

TABLE OF CONTENTS

1

2

3

4 **TABLE OF CONTENTS** ii

5 **TABLE OF AUTHORITIES**..... iiiii

6

7 **INTRODUCTION** 1

8 **RIGHT OF PRIVACY**.....2

9 Divorce is Entitled to the Protections of the Right of Privacy.....2

10 Article I Section I Right of Privacy3

11 Scope of Right of Privacy Includes Families and Right of Association.....4

12 Standard of Review: Strict Scrutiny4

13 Hill 7 Cal.4th Elements.....6

14 (1)A legally protected privacy interest6

15 (2) a reasonable expectation of privacy in the circumstance7

16 (3) conduct by defendant constituting a serious invasion of privacy.....8

17 Compelling State Interest.....9

18

19 **SEPARATION OF POWERS**..... 9

20 Introduction..... 9

21 Article III Section 3, Separation of Powers 11

22 Delegation of Legislative Power to the Judiciary 11

23 Separation of Core functions among Government Branches..... 12

24 Improper Delegation of Legislative Power to the Judiciary 13

25

26 **CONCLUSION**22

27

28 **PRAYER FOR RELIEF**23

29

30 **CERTIFICATE OF SERVICE**.....26

TABLE OF AUTHORITIES

Cases

American Academy of Pediatrics v. Lungren (1997) 16 Cal.4th 307 , 66 Cal.Rptr.2d 210; 940 P.2d 797 passim

Bush v. Schiavo, 885 So.2d 321, (Fla. 2004) 10, 11, 13

Carmel Valley Fire Protection Dist. v. State of California (2001) 25 Cal.4th 287 , 105 Cal.Rptr.2d 636; 20 P.3d 533 12

Chiles v. Children, 589 So. 2d 260 (Fla. 1991) 11

City of Mobile v. Bolden, 466 U.S. 55 (1980)..... 5

Harris v. McRae, 448 U.S. 297 (1980)..... 5

Hill v. National Collegiate Athletic Assn. (1994) 7 Cal.4th 1 , 26 Cal.Rptr.2d 834; 865 P.2d 633) passim

LittleJohn v. Rose, 768 F. 2d 765 (6th Cir. 1985)..... 2

Lockyer v. City & County of San Francisco (2004) 33 Cal.4th 1055 Aug. 12, 2004. 10, 13

Loving v U.S., 517 US 748 (1996)..... 11

Loving v. Virginia, 388 U.S. 1 (1967)..... 2

Marine Forests Soc'y v. Cal. Coastal Comm'n 36 Cal. 4th 1;30 Cal. Rptr. 3d 30;2005 Cal10

Palko v. Connecticut, 302 U.S. 319 (1937) 2, 5

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, (1992)..... ii, 5

Roe v. Wade, 410 U.S. 113 (1973)..... 2, 5

Simms v. State, 641 So. 2d 957 (Fla. 3d DCA 1994)..... 11

1 *Zablocki v. Redhail*, 434 US 374 (1978)..... 2, 3

2 **Statutes and Constitutional Provisions**

3 Article I, section 1 California Constitution..... 3

4 Article III section 3 California Constitution passim

5 FAMILY.CODE SECTION 2550-2556 19

6 FAMILY.CODE SECTION 2600-2604 20

7 FAMILY.CODE SECTION 2610 21

8 FAMILY.CODE SECTION 4320-4325 17

9 FAMILY.CODE SECTION 4330-4339 14

10 FAMILY.CODE SECTION 4935 18

11 **Other Authorities**

12 O.W. Holmes. The Path of the Law. 10 Harvard Law Review 457 (1897)..... 23

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1 **INTRODUCTION**

2
3 *“The question before us is not whether, as a matter of policy, the challenged*
4 *statute is wise or beneficial, but instead whether it is constitutional. We determine*
5 *the validity of the legislative measure by applying the relevant legal principles*
6 *embodied in the California Constitution, the preeminent expression of California*
7 *law enacted by the people.” American Academy of Pediatrics v. Lungren (1997)*
8 *16 Cal.4th 307, 66 Cal.Rptr.2d 210; 940 P.2d 797*

9 The statutory provisions in question Ca. Family Code 4300-4360, 2500-2660,
10 postdissolution spousal support and property distribution constitute just one part of a
11 comprehensive statutory scheme governing the conditions the state of California has put on its
12 citizens who chose to alter their liberty interest, associational interest, and state constitutional
13 right of privacy by making the personal decision relating to marriage to terminate their marriage
14 relationship. The statutory provisions can impose the oppressive undue burden of a temporal or
15 permanent alimony and also strip the property rights of married Californians when they chose to
16 exercise a fundamental right to divorce.

17 The California legislature has been on a voyage of minor medical emancipation statutes
18 some of which the judiciary has found unconstitutional as violative of the right of privacy.
19 *American Academy* at 16 Cal.4th 307, 317. On the other hand, the legislature has largely ignored
20 a journey of marital emancipation, instead choosing to forever shackle together parties in a
21 marriage with its alimony provisions. Now the judiciary must recognize the right of privacy,
22 broader than the federal right of privacy, must be applied to emancipate married and divorcing
23 Californians and permit them their chosen path of independence without undue burdens. See
24 *American Academy* 16 Cal 4th at p 326.

25 A statute which compels some Californians to work for the benefit of another simply
because they exercised their fundamental right and liberty interest to enter

1 marriage and then later to exit marriage is a formidable undue burden that impermissibly
2 infringes the state right of privacy.

3 A statute which strips the property rights of Californians and gives those property rights
4 to another Californian because they exercised their fundamental right and liberty interest to enter
5 marriage and then later exit marriage is a formidable undue burden that impermissibly infringes
6 the state right of privacy.

