

Appeal Case Number 5D06-1998

IN THE FIFTH 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 REPLY BRIEF

Robert W. Radloff, *pro se*,
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Table of Contents

Table of Contents ii

Table of Citations iii

Issues Presented 1

Introduction 2

Art. I § 23, Fla. Const. Right of Privacy 3

Appellee’s Argument 4

Notice of Hearing is Materially Defective and Void 7

Contempt/Income Deduction/Incarceration Order is Materially Defective
and Void 8

Conclusion 9

Prayer for Relief 9

Certificate of Service 11

Table of Citations

Cases

<i>Barna v Barna</i> , 850 So. 2d 603 (Fla. 4 th DCA 2003).....	3
<i>Blanchard v. Blanchard</i> , 860 So. 2d 976 (Fla.4 th DCA 2003)	5
<i>Bowen v. Bowen</i> , 471 So. 2d 1274, 1278 (Fla. 1985).....	9
<i>Bresch v. Henderson</i> , 761 So. 2d 449, 451 (Fla. 2d DCA 2000)	9
<i>Canakarlis v. Canakarlis</i> , 382 So. 2d 1197, (Fla. 1980)	4, 5
<i>Connor v. Southwest</i> , 668 So. 2d 175 (Fla. 1995).....	1, 9, 10
<i>Pompay v. Cochran</i> , 685 So. 2d 1007, 1013 (Fla. 4th DCA 1997).....	9
<i>Rosen v. Rosen</i> , 696 So. 2d 697 (Fla. 1997).....	4
<i>Sanford v Rubin</i> , 237 So. 2d 134 (Fla. 1970).....	7
<i>State v. Gray</i> , 48 So. 2d 84, (Fla. 1950)	6

Statutes

§ 61.08 Fla. Stat.	4, 9, 10
Art. I § 23 Fla. Const.....	1, 3, 9, 10
Art. II, § 3, Fla. Const.	1,9, 10

Rules

Florida Fam. Law R. P. Rule 12.615 (b)	7
Florida Fam. Law R. P. Rule 12.615 (e).....	8

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?

Introduction

This court must not be distracted from its task of interpreting the constitutionality of the permanent alimony statute by opposing counsel's eloquent vitriolic ad hominum ranting attack on the Appellant. The issues in this appeal are matters of profound constitutional law effecting thousands of Floridians. They are not equitable issues. Instead the issues strike to the core of the overreaching of government into personal decisions of Floridians to exercise their liberty interest, right of association, and right of privacy. The issues further provide this court the opportunity to view the proper allocation of the constitutional separation of powers necessary to ensure the balance of the branches of state government created by the citizens of Florida.

The answer brief offered this court reflects the high emotion created by the alimony statutes.

The Appellant does not accept the Appellee's characterization of the facts. The facts in this appeal are not at issue. The Appellant acknowledges the contempt proceeding and his arrearages in alimony payments. He has respect for the Florida courts. It is not his purpose to add legal expenses for his former wife through this appeal. The Appellant is merely making a good faith attempt to change current law. The structure of the Florida dissolution of marriage process, and prior Florida courts failure to offer a reasoned

opinion on the issues raised, regrettably may, but do not necessitate, the former wife defending the constitutionality of the state's alimony statutes.

Because the Appellant is making a good faith effort to change existing laws by challenging the constitutionality of the alimony statutes he should not be forced to incur the costs and expenses of the former wife should she assume the state's role to defend its statutes.

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

Art. I Sec § 23 Fla. Const., Right of Privacy completely altered the landscape of Chapter 61, Fla. Stat. "Dissolution of Marriage" and its judicial interpretation in the autonomous decision making context.

All case law relied upon prior to the passage of the Right of Privacy Amendment in November 1980 must be reexamined to ensure it passes this new constitutional muster. All case law since must also be viewed through the Privacy prism. The Florida Family Law Bar has been slow to shine the constitutional light on the alimony statutes. The Appellant should not be penalized for a good faith effort to bring before the court an awareness of the unconstitutionality of the alimony statute. The Appellant, in his initial brief, provided the legal argument as to why *Barna v Barna*, 850 So. 2d 603 (Fla. 4th DCA 2003) was an erroneous ruling by the Fourth District Court of Appeal. (*Barna* 850 So. 2d *only* raised the Right of Privacy infringement—it

did not raise any of the other issues in this appeal.) It must also be noted that in that appellate as well as in that trial court order, no reasoned written opinion was offered by those courts—or any other Florida court. To date no Florida court has offered an analysis of the issues presented in this appeal.

