

IN THE CIRCUIT COURT
OF THE [NUMBER] JUDICIAL CIRCUIT
IN AND FOR COUNTY
FLORIDA
CIVIL DIVISION

CASE NO. 2003

[NAME],

v.

THE [NUMBER] CIRCUIT COURT OF FLORIDA

PLAINTIFF'S RESPONSE TO MOTION TO DISMISS

Introduction

This action was pled as, and is, a Chapter 86 Declaratory Judgment action.

The declaratory judgment statute and its relevant case law are the law to be applied. The Court should not be confused by the State's good faith substitution of civil action law for declaratory judgment law nor it's mixing an argument for dismissal with an argument on the merits. The State weaves these two arguments together into one fabric. We will distinguish one from the other.

I. Summary of the State's Dismissal Argument

1. The State of Florida, Office of Attorney General, on behalf of the Defendant, argues its motion to dismiss based upon
 - a. the Plaintiff's failure to state a cause of action,
 - b. state a cause of action for injunctive relief,
 - i. sought similar relief in the family court

- ii. Plaintiff should use venue of family law modification and appeal
- iii. declaratory judgment proceedings are discretionary
- c. state a cause of action for declaratory relief,
- d. the [NUMBER] Judicial Circuit Court is an improper party,
- e. for failure to join indispensable parties, and,
- f. alimony is not a fundamental right guaranteed in the Constitution.

The State of Florida fails to frame its motion to dismiss in the context of Florida Statutes Chapter 86 Declaratory Judgment law.

II The Declaratory Judgment Statute is to be Liberally Construed

We repeat our Pleadings calling attention to the statutory elements and the Supreme Court case stating the Declaratory Judgment statute must be liberally construed., “1. Florida Statutes Chapter 86 provisions are to be liberally construed (Florida Statutes § 86.101); *Olive v. Maas*, 811 So. 2d 644 (Fla. 2002).”

“Liberally construed” must be this Court’s standard in determining its conclusion in this motion to dismiss.

III Causes of Action

a. the Plaintiff’s failure to state a cause of action and

c. failure to state a cause of action for declaratory relief,

The Defendant’s a. and c. dismissal reasons are identical. Because the claim is filed as a Chapter 86 Declaratory Judgment claim a. and c. meld together.

The only question this Court needs to decide to affirm a valid cause of action (and cause of action for Declaratory Judgment) in this Chapter 86 Declaratory Judgment action and for the

Plaintiff to survive a motion to dismiss is, “Does the Plaintiff have standing pursuant to §86.021?”

Rephrased, the question is... “Is the plaintiff a, ‘...person... whose rights, status, or other equitable or legal relations are affected by a statute...’ ”?

The Plaintiff has pled, and the State in its motion acknowledged, the Plaintiff is currently subject to the adverse provisions of the statute for which he requests a declaratory judgment, i.e. § 61.08 (Alimony statute).¹

The Plaintiff has pled that § 61.08 has impermissibly infringed his fundamental constitutionally guaranteed right to privacy, basic right to pursuit of happiness and property rights.²

The Plaintiff, in his declaratory judgment pleadings, asks this court to rule on the constitutionality of the challenged statute.

In the Pleadings the Plaintiff states he believes the statute unconstitutionally infringes his Florida Constitution Article I Section 2 and Article I Section 23 rights. Further, he pleads, that §61.08 violates his right to equal protection compared with similar single men and former married spouses upon whom alimony was not levied by the State. The pleadings provide ample notice to the State defendant what statute is constitutionally challenged and which constitutional provisions the statute conflicts.³

The Pleadings notice the State defendant how §61.08, factually and legally, has

¹ Pleadings 3, 19, 23, 25, 26, 27.

² Pleadings 28,29,31,32,33,34,35.

³ Pleadings 6, 7, 9, 10, 32, 33, 34, 36, 37, 38.

adversely effected the Plaintiff and his constitutionally guaranteed fundamental rights.⁴

Because the Plaintiff has had an order of Final Judgment of Dissolution entered against him stripping him of his liberty interests in privacy rights, basic rights and property rights under threat of contempt and imprisonment it is evident the Plaintiff is not asking for an advisory opinion from this court.

