D06-

IN THE FOURTH DISTRICT COURT OF APPEALS OF FLORIDA

In Re Marriage of

ROBERT W. RADLOFF
Appellant, *pro se*

v.

CARMEN E. RADLOFF
Appellee

Ninth Judicial Circuit Court of Florida

CASE NUMBER DR89-3999

APPELLANT'S INITIAL BRIEF

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Preface

The Appellant, William A. Cabana, will be referred to as the Appellant or Former Husband. The Appellee, Sharon Ann Mayo, will be referred to as Appellee or Former Wife.

The Record will be referred to as R and the Circuit Court Document Name.

Reservation of Federal Claims

The Appellant requests this court to consider federal law in adjudicating his state law claims. He does not request this Court adjudicate his federal constitutional challenges to the alimony statutes (§ 61.08, Fla. Stat.). *England v Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964)

The Appellant plans to avail himself of federal court to adjudicate his federal claims in the event this court rules adversely on his state claims.

The Appellant is before the state court involuntarily because the state of Florida has applied, and enforced § 61.08, Fla. Stat. against him. He must defend himself because the statutes authorize, and the state circuit court has retained jurisdiction.

The Appellant does not have federal court available to him at this time to adjudicate these state constitutional claims.

Statement of the Case and of the Facts

The parties in this dispute were married for about thirty five years before their marriage was dissolved sixteen years ago on June 28, 1990, (R. Final Judgment of Dissolution of Marriage). Robert W. Radloff was ordered to pay permanent alimony to Carmen E. Radloff until she died or remarried. (R. Final Judgment of Dissolution of Marriage).

In February 2001 the Appellant pleaded for and received a reduction in alimony. (R. Order Modifying Final Judgment of Dissolution of Marriage). No minor children are at issue in this case.

On January 31, 2006 the former wife filed a Motion to Show Cause for nonpayment of alimony. (R) As a defense to the motion the Appellant challenged the constitutionality of § 61.08, Fla. Stat.. (R) On April 4, 2006 the trial court granted the motion. The order was rendered April 27, 2006 (R) This appeal was properly and timely mailed on May 18, 2006.

Issues Presented

I. Whether the “Dissolution of Marriage” statute alimony provision (§ 61.08, Fla. Stat.) impermissibly infringes Art. I, § 23, Fla. Const., Right to Privacy?

II. Whether the “Dissolution of Marriage” statute alimony provision (§ 61.08, Fla. Stat.) impermissibly infringes Art. II, § 3, Fla. Const., Separation of Powers?

III. Whether the “Dissolution of Marriage” statute alimony provision (§ 61.08, Fla. Stat.) impermissibly infringes the ruling and public policy established in *Connor v. Southwest*, 668 So.2d 175 (Fla. 1995)?

IV. Whether incarceration (civil contempt powers) for enforcement of alimony nonpayment is impermissible after Art. I, § 23, Fla. Const and *Connor v Southwest*, 668 So.2d 175 (Fla. 1995) nullify the duty of a husband to his wife and society allegedly created by marriage?

Jurisdiction

This court has jurisdiction to review this case pursuant to Art. V, § 4 (b) (1), Fla. Const.

Standard of Review

This Court's review of the circuit court's decision is de novo. See *Florida Fish & Wildlife Conservation Comm'n v. Caribbean Conservation Corp., Inc.*, 789 So.2d 1053, 1054 (Fla. 1st DCA 2001) (holding that whether a state statute is constitutional is a pure question of law subject to de novo review), approved, 838 So.2d 492 (Fla. 2003). See also *Sunset Harbour Condo. Ass'n. v. Robbins*, 914 So.2d 925 (Fla. 2005).

Summary of Argument

“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, 847 (1992)

Divorce is entitled to the protections of Art. I, § 23, Fla. Const. Right to Privacy. Any statute written within that privacy protected zone of Dissolution of Marriage, i.e. the alimony provision § 61.08, Fla. Stat., is presumptively unconstitutional unless the state proves a compelling state interest minimally applied to validate the statute. *Littlejohn v. Rose*, 786 F.2d 785, 786 (6th Cir. 1985); *Carey v. Population Serv. Int'l.*, 431 U.S. 678, 684-685 (1977); *N. Fla. Women's Health & Counseling Servs., Inc. v. State*,

866 So.2d 612, 635 (Fla. 2003). There is no compelling state interest to validate the alimony statute.

Art. II , § 3, Fla. Const., Separation of Powers, prohibits the legislature from delegating its exclusive law making powers via unbridled discretion to the judiciary as it does in § 61.08 (2), Fla. Stat. inter alia. The amendment also prohibits the legislature delegating authority to another branch of government which it itself does not have, i.e. the dissolution of marriage statute violates Art. I, § 23, Fla. Const. Right to Privacy and cannot be the subject of legislation in its current form.. *Bush v. Schiavo*, 885 So.2d 321, (Fla. 2004) (legislature cannot delegate authority it does not have).

Connor at 668 So.2d abrogated the doctrine of necessities making parties in a marriage economic independents. § 61.08, Fla. Stat. cannot convert their economic independence to economic dependence because they exercise their liberty interest to alter their associational status, i.e. dissolve their marriage.

