

Eric Damiani, *pro se*, Defendant
829 Kings Croft
Cherry Hill, NJ 08034
(856) 269-0119

YVONNE DAMIANI,
n/k/a Yvonne Principato

Plaintiff,

vs

ERIC DAMIANI

:NEW JERSEY SUPERIOR COURT
:CHANCERY DIVISION-FAMILY PART
:CAMDEN COUNTY
:
:DOCKET NO.: FM-04-898-04
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:
:
:CIVIL ACTION

:

MEMORANDUM OF LAW TO SUPPORT

MOTION FOR DECLARATORY JUDGMENT TO CHALLENGE THE

PERMANENT ALIMONY PROVISIONS (N.J.S.A. 2A:34-23 et al)

AS VIOLATIVE OF NEW JERSEY CONSTITUTION

ARTICLE I PARAGRAPH 1 RIGHT OF PRIVACY AND

ARTICLE III PARAGRAPH 1 SEPARATION OF POWERS

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ARTICLE I PARAGRAPH 1 RIGHT OF PRIVACY AND

ARTICLE III PARAGRAPH 1 SEPARATION OF POWERS

“The Constitution protects individuals, men and women alike, from unjustified state interference, even when that interference is enacted into law for the benefit of their spouses.” Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847 (1992)

INTRODUCTION

The statutory provisions in question, N.J.S.A. 2A:34-23, permanent alimony, constitute just one part of a comprehensive statutory scheme governing the conditions the state of New Jersey has put on its citizens who chose to alter their liberty interest, associational interest, and state constitutional right of privacy by making the personal decision relating to marriage to terminate their marriage relationship. The statutory provisions can impose the oppressive undue burden of a temporal or permanent alimony and also strip the property rights of married New Jerseyites when they chose to exercise a fundamental right to divorce.

The New Jersey legislature has been on a voyage of minor medical, end of life emancipation, and abortion emancipation statutes some of which the judiciary has found unconstitutional as violative of the right of privacy. Planned Parenthood of Central New Jersey v. Farmer, 165 N.J. 609, A.2d 620 (2000). On the other hand, the legislature has largely ignored a journey of marital emancipation, instead choosing to forever shackle together parties to a marriage with its lifetime alimony provisions. Now the judiciary must recognize the right of privacy, broader than the federal right of privacy, must be applied to emancipate married and divorcing New Jerseyites and permit them their chosen path of independence, their associational interests, and right to adjust their marital status without undue burdens.

A statute which compels some New Jerseyites to work for the benefit of another simply because they exercised their fundamental right and liberty interest to enter marriage and then later to exit marriage is a formidable undue burden that impermissibly infringes the state right of privacy.

A statute which strips the property rights of New Jerseyites in their earnings and gives those property rights to another New Jerseyite because they exercised their fundamental right and liberty interest to enter marriage and then later exit marriage, i.e. alter their associational interests is a formidable undue burden that impermissibly infringes the state right of privacy.

Further, the permanent alimony statutes impermissibly infringe Article III Paragraph 1 New Jersey Constitution because the New Jersey legislature, through the alimony and property distribution statutes, impermissibly gives its exclusive legislative power to the judiciary.

RIGHT OF PRIVACY

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

“These decisions make it clear that only personal rights that can be deemed ‘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 also make it clear that the right has some extension to activities relating to marriage, Loving v. Virginia, 388 U.S. 1, 12 (1967)...” Roe v. Wade, 410 U.S. 113, 151 (1973)

Divorce is Entitled to the Protections of the Right of Privacy

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

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

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

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

Article I Section 1 Right of Privacy

Article I, paragraph 1 of the New Jersey Constitution protects New Jersey citizens' fundamental right to privacy and guarantees that it will not be discriminatorily abridged. It does

so in language “ ‘more expansive’ ” than that of the federal Constitution, Planned Parenthood v. Farmer, 165 N.J. 609, 629 (2000) (quoting Right to Choose v. Byrne, 91 N.J. 287, 303 (1982)), providing,

All persons are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

“By declaring the right to life, liberty and the pursuit of happiness, Art. I, par. 1 protects the right of privacy.” Right to Choose, 91 N.J. at 303.