May v. Holley criteria

The Plaintiff, contrary to the State's assertion, fully complies with May v. Holley, 59 So. 2d 636, 636 (Fla. 1952) criteria as listed here,

a. “bona fide, actual, present practical need for the declaration” The Plaintiff's property right (income, assets) are being taken by the State. The Plaintiff is in imminent threat of imprisonment. The Plaintiff's fundamental privacy rights, fundamental basic rights, and liberty interest of freedom from incarceration are being violated by the State enforcing § 61.08 provisions. Not only are the Plaintiff's privacy rights and his money being striped by the State the State is attempting to put him in jail by enforcing § 61.08 against him.

b. “deal with a present ascertained state of facts” The State, in its motion to dismiss, has even acknowledged the plaintiff is subject to §61.08 and its enforcement. Further, the State has reinstated proceeding against the plaintiff for contempt and imprisonment based on § 61.08.

c. “that some...right of the complaining party is dependent upon...the law applicable...” We would repeat our statements in a. and b. here.

d. “ ... there is a person who...may have an actual adverse interest in the subject matter...in law.” The State official designated with enforcing § 61.08 is adverse to the plaintiff. That party is the State official representing this [NUMBER] Judicial Circuit Court, i.e. the Chief

⁴ Pleadings 20, 21, 22, 23, 24, 25, 26, 27, 31. 4

Judge of the Circuit Court (The Honorable James Fine). The Circuit Court is threatening imprisonment of the Plaintiff.

e. "...before the court by proper process" The action is filed under Chapter 86 Declaratory Judgment statute and is properly filed with all elements necessary pled. The Defendant and all interested parties were properly noticed.

f. "relief sought is not merely the giving of legal advice." The Plaintiff is pleading not to be imprisoned, not to have his property taken from him, to allow him the opportunity to pursue happiness free of State imposed oppressive obligations, and to receive equal protection as other similarly single or divorced Floridians. All these liberties have been imperiled by the Circuit Court because he was once married. He asks no advice.

The Plaintiff and his pleadings fulfill all the criteria of May for declaratory relief. By fulfilling the May criteria for declaratory relief the Plaintiff also meets the burden for a cause of action and a cause of action for declaratory judgment.

Basic Grounds for Declaratory Judgment

The complaint contains the grounds the Declaratory Judgment.⁵ The plaintiff pled he is currently effected, to the degree of order to be jailed, because of the Circuit Court's enforcement of § 61.08 against him.⁶ He further pled § 61.08 violated the Right to privacy, Article I Section 23 to be free of government interference when he was compelled to appear as a defendant in a dissolution of marriage proceeding filed against him; the statute violates his fundamental rights as violating his right to equal protection afforded other spouses in a dissolution of marriage

⁵ Pleadings 19, 20, 21, 22, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41.

⁶ Pleading 26, 27, 29.

action; and the statute fails for vagueness.⁷ The vagueness is acknowledged in the Florida Supreme Court’s Gender Bias Study Commission Report .

b. failure to state a cause of action for Injunctive Relief

In determining whether to grant a preliminary injunction, courts traditionally consider four factors: (a) the likelihood of irreparable harm and the unavailability of an adequate remedy at law, (b) the substantial likelihood of success on the merits, (c) that the threatened injury to petitioner outweighs any possible harm to the respondent and, (d) that the granting of a preliminary injunction is not contrary to the public interest. *Department of Business Regulation v. Prevende, Inc.*, 399 So. 2d 1038, 1041 (Fla. 3d DCA 1081); see *Oxford International Bank and Trust, Ltd. V. Merrill Lynch, Pierce, Fenner, & Smith, Inc.* 374 So. 2d 54 (Fla. 3d DCA 1079), cert. Dismissed, 383 So. 2d 1199 (Fla. 1080); *State Department of Health and Rehabilitative Services v. Artis*, 345 So. 2d 1109 (Fla. 4th DCA 1977).

