1999 WL 34793393 (Alaska Super.) (Trial Order)
Superior Court of Alaska,
Third Judicial District.

PLANNED PARENTHOOD OF ALASKA, INC., Jan Whitefield, M.D., and Susan Lemagie, M.D., Plaintiffs,
v.
Karen PERDUE, Commissioner, Department of Health and Social Services, and the Department of Health and Social Services, State of Alaska, Defendants.

No. 3AN 98-7004 CI.
March 16, 1999.

Memorandum and Decision

Sen K. Tan, Superior Court Judge.

I.INTRODUCTION

This lawsuit tests the constitutionality of a regulation that limits an indigent woman's ability to exercise her right to reproductive choice, by limiting abortion funding to those necessary to prevent the death of the mother or to pregnancies resulting from rape or incest.

Plaintiffs Planned Parenthood of Alaska, Jan Whitefield, M.D. and Susan Lemagie, M.D. move for summary judgment against the State of Alaska, Department of Health and Social Services challenging the constitutional legality of the regulation. The defendant, State of Alaska, in opposition cross-moves for summary judgment.

From 1970 through August 1998, under Alaska's General Relief Medical program, lower-income women received public assistance for the cost of medically therapeutic abortions. In August 1998, the General Relief Medical program was de-funded. A new program, the Chronic and Acute Medical Assistance Program was established. Now, funding for abortions is available only when the life of the mother is threatened, or when the pregnancy is a result of rape or incest. Funding for medically therapeutic abortions is no longer available.

II. *FACTS*

In 1953, by implementation of the General Relief Medical program (GRM), Alaska established its first medical assistance program for lower-income Alaska residents. AS 47.25, et seq. Through the GRM, the State has reimbursed medical providers for services rendered to those who qualify. The GRM has always been 100% state funded.

From 1970 through approximately August 1998, the GRM funded therapeutic abortions. 7 AAC 47.210; 7 AAC 47.290. Under the GRM program, therapeutic abortions are those:

> (A) certified by a physician as medically necessary to prevent the death or disability of the woman, or to ameliorate a condition harmful to the woman's physical or psychological health; or

> (B) that resulted from actions that would constitute a crime of sexual assault under AS 11.41.410-11.41.425, a crime of sexual abuse of a minor under AS 11.41.434-11.41.440, or the crime of incest under AS 11.41.450. 7 AAC 47.290.

In 1998, the legislature de-funded the GRM program. A new program, the Chronic and Acute Medical Assistance program (CAMA), codified as AS 47.08.010-150 was created. The 1999 fiscal year budget for the CAMA is $1,900,000, the same amount previously budgeted for the GRM. The primary difference between the GRM and the CAMA is the elimination of funds for medically therapeutic abortions. 7 AAC 48.550(B). CAMA limits abortion coverage to the level provided under the Medicaid program.

In 1972, Alaska created its Medicaid program. Medicaid is a joint federalstate program that provides medical coverage to eligible recipients. 42 U.S.C. sec. 1396 et seq.; AS 47.07.010-020. The Medicaid program provides coverage for a broad range of health care services for Alaska residents in financial need. AS 47.07.010-900.

Among the pregnancy related services paid for under Medicaid are physician services, including pre-natal and post-natal care; inpatient and outpatient hospital services, including childbirth services; prescription services; family planning services; nurse midwife services; and nutrition services for pregnant women. 7 AAC 43.005. Under Medicaid, the State also pays for necessary transportation costs associated with covered services.

Until 1977, medically therapeutic abortions were also covered under the federal Medicaid regulations. [See endnote 1] Since passage of the Hyde Amendment in 1977, however, federal Medicaid funding for abortions is available only when the pregnancy endangers the woman's life or is the result of rape or incest. [See endnote 2]

Medicaid does not prohibit the states from independently funding services not eligible under the federal program. [See endnote 3] Since 1979, Alaska has provided additional funding for abortion services through the GRM. With the elimination of the GRM and the restrictions imposed under the CAMA, Alaska's abortion funding now follows the restrictions set by the Federal government. [See endnote 4]

With the elimination of the GRM program, a Medicaid-eligible Alaskan woman can no longer receive public funding for an abortion necessary to prevent a disability or to ameliorate a condition harmful to her physical or psychological health. But, if she chooses to carry her pregnancy to term, she can receive public funding for a broad range of pre-natal, child birth, and postnatal services. In 1998, the legislature actually increased the availability of funding to low-income pregnant women. Medicaid income eligibility limits are now 200% of the federal poverty level for pregnant women, versus 133% for all other Medicaid-funded services for men and women.