The use of incarceration (civil contempt powers) for alimony non payment is grounded in the rationale, i.e. a husband's duty to his wife and to society. This is now void after Art. I, § 23, Fla. Const. and *Connor* 668. So.2d. There is no duty of support by a husband to his wife or society and

therefore no rationale for civil contempt powers (incarceration) for alimony nonpayment. Alimony payment is in fact debt not a duty.

Argument

“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)

I. Whether the “Dissolution of Marriage” statute alimony provision (§ 61.08, Fla. Stat.) impermissibly infringes Art. I, § 23, Fla. Const., Right to Privacy?

The Alimony Statute Impermissibly Infringes Art. I, § 23, Fla. Const., Right of Privacy

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

There is no common law right to alimony. *Pacheco v. Pacheco*, 246 So.2d 778 (Fla. 1971). Alimony is merely a statute, part of Chapter 61 Fla. Stat.. 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, Fla. Stat., alimony provisions is part of the Florida Statutes titled Chapter 61 “Dissolution of Marriage.” As such it regulates 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 v. Redhail, 434 US 374, 385 (1978) 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

Article I Section 23. Right of privacy.--Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

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 So.2d 544, 548 (Fla. 1985). (See also *N. Fl. Women's Health* 866 So.2d, 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

The Right of Privacy having attached to the alimony provision, § 61.08, Fla. Stat., it is presumptively unconstitutional, and requires strict scrutiny review.

N. Fla.. 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. Fla.. 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. Fla. 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. Fla.. 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 criterion 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. Fla. 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 [of alimony]*”. 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 expressed by these three appellate courts.

2. Purposes of § 61.08, Fla. Stat., contained in § 61.001, Fla. Stat.

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, as in *N. Fla. Women’s Health* 866 So 2d did not label the state interest as important and compelling when it specifically crafted its purposes in § 61.001, Fla. Stat.

N. Fla. 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:”

E. 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 Art. XI, § 2, Fla. Const., § 708, Fla. Stat. (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 when the legislature was compelled to make the dissolution of marriage statute and alimony provisions gender neutral as to not violate constitutional equal protection rights.

F. The Search for a Compelling State Interest

1. 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 v. Canakaris*, 383 So.2d 1197 (Fla.1980). There is no evidence in the opinion that the *Canakaris* 383 So.2d 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 and conflicts with *Connor* 688 So.2d.

The Supreme Court in *Canakaris* 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 and *Connor* 688 So.2d 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 proceedings are to be in chancery with the mandate the doctrine of equity be applied. (See § 61.011, Fla. Stat., § 61.08 (2), Fla. Stat.) Equity is not a compelling State interest.

2. 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 during dissolution? 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, not whether the dissolution is contested, not the 2¹⁷ factors in § 61.08, Fla. Stat., and the public policy interest should be called compelling and be contained in the purposes provision of the statute .

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 state constitutional and legislative death rendered to coverture. The abrogation of the doctrine of necessities in *Connor* 668 So.2d. is further reason the state is prohibited from treating spouses in marriage, or after marriage any differently....or any differently than single citizens.

If indeed concern for spousal poverty is valid as 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 dissolve his/her marriage 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. alimony 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. It has not consistently legislated that public policy. 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 or mandate he must wear a helmet. 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? If the economic survival and betterment of married parties was a

legislative concern it would have been addressed when §316.211 (b), Fla. Stat. was passed. It was not.

G. 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 this District Court of Appeals. Neither court offered a reasoned opinion for denying a similar declaratory judgment right of privacy constitutional challenge to the alimony statutes. At the trial level and at the appellate level soundly 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.

"[A] party's good faith efforts to change existing law does not render an action frivolous." *Carnival Leisure Indus., Ltd., v. Holzman*, 660 So. 2d 410, 412 (Fla. 4th DCA 1995) "Where a party asserts a good faith attempt to change an existing rule of law, that party is not subject to attorney's fees under section 57.105." See *Jones v. Charles*, 518 So. 2d 445 (Fla. 4th DCA 1988).

See *Fisher v. Carter*, 864 So. 2d 493, (Fla. 4th DCA 2004),

“When reviewing this issue [justiciable issue, as required for fees under section 57.105], this court must look to see if the trial court abused its discretion in finding no justiciable issues of fact or law. See *Read v. Taylor*, 832 So. 2d 219 (Fla. 4th DCA 2002). ‘In order to demonstrate a complete absence of justiciable issues, the claim or defense must be so clearly devoid of merit both on the facts and the law when presented as to be completely untenable.’ *Arenas v. City of Coleman*, 791 So. 2d 1234, 1235 (Fla. 5th DCA 2001) (citation omitted)”

The *Barna* 850 So.2d trial court did not even examine the material offered to the trial court to ascertain the *Fisher* 864 So.2d and *Read* 832 So.2d standards. This court never commented on the materials or merits.

In fact, this court’s affirmation of sanction of fees against the attorneys in *Barna* 850 So.2d stands as a chilling 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.

II. Whether the “Dissolution of Marriage” statute alimony provision (§ 61.08, Fla. Stat.) impermissibly infringes Art. II, § 3, Fla. Const., Separation of Powers?