Article I, paragraph 1, of the New Jersey Constitution guarantees equal protection for New Jersey citizens, Right to Choose 91 N.J. at 304-05, Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 79 (1978), thus ensuring that privacy rights will not be discriminatorily infringed. Accordingly, Article I, paragraph 1, requires the government to proceed “in a neutral manner” and “impartially” in regard to a New Jerseyite’s fundamental rights, rights which include the intimate and personal choice whether or not to alter their marital status. Right to Choose, 91 N.J. at 307, 307 n.5; see also Planned Parenthood, 165 N.J. at 613 (“Simply, the effect of declaring the notification [to have an abortion] statute unconstitutional is to maintain the State’s neutrality in respect of a minor’s childbearing decisions and a parent’s interest in those decisions”). “In effect, the State may not affirmatively tip the scale [for or] against the right to choose an abortion absent compelling reasons to do so.” Planned Parenthood, 165 N.J. at 613. “In that constitutionally protected zone, the State may be an umpire, but not a contestant.” Right to Choose, 91 N.J. at 307 n.5.

Just as with the fundamental right of procreation the fundamental right to make personal decisions relating to marriage is an equal zone of privacy entitled to the same case law and legal reasoning applied to procreation decisions—the state to be an umpire not a contestant.

Just as citizens have the fundamental right relating to procreation to terminate it, so too do citizens have the fundamental right relating to marriage to terminate it. Neither fundamental right or liberty interest may be encumbered by a state statute creating an undue burden.

The right to privacy and autonomy in reproductive decisions –and marital decisions-protected by the New Jersey Constitution is broader than the correlate federal right and thus the requirement of state neutrality is applied more rigorously under the New Jersey Constitution. “[S]tate Constitutions are separate sources of individual freedoms and restrictions on the exercise of power by the Legislature. . . . Thus, in appropriate cases, the individual states may accord greater respect than the federal government to certain fundamental rights.” Right to Choose, 91 N.J. at 300. Accordingly, the New Jersey Supreme Court frequently has held that the New Jersey Constitution “afford[s] our citizens broader protection of certain fundamental rights than that afforded by analogous or identical provisions of the federal constitution.” State v. Novembrino, 105 N.J. 95, 145 (1987). See also Planned Parenthood, 165 N.J. at 631; State v. Norman, 151 N.J. 5, 25 (1997); Right to Choose, 91 N.J. at 300-310; State v. Baker, 81 N.J. 99, 112-14, 114 n.10 (1979); State v. Saunders, 75 N.J. 200, 216-17; Taxpayers Ass’n of Weymouth Tp. v. Weymouth Tp., 80 N.J. 6, 43 (1976); Southern Burlington County NAACP v. Mt. Laurel Tp., 67 N.J. 151, 174-75 (1975).

Standard of Review: Federal & State Strict Scrutiny

United States Supreme Court,

“It is well settled that . . . if a law ‘impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional.’”

Harris v. McRae, 448 U.S. 297, 312 (1980) (quoting City of Mobile v. Bolden, 466 U.S. 55, 76 (1980))

“These decisions make it clear that only personal rights that can be deemed ‘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 also make it clear that the right has some extension to activities relating to marriage, Loving v. Virginia, 388 U.S. 1, 12 (1967)...” Roe v. Wade, 410 U.S. 113, 151 (1973)

“It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before. Marriage is mentioned nowhere in the Bill of Rights... but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause in Loving v. Virginia, 388 U.S. 1, 12 (1967).” Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847 (1992)

Standard of Review: Strict Scrutiny v. New Jersey Balancing Test

New Jersey fails to recognize the federal standard of review of strict scrutiny analysis when a statute infringes a fundamental right. Here the Defendant challenges the validity of the balancing test set forth in Right to Choose v. Byrne, 91 N.J. 287, A.2d 925 (1982) as the proper standard for review of statute when it infringes a fundamental right. Strict scrutiny is proper.

In particular, in examining state infringements upon women’s procreative autonomy, the New Jersey Supreme Court has closely adhered to its own admonition that “[w]hen the United States Constitution affords our citizens less protection than does the New Jersey Constitution, we have not merely the authority to give full effect to the State protection, we have the duty to do so.” State v. Hempele, 120 N.J. 182, 196 (1990). Thus, in the context of privacy rights protected by Article I, paragraph 1, the Court has noted, “[T]he lack of constraints imposed by considerations of federalism permits this Court to demand stronger and more persuasive showings of a public interest in allowing the State [to infringe on privacy rights] than would be required by the United States Supreme Court.” Saunders, 75 N.J. at 217.

This court should apply the same standard it applies to reproductive fundamental rights to marital fundamental rights.