7 Further, the alimony and property distribution statutes impermissibly infringe Article III
8 section 3 California Constitution because the California legislature through the alimony and
9 property distribution statutes improperly gives legislative power to the judiciary.
10

11 **RIGHT OF PRIVACY**

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

14 “These decisions make it clear that only personal rights that can be deemed
15 ‘fundamental’ or ‘implicit in the concept of ordered liberty,’ *Palko v. Connecticut*,
16 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They
17 also make it clear that the right has some extension to activities relating to
18 marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967)...” *Roe v. Wade*, 410 U.S.
113, 151 (1973)

19 **Divorce is Entitled to the Protections of the Right of Privacy**

20 Divorce is entitled to the protections of the fundamental Right of Privacy. As such, any
21 provisions of divorce statutes, here alimony and stripping of property rights are entitled to that
22 same protection.
23
24
25

1 See *LittleJohn v. Rose*, 768 F. 2d 765, 768 (6th Cir. 1985) citing (*Zablocki v. Redhail*, 434
2 US 374 (1978)) for the rule that divorce falls within the umbrella of the right of privacy,

3 "Decisions of the Supreme Court have firmly established that "matters relating to
4 marriage [and] family relationships" involve privacy rights that are
5 constitutionally protected against unwarranted governmental interference. E.g.,
6 *Roe v. Wade*, 410 U.S. 113, 152-53, 35 L. Ed. 2d 147, 93 S. Ct. 705 (1973). The
7 Court has "routinely categorized [these matters] as among the personal decisions
8 protected by the right to privacy [and, in addition] has long recognized that
9 freedom of personal choice in matters of marriage and family life is one of the
10 liberties protected by the Due Process Clause of the Fourteenth Amendment."
11 *Zablocki v. Redhail*, 434 U.S. 374...

12 The Supreme Court has established broad protection for matters relating to the
13 marital relationship including the availability of due process in seeking
14 adjustments to the marital relationship. *Boddie v. Connecticut*, 401 U.S. 371, 28
15 L. Ed. 2d 113, 91 S. Ct.780 (1971). Given the "associational interests that
16 surround the establishment and dissolution of [the marital] relationship", such
17 "adjustments" as divorce and separation are naturally included within the
18 umbrella of protection accorded to the right of privacy. See *Zablocki*, 434 U.S. at
19 385; *U.S. v. Kras*, 409 U.S. 434, 444, 34 L. Ed. 2d 626, 93 S. Ct. 631 (1975)."

20 **Article I Section I Right of Privacy**

21 Article I, section 1 California Constitution provides: "All people are by nature free and
22 independent and have inalienable rights. Among these are enjoying and defending life and
23 liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety,
24 happiness, *and privacy*." (Italics added.)

25 The phrase "and privacy" was added to California Constitution, Article I, section 1 by an
initiative adopted by the voters on November 7, 1972 (the Privacy Initiative or Amendment).

Article I, section 1 California Constitution is an enumeration of the "inalienable rights" of all
Californians. "Privacy" is declared to be among those rights. *Hill v. National Collegiate Athletic
Assn.* (1994) 7 Cal.4th 1, 26 Cal.Rptr.2d 834; 865

1 P.2d 633)

2 *American Academy* 16 Cal 4th at p. 326,

3 “The California Constitution... contains in article I, section 1, an explicit
4 guarantee of the right of ‘privacy.’”

5 “Finally, and most significantly, not only is the state constitutional right of
6 privacy embodied in explicit constitutional language not present in the federal
7 Constitution, but past California cases establish that, in many contexts, the scope
8 and application of the state constitutional right of privacy is *broader* and *more*
9 *protective of privacy* than the federal constitutional right of privacy as interpreted
10 by the federal courts.” [Emphasis added]

9 **Scope of Right of Privacy Includes Families and Right of Association**

10 Part of the controlling law on Article I section 1 California Constitution is now *Hill v.*
11 *NCAA*, 865 P.2d 633, 657 (Cal. 1994). Even though it is a case of private invasion of the right of
12 privacy in the information disclosure context (drug testing) it sets out the guidelines for a minimal
13 threshold requirement of a plaintiff to overcome prior to application of a strict scrutiny standard
14 review if the challenged statute infringes a fundamental right or liberty interest.
15

16 *Hill* 7 Cal.4th at p. 20 offers guidance as to the scope of the California right of privacy as
17 including families and a freedom to associate with the people Californians choose.

18
19 “The text of the Privacy Initiative does not define ‘privacy.’ The Ballot Argument
20 in favor includes broad references to a ‘right to be left alone,’ calling it a
21 ‘fundamental and compelling interest,’ and purporting to include within its
22 dimensions *no less than* ‘our homes, *our families*, our thoughts, our emotions, our
23 expressions, our personalities, our freedom of communion, and *our freedom to*
24 *associate with the people we choose.*” [Emphasis added]

22 **Standard of Review: Strict Scrutiny**

23 *American Academy* 16 Cal.4th at p.342,
24
25

1 “We conclude that, under the California constitutional privacy clause, a statute
2 that impinges upon the fundamental autonomy privacy right of either a minor or
an adult must be evaluated under the demanding ‘compelling interest’ test.”

3 United States Supreme Court,

4 “It is well settled that . . . if a law ‘impinges upon a fundamental right explicitly or
5 implicitly secured by the Constitution [it] is presumptively unconstitutional.’”
6 *Harris v. McRae*, 448 U.S. 297, 312 (1980) (quoting *City of Mobile v. Bolden*, 466
U.S. 55, 76 (1980))

7 “These decisions make it clear that only personal rights that can be deemed
8 ‘fundamental’ or ‘implicit in the concept of ordered liberty,’ *Palko v. Connecticut*,
302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy. They
9 also make it clear that the right has some extension to activities relating to
10 marriage, *Loving v. Virginia*, 388 U.S. 1, 12 (1967)...” *Roe v. Wade*, 410 U.S.
113, 151 (1973)

11 “It is a promise of the Constitution that there is a realm of personal liberty which
12 the government may not enter. We have vindicated this principle before. Marriage
13 is mentioned nowhere in the Bill of Rights... but the Court was no doubt correct
14 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).” *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833,
847 (1992)

15
16 *American Academy* 16 Cal.4th at p. 329 sets a strict scrutiny standard of review
for the review of a statute that infringe a fundamental right or liberty interest,

17
18 “Where the case involves an obvious invasion of an interest fundamental to
19 personal autonomy, e.g., freedom from involuntary sterilization or the freedom to
pursue consensual familial relationships, a ‘compelling interest’ must be present to
overcome the vital privacy interest.”