The cost of abortion services for Alaskan women can run from $450 to $4,000. In addition to medical costs, there are often travel and lodging costs. Many women have to travel from remote areas where abortion services are not available, to places such as Fairbanks, Anchorage, Soldotna or Washington state. The cost of travel and lodging for these women can run as high as $1,400. As a result, the total cost of an abortion for Alaskan women can range from $450 to $5,400.

In the absence of public funding, most indigent women who seek abortions for medical reasons will not be able to gather the funds necessary to have the procedure performed. Many Medicaid eligible women have no income other than public assistance. In 1998, a family of three surviving on the Alaska Temporary Assistance Program receives a maximum cash grant of $923 per month. Dr. Whitefield attests, based upon his experiences, that many Medicaid-eligible women live a non-cash subsistence lifestyle.

Drs. Dukeminier, Lemagie and Whitefield, and Planned Parenthood of Alaska have provided abortion services to Medicaid-eligible women in Alaska, and elsewhere, for many years. In their opinions, women who are otherwise Medicaid-eligible will forego medically therapeutic abortions because they do not have the funds to pay for them. The providers also opine that, often, friends and family of Medicaid-eligible women are also poor and will not be able to help financially.

The State has predicted that, when public assistance for abortion is eliminated, at least 20% and likely 35% of those women who would have obtained abortions under GRM will carry their pregnancies to term. *See* January 1998 Alaska DHSS Fiscal note to the State Legislature. [See endnote 5]

III. *SUMMARY JUDGMENT STANDARD*

The proponent of a motion for summary judgment has the burden of establishing the absence of genuine issues of material fact and his or her right to judgment as a matter of law. *Dansereau v. Ulmer,* 903 P.2d 555, 570 (Alaska 1995), *citing Bauman v. State, Div. of Family and Youth Services,* 768 P.2d 1097, 1099 (Alaska 1989). The party opposing a motion for summary judgment need not establish that it will prevail at trial, but merely that there exists a genuine issue of fact to be litigated. *Alaska Rent-A-Car, Inc. v. Ford Motor Co.,* 526 P.2d 1136 (Alaska 1974). "If reasonable minds could draw different inferences and reach different conclusions from the facts the issue must be reserved for trial." *Maddox v. River & Sea Marine, Inc.,* 925 P.2d 1033, 1035 (Alaska 1996). All inferences of fact from proffered proofs must be drawn in favor of the non-moving party. *Id.*

IV. *DISCUSSION*

The parties have raised numerous issues regarding interpretation and application of the Alaska Constitution. At the outset, it is clear that the Hyde Amendment does not violate the United States Constitution. In *Maher v. Roe,* 432 U.S. 464, 97 S.Ct. 2376, 53 L.Ed. 484, 494 (1977) and *Harris v. McRae,* 448 U.S. 297, 100 S.Ct. 2671, 65 L.Ed 784, 804 (1980), the United States Supreme Court ruled that restrictions on public funding for abortions do not violate the Due Process and Equal Protection clauses of the Federal Constitution.

The issues raised require consideration of the Alaska Consitution in four ways. First, does the regulation violate Alaska's express constitutional right to privacy? Second, does the regulation violate the right of all Alaskans to equal protection? Third, does the regulation discriminate on the basis of sex? Fourth, does the separation of powers doctrine prohibit the court from any action affecting the legislature's appropriation power. To answer the questions presented, I must first determine the scope of constitutional rights guaranteed to the women affected by the regulation. [See endnote 6]

A. PRIVACY

Article 1, section 22 of the Alaska Constitution states:

> Right of Privacy. The right of the people to privacy is recognized and shall not be infringed.