(a) the likelihood of irreparable harm and the unavailability of an adequate remedy at law...

The Plaintiff has pled his money will be taken and he could go to jail both of which represent irreparable harm—imminently! There is no remedy at law to prevent his money and property from being taken. The only way , today , that he can stay out of jail is to “buy” his way out by paying to the State his monies and assets which it will then distribute to another Floridian.

(b) the substantial likelihood of success on the merits...

i. attachment of Privacy Amendment to the “Dissolution of Marriage Statute”

The legal argument is frighteningly simple under *North Florida Women’s Health and Consuling Services Inc. et al, v. State of Florida*, No. SC01-843 (Fla. July 2003).

⁷ Pleadings 33, 34, 36, 37, 38,

When the privacy amendment attaches to a statute it is presumed unconstitutional unless the State proves a compelling State interest applied in the least intrusive manner and in fact the State interest is furthered by the statute.⁸

The Privacy Amendment attaches via the title of the statute, i.e. “Dissolution of Marriage” and the constitutionally recognized privacy protected zone of “personal decision relating to marriage.”

“Personal decisions relating to marriage” are judicially recognized as within the Privacy Protected Zone of the Privacy Amendment. See *Carey v. Population Serv. Int’l.*, 431 U.S. 678, 684-685 (1977),

“...it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage...”

Loving v. Virginia, 388 U.S. 1, 12, 87 S.Ct. 1817 (1967); *Zablocki v. Redhail*, 434 US 374 (1978)and; *Planned Parenthood v. Casey*, 505 U.S. 833, 859 (1992) all place marriage and personal decisions relating to marriage in the privacy protected zone of the Right to Privacy.

Getting married, staying married and dissolving a marriage are all well recognized fundamental constitutionally guaranteed rights in the protected zone of “personal decisions relating to marriage.”

The State itself has acknowledged the nexis linking principle between the title of the challenged statute and its constitutional invalidity. To support this link it cites applicable state law in its Brief of the Attorney General in *Butler v Harris, Butterworth*. No. SC00-2403 Florida Supreme Court,⁹

⁸ The State has never successfully carried this burden. *North Fl. Women’s Health*.

⁹ <http://www.flcourts.org/pubinfo/election/00-2403ansButterworth.pdf>

“[T]he vice of constitutional invalidity must inhere in the very terms of the title or body of the act. If this cannot be made to appear from argument deduced from its terms or from matters of which the court can take judicial knowledge, we will not go beyond the face of the act to seek grounds for holding it invalid. *Crandon v. Hazlett*, 157 Fla. 574, 26 So.2d 638, 643 (1946), quoting *State v. Armstrong*, 127 Fla. 170, 172 So. 861, 862 (1937) (Terrell, J).”

ii. compelling state interest applied least intrusively..statute furthers the interest.

The state has not yet offered a compelling state interest. Since this burden belongs to the State and the State has never successfully borne this burden in a constitutional challenge to a Statute predicated on the Privacy Amendment the likelihood of success must be placed with the Plaintiff.

For these above reasons there is substantial likelihood the Plaintiff will prevail.

(c) that the threatened injury to petitioner outweighs any possible harm to the respondent...

No possible harm can come to the Defendant.

(d) that the granting of a preliminary injunction is not contrary to the public interest...

Public policy demands Floridians constitutionally guaranteed fundamental rights not be infringed. On the contrary, the State taking the property of and threatening to imprison Floridians for not giving up their property represents the most egregious of violations of public policy.