20 *Hill* at 7 Cal.4th at pp. 33, 34,

21 “Where the case involves an obvious invasion of an interest fundamental to
22 personal autonomy, e.g., freedom from involuntary sterilization or the freedom to
23 pursue consensual familial relationships, a ‘compelling interest’ must be present
24 to overcome the vital privacy interest.”
25

1 The statutory provisions challenged here intrude upon an interest fundamental to personal
2 autonomy, i.e. adjusting the associational relationship to others by exercising the right to alter
3 their marriage relationship, i.e. to terminate it. "...the statute at issue in the case now before us
4 intrudes upon just such 'an interest fundamental to personal autonomy,' and we conclude that the
5 statute thus is subject to scrutiny under the 'compelling interest' test. *American Academy* 16
6 Cal.4th at p. 330.

8 "When an enactment intrudes upon a constitutional right, however, greater judicial
9 scrutiny is required. (See, e.g., *Spiritual Psychic Science Church v. City of Azusa*
10 (1985) 39 Cal.3d 501, 514 [217 Cal.Rptr. 225, 703 P.2d 1119] ["[T]he ordinary
11 deference a court owes to any legislative action vanishes when constitutionally
12 protected rights are threatened"

13 *American Academy* 17 Cal.4th, then uses the lower standard of review in *Hill* 7 Cal.4th and
14 concludes, as this court here must conclude that the intrusion of the alimony and the property
15 stripping rights of the property distribution provisions create a significant undue burden
16 infringement so as to overcome the threshold three elements of *Hill* 7 Cal.4th.

17 No deference need be given to the legislature if a statute affects a fundamental constitutional
18 right it is presumptively unconstitutional. See *American Academy* 16 Cal.4th at p. 413.

19 **Hill 7 Cal.4th Elements**

20 "The proper focus of constitutional inquiry is the group for whom the law is a restriction, not
21 the group for whom the law is irrelevant." *American Academy* 16 Cal.4th at p. 345.

22 **(1) A legally protected privacy interest**

23 The legally protected interest is the second discussed in *Hill* 7 Cal.4th and
24
25

1 expressed in *American Academy* 16 Cal.4th , “(2) interests in making intimate personal decisions
2 or conducting personal activities without observation, intrusion, or interference ('autonomy
3 privacy')." The divorce statute which adjusts the marital status of Californians contains the alimony
4 and property distribution provisions which fit within this legally protected privacy interest.

5 The earlier discussion in the memorandum note the repeated caselaw placing personal
6 decisions relating to marriage, i.e. adjustments to the associational interest of Californians who
7 choose to exercise their liberty interest to terminate their marriage—divorce. Divorce itself is
8 judicially recognized as squarely within the umbra of the right of privacy. Above United States
9 Court rulings including personal decisions relating to marriage as well as *Littlejohn* at 768 F. 2d
10 765 explicitly state that personal decisions relating to marriage, particularly divorce, are entitled
11 to the protections of the right to privacy. This first *Hill* element is readily fulfilled.

12
13 **(2) a reasonable expectation of privacy in the circumstance**

14 “It is no longer necessary to determine at the outset whether a reasonable expectation of
15 privacy exists in the circumstances. (*Hill*, supra, 7 Cal.4th at p. 40.)” *American Academy* 16 Cal.4th
16 at p.418.

17
18 This criterium was reviewed as a matter of law and fact in the non government
19 application of the right of privacy between Californians. The test is inapplicable here where the
20 constitutionality of a statutory provision is at issue. Regardless, can there be any doubt that a
21 Californian has an expectation of privacy in his economic assets, income, debts, liabilities,
22 psychological intimacies, work, education, and other family matters as CA. FAMILY CODE
23 4300-4360, 2500-2660 mandates to be disclosed and
24
25

1 adjudicated by the state through the judiciary? The existence of a "reasonable expectation of
2 privacy" turns on "broadly based and widely accepted community norms" *Hill* 7 Cal.4th at p. 37.

3 The alimony provisions mandate that Californians must lay themselves bare before the state
4 in every context and personal dimension except the physical.

5
6 **(3) conduct by defendant constituting a serious invasion of privacy**

7 “As explained in the lead opinion in the recent decision in *Loder*, the application of this
8 element in *Hill* demonstrates ‘that this element is intended simply to screen out intrusions on
9 privacy that are de minimis or insignificant.’ (*Loder*, supra, 14 Cal.4th 846, 895, fn. 22 (lead opn.
10 by George, C. J).” *American Academy* 16 Cal.4th.

11
12 Again *Hill* at 7 Cal.4th describes this as a matter of law and fact analysis that is not
13 applicable here. Even so, can there be any doubt about the oppressive nature and cataclysmic
14 undue burden cast on Californians by the yoke of lifetime or even temporarily limited alimony?
15 Can there be any doubt about the colossal magnitude of the stripping of property right from one
16 Californian and granting them to another Californian simply because they chose to enter
17 marriage and then to exit marriage? Because marriage is a protected liberty interest the travesty
18 of stripping property rights and liberally reassigning them through a statute that grants the
19 judicial almost unfettered discretion to do so strike at the heart of what our forefathers fought for
20 and labored to preserve in our federal and state constitutions. Property rights of the individual
21 are paramount. They are a liberty interest that may only be transgressed by the state legislature
22 for a compelling state interest, minimally applied. That governments must not legislate the
23 stripping of property rights when liberty interests and fundamental privacy
24
25

1 rights protect a zone of personal autonomous decision making is the core of our free society.

2 **Compelling State Interest**

3 “Numerous decisions establish that when a statute impinges upon a constitutional
4 right, legislative findings with regard to the need for, or probable effect of, the
5 statutory provision cannot be considered determinative for constitutional purposes.”
American Academy 17 Cal 4th at p. 349.