The privacy rights the state constitution protects from government interference are those “choice[s] that bear[] so vitally upon a matter of deep personal privacy [that they] may . . . be considered an integral aspect of the ‘natural and unalienable right’ of all people to enjoy and pursue their individual well-being and happiness.” In re Grady, 85 N.J. 235, 250 (1981). Thus, “[a]ny discussion of the right of privacy must focus on the ultimate interest which protection the Constitution seeks to ensure: the freedom of personal development.” Saunders, 75 N.J. at 213 (1977).

When a statute penalizes the exercise of a fundamental right, it is unconstitutional absent a compelling state interest directly served by the statute. Sanchez v. Department of Social Services, 314 N.J. Super. 11, 21-24 (App. Div. 1998)

The New Jersey Supreme Court made clear in State v. Saunders that when a proffered interest will not actually be served by a provision that infringes privacy rights, the provision is unconstitutional, regardless of how compelling the proffered interest is. Saunders, 75 N.J. at 218; see also State v. Miller, 83 N.J. 402, 415 (1980) (holding that the State must not only articulate a legitimate interest in support of a provision that impinges on constitutional rights, but must also demonstrate how the particular restriction relates to that interest).

Despite the improper balancing test standard, the Defendant still argues that the alimony statute cannot even survive the lower balancing test standard that the New Jersey courts continue to apply.

New Jerseyites Weighty Interest in Divorce Free of Undue Burden

New Jerseyites have a constitutional right to adjust their associational interest by altering

their marital status. The state may not impose an undue burden on its citizens who make personal decisions relating to their marriage to enter or leave it. To forever work for the benefit of another New Jerseyite because one chooses to change his marital status creates a weighty interest for a citizen, and the Defendant here. This is especially true when the party is before the court involuntarily through “no fault” or harm to the other party as a defendant.

State Lacks a Compelling need that Outweighs Citizens Oppressive Burden of Alimony

When legislation burdens a fundamental right the New Jersey Constitution requires reviewing courts to scrutinize the State’s purported justification for the legislation closely to determine whether it outweighs the burden on the fundamental right. Planned Parenthood, 165 N.J. at 619-20. For such legislation to be constitutional, the State must “demonstrate a real and significant relationship between the statutory classification and the ends asserted.” Id. at 613; See also Taxpayers Ass’n, 80 N.J. at 42-43 (“It must be shown that there is an appropriate governmental interest suitably furthered by the differential treatment. . . . New Jersey has always required a real and substantial purpose between the classification and the governmental purpose which it purportedly serves”).

The New Jersey Supreme Court has noted that there is no rationale to keep married parties who are no longer married bound together economically. Mani v Mani, 183 N.J. 70, 869 A.2d 904, (2005),

“Alimony was granted only in the former class of cases on the theory that husband was obliged to continue to support his wife as long as they remained married. Collins, supra, 24 Harv. Women’s L.J. at 28-29 (2001). Somehow, with the passage of time, the distinction between true divorce and mere separation was obliterated and alimony began to be awarded in all cases. No rationale was advanced to explain why parties, who were no longer married, remained economically bound to one another. As one legal scholar put it:

By the time that matrimonial law reform in Great Britain created universally accessible civil divorce in the mid-nineteenth century, the concept of alimony was

so well-accepted that it was carried over and applied to those new cases where the marriage itself was actually ending, without apparent reflection or explanation as to why it should continue once the marital relationship had been extinguished. Section 32 of the Matrimonial Causes Act [of] 1857 gave the judge discretion to order a husband to provide for his wife even after the marriage had ended in an amount reflecting her own wealth, his own means, and their respective conduct during the marriage. Posterity was not, however, provided with a rationale.

The New Jersey Supreme Court further acknowledges there is no consensus on the purpose of permanent alimony. Mani 183 N.J. (2005),

“Again, as had been the case in England, the reason for alimony, outside the legal separation scenario, remained an enigma.... That lack of clarity regarding the theoretical underpinning of post-divorce alimony explains why, although alimony is now awarded in every jurisdiction, Collins, supra, 24 Harv. Women's L.J. at 31, there is no consensus regarding its purpose.