The Alimony Statute Impermissibly Infringes Art. II, § 3, Fla. Const., Separation of Powers

A. Infringement of § 61.08, Fla. Stat. on Art. II, § 3, Fla. Const.

The legislature in § 61.08, Fla. Stat. impermissibly delegates its exclusive lawmaking power to the judicial branch without proper restrictions. The impermissible delegation of unbridled authority is further compounded because the authority delegated takes place in an area (privacy protected zone of divorce) where the legislature itself lacks constitutional authority to make law absent a compelling interest which in fact furthers the interest and is minimally applied. Both legislative actions violate the Separation of Powers.

B. Separation of Powers Art. II, § 3, Fla. Const.

The Florida Constitution Separation of Powers provision is a safeguard designed precisely to prevent the concentration of power in the hands of one branch. *In re Advisory Opinion to the Governor*, 276 So.2d 25 (Fla.1973).

Bush v. Schiavo, 885 So.2d 321, (Fla. 2004) is the most recent culmination of Florida law related to Separation of Powers. *Bush* 885 So.2d states,

“The cornerstone of American democracy known as separation of powers recognizes three separate branches of government—the executive, the legislative, and the judicial—each with its own powers and responsibilities. In Florida, the constitutional doctrine has been expressly codified in article II, section 3 of the Florida Constitution, which not only divides state government into three branches but also expressly prohibits one branch from exercising the powers of the other two branches:

Branches of Government.—The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

“This Court . . . has traditionally applied a strict separation of powers doctrine,” *State v. Cotton*, 769 So. 2d 345, 353 (Fla. 2000), and has explained that this doctrine “encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. [*19] The second is that no branch may delegate to another branch its constitutionally assigned power’ *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991) (citation omitted).”

The danger sought to be remedied is best captured by Daniel Webster (1782-1852), who is widely credited with observing:

“Good intentions will always be pleaded for every assumption of authority. It is hardly too strong to say that the Constitution was made to guard the people against the dangers of good intentions. There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters.”

C. Caselaw on Separation of Powers

Most case law on Florida Separation of Powers deals with legislatively improper delegation of authority, authority without proper restrictions, or authority in a constitutionally prohibited zone to the executive and executive agencies. This case focuses on these improper delegations of authority from the legislature to the judiciary to allegedly effect the purposes of Chapter 61 “Dissolution of Marriage” Fla. Stat. alimony provisions.

The Florida Legislature is vested with the plenary authority to enact laws, subject only to limitation by the state constitution. (Art. III, § 1, Fla. Const. (en banc).

The legislative branch bears the responsibility to protect the rights of citizens, *Satz v. Perlmutter*, 379 So. 2d 359, 361 (Fla. 1980) It has the exclusive obligation to enact social policy. *Krischer v. McIver*, 697 So. 2d 97, 104 (Fla. 1997). Most importantly for present purposes, the legislature defines and administers the regulation of dissolution of marriage. See, e.g., Chapter 61 Part I (2003) Fla. Stat.

The judicial branch, by contrast, enjoys the exclusive power to “administer justice and resolve disputes within the common law and the laws

established by the legislature.” Art. V, § 3, Fla. Const. (citing generally from *Bush* 885 So.2d)

There are essentially two ways in which the principle of separation of powers can be violated: (1) if one branch encroaches upon or nullifies the powers of another; or (2) if one branch improperly delegates its own, or another branch’s, constitutionally assigned authority to a separate branch of government. *Chiles v. Children*, 589 So.2d 260, 264 (Fla. 1991).

To determine whether a given power is exclusive to one branch, one must consider the constitutional text and history, along with the nature of the activity in question. *Simms v. State*, 641 So.2d 957, 961 (Fla. 3d DCA 1994).

The legislature is constitutionally prohibited from assigning its own exclusively held power to other branches through excessive delegation. See *Askew v. Cross Key Waterways*, 372 So.2d 913, 918-19 (Fla. 1978). To be sure, legislatures may, and routinely do, delegate authority to the executive branch to administer a statutory scheme; in so doing they often times provide to the relevant agency a measure of discretion to flesh out the underlying law’s contours. *Id.* At 924. To pass constitutional muster, however, such authority may not be utterly open-ended and must provide “some minimal standards and guidelines ascertainable by reference to the

[underlying] enactment.” *Id.* at 925. In short, the executive official must be given guidance as to the intention of the act itself, so as not to cede the “discretion as to What the law shall be,” which, of course, is the province of the legislature alone. *Conner v. Joe Hatton, Inc.*, 216 So. 2d 209, 211 (Fla. 1968).

The Dissolution of Marriage statute and its alimony provisions vest in the judiciary powers that are exclusively reposed in the legislative branch. This is evident if one “consider[s] the essential nature and effect of the governmental activity to be performed.” *Simms*, 641 So. 2d at 961. In fact, Art. I., § 23, Fla. Const, Right of Privacy, prevents *any* branch of government from imposing undue burdens on the right of privacy of citizens to dissolve their marriage. *Littlejohn v. Rose*, 786 F.2d 785, 786 (6th Cir. 1985) (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.).