6 Whatever the interest offered by the state as a compelling interest it should be evidenced
7 in the wording of the statute and there should be demonstrated legislative consistency of the
8 same interest.

9 If there is a state interest then all divorces, not just contested divorces, would be examine
10 by the judiciary for the “compelling” state interest. The fact that only contested divorces are
11 subject to the challenged provisions de facto establishes that the state interest is not compelling.
12

13 The interest must be minimally applied and the statute must in fact further the sate
14 compelling interest.

15
16 **SEPARATION OF POWERS**

17
18 **Introduction**

19 California Family Law Code 4300 et seq. and 2500 et. Seq. impermissibly infringe
20 Article III section 3 California Constitution, separation of powers because the legislature has
21 improvidently delegated core powers to make law and public policy to the judiciary. The
22 judiciary has assumed that grant of law making power to the detriment of Californians who seek
23 to adjust their associational interests by divorcing.
24
25

1 Most California separation of powers law deals with infringement by the judiciary on the
2 executive branch and its agencies. Marine Forests Soc'y v. Cal. Coastal Comm'n 36 Cal. 4th 1;
3 30 Cal. Rptr. 3d 30; 2005 Cal; Lockyer v. *City & County of San Francisco* (2004) 33 Cal.4th
4 1055 Aug. 12, 2004.

5 The danger sought to be remedied by the separation of powers doctrine is best captured
6 by Daniel Webster (1782-1852), who is widely credited with observing:

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

12 In this case the separation of powers violation occurs between the legislature and the
13 judiciary. The other novel context is that the judiciary is improvidently exercising power, i.e.
14 law making and public policy making that is constitutionally afforded only to the legislature.
15 This exercise of legislative function by the judiciary occurs not because the judiciary usurps
16 legislative authority but because the legislative power is erroneously and improvidently
17 delegated by the legislature to the judiciary though the infirmaments of California Code Family
18 Law sections 4300 et. seq., notably California Code Family Law Section 4320 (n).

19 For judicial precedence for this aspect of infringement on the constitutional separation of
20 powers amendment the court is referred to the Florida Supreme Court reasoning, history, and
21 decision of improper granting by the legislature to another branch of government its exclusive
22 legislative function. In Florida as here in California an overlap of government branches is
23 permissible but the core function of a branch must not be delegated to or transgresses by another
24 branch. See *Bush v. Schiavo*, 885 So.2d 321, (Fla. 2004)

1 **Article III Section 3, Separation of Powers**

2 CALIFORNIA CONSTITUTION
3 ARTICLE 3 STATE OF CALIFORNIA

4 SEC. 3. The powers of state government are legislative, executive, and judicial.
5 Persons charged with the exercise of one power may not exercise either of the
6 others except as permitted by this Constitution.

7 The amendment implicates both contexts of infringement, i.e. arrogation of power and
8 delegation of power. Either conduct results in an alternative branch of government exercising
9 the power of another contrary to Article III section 3 California Constitution.

10 **Delegation of Legislative Power to the Judiciary**

11 The court is referred to the *Bush* 885 So. 2d and other Florida law for analysis of the
12 concept that delegation of legislative power to another branch of government is an improper
13 infringement on the separation of powers.

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

18 To determine whether a given power is exclusive to one branch, one must consider the
19 constitutional text and history, along with the nature of the activity in question. *Simms v. State*,
20 641 So. 2d 957, 961 (Fla. 3d DCA 1994).

21 *Loving v U.S.*, 517 US 748, 758 (1996) "Another strand of our separation-of-powers
22 jurisprudence, the delegation doctrine, has developed to prevent Congress from forsaking its
23 duties."
24

1 *Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 105

2
3 *Cal.Rptr.2d* 636; 20 P.3d 533 at p. 299,

4 "The true distinction ... is between the delegation of power to make the law,
5 which necessarily involves a discretion as to what it shall be, and conferring
6 authority or discretion as to its execution, to be exercised under and in pursuance
7 of the law. The first cannot be done; to the latter no valid objection can be made."
8 ' ' (*Loving v. United States, supra*, 517 U.S. at pp. 758-759 [116 S.Ct. at p. 1744];
9 see also 7 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, §
10 130, p. 186.)”

11 Further evidence of the existence of the delegation of power as a valid legal doctrine
12 infringing separation of powers is found in *Loving* 517 U.S. Scalia concurring at p. 776,

13 “I have one point of definition or conceptualization, which applies to those
14 portions of the opinion that I have joined. While it has become the practice in our
15 opinions to refer to ‘unconstitutional delegations of legislative authority’ versus
16 ‘lawful delegations of legislative authority,’ in fact the latter category does not
17 exist. Legislative power is nondelegable. Congress can no more ‘delegate’ some
18 of its Article I power to the Executive than it could “delegate” some to one of its
19 committees. What Congress does is to assign responsibilities to the Executive;
20 and when the Executive undertakes those assigned responsibilities it acts, not as
21 the ‘delegate’ of Congress, but as the agent of the People. At some point the
22 responsibilities assigned can become so extensive and so unconstrained that
23 Congress has in effect delegated its legislative power; but until that point of
24 excess is reached there exists, not a ‘lawful’ delegation, but no delegation at all.”

25 **Separation of Core Functions among Government Branches**

Absolute separation of governmental branch function is not required, but separation of
core functions, here legislative law making and creation of public policy, are required.

Carmel Valley 25 Cal.4th at p.297,

The separation of powers doctrine limits the authority of one of the three branches
of government to arrogate to itself the core functions of another branch. .. "The
courts have long recognized that [the] primary purpose [of the separation-of-
powers doctrine] is to prevent the combination in the hands of

1 a single person or group of the basic or fundamental powers of government.' " 'To
2 serve this purpose, courts " 'have not hesitated to strike down provisions of law that
3 either accrete to a single Branch powers more appropriately diffused among separate
4 Branches or that undermine the authority and independence of one or another
5 coordinate Branch.' {Internal citations omitted]

6 Infringement of core functions can occur in two fashions. Either a governmental branch
7 accreting a power of another to itself or by a branch delegating its exclusive power in an area of
8 law through a statute to another branch. *Bush* 885 So.2d

9 The core function of the legislature is the creation of statutes, law making and the creation of
10 public policy. The power of the judiciary is to interpret the laws. The power of the executive
11 branch is to enforce the laws.