The Mani 183 J.J. (2005) court went on to discuss caselaw as to the reason for alimony. These presumptive state “needs” lack consensus. Mani 183 N.J. again,

“Indeed, many distinct explanations have been advanced for alimony. Id. at 23. They include its characterization as damages for breach of the marriage contract, Margaret F. Brinig & June R. Carbon, *The Reliance Interest in Marriage and Divorce*, 62 Tul. L. Rev. 855, 882 (1988); as a share of the benefits of the marriage partnership, Rothman v. Rothman, 65 N.J. 219, 229, 320 A.2d 496 (1974); as damages for economic dislocation (based on past contributions), Elisabeth M. Lands, *Economics of Alimony*, 7 *J. Legal. Stud.* 35 (1978); as damages for personal dislocation (foregoing the chance to marry another), Lloyd Cohen, *Marriage, Divorce, Quasi Rents; Or, "I Gave Him the Best Years of My Life,"* 16 *J. Legal Stud.* 267, 276 (1987); as compensation for certain specific losses at the time of the dissolution, A.L.I., *Principles of Law of Family Dissolution: Analysis and Recommendations*, 8 Duke J. Gender L. & Pol'y 1, 28 (2001); [*27] as deterrence or punishment for marital indiscretion, Brinig & Carbone, supra, 62 Tul. L. Rev. at 860-61; and as avoidance of a drain on the public fisc, Miles v. Miles, 76 Pa. 357, 358 (1874).

It should be noted that the Mani 183 N.J. (2005) court did not cite legislative language, purpose or intent for the reason for alimony, but cited its own conclusion in Rothman v. Rothman, 65 N.J. 219, 229, 320 A.2d 496 (1974).

None of the purposes created by the judiciary reaches the threshold of a compelling state interest to overcome the presumptive unconstitutionality of the statute.

The Defendant avers that the state really has no interest, let alone a compelling one, to ensure “a share of the benefits of the marriage partnership” between married parties. Each party in a marriage has ample opportunity to look out for their own economic interests while in the marriage. In no other aspect of law does a court have authority to strip property rights from a New Jerseyite and give the property to a party that has sat on his rights. The irony of the alimony statute is the longer a party sits on his rights to his share of the economic benefits that might accrue in marriage the more likely the court is to reward him for sitting on their rights.

Citizens’ Fundamental Right to Unencumbered Divorce Outweighs an Unknown State Interest

Under the balancing test established by the New Jersey Supreme Court New Jerseyites’ fundamental right to exercise their fundamental right to exercise their personal decision relating to marriage to terminate their marriage and adjust their fundamental right of association is not outweighed by a state interest that does not even reach a level of consensus and has no rationale.

When in Mani 183 N.J. (2005) the state Supreme Court did not find a consensus for the existence of the alimony statute any state interest contained in the purpose pales in comparison with the undue burden of a lifetime sentence of working for the benefit of another that the permanent alimony statute and judicial discretion permits to be applied to New Jerseyites.

Surely if an important state need or a compelling state need existed for permanent alimony the purpose of permanent alimony would be evident, would be in the statute itself, and at a minimum a consensus would exist for the state interest. The fact that no rationale exists for

alimony is further support that fundamental rights cannot be superseded because in fact no rationale and no state interest exist for permanent alimony.

SEPARATION OF POWERS

Introduction

N.J.S.A. 2A:34-23 et seq permanent alimony provisions impermissibly infringe Article III paragraph 1 New Jersey Constitution, Separation of Powers, because the legislature has impermissibly delegated core powers to make law and public policy to the judiciary. The judiciary has assumed that grant of law making power to the detriment of the Defendant and all New Jerseyites who seek to adjust their associational interests by divorcing.

The little New Jersey caselaw on separation of powers deals with active infringement by the judiciary on the executive branch and its agencies. Here the violation is the active delegation of exclusive lawmaking power by the legislature to the judiciary.

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

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

In this case the separation of powers violation occurs between the legislature and the judiciary. The other novel context is that the judiciary is impermissibly exercising power, i.e. law making and public policy making that is constitutionally afforded only to the legislature. This exercise of legislative function by the judiciary occurs not because the judiciary usurps legislative authority but because the legislative power is erroneously and impermissibly delegated by the legislature to the judiciary though the infirmaments of N.J.S.A. 2A:34-23,

notably N.J.S.A. 2A:34-23 (b) (13), “Any other factors which the court may deem relevant.”

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

Article III Paragraph 1, Separation of Powers

New Jersey Constitution, ARTICLE 3 State of New Jersey

“1. The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.”

The amendment implicates both contexts of infringement, i.e. arrogation of power and delegation of power. Either conduct results in an alternative branch of government exercising the power of another contrary to Article III paragraph 1 New Jersey Constitution.