N. Fla.. Women’s Health 866 So.2d at 658,

“As has so often been said, it is not the role of the courts to set policy or to engage in judicial legislation. We have long recognized that it is not this Court’s ‘function to substitute its judgment for that of the Legislature as to the wisdom or policy of a particular statute.’ *State v. Rife*, 789 So. 2d 288, 292 (Fla. 2001). However, this Court does not ‘violate the separation of

powers doctrine by determining whether a legislative enactment was constitutionally adopted.’ Chiles v. Phelps, 714 So. 2d 453, 456 (Fla. 1998).”

D. Impermissible Delegation-Uncertain Implementation

The flaws in the alimony statute which create the unauthorized delegation of authority, and the unbridled law making authority to the judiciary are the multiple permutations of factors in the statute that “shall” be weighed and the closing statement in § 61.08 (2), Fla. Stat. which creates unbridled authority. (§ 61.08 (2) Fla. Stat.: “The court *may* consider *any* other *factor* necessary to do *equity* and *justice* between the parties.”) Further, the Florida courts for decades have been unable to determine what statutory factors they must use, and how to weigh them when unleashing the devastating maelstrom of alimony against some divorcing Floridians. Amid this admitted inability to interpret and apply the statute the courts are given unfettered discretion to decide *if* alimony will be awarded in *what amount* and *for how long*.

E. § 61.08, Fla. Stat.

The highlighted areas in the provision below represent the impermissible unbridled authority delegated to the judiciary to create law. The line of code concluding § 61.08 (2), Fla. Stat. , i.e. “The court *may*

consider any other factor necessary to do equity and justice between the parties.” Represents impermissible delegation of law making power without restraints or limits. The provision violates the Separation of Powers Fl. Const. directive. Further the provision is non severable.

61.08 Alimony.—

(1) In a proceeding for dissolution of marriage, the court may grant alimony to either party, which alimony may be rehabilitative or permanent in nature. In any award of alimony, the court may order periodic payments or payments in lump sum or both. The court may consider the adultery of either spouse and the circumstances thereof in determining the amount of alimony, if any, to be awarded. In all dissolution actions, the court shall include findings of fact relative to the factors enumerated in subsection (2) supporting an award or denial of alimony.

(2) In determining a proper award of alimony or maintenance, **the court shall consider all relevant economic factors, including but not limited to:**

- (a) The standard of living established during the marriage.
- (b) The duration of the marriage.
- (c) The age and the physical and emotional condition of each party.
- (d) The financial resources of each party, the nonmarital and the marital assets and liabilities distributed to each.
- (e) When applicable, the time necessary for either party to acquire sufficient education or training to enable such party to find appropriate employment.
- (f) The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education, and career building of the other party.
- (g) All sources of income available to either party.

The court may consider any other factor necessary to do equity and justice between the parties.

To the extent necessary **to protect** an award of alimony, the court **may order** any party who is ordered to pay alimony to purchase or maintain a life insurance policy or a bond, or **to otherwise secure** such alimony award with **any other assets** which **may be suitable** for that purpose.

History.—ss. 7, 12, Oct. 31, 1828; RS 1484; GS 1932; RGS 3195; CGL 4987; s. 1, ch. 23894, 1947; s. 1, ch. 63-145; s. 16, ch. 67-254; s. 10, ch. 71-241; s. 1, ch. 78-339; s. 1, ch. 84-110; s. 115, ch. 86-220; s. 2, ch. 88-98; s. 3, ch. 91-246.

Despite the newly added statutory provision that a dissolution order contain a narrative of the factors in § 61.08 (2), Fla. Stat. is it impossible to ever determine which factors result in the rulings. (See *Hillier v. Iglesias*, 901 So.2d. 947, (Fla 4th DCA 2005) (Judge Farmer concurring expresses opinion that trial courts do not weigh factors properly, e.g. entitlement to lifestyle of the marriage.)

F. Unbridled Authority Improperly Given to the Judiciary

A legislative delegation of power to another branch of government without proper standards and guidelines violates Florida’s separation-of-powers prohibition because it permits the other branch the discretion to decide what the law shall be. See *Askew* 372 So.2d at 913; *Conner* 216 So. 2d. This concept is so fundamental and universally accepted that the Florida Supreme Court considers it “hornbook law.” *Lewis v. Bank of Pasco County*, 346 So.2d 53 (Fla.1976).

The Florida Supreme Court Gender Bias Study Commission in their (1990) report as an authoritative body acknowledges the judiciary is granted almost unlimited discretion to apply § 61.08, Fla. Stat. (See infra G.)

The Separation of Powers test is noted in *State v . Griffin*, 239 So.2d 577 (Fla. 1970),

“The test then became twofold: first, was a transfer of authority possible; second, if so, was it sufficiently restrictive? We quote from *Bailey v. Van Pelt*, 78 Fla. 337, 82 So. 789 (1919):

‘In order to justify the courts in declaring invalid as a delegation of legislative power a statute conferring particular duties or authority upon administrative officers it must clearly appear beyond a reasonable doubt that the duty or authority so conferred is a power that appertains exclusively to the legislative department, and the conferring of it is not warranted by the provisions of the Constitution.

‘The Legislature may not delegate the power to enact a law, or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law complete in itself, designed to accomplish a general purpose, and may expressly authorize designated officials within valid limitations to provide rules for the complete operation and enforcement of the law within its expressed general purpose.’”