12 *Lockyer v. City & County of San Francisco* (2004) 33 Cal.4th 1055, 1063 Aug. 12, 2004,

13 "This conclusion is consistent with the classic understanding of the separation of
14 powers doctrine -- that the legislative power is the power to enact statutes, the
15 executive power is the power to execute or enforce statutes, and the judicial
16 power is the power to interpret statutes and to determine their constitutionality."

17 **Improper Delegation of Legislative Power to the Judiciary**

18 Any portion of the Family Law code addressing support or property distribution
19 when a Californian adjusts his marriage by divorcing must not delegate law
20 making power from the legislature to the judiciary. The legislature fails to comply
21 with Article III section 3 California Constitution separation of powers when it
22 gives unbridled or near unbridled discretion to the judiciary to apply divorce
23 support and property distribution statutes. The support and property distribution
24 provisions are infirm because they delegate legislative power in the below
25 highlighted provisions via unbridled discretion to

1 the court on support and property distribution issues.

2 The highlighted areas in the provisions below represent the improper unbridled power
3 delegated to the judiciary to create law and make public policy. The judiciary is not interpreting the
4 law but is making the law when it takes action on any statutory provision that is delegating
5 unbridled or near unbridled discretion to it.

6 **FAMILY.CODE SECTION 4330-4339**

7
8 4330. (a) In a judgment of dissolution of marriage or legal separation of the
9 parties, the court may order a party to pay for the support of the other party an
10 amount, for a period of time, **that the court determines is just and reasonable**,
based on the standard of living established during the marriage, taking into
11 consideration the circumstances as provided in Chapter 2 (commencing with
12 Section 4320).

13 (b) When making an order for spousal support, the court may advise the
14 recipient of support that he or she **should make reasonable efforts** to assist in
15 providing for his or her support needs, **taking into account** the particular
16 circumstances considered by the court pursuant to Section 4320, **unless**, in the
17 case of a marriage of long duration as provided for in Section 4336, **the court**
18 **decides this warning is inadvisable**.

19 4331. (a) In a proceeding for dissolution of marriage or for legal separation of the
20 parties, the court may order a party to submit to an examination by a vocational
21 training counselor. The examination shall include an assessment of the party's
22 ability to obtain employment based upon the party's age, health, education,
23 marketable
24 skills, employment history, and the current availability of employment
25 opportunities. The focus of the examination shall be on an assessment of the
party's ability to obtain employment that would allow the party to maintain herself
or himself at the marital standard of living.

(b) The order may be made only on motion, for good cause, and on notice to the
party to be examined and to all parties. The order shall specify the time, place,
manner, conditions, scope of the examination, and the person or persons by whom
it is to be made.

(c) A party who does not comply with an order under this section is subject to
the same consequences provided for failure to comply with an examination
ordered pursuant to Chapter 15 (commencing with Section 2032.010) of Title 4 of
Part 4 of the Code of Civil Procedure.

(d) "Vocational training counselor" for the purpose of this section means an
individual with sufficient knowledge, skill, experience, training, or education in
interviewing, administering, and interpreting tests for analysis of marketable skills,
formulating career goals, planning courses of training

1 and study, and assessing the job market, to qualify as an expert in vocational
2 training under Section 720 of the Evidence Code.

3 (e) A vocational training counselor shall have at least the following
4 qualifications:

5 (1) A master's degree in the behavioral sciences.

6 (2) Be qualified to administer and interpret inventories for assessing career
7 potential.

8 (3) Demonstrated ability in interviewing clients and assessing marketable skills
9 with understanding of age constraints, physical and
10 mental health, previous education and experience, and time and geographic
11 mobility constraints.

12 (4) Knowledge of current employment conditions, job market, and wages in the
13 indicated geographic area.

14 (5) Knowledge of education and training programs in the area with costs and
15 time plans for these programs.

16 (f) The court **may** order the supporting spouse to pay, in addition to spousal
17 support, the necessary expenses and costs of the counseling, retraining, or
18 education.

19 4332. In a proceeding for dissolution of marriage or for legal separation of the
20 parties, the court shall make specific factual findings with respect to the standard
21 of living during the marriage, and, at the request of either party, the court shall
22 make appropriate factual determinations with respect to other circumstances.

23 4333. An order for spousal support in a proceeding for dissolution of marriage or
24 for legal separation of the parties **may** be made retroactive to the **date of filing**
25 the notice of motion **or** order to show cause, **or to any subsequent date.**

4334. (a) If a court orders spousal support for a contingent period of time, the
obligation of the supporting party terminates on the happening of the contingency.
The court **may**, in the order, **order** the supported party to notify the supporting
party, or the supporting party's attorney of record, of the happening of the
contingency.

(b) If the supported party fails to notify the supporting party, or the attorney of
record of the supporting party, of the happening of the contingency and continues
to accept spousal support payments, the supported party shall refund payments
received that accrued after the happening of the contingency, except that the
overpayments shall first be applied to spousal support payments that are then in
default.

4335. An order for spousal support terminates at the end of the period provided in
the order and shall not be extended unless the court retains jurisdiction in the order
or under Section 4336.

1 4336. (a) Except on written agreement of the parties to the contrary or a court
2 order terminating spousal support, the court retains jurisdiction indefinitely in a
3 proceeding for dissolution of marriage or for legal separation of the parties where
4 the marriage is of long duration.

