

IN THE [NAME]TH CIRCUIT COURT
IN AND FOR [NAME] COUNTY,
FLORIDA
CIVIL DIVISION

CASE NO.

[NAME]

v.

THE [NAME]TH CIRCUIT COURT OF FLORIDA

MEMORANDUM OF LAW

I

**THE CIRCUIT COURT IS THE DEFENDANT IN A CHAPTER 86 CONSTITUTIONAL
CHALLENGE ACTION TO A CHAPTER 61 PROVISION**

A Chapter 86 constitutional challenge of Section 61.08 and Section 61.14 presents an unexpected set of legal anomalies for which we seek guidance. On our way to challenging the impermissible infringement of Section 61.08 and related sections to Article I Section 23 via the avenue of a Chapter 86 motion a series of issues of first impression has been exposed. Who is the proper defendant to a Chapter 86 constitutional challenge of a Section 61.08 and related sections provisions? If the Trial Court (Circuit Court) is the proper defendant and also the adjudicator, then what is the proper remedy to achieve an impartial ruling? If a Canon 3 E (1) (d) (i) Code of Judicial Conduct violation occurs because the Trial Court Judge is a party to the Chapter 86 motion and does not disqualify herself, should the alleged violation be severed and move directly to the Florida Supreme Court because it has sole jurisdiction, or should the alleged violation travel with the primary appeal of the constitutional challenge? Does the Code of Judicial Conduct apply to the Circuit Court State official broadly or to a specific judge?

It is the position of the State as expressed in a Memorandum of Law by the Florida Attorney General that the proper defendant to a constitutional challenge is the State official designated to enforce the statute. (Memorandum of Law of the Attorney General on behalf of John Bush Governor et al, Defendants in Jerry Bainbridge, et al v. John Bush, et al, Case No. 99-2681-CIV-T-25E U.S. District Court, Middle District, Tampa, Florida, February 2000).

The Attorney General cites, and we rely upon the authority of Walker v. President of the Senate, 658 So. 2d 1200, 1200 (Fla. 5th DCA 1995) "*it is the state official designated to enforce (it) who is the proper defendant, even when that party has made no attempt to enforce (it).*"; American Civil Liberties Union v. The Florida Bar, 999 F. 2d 1486, 1491 (11th Cir. 1993) "*Under the Supreme Court precedent, when a plaintiff challenges the constitutionality of a rule of law, it is the state official designated to enforce that rule who is the proper defendant, even when that party has made no attempt to enforce the rule.*[Citing] Diamond v. Charles, 476 U.S. 54, 64, 106 S. Ct. 1697, 1704, 90 I.Ed. 2d 48 (1986)."

The State, through the legislature, has empowered the Circuit Court in a Dissolution of Marriage proceeding as the state official designated to enforce the provisions of Chapter 61 at issue here, i.e. Section 61.08 and its related Sections, 61.011, § 61.031, § 61.043, § 61.071, § 61.08, § 61.09, § 61.10, § 61.12, § 61.1301, § 61.13015, § 61.13016, § 61.14, § 61.17, § 61.18, § 61.181, § 61.1824.

The statutes indicating the Circuit Court as State enforcing agent of permanent alimony are:

“**Section 61.14** *Enforcement* and modification of support, maintenance, or alimony agreements or orders...

(2)... No court has jurisdiction to entertain any action *to enforce* the recovery of separate support, maintenance, or alimony other than as herein provided.

“**Section 61.16 (1)**...In those cases in which an action is brought for *enforcement* and the court finds”

“**Section 61.17** Alimony and child support; additional method for *enforcing* orders and judgments; costs, expenses.--

(1) An order or judgment for the payment of alimony or child support or either entered by any court of this state may be *enforced* by another chancery court in this state in the following manner:

(a) The person to whom such alimony or child support is payable or for whose benefit it is payable may procure a certified copy of the order or judgment and file it with a complaint for *enforcement in the circuit court* for the county in which the person resides or in the county where the person charged with the payment of the alimony or child support resides or is found.

“**Section 61.18** Alimony and child support; default in undertaking of bond posted to ensure payment.—

(3) If the principal or sureties or sheriff or clerk fails to pay within the time and as required by the order, the court may *enforce* the payment by contempt...”

As further support for our position we offer the Position of the Florida Bar Family Law

Section August 16, 2002,

“3. Opposes legislation that would seek to remove from the courts in any way the establishment, modification or enforcement of family support, and/or that would seek to place consideration, effectuation or adjudication of these issues under the jurisdiction of the Department of Revenue or any other governmental or administrative body.”

The Attorney General in the same Memorandum of Law above has excluded the Governor, and the Director of the Department of Revenue as defendants.

We rely on Fl. Dept. of Education v. Glasser, 622 So. 2d 944 (Fla. 1993) for the premise, by analogy, that the Clerk of Court is not a proper defendant. (a tax collector was not a proper defendant to a Chapter 86 declaratory judgment proceeding because the tax collector had no antagonistic interest against the plaintiff.)

Further we wish to stress that our pleadings to this court that [Spouse’s Name] is not a defendant to any of the proceedings related to this Chapter 86 Declaratory Judgment Action. At

all times [Spouse's Name] has been merely an interested party. Under Section 86.091 she is merely an interested party not an obligatory party to the proceeding.

II.

DISQUALIFICATION AND CERTIFICATION

Canon 3 E (1) (d) (i) Code of Judicial Conduct states,

“Canon3: A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently

E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;”

We argue the reality the Judge of the Circuit Court is in fact the state official charged with enforcing Chapter 61.08 provisions. In essence the Judge is the Circuit Court just as the Director of the Department of Revenue is the Department of Revenue. Each is given authority by the State to affect the functions of the state entity which they represent.

We also argue the rule of necessity to override the rule of disqualification is inapplicable. All judges suffer the same infirmity as defendants, i.e. parties, to this Chapter 86 constitutional challenge of a statute they are the state official legislatively empowered to enforce.

The only remedy is certification to the District Court. The District Court would suffer the same infirmity as they are charged to preserve state statutes if possible. Because of this conflict the Circuit Court, as a party to this action, must suggest, pursuant to Rules of Appellate

Procedure 9.125, the District Court of Appeals immediately certify the question to the Florida Supreme Court.

This Court may in the alternative certify this question to the Florida Supreme Court as the adjudicative body authorized with oversight to address alleged violations of the Code of Judicial Conduct.

IT IS HEREBY CERTIFIED that a copy of this memorandum has been mailed to interested parties [SPOUSE'S NAME] and Assistant Attorney General, this ___ Day of _____, 2003.

Respectfully submitted,

alimonyreform@hotmail.com

Counsel for [NAME] as Cooperating Attorney for the Alliance For Freedom From Alimony, Inc.