Smith v. Portante, 212 So.2d 298, 299 (Fla.1968) (cited in *Schiavo v. Bush*, No. 03-008212-CI-20, 6th Judicial Circuit Florida, (2004)) states,

“A statute which delegates power to the executive [in this appeal, Cabana, we argue to the judiciary] must so clearly define that power that the executive [judiciary] is precluded from acting through whim, showing favoritism, or exercising unbridled discretion. Id at 56. ‘No matter how laudable a piece of legislation may be in the minds of its sponsors, objective

guidelines and standards should appear expressly in the act or be within the realm of reasonable inference from the language of the act where a delegation of power is involved and especially so where the legislation contemplates a delegation of power to intrude into the privacy of citizens.’”

A critical point demonstrating the alimony provisions violation of the separation of powers is the inability of the courts to determine the intent of the legislation. Whether the courts find the intent and provisions ambiguous or simply chose not to follow the myriad of factors in § 61.08, Fla. Stat. is unclear subjecting the act to whim or favoritism. The fact is they do not follow the factors. The alimony provisions fail the test outlined in *Askew* 372 So.2d at 918,

“When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency [judiciary] is carrying out the intent of the Legislature in its conduct, then, in fact, the agency [judiciary] becomes the lawgiver rather than the administrator [interpreter] of the law.”

G. Judiciary Cannot Implement the Improperly Delegated Authority

The Florida Judiciary itself admits it does not know how to implement the impermissibly delegated law making authority given it by the legislature in the alimony statute.

The Report of the Florida Supreme Court Gender Bias Study Commission (1990), which resulted from the Florida Supreme Court’s

appointed commission on gender bias in the Court system, contains the follows observations and conclusions.

“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)

“Most of Florida’s circuit court judges dislike dealing with family law matters. This attitude can affect the outcome of cases.” (page 6)

“As a result of their *almost unlimited discretion*, trial courts distribute marital assets either as property or alimony with a lack of certainty and consistency. This may lead to inappropriate property settlements between the parties.” (page 7) [Emphasis added]

The follow up Gender Bias—Then and Now, Continuing Challenges in the Legal System, The Report of the Gender Bias Study Implementation Commission (1996) states,

“...alimony decisions, backed by competent substantial evidence to support the trial court rulings, are now required by statute, as was originally recommended.... *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...*” (page 7) (Emphasis added)

“The original Commission recommended that the laws dealing with the amount of spousal support require the trial judges to set consistent amounts, in all cases, and amounts which comport with the supported spouse’s marital standard of living, analogous to child support guidelines. *This has not been done.* Section 61.08 requires the trial judge to make a laundry list of

fact-findings when alimony is asked for and either awarded or denied. *It is not clear whether all the statutory factors must be considered, or only relevant ones, and whether or not there is any factor or factors which should be given more weight than others.*” (page 7) (Emphasis added)

The authoritative body appointed by the Florida Supreme Court offers the above opinion on the unbridled discretion and the demonstrated inability of the judiciary to implement it. This continues today.

Department of Insurance v. Southwest Volusia Hospital Dist., 438 So.2d 815 (Fla. 1983) cites *Askew* 372 So.2d as the source of the test for determining whether a statute violates the nondelegation standard and repeats:

“[T]he crucial test in determining whether a statute amounts to an unlawful delegation of legislative power is whether the statute contains sufficient standards or guidelines to enable the agency and the courts to determine whether the agency is carrying out the legislature’s intent.”

The above commission reports prove § 61.08, Fla. Stat. fails this test.

A measure of legislative intent is contained in the specific provision of the Dissolution of Marriage Statute Purposes. The alimony provisions in no way fulfill the purpose succinctly expressed in § 61.001, Fla. Stat.

61.001 Purpose of chapter.—

- (1) This chapter shall be liberally construed and applied.
- (2) Its purposes are:
 - (a) To preserve the integrity of marriage and to safeguard meaningful family relationships;

(b) To promote the amicable settlement of disputes that arise between parties to a marriage; and

(c) To mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage.

History.—s. 1, ch. 71-241; s. 111, ch. 86-220.

Richardson 866 So.2d “courts should refrain from reading elements into a statute that plainly lacks such additional elements. See Schmitt, 590 So. 2d at 414.” That is precisely what the judiciary has been doing when it constantly invents purposes of the statute that do not exist in § 61.001, Fla. Stat.

The judiciary has used the unbridled discretion impermissibly delegated to it to “legislate” a myriad of “purposes” for the alimony statute none of which exist in the § 61.001, Fla. Stat. This judicial legislation is further evidence the courts have been exercising impermissible law making power. The judiciary legislates and makes new law because of the unbridled discretion of § 61.08, Fla. Stat. Neither the legislature nor the judiciary has noticed this and initiated or attempted to reinstate the separation of powers necessary in the statute.

H. Legislative Delegation of an Authority It Lacks

The “Dissolution of Marriage” alimony provision is written in the prohibited privacy zone of a personal decision relating to marriage.

Littlejohn, 786 F.2d rules that divorce is entitled to right of privacy protections.