5 (b) For the purpose of retaining jurisdiction, there is a presumption affecting the
6 burden of producing evidence that a marriage of 10 years or more, from the date
7 of marriage to the date of separation, is a marriage of long duration. **However,**
8 the court **may consider** periods of separation during the marriage in determining
9 whether the marriage is in fact of long duration. **Nothing in this subdivision**
10 **precludes a court from determining that a marriage of less than 10 years is a**
11 **marriage of long duration.**

12 (c) **Nothing in this section limits the court's discretion to terminate** spousal
13 support in later proceedings on a showing of changed circumstances.

14 (d) This section applies to the following:

15 (1) A proceeding filed on or after January 1, 1988.

16 (2) A proceeding pending on January 1, 1988, in which the court has not entered
17 a permanent spousal support order or in which the court order is subject to
18 modification.

19 4337. Except as otherwise agreed by the parties in writing, the obligation of a
20 party under an order for the support of the other party terminates upon the death
21 of either party or the remarriage of the other party.

22 4338. In the enforcement of an order for spousal support, the court shall resort to
23 the property described below in the order indicated:

24 (a) The earnings, income, or accumulations of either spouse, while living
25 separate and apart from the other spouse, which would have been community
property if the spouse had not been living separate and apart from the other
spouse.

(b) The community property.

(c) The quasi-community property.

(d) The other separate property of the party required to make the
support payments.

4339. The court **may order** the supporting party to give reasonable security for
payment of spousal support.

Family Code section 4320 is effectively nullified in its entirety because of the
impermissibly delegated power to make law and public policy in § 4320 (n) that is
the exclusive purview of the legislature. § 4320 (n) is so broad and excessive in
breadth as to

1 be stupefying. “§ 4320 (n) Any other factors the court determines are just and equitable.”

2 **FAMILY.CODE SECTION 4320-4325**

3 4320. In ordering spousal support under this part, the court shall consider all of
4 the following circumstances:

5 (a) The extent to which the earning capacity of each party is sufficient to
6 maintain the standard of living established during the marriage, taking into
7 account all of the following:

8 (1) The marketable skills of the supported party; the job market for those skills;
9 the time and expenses required for the supported party to acquire the appropriate
10 education or training to develop those skills; and the possible need for retraining
11 or education to acquire other, more marketable skills or employment.

12 (2) The extent to which the supported party's present or future earning capacity
13 is impaired by periods of unemployment that were incurred during the marriage to
14 permit the supported party to devote time to domestic duties.

15 (b) The extent to which the supported party contributed to the attainment of an
16 education, training, a career position, or a license by the supporting party.

17 (c) The ability of the supporting party to pay spousal support, taking into
18 account the supporting party's earning capacity, earned and unearned income,
19 assets, and standard of living.

20 (d) The needs of each party based on the standard of living established during
21 the marriage.

22 (e) The obligations and assets, including the separate property, of each party.

23 (f) The duration of the marriage.

24 (g) The ability of the supported party to engage in gainful employment without
25 unduly interfering with the interests of dependent children in the custody of the
party.

(h) The age and health of the parties.

(i) Documented evidence of any history of domestic violence, as defined in
Section 6211, between the parties, including, but not limited to, consideration of
emotional distress resulting from domestic violence perpetrated against the
supported party by the supporting party, and consideration of any history of
violence against the supporting party by the supported party.

(j) The immediate and specific tax consequences to each party.

(k) The balance of the hardships to each party.

(l) The goal that the supported party shall be self-supporting within a reasonable
period of time. Except in the case of a marriage of long duration as described in
Section 4336, a "reasonable period of time" for

1 purposes of this section generally shall be one-half the length of the marriage.
2 However, **nothing in this section is intended to limit the court's discretion to**
3 **order support for a greater or lesser length of time, based on any of the other**
4 **factors listed in this section, Section 4336, and the circumstances of the**
5 **parties.**

6 (m) The criminal conviction of an abusive spouse shall be considered in making
7 a reduction or elimination of a spousal support award in accordance with Section
8 4325.

9 (n) **Any other factors the court determines are just and equitable.**

10 4321. In a judgment of dissolution of marriage or legal separation of the parties,
11 the court **may deny** support to a party out of the separate property of the other
12 party in any of the following circumstances:

13 (a) The party has separate property, or is earning the party's own livelihood, or
14 there is community property or quasi-community property sufficient to give the
15 party proper support.

16 (b) The custody of the children has been awarded to the other party, who is
17 supporting them.

18 4322. In an original or modification proceeding, where there are no children, and
19 a party has or acquires a separate estate, including income from employment,
20 sufficient for the party's proper support, no support shall be ordered or continued
21 against the other party.

22 4323. (a) (1) Except as otherwise agreed to by the parties in writing, there is a
23 rebuttable presumption, affecting the burden of proof, of decreased need for
24 spousal support if the supported party is cohabiting with a person of the opposite
25 sex. Upon a determination that circumstances have changed, the court may
modify or terminate the spousal support as provided for in Chapter 6
(commencing with Section 3650) of Part 1.

(2) Holding oneself out to be the husband or wife of the person with whom one
is cohabiting is not necessary to constitute cohabitation as the term is used in this
subdivision.

(b) The income of a supporting spouse's subsequent spouse or nonmarital
partner shall not be considered when determining or modifying spousal support.

(c) **Nothing in this section precludes later modification or termination of**
spousal support on proof of change of circumstances.

FAMILY.CODE SECTION 4935

4935. (a) If a support order entitled to recognition under this chapter has not been
issued, a responding tribunal of this state **may issue** a support order if either of the
following conditions apply:

(1) The individual seeking the order resides in another state.

- 1 (2) The support enforcement agency seeking the order is located in another state.
2 (b) The tribunal may issue a temporary child support order if any of the
3 following conditions apply:
4 (1) The respondent has signed a verified statement acknowledging parentage.
5 (2) The respondent has been determined by or pursuant to law to be the parent.
6 (3) There is other clear and convincing evidence that the respondent is the
7 child's parent.
8 (c) Upon finding, after notice and opportunity to be heard, that an obligor owes
9 a duty of support, the tribunal shall issue a support order directed to the obligor
10 and may issue other orders pursuant to Section 4919.