Appellee's Argument

Appellee's brief states it would show the constitutionality of §61.08 Fla. Stat., permanent alimony statute, yet it offers no analysis of the issues or of the legal arguments proffered in the Appellant's Initial Brief.

As to argument, Appellee's Answer Brief merely states the Florida Supreme Court landmark decision in *Canakaris v. Canakaris*, 382 So. 2d 1197, (Fla. 1980) and *Rosen v. Rosen*, 696 So. 2d 697 (Fla. 1997) “provide the historical basis for alimony awards...The suggestion these cases overlook or choose to ignore that alimony is unconstitutional pursuant to State law is preposterous.” Such reliance is misplaced.

None of the issues raised in this appeal were presented to the Florida Supreme Court in *Canakaris* 382 So. 2d or *Rosen* 696 So. 2d . The Florida Supreme Court nor this District Court of Appeal has ever reviewed the issues presented in this appeal.

The fact that the Florida Supreme court did not address the constitutional issues raised here in *Canakaris* 382 So. 2d and *Rosen* 696 So.

2d lacks persuasive power as to deem the alimony statute does not impermissibly infringe the Florida Constitution Right of Privacy, Separation of Powers, nor Conflict with the ruling and public policy of marital economic independence annunciated in *Connor v. Southwest*, 668 So.2d 175, (Fla. 1995)—nor address the impermissibility of incarceration for alimony non payment.

Canakaris 382 So. 2d was a ruling entered *before* the passage of Art. I § 23 Fla. Const.. *Canakaris* 382 So. 2d was entered in March 1980 and the Privacy Amendment was passed by voters November 1980.

Rosen 696 So. 2d addresses a different statute and issue than in the current appeal. It addresses §61.16 and attorney fees in dissolution proceedings. Its discussion of alimony offers nothing of substance to refute the constitutional claims raised herein.

Blanchard v. Blanchard, 860 So. 2d 976 (Fla.4th DCA 2003) is not applicable in this Appeal. The Radloff Final Judgment of Dissolution of Marriage of June 15 1990 contains a specific court order of permanent alimony, does not allude to an agreement on alimony and if such an agreement exists it is not incorporated into the Final Judgment of Dissolution of Marriage. The Appellant's obligation for permanent alimony is court ordered.

Paragraph 23 of the Final Judgment of Dissolution of Marriage limits the parties obligations to those in the “Final Judgment of Dissolution of Marriage or under any instrument or document executed *pursuant to this* Final Judgment of Dissolution of Marriage.” No mention, in #23, is made to documents created prior to the creation of the Final Judgment of Dissolution of Marriage, only to those pursuant.

The fact that the permanent alimony is court ordered is enough to make *Blanchard* 860 So. 2d inapplicable. There is more that makes it inapplicable. In *Blanchard* 860 So. 2d the 4th DCA mistakenly relied on *State v. Gray*, 48 So. 2d 84, (Fla. 1950). In *Gray* 48 So. 2d candidate Gray was estopped from being granted a writ of mandamus because of an alleged unconstitutional election statute that he felt cost his election to office.

In *Blanchard* 860 So. 2d, as here, it is a court order predicated on an unconstitutional statute which intrudes on a fundamental constitutional right that is at issue.

An agreement entered into by the Radloff’s under mandatory mediation gains its alleged restrictive power only because of its incorporation into a final order of dissolution. On the contrary, the flexibility of the alimony agreement is evidenced by the fact the parties engaged in subsequent litigation over alimony amount. That the court did

modify the original agreement demonstrates that a party is not precluded from having the terms of the agreement altered by the courts. Here the Appellant wishes the court to note that the agreement, entered under court ordered mediation is subject to state constitutional restraints. When a fundamental error involving a constitutional right is at issue the claim may be raised at any stage of the proceedings. *Sanford v Rubin*, 237 So. 2d 134 (Fla. 1970)

Notice of Hearing is Materially Defective and Void

The Appellee is critical of the Appellant for not providing a transcript for this court's review. Because the Appellant raises issues of law not of fact for this court's consideration and the record provided this court indicates the issues were raised with the trial court, a transcript is not of necessity to this court's deliberation.

More importantly, this court must also consider the trial court proceeding and order at issue as void ab initio for failure to comply with Florida Fam. Law R. P. Rule 12.615 (b). Appellee's Notice of Hearing on Motion for Contempt served August 29, 2005 does not comply.