The legislature lacks authority to legislate such concepts as alimony in the privacy protected zone of Dissolution of Marriage absent a compelling state interest minimally applied. The alimony provisions place an undue burden on Floridians seeking to alter their right of privacy and associational rights related to the personal decision to dissolve their marriage. The legislature compounds the Separation of Powers infringement by impermissibly delegating unrestricted authority to the judiciary in the “Dissolution of Marriage” alimony provisions, and on top of it, the legislature lacks that authority to exercise such regulation itself, let alone impermissibly delegate it to the judiciary.

III. Whether the “Dissolution of Marriage” statute alimony provision (§ 61.08, Fla. Stat.) impermissibly infringes the ruling and public policy established in *Connor v. Southwest*, 668 So.2d 175 (Fla. 1995)?

***Connor v. Southwest* –**
Abrogation of the Doctrine of Necessaries

Any shred of basis for an economic partnership model of marriage was torn asunder by the abrogation of the doctrine of necessities 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 necessities (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.¹

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.²

The parties within a marriage were thereby declared economically independent!

The abrogation of the doctrine of necessities and the failure of the legislature to reinstate it forcefully argue that if marriage had been viewed as a partnership, i.e. an economic partnership, each party now has his and her own personal responsibilities and liabilities. After dissolution the State cannot create a model or entity, which did not exist in the marriage.

Since *Connor* 668 So.2d, neither the judiciary nor the legislature has changed this economic principle of independence of parties within the

¹ Connor at 176.

² Fla. HB 1211 (1996); Fla. SB 906 (1996).

marriage. When given the opportunity to choose between making each party to a marriage independent or equalizing dependency the Florida Supreme Court chose economic independence for each. The legislature did not alter that economic independence. The Court dismantled the yoke of economic liability from a husband for his wife to a third party. The Court's action and the legislature's failure to change it emphasized the current law and public policy, i.e. the independence rather than the dependence of each party in the privacy area of marriage. If the law and public policy has become independence during marriage what compelling interest has the State articulated applied in the least intrusive manner to create dependence after marriage? How does the State invade the privacy area of marriage, in which the parties represent independent economic entities, and with dissolution statutes turn the independence into dependence with the threat of contempt, arrest and imprisonment?

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.”³

He also tells us...

“The majority’s decision to abrogate the common law doctrine of necessities departs from the partnership theory of marriage...”⁴

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.”⁵

Overton recognized the *Connor* 668 So.2d pinion 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 for himself or *herself*. He recognized the reduction of the legal obligations of the marriage contract. This Court must do the same.

Overton acknowledges the *Connor* 668 So.2d opinion destroys the underpinnings of the judicially applied theory of the marriage as partnership.

³ Connor at 177.

⁴ Id.

⁵ Id

The Court's basis for its *Canakaris* 383 So.2d and its current progeny rulings has been swept away by *Connor* 668 So.2d.⁶

The abrogation of the doctrine of necessities effectively eliminates the economic partnership theory of marriage. More importantly, the abrogation eliminates the application of economic partnership theory as a foundation upon which to build an argument for a compelling State interest to intervene in the privacy area of marriage and dissolution of that marriage with statutorily mandated postdissolution permanent spousal support requirements.

IV. Whether incarceration (civil contempt powers) for enforcement of alimony nonpayment is impermissible after Art. I, § 23, Fla. Const and *Connor v Southwest*, 668 So.2d 175 (Fla. 1995) nullify the duty of a husband to his wife and society allegedly created by marriage?

Incarceration (civil contempt powers) for enforcement of alimony payments is impermissible because of Art. I, § 23, Fla. Const. and *Connor v. Southwest*, 668 So.2d 175, (Fla. 1995)

⁶*Fernandez v Fernandez*, 710 So.2d 223, 225 (Fla. 2d DCA 1998)), noted that the *Connor* at 668 So.2d opinion had not yet been applied to overrule *Belcher v. Belcher*, 271 So. 2d 7 (Fla. 1972). The 2nd DCA erred in viewing *Connor* 668 So.2d merely as an equal protection case. Its failure to acknowledge the enormous family law ramifications noted by Judge Overton in the dissent is error. It is akin to saying *Plessy v Ferguson*, 163 US 537 (1896) is about equal protection and not about race; *Roe v Wade*, 410 US 113 (1973) is about privacy not about abortion. *Belcher* 271 So.2d is rife with equal protection violations and invited by Art. I § 23 Fla. Const.

Incarceration (civil contempt powers) for enforcement of alimony payments is no longer proper. The grounds for incarceration (civil contempt powers) as an enforcement tool for alimony arrearages as recited in *Fishman v. Fishman*, 656 So.2d 1250 (Fla. 1995) (alimony arrearages are not a *debt* but a husband's *duty* of support to his wife and to society) are invalidated by Art. I, § 23, Fla. Const. and *Connor* 668 So.2d.