7 The property division statutes suffer the same profound infirmity as the support (alimony)
8 statutes because the legislature is delegating unbridled lawmaking and public policy creation
9 power to the judiciary on the entire spectrum of property distribution via Family Code Section
10 2553, "2553. The court may make any orders the court considers necessary to carry out the
11 purposes of this division"

12 **FAMILY.CODE SECTION 2550-2556**

13 2550. Except upon the written agreement of the parties, or on oral stipulation of
14 the parties in open court, or as otherwise provided in this division, in a proceeding
15 for dissolution of marriage or for legal separation of the parties, the court shall,
16 either in its judgment of dissolution of the marriage, in its judgment of legal
17 separation of the parties, or at a later time if it expressly reserves jurisdiction to
18 make such a property division, divide the community estate of the parties equally.

17 2551. For the purposes of division and in confirming or assigning the liabilities
18 of the parties for which the community estate is liable, the court shall characterize
19 liabilities as separate or community and confirm or assign them to the parties in
20 accordance with Part 6 (commencing with Section 2620).

21 2552. (a) For the purpose of division of the community estate upon dissolution of
22 marriage or legal separation of the parties, except as provided in subdivision (b),
23 the court shall value the assets and liabilities as near as practicable to the time of
24 trial.
25

1 (b) Upon 30 days' notice by the moving party to the other party, the court for good
2 cause shown may value all or any portion of the assets and liabilities at a date
3 after separation and before trial to accomplish an equal division of the community
4 estate of the parties in an equitable manner.

4 **2553. The court may make any orders the court considers necessary to carry
out the purposes of this division.**

5 2554. (a) Notwithstanding any other provision of this division, in any case in
6 which the parties do not agree in writing to a voluntary division of the community
7 estate of the parties, the issue of the character, the value, and the division of the
8 community estate may be submitted by the court to arbitration for resolution
9 pursuant to Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3 of
10 the Code of Civil Procedure, if the total value of the community and quasi-
11 community property in controversy in the opinion of the court does not exceed
12 fifty thousand dollars (\$50,000). **The decision of the court regarding the value
of the community and quasi-community property for purposes of this section
is not appealable.**

11 (b) The court may submit the matter to arbitration at any time it believes the
12 parties are unable to agree upon a division of the property.

13 2555. The disposition of the community estate, as provided in this division, is
14 subject to revision on appeal in all particulars, including those which are stated to
15 be in the discretion of the court.

16 2556. In a proceeding for dissolution of marriage, for nullity of marriage, or for
17 legal separation of the parties, the court has continuing jurisdiction to award
18 community estate assets or community estate liabilities to the parties that have not
19 been previously adjudicated by a judgment in the proceeding. A party may file a
20 postjudgment motion or order to show cause in the proceeding in order to obtain
21 adjudication of any community estate asset or liability omitted or not adjudicated
22 by the judgment. In these cases, the court shall equally divide the omitted or
23 unadjudicated community estate asset or liability, **unless the court finds upon
good cause shown that the interests of justice require an unequal division of
the asset or liability.**

21 **FAMILY.CODE SECTION 2600-2604**

22 2600. Notwithstanding Sections 2550 to 2552, inclusive, the court may divide
23 the community estate as provided in this part.

24 2601. Where economic circumstances warrant, the court may award an asset of
25 the community estate to one party on such conditions **as the court**

1 **deems proper** to effect a substantially equal division of the community estate.

2 2602. As an additional award or offset against existing property, the court **may**
3 award, from a party's share, **the amount the court determines** to have been
4 deliberately misappropriated by the party to the exclusion of the interest of the
other party in the community estate.

5 2603. (a) "Community estate personal injury damages" as used in this section
6 means all money or other property received or to be received by a person in
7 satisfaction of a judgment for damages for the person's personal injuries or
8 pursuant to an agreement for the settlement or compromise of a claim for the
damages, if the cause of action for the damages arose during the marriage but is
not separate property as described in Section 781, unless the money or other
property has been commingled with other assets of the community estate.

9 (b) Community estate personal injury damages shall be assigned to the party
10 who suffered the injuries **unless the court**, after taking into account the economic
11 condition and needs of each party, the time that has elapsed since the recovery of
12 the damages or the accrual of the cause of action, and all other facts of the case,
13 **determines that the interests of justice require another disposition**. In such a
case, the community estate personal injury damages shall be assigned to the
14 respective parties in such proportions **as the court determines to be just**, except
15 that at least one-half of the damages shall be assigned to the party who suffered
16 the injuries.

17 2603.5. The court **may**, if there is a judgment for civil damages for an act of
18 domestic violence perpetrated by one spouse against the other spouse, **enforce**
19 that judgment against the abusive spouse's share of community property, if a
20 proceeding for dissolution of marriage or legal separation of the parties is pending
21 prior to the entry of final judgment.

22 2604. If the net value of the community estate is less than five thousand dollars
23 (\$5,000) and one party cannot be located through the exercise of reasonable
24 diligence, the court **may award** all the community estate to the other party **on**
25 **conditions the court deems proper** in its judgment of dissolution of marriage or
legal separation of the parties.

22 **FAMILY.CODE SECTION 2610**

23 2610. (a) Except as provided in subdivision (b), the court **shall make whatever**
24 **orders are necessary or appropriate** to ensure that each party receives the
25 party's full community property share in any retirement plan, whether public or
private, including all survivor and death benefits, including, but not limited to,
any of the following:

1 (1) Order the disposition of any retirement benefits payable upon or after the
2 death of either party in a manner consistent with Section 2550.

3 (2) Order a party to elect a survivor benefit annuity or other similar election for
4 the benefit of the other party, as specified by the court, in any case in which a
5 retirement plan provides for such an election, provided that no court shall order a
6 retirement plan to provide increased benefits determined on the basis of actuarial
7 value.

8 (3) Upon the agreement of the nonemployee spouse, order the division of
9 accumulated community property contributions and service credit as provided in
10 the following or similar enactments:

11 (A) Article 1.2 (commencing with Section 21215) of Chapter 9 of Part 3 of
12 Division 5 of Title 2 of the Government Code.