Injunctive Relief Argument on the Merits

We respond to the State’s argument on the merits of granting injunctive relief but only with the caveat that this argument is not related or dispositive of the “motion to dismiss.” The two are separate issues, i.e. motion to dismiss relates to the four corners of the complaint and adequacy of pleadings. That and is separate from the argument whether injunctive relief should

be granted based on the merits.

i. sought similar relief in the family court

The State argues for dismissal because the plaintiff sought similar relief in a different venue with appeal. No court has written an analytic opinion evidencing the issue was considered, therefore the Plaintiff is entitled to make the argument. The issue, a constitution challenge, was previously raised in a Chapter 61 proceeding. Here it is raised in a Chapter 86 action. Further, the argument is made in a separate proceeding and with a different party to the action. See *Florida Department of Transportation v. Juliano*, 801 So. 2d 101 (Fla. 2001). The matter is neither res judicata nor law of the case.

ii. Plaintiff should use venue of family law modification and appeal

(a) Chapter 86 provisions...

The Plaintiff is statutorily entitled to declaratory relief under Chapter 86 even if another remedy is available to him.

“§ 86.111 Existence of another adequate remedy; effect.--The existence of another adequate remedy does not preclude a judgment for declaratory relief.”

The plaintiff need not pursue other avenues for declaratory relief other than a Chapter 86 action even if they are available. In this instance, for this plaintiff, alternative venues or remedies are not practically available. There is a well founded fear that the plaintiff cannot achieve an unbiased opinion, let alone a strict scrutiny analysis, in family court because of the Florida Supreme Court’s acknowledgment that gender bias exists in the Florida legal system, particularly, the family division. There are further family court defects which question the integrity of a judicial response to a constitutional challenge in the family law forum.

(b) family Court deficiency...standard of review and bias.

The Plaintiff has a good faith, well founded fear that he cannot receive strict scrutiny analysis or even equity in the family court proceedings. Further, the judicial standard for ruling on Chapter 61 provisions in the family division is equity. Constitutionally guaranteed fundamental rights cannot be adjudicated under a standard of equity. See North Florida Women's Health IV. A. at page 23.¹⁰

The Plaintiff's fear is further founded in the Gender Bias Report of the Florida Supreme Court 1990 and the follow up report of 1996.

Because the Florida Supreme Court has acknowledged gender bias in family court proceedings it is appropriate this action be filed, formal hearing be granted and an analytic opinion be provided by this Circuit Court on the impermissible infringement of the Dissolution of Marriage statute, alimony (§61.08), on Article I Section 23 and Section 2 as well as Article VIII Florida Constitution equal protection clause.

(c) another family court deficiency...

The unavailability of another remedy at law is evident in The Gender Bias Study Commission Report statement,

“Dislike of family law may lead to being uninformed and insensitive about family law. Sixty-eight percent of family law attorneys responding to a Bench-Bar Survey opined that judges were uninformed, insensitive or both when presiding over family law matters; and more than seventy-five percent of the family law attorneys agreed that courts have preconceived notions about family law matters and really do not want to see the “total picture”:

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.”

¹⁰ Equity is not one of the listed standards of scrutiny to be applied when a statute's validity is constitutionally challenge.

iii. Declaratory relief is discretionary with this Court.

We agree the declaratory judgment statute (Chapter 86) grants this Court discretion whether or not to grant review and relief.

We encourage the court to review this action and provide a written analytic opinion. To date no Florida State Court has offered an analysis of whether the Dissolution of Marriage Statute (Chapter 61), here particularly § 61.08 the alimony provision, impermissibly infringes the Florida Constitution Article I Section 23. Right of Privacy.

When the State is denying its citizens fundamental constitutional rights including loss of personal liberty (jail) and stripping of property rights the Court should feel a duty to analyze and offer a written opinion as the validity of a Statute that imposes such harsh remedies. Floridians are entitled to no less.

The State judiciary should feel a duty to Floridians to render an analytic opinion on such a fundamental right as the Right to Privacy. The timeliness of reviewing statutes for their compatibility with the Right to Privacy is paramount as evidenced by *Lawrence v. Texas*, No. 02-102 US June 2003 and *North Florida Women's Health*.

Lawrence, federally, and *North Fl. Women's Health*, in Florida, are sentinel Right to Privacy decisions formulated this summer. *Lawrence* effectively invalidated all state statutes prohibiting sodomy and reversed *Bowers v Hardwick*, 478 US 186 (1986) based on the primacy of Liberty interests protected by the constitutional Right to Privacy. In Florida, *North Florida Women's* invalidated the statute mandating parental notification of a minor's abortion plans based on the primacy of the Liberty interests protected by the State Constitution Right to Privacy.