“Article I, section 11 of the Florida Constitution specifically prohibits imprisonment for debt. However, the use of civil contempt powers for the enforcement of support payments in domestic relations cases has been approved. *Bronk v. State*, 43 Fla. 461, 31 So. 248 (1901); *Phelan v. Phelan*, 12 Fla. 449 (1868). The rationale underlying this rule is that the obligation to pay spousal or child support is a personal duty owed to both the former spouse or child and to society rather than a debt within the meaning of article I, section 11. *Gibson v. Bennett*, 561 So.2d 565, 570 (Fla. 1990). The use of contempt in dissolution proceedings is premised on the "assumed necessity for the special protection and enforcement of rights growing out of the marriage relationship." *Price v. Price*, 382 So.2d 433, 437 (Fla. 1st DCA 1980). This rule has been extended to include the enforcement of payments of attorney's fees related to dissolution proceedings. *State ex rel. Krueger v. Stone*, 137 Fla. 498, 188 So. 575 (1939); *Orr v. Orr*, 141 Fla. 112, 192 So. 466 (1939); *Heitzman v. Heitzman*, 281 So.2d 578 (Fla. 4th DCA 1973).” *Fishman* 656 So.2d at 1252

The unique enforcement of alimony nonpayment by incarceration (civil contempt powers) is grounded in an antediluvian no longer valid ruling that a “husband” has a duty to his “wife” and to society. *Phelan v. Phelan* 12

Fla. 449, 467 (1868); *Bronk v. State*, 43 Fla. 461, 475 (1901) See also *Gibson v. Bennett*, 561 So.2d 565, 570 (Fla. 1990).

Phelan 12 Fla. is replete with outdated superceded law that is void today.⁷

Phelan 12 Fla. was decided during the turmoil of the Civil war. It was a case where the wife's petition for divorce was not even granted as the pleading was defective.

⁷ Other examples of voided law in Phelan 12 Fla.: Cohabiting is criminal; Residence requirement from filing in Phelan was 2 years-- now 6 months; Required grounds for divorce "...wilful, obstinate and continued desertion for the term of a year, and the habitual indulgence of violent and ungovernable temper."--now no fault; "... the public have an interest in these suits, and the duty of the court is to protect that interests even at the expense of the wishes of the parties themselves." -- now the Right of Privacy prevails; Lump sum alimony is error; Gender bias, violation of equal protection, "Permanent alimony is not a sum of money or a specific proportion of the husband's estate given absolutely to the wife. It is a continuous allotment of sums payable at regular periods for her support from year to year. ...Not only is there error in this respect; No legislative authority for alimony....judicially created lawmaking... " This court has decided that in all cases of divorce it is proper to grant alimony, 'the right to decree alimony being held to be an incident to the power to grant divorces,..."

One statement rings bitterly true across the susqicentennial, "It might be very gratifying to the cupidity of a captious solicitor, who should be more intent on making money out of family dissensions than bringing their difficulties to a speedy adjustment, to try experiments in practice, and subject the husband's estate to all expenses of litigation, whether regular or irregular, and no husband should be subjected to such legalized depredations."

The part of *Phelan* 12 Fla.—a 150 year old decision--that the Florida courts have latched onto for the validity of incarceration (civil contempt powers) as enforcement of contempt is only dicta in the ruling. *Phelan* 12 Fla. is relied on for the concept of a “husband” having a duty to support his “wife” during marriage. *Phelan* 12 Fla.,

“There can be no serious question of the soundness of the doctrine that "the *duty of the husband to support his wife* does not depend alone upon his having tangible property; that while they are living together they are bound to contribute by their several personal exertions to a common fund which in law is the husband's, and from which the wife may claim a support; that if she is compelled to seek a divorce on account of his misconduct, she loses none of her rights in this respect, only she is to draw her maintenance in a different way, that is, under a decree for alimony based, if he has no property, upon his earnings or ability to earn money. 2 Bish., 446” [Emphasis added]

This “doctrine of necessities” which had been codified in Florida Statutes was abrogated in *Connor* 668 So.2d and never reinstated despite two legislative attempts.

Phelan 12 Fla. and *Bronk* 43 Fla. arbitrarily extended the economic duty of a “husband” to support his “wife” to be a duty to society (impermissible judicial law making). This alleged duty to society was abrogated by Art. I, § 23, Fla. Const., Right of Privacy. The state by implying such a duty today to justify jailing a husband for alimony arrearages is an impermissible infringement of Art. I, § 23, Fla. Const. in the

privacy protected zone of marriage and divorce. The state cannot be a party to a marriage after the passage of Art. I, § 23, Fla. Const. A married Floridian has no duty to society simply because he is married or changing his marital status.

After *Connor* 668 So.2d and Art. I, § 23, Fla. Const. the state no longer can tout an economic interest in the marriage or divorce of two Floridians.

The dicta, not holding, in *Phelan* 12 Fla. at 465 that,

“the doctrine running through all matrimonial suits and bringing into subserviency all other law on the subject, that the proceeding, though upon its face a controversy between the parties of record only, is in fact a triangular suit, '*sui generis*,' the government or public occupying the position of a third party without counsel, it being the duty of the court to protect its interest.”

is overturned by Art. I, § 23, Fla. Const., Right of Privacy. “**ART I § 23** -

Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein.”