13 (B) Chapter 12 (commencing with Section 22650) of Part 13 of the Education
14 Code.

15 (C) Article 8.4 (commencing with Section 31685) of Chapter 3 of Part 3 of
16 Division 4 of Title 3 of the Government Code.

17 (D) Article 2.5 (commencing with Section 75050) of Chapter 11 of Title 8 of
18 the Government Code.

19 (E) Chapter 15 (commencing with Section 27400) of Part 14 of the Education
20 Code.

21 (4) Order a retirement plan to make payments directly to a nonmember party of
22 his or her community property interest in retirement benefits.

23 (b) A court shall not make any order that requires a retirement plan to do either
24 of the following:

25 (1) Make payments in any manner that will result in an increase in the amount
of benefits provided by the plan.

(2) Make the payment of benefits to any party at any time before the member
retires, except as provided in paragraph (3) of subdivision (a), unless the plan so
provides.

(c) This section shall not be applied retroactively to payments made by a
retirement plan to any person who retired or died prior to January 1, 1987, or to
payments made to any person who retired or died prior to June 1, 1988, for plans
subject to paragraph (3) of subdivision (a).

CONCLUSION

For the above stated reasons California Family Law Code 4300 et seq. and 2500 et. seq
impermissibly infringe Article I section 1 California Constitution, right of privacy, in the privacy
protected zone of personal decisions relating to marriage, i.e. adjusting the associational interest
of Californians who exercise their liberty interest and right of privacy to terminate their marriage
by divorcing. As such they are null and void.

1 Article III section 3 California Constitution prohibits the exercise by one branch of government
2 the core functions of another branch of government. This constitutional violation can occur
3 when one branch accretes the power of another or when one branch delegates powers of one
4 branch to another. The most alarming of all of the above noted delegations is the delegation
5 of legislative power which effectively nullifies all of Family Law Code 4320, i.e. “§ 4320 (n)
6 *Any other factors the court determines are just and equitable.*” The completely unbridled
7 discretion delegated to the judiciary permits unfettered lawmaking and public policy creation
8 contrary to Article III section 3.
9

10 The challenged statutes here are a delegation of exclusive legislative lawmaking and
11 public policy creation powers to the judiciary. As such they are null and void.

12 “We are only at the beginning of a philosophical reaction, and of a
13 reconsideration of the worth of doctrines which for the most part still are taken for
14 granted without any deliberate, conscious, and systematic questioning of their
15 grounds...

16 Most of the things we do, we do for no better reason than our fathers have done them
17 or that our neighbors do them, and the same is true of a larger part that we suspect of
18 what we think. The reason is a good one, because our short life gives us no time for
19 a better, but it is not the best. It does not follow, because we all are compelled to
20 take on faith at second hand most of the rules on which we base our action and our
21 thought, that each of us may not try to set some corner of the world in the order of
22 reason, or that all of us collectively should not aspire to carry reason as far as it will
23 go throughout the domain.” O.W. Holmes. The Path of the Law. 10 Harvard Law
24 Review 457 (1897)

25 **PRAYER FOR RELIEF**

“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)

WHEREFORE DWAIN S. BAREFIELD prays that the Court take jurisdiction

1 over this matter, enter such orders as are appropriate to expedite consideration of this motion,
2 and:

3 1. Enter an immediate temporary injunction prohibiting the State of California through this or
4 any State Court, any agency of the State of California, or any interested party to this action
5 from initiating any adverse proceedings or entering, or enforcing any adverse orders against
6 DWAIN S. BAREFIELD related to the postdissolution California Spousal Support and
7 Property Distribution codes (Ca. Family Code 4300-4360, 2500-2660) pending appellate
8 review by the California Supreme Court.
9

10 In the alternative,

11 2. Enter a declaratory judgment that DWAIN S. BAREFIELD has a constitutional right under
12 the California Constitution Privacy Amendment to be free of the burden of the postdissolution
13 permanent spousal support provisions of California Spousal Support and Property
14 Distribution codes (Ca. Family Code 4300-4360, 2500-2660);

15 3. Enter a declaratory judgment that DWAIN S. BAREFIELD has a constitutional right under
16 the equal protection laws of California to be free of the burden of the postdissolution
17 California Spousal Support and Property Distribution codes (Ca. Family Code 4300-4360,
18 2500-2660);
19

20 4. Enter a declaratory judgment that California Spousal Support and Property Distribution codes
21 (Ca. Family Code 4300-4360, 2500-2660) impermissibly infringe Article III Section 3
22 California Constitution, Separation of Powers, and are void ab initio and unenforceable.

23 5. Enter a declaratory judgment that California Spousal Support and Property Distribution codes
24 (Ca. Family Code 4300-4360, 2500-2660) violate Article I section
25

1 California Constitution Right of Privacy, and are void ab initio and unenforceable. in the
2 alternative fail for vagueness;

3 6. Enter a temporary and permanent injunction prohibiting the State of California through this or
4 any State Court, any agency of the State of California, or any interested party to this action
5 from initiating any adverse proceedings or entering, or enforcing any adverse orders against
6 DWAIN S. BAREFIELD related to California Spousal Support and Property Distribution
7 codes (Ca. Family Code 4300-4360, 2500-2660);
8

9 7. Awarding DWAIN S. BAREFIELD all costs and a reasonable attorneys' fee for the
10 prosecution of this action pursuant to California declaratory judgment code and California
11 common law.
12
13

14 Respectfully submitted,
15

16 _____
17 DWAIN S. BAREFIELD, *In pro per*

Dated December 14, 2005
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1 **CERTIFICATE OF SERVICE**

2
3 I hereby certify that on the 14th day of December, 2005, I caused a true and accurate copy of the
4 foregoing to be served via U.S. Mail to

5
6 H. Vincent Jacobs, Esq. (#50813)
7 Hiroshima, Jacobs, Roth and Lewis
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