Delegation of Legislative Power to the Judiciary

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

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

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

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

The sister state of California offers another example of the dimension of the separation of powers amendment, Carmel Valley Fire Protection Dist. v. State of California (2001) 25 Cal.4th 287 , 105 Cal.Rptr.2d 636; 20 P.3d 533 at p. 299,

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

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

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

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

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

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

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

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

Improper Delegation of Legislative Power to the Judiciary

Any portion of the Family Law code addressing spousal support when a New Jerseyite adjusts his marriage by divorcing must not delegate law making power from the legislature to the judiciary. The legislature fails to comply with Article III paragraph 1 New Jersey Constitution

separation of powers when it gives unbridled or near unbridled discretion to the judiciary to apply divorce support and property distribution statutes. The support and property distribution provisions are infirm because they delegate legislative power in the below highlighted provisions via unbridled discretion to the court on permanent alimony.

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

N.J.S.A. 2A:34-23(b) provides that in all divorce actions "the court may award one or more of the following types of alimony: permanent alimony; rehabilitative alimony; limited duration alimony or reimbursement alimony to either party." When ordering alimony, a "court *shall* consider" a **non-exclusive** list of enumerated factors:

- (1) The actual need and ability of the parties to pay;
- (2) The duration of the marriage;
- (3) The age, physical and emotional health of the parties;
- (4) The *standard of living* established in the marriage and the *likelihood* that each party can maintain a reasonably comparable standard of living;
- (5) The earning capacities, educational levels, vocational skills, and employability of the parties;
- (6) The *length* of absence from the job market of the party seeking maintenance;
- (7) The parental responsibilities for the children;
- (8) The time and expense necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment, the availability of the training and employment, and the opportunity for future acquisitions of capital assets and income;
- (9) The history of the financial or non-financial contributions to the marriage by each party including contributions to the care and education of the children and interruption of personal careers or educational opportunities;

(10) The equitable distribution of property ordered and any payouts on equitable distribution, directly or indirectly, out of current income, to the extent this consideration is reasonable, just and fair;

(11) The income available to either party through investment of any assets held by that party;

(12) The tax treatment and consequences to both parties of any alimony award, including the designation of all or a portion of the payment as a non-taxable payment; and

(13) *Any other factors which the court may deem relevant.*

N.J.S.A. 2A:34-23 is effectively nullified in its entirety because of the impermissibly delegated power to make law and public policy in N.J.S.A. 2A:34-23 that is the exclusive purview of the legislature. N.J.S.A. 2A:34-23 (b) (13.) is so broad and excessive in breadth as to be stupefying. “N.J.S.A. 2A:34-23(b)(13.) “*Any other factors which the court may deem relevant.*”

CONCLUSION

“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)

New Jersey has a constitutional Right to Privacy broader than the federal Right to Privacy. Divorce, and thereby the encompassed permanent alimony statutes within that section, are protected by the fundamental Right of Privacy. Strict scrutiny is the proper standard to apply when a statute infringes a fundamental constitutional right or liberty interest. Under strict scrutiny a statute is presumptively unconstitutional unless a compelling state interest, minimally applied, which in fact serves the compelling interest of the state is proven by the state. No

compelling state interest exists for the alimony statutes or all divorces would be examined for the compelling interest and now only a very small percent of divorces plead for and are granted alimony. The New Jersey Supreme Court has acknowledged there is no clear rationale or purpose for the permanent alimony statute.

The alimony statute violates Article III Paragraph 1 Separation of Powers N.J. Const. because the legislature has impermissibly delegated its exclusive law making and public policy making power to the judiciary by granting unbridled discretion to choose if, and when and how and how much the permanent alimony statute will be applied. The role of the judiciary is to interpret law, not to make it.

PRAYER FOR RELIEF

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

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

Wherefore the Defendant prays this court will declare New Jersey permanent alimony statutes violate Article I paragraph 1 N.J. Const Right to Privacy and Article III paragraph 1 N.J. Const., Separation of Powers and are void ab initio and unenforceable against the Defendant and all other New Jerseyites.

Respectfully submitted,

Eric Damiani, *pro se*
829 Kings Croft
Cherry Hill, NJ 08034
(856) 269-0119

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of February, 2006, I caused a true and accurate copy of the foregoing Memorandum of Law was mailed via U.S. Mail to Yvonne Damiani n/k/a Yvonne Principato at 112 Wright Avenue, Stratford, NJ 08084.

Respectfully submitted,

Eric Damiani, *pro se*
829 Kings Croft
Cherry Hill, NJ 08034
(856) 269-0119