The rule specifically states that a Notice of Hearing for Contempt/Incarceration must contain the following statement. "...This notice must also state whether electronic recording or a court reporter is

provided by the court or whether a court reporter, if desired, must be provided by the party.” (Emphasis added).

“Rule 12.615: In subdivision (b), the sentence requiring the motion to recite the essential facts constituting contempt has been moved to the beginning of the subdivision for emphasis. Also in subdivision (b), a sentence has been added requiring that the notice of hearing state whether electronic recording or a court reporter will be provided by the court or must be provided by a party. This change conforms this rule to *Rule* 12.490(b)(3) and *Form* 12.920(c) (general masters) and *Form* 12.980(c)(1) (injunctions for protection), which require similar notice. A recommendation for a companion amendment to *Form* 12.961 has been forwarded to the Forms Workgroup.” In Re: Amendments To the Florida Family Law Rules of Procedure, Two Year Cycle Report of the Family Law Rules Committee (Florida Bar)

Lacking the prerequisite phrases in the Notice of Hearing voids ab initio the hearing and the resultant orders.

Contempt/Income Deduction/Incarceration Order is Materially Defective and Void

The court orders at issue here (Order Adjudicating Respondent in Willful Civil Contempt and Income Deduction Order of November 7 2005) are void ab initio as they fail to comply with Florida Fam. Law R. P. Rule 12.615 (e). The order lacks the imperative purge amount, present ability to pay, and a recitation of the facts from which the funds for purge are presently available. Rule 12.615 (e),

“(e) Purge. If the court orders incarceration, a coercive fine, or any other coercive sanction for failure to comply with a prior

support order, the court shall set conditions for purge of the contempt, based on the contemnor's present ability to comply. The court shall include in its order a separate affirmative finding that the contemnor has the present ability to comply with the purge and the factual basis for that finding.

See *Bowen v. Bowen*, 471 So. 2d 1274, 1278 (Fla. 1985); *Bresch v. Henderson*, 761 So. 2d 449, 451 (Fla. 2d DCA 2000). Also, *Pompay v. Cochran*, 685 So. 2d 1007, 1013 (Fla. 4th DCA 1997).

Conclusion

Appellee offers no legal arguments to counter those raised by the Appellant to show §61.08 Fla. Stat., permanent alimony statute, impermissibly infringes Art. I § 23 Fla. Const., Right of Privacy, Art. II §3 Fla. Const., Separation of Powers, and conflicts with the public policy established in *Connor* 668 So. 2d.

The Appellant has standing for this appeal.

The Contempt/Incarceration proceeding was void ab initio because the Notice of Hearing failed to comply with Fam. Law R.P. 12.615 (b).

The Order for Contempt/Incarceration/Income Deduction, fees and costs is void ab initio as it fails to comply with Fam. Law R. P. Rule 12.615 (e).

Prayer for Relief

“We are deeply troubled that circuit courts continue to illegally incarcerate people for civil contempt in the face not only of

ample case law, but also a rule which clearly delineates the procedures that should be followed in order to ensure that the due process rights of alleged contemnors are protected. As the Supreme Court noted when issuing a public reprimand to a judge found to have improperly exercised his contempt powers, '[a]lthough the contempt power is an extremely important power for the judiciary, it is also a very awesome power and is one that should *never* be abused.' See In re Inquiry Concerning Perry, 641 So. 2d 366, 368 (Fla. 1994). We therefore once again repeat our admonishment that there are dangers not only to litigants but to trial judges as well when contempt powers are abused. See Conley v. Cannon, 708 So. 2d 306 (Fla. 2d DCA 1998); Blalock v. Rice, 707 So. 2d 738 (Fla. 2d DCA 1997)." *Bresch v Henderson*, 761 So. 2d 449, (Fla. 2nd DCA 2000) [Emphasis added]

Wherefore the Appellant prays this court declare §61.08 Fla. Stat. impermissibly infringes Art. I § 23 Fla. Const., Art. III Fla. Const, conflicts with the ruling and public policy in *Connor* 668 So.2d, and that incarceration (civil contempt power) is an impermissible to enforce alimony payments and arrearages.

Further, that the contempt hearing, and procedure as well as the resultant orders are void ab initio for failure to comply with Fam. Law R. P. Rule 12.615.

Respectfully submitted,

Robert W. Radloff, *pro se* , prepared with assistance of counsel

July 8, 2006

Certificate of Service

I hereby certify that on this 8th day of July, 2006, I caused a true and accurate copy of this Appellant's Reply Brief to be sent by U.S. mail to:

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