Further, the plaintiff has the option to seek review of this question in Federal Court but believes the proper course is to offer the State Court system the opportunity to analyze the issue, recognize the unconstitutional nature of the Dissolution of Marriage statute (alimony), eliminate the stigma associated with enforcement of the statute and render an opinion for its own citizens—all Floridians!

The Florida's Courts should be the first to protect and preserve the constitutionally guaranteed fundamental rights of Floridians.

IV. The [NUMBER] Judicial Circuit Court is the Proper Defendant

(a) Position of the Attorney General

We adopt the reasoning and the law offered by the State in other writings to verify the Circuit Court is the proper defendant.

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).”¹¹

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 the State agent designated to enforce Chapter 61 provisions 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...”

¹¹ <http://www.wswa.org/public/state/pdfs/fl/StateMTD.PDF>

(b) Position of the Florida Bar Family Law Section

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.)

V. Indispensable parties

The Attorney General is aware that the only indispensable party to a Chapter 86 Declaratory Judgment constitutional challenge to a statute was held to be the Attorney General. See Brief of Petitioners on Jurisdiction to the Florida Supreme Court *Charlie Crist, Attorney General of the State of Florida v. Rep. Corrine Brown, et al.* No. 4d02-2353 & 4d02-2401, January 2003.¹²

The Attorney General was arguing on appeal to the Florida Supreme Court that he is not an indispensable party but has discretion whether to participate in a Chapter 86 constitutional

¹² http://www.flcourts.org/sct/clerk/briefs/2003/1-200/03-23_JurisIni.pdf

challenge to a statute. He cites the 4th DCA opinion *Brown v. Butterworth*, Case Nos. 4D02-2353 & 4D02-2401 (Fla 4th DCA 2002) in which the 4th DCA stated,

“The only truly “indispensable” party to an action attacking the constitutionality of Florida legislation...is the Attorney General.”¹³

The *Brown* ruling is controlling for this action as to who is consider an indispensable party. No one other than the Attorney General is indispensable.

VII Conclusion

The burden to prevail on a motion to dismiss is the State’s. It has not met its burden.

This court must liberally construe this Declaratory judgment action in favor of the Plaintiff based on the declaratory judgment statute and case law.

The Plaintiff has standing. All elements for a Chapter 86 action have been pled. All elements for declaratory relief and injunctive relief have been pled.

The State official designated to enforce the challenged statute is the only indispensable party. The Circuit Court is the state official designated to enforce Chapter 61 provisions.

Immediate temporary injunctive relief for the Respondent is appropriate because all elements have been pled and all elements for granting temporary injunctive relief have been fulfilled.

Liberty interests related to the Right to Privacy are in the forefront of federal and state law.

North Florida Women’s Health outlines the steps necessary to challenge the

¹³ We do agree with the Attorney General that his presence as an indispensable party is discretionary with him.

constitutionality of a statute when it impermissibly infringes the Right to privacy. All steps have been fulfilled.

The Right to Privacy amendment attaches to the statute entitled “Dissolution of Marriage” by the recognized privacy protected zone of “personal decisions relating to marriage.”

WHEREFORE for the above stated reasons this Court must,

1. Deny Defendant’s motion to dismiss,
2. Declare the [NUMBER] Judicial Circuit is the proper party defendant.
3. The Attorney General is the only indispensable party.
4. Grant immediate temporary injunctive relief requested until such time as this declaratory judgment action constitutional challenge is finalized.

Certificate of Service

IT IS HEREBY CERTIFIED that a copy of this pleading has been mailed to , Assistant Attorney General, day of October 2003.

Respectfully submitted,

[NAME], Esq.
Florida Bar Number 00

Counsel for the Plaintiff as Cooperating Counsel for the Center for Liberty and Privacy