The dicta, not holding, in *Phelan* 12 Fla. at 464 that,

“This is one of the many differences between divorce suits and other chancery cases, which has led most elementary writers to designate is as a suit *sui generis*; and this, like many other of its peculiar incidents, arises from the fact that the public have an interest in these suits, and *the duty of the court is to protect that interests even at the expense of the wishes of the parties themselves.*” [Emphasis added]

is likewise invalidated by Art. I, § 23, Fla. Const. The state has no place in the recognized privacy protected zone of the personal decision relating to marriage to dissolve it, i.e. divorce. “**ART I § 23** -Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein.”

Bronk 43 Fla. at 475,

“It is regarded more in the light of a personal duty due not alone from the husband to the wife, but from him to society, that the courts of equity have the power to enforce by detention of the person of the husband in cases where he can discharge it, but will not.” [Emphasis added]

The *Bronk* 43 Fla. at 475 dicta, heavily relied upon for over a century, is equally invalidated by Art. I, § 23, Fla. Const. Marriage, entering and leaving, is a privacy protected zone that the state cannot intrude upon absent a compelling state interest.

The Privacy Amendment radically changed the legal landscape of the dissolution of marriage statute. It invalidated all parts of it except those the state can prove a compelling state interest minimally applied which in fact furthers the interest. It invalidated any concept of the state being part of the marriage between Floridians. Without a spouse’s duty to society or the requirement he support his spouse jailing him (civil contempt powers) is impermissible.

Simply because a Floridian makes the personal decision relating to his marriage to dissolve it, to change his associational interest by exercising his liberty interest and fundamental right by dissolving his marriage the state cannot unduly burden the exercise of his choice to divorce. The state by creating and enforcing the alimony statute with incarceration (civil contempt powers) impermissibly intrudes into a Floridian's liberty interest and fundamental right of privacy.

The Florida Courts' wordsmithing to craft alimony payments as not being a debt but a "husband's" duty to his "wife" and "society" now fails. This gossamer linguistic prestidigitation from debt to duty must now revert to the simple fact of what it is ---a debt!⁸ Notwithstanding *Gibson* 561 So.2d and *Fishman* at 656 So.2d and other courts alimony payments (nonpayments) are a debt and as such incarceration for them is impermissible under Art. I, § 11, Fla. Const.

The judicial rationale to use physical incarceration (civil contempt powers) as an enforcement tool for alimony arrearages are extinguished by the privacy amendment and *Connor* 668 So.2d. With the rationale for

⁸ Definition: alimony: an allowance under court order made to one spouse by the other for support pending or after legal separation or divorce

Definition arrearage: Overdue alimony or child support payments.

Definition debt: That which is due from one person to another, whether money, goods, or services; that which one person is bound to pay to another, or to perform for his benefit; thing owed; obligation; liability .

depriving a Floridian of personal liberty no longer valid, incarceration (civil contempt powers) for enforcement of alimony payments is impermissible. Deprivation of personal liberty whether it be characterized as failing to comply with a court order, or deliberately failing to pay alimony is a distinction without a difference. It is still loss of liberty based on an invalid statute whose grounds for incarceration (civil contempt powers) enforcement no longer exist.

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)

The Right of Privacy attaches to the “Dissolution of Marriage” alimony provisions. § 61.08, Fla. Stat. is presumptively unconstitutional as it impacts a liberty interest and a fundamental right. The state has not proven a state interest, let alone a compelling state interest minimally applied that in fact furthers the interest sufficient to rehabilitate the provisions from their presumptively unconstitutionally. All legal actions predicated upon § 61.08, Fla. Stat. are null and void ab initio and unenforceable.

The alimony provision impermissibly conflicts with *Connor* 688 So.2d and the public policy established therein by impermissibly transforming Floridians who are economically independent before and during marriage into economically dependent Floridians simply because they exercise their fundamental constitutional right of association and privacy to alter their marriage by dissolving it.

The alimony provisions impermissibly grant unbridled exclusive legislative law making power to the judiciary to create the law and public policy contrary to Art. II. § 3. Fla. Const. Furthermore, the legislature via the alimony provision is impermissibly granting legislative authority to the judiciary which it itself does not have because of Art. I. § 23. Fla. Const..
Right of Privacy.

The rationale for incarceration (civil contempt powers) as an enforcement for alimony payment is void after Art. I, § 23, Fla. Const. and *Connor* 668 So.2d. A husband does not owe his wife or society an economic duty because of his marital status. Alimony is a debt.

Prayer for Relief

"The law is not static. It must keep pace with changes in our society, for the doctrine of stare decisis is not an iron mold which can never be changed." *Gates v. Foley*, 247 So.2d 40 (Fla. 1971)

The Appellant prays this court declare § 61.08, Fla. Stat. and its associated alimony provisions impermissibly infringes Art. I, § 23, Fla. Const., Right of Privacy, impermissibly infringes Art. II, § 3, Fla. Const., Separation of Powers, and conflicts with *Connor* 688 So. 2d.; incarceration (civil contempt powers) as an enforcement for alimony payments is impermissible under Art. I, § 23, Fla. Const. and *Connor* 668 So.2d. As a result of these infringements and conflict § 61.08, Fla. Const and its enforcement provisions are void ab initio and unenforceable.

Respectfully submitted,

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May 26, 2006

Certificate of Service

I hereby certify that on this 26th day of May, 2006, I caused a true and accurate copy of this Appellant's Initial Brief to be sent by U.S. mail to:

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