Alaska's privacy guarantee is broader in scope than the implicit right of privacy guaranteed by the federal constitution. *Messerli v. State,* 626 P.2d 81, 83 (Alaska 1980); *State v. Glass,* 583 P.2d 872, 879 (Alaska 1978); *Falcon v. Alaska Pub. Offices Commission,* 570 P.2d 469 (Alaska 1977); *Ravin v. State,* 537 P.2d 494, 515 (Alaska 1975) (Boochever, J., concurring).

a. ***Is the right to reproductive choice a fundamental right encompassed within the right to privacy expressed in Alaska's Constitution?***

In *Valley Hospital Association, Inc. v. Mat-Su Coalition for Choice,* 948 P.2d 963, 969 (Alaska 1997), the Alaska Supreme Court considered the extent of this state's constitutional right to privacy as it applies to reproductive rights. In *Valley Hospital,* the supreme court unanimously held:

> [W]e are of the view that reproductive rights are fundamental, and that they are encompassed within the right to privacy expressed in article I, section 22 of the Alaska Constitution.... These fundamental reproductive rights include the right to an abortion.

A fundamental right is a right protected to the highest degree. Such a right cannot be legally constrained or interfered with unless justified by a compelling state interest. *Valley Hospital* at 971. Further, even if there is a compelling state interest, there must also be no less restrictive means by which the interest might be otherwise advanced. *Id.* at 971.

Having determined that a fundamental right is at issue, I must address whether that right has been interfered with.

b. Does 7 AAC 43.140 constrain and interfere with the fundamental right to reproductive choice?

The State contends that there has been no constitutional violation because the elimination of funding does not directly burden the exercise of a constitutional right.

The denial of funding to those in need can certainly constrain their options. If an indigent woman faces a pregnancy with health risks but not sufficient risks to endanger her life, 7 AAC 43.140 provides her with two options. She can carry the pregnancy to term, and have all of her health care costs covered. Or, she can choose to abort, in which case she will receive no coverage. [See endnote 7] A woman of financial means will have a real choice, but an indigent women will have no choice but to go forward with the pregnancy.

Whether this is sufficient to warrant the conclusion that a right has been infringed requires consideration of the permissible level of state interference. In *Valley Hospital,* the Alaska Supreme Court found that by restricting its abortion services to only those pregnancies which endangered women's lives, or which were the result of rape or incest, or which involved an non-viable fetus, the hospital had interfered with the right to reproductive choice. *Valley Hospital* at 970-71. The court found that denial of access to lawful medical procedures constituted interference even though other medical facilities in Alaska were willing to perform the procedure. *Id.; see also Mat-su Coalition for Choice v. Valley Hospital Assoc., Inc.,* 3PA-92-1207 CI at 19 (finding that because women were prohibited from obtaining medically necessary abortions at Valley Hospital, their fundamental right was impermissibly burdened). The court held that the hospital, as a quasi-public institution, could not preclude medically therapeutic abortions unless for a compelling state reason. *Valley Hospital* at 971. Even in the absence of direct state action, the court found that there was interference with women's right to choose. Whether a hospital precludes delivery of a medical service or whether the state precludes payment for the service, the effect is the same.

Other states have also found that the denial of funds affecting a woman's reproductive choice interferes with her exercise of a fundamental right. In *Myers,* the California court rejected the state's argument that the indirect restraint of abortion through elimination of public subsidies was constitutional. *Committee to Defend Reprod. Rights v. Myers,* 625 P.2d 779 (1981)

(striking down legislation restricting public funding of abortions as unconstitutional under the state's constitutional privacy clause on the ground that, "when the state implements a general public benefit program, the California Constitution imposes definite limitations on the state's ability to offer such a benefit in a fashion which discriminates against the exercise of constitutional rights"), *cited affirmatively by Valley Hospital* at 967 n. 7.

I find that 7 AAC 43.140 impermissibly interferes with a Medicaid-eligible woman's fundamental right to privacy to decide whether or not to carry a child to term. Accordingly, I must next examine whether there is a compelling state interest sufficient to justify such a restriction.

c. Is there a compelling state interest?

Because there is infringement of a fundamental right, for the regulation to be constitutional, there must be a compelling state interest.

Defendant asserts that there are compelling medical and public welfare interests served by the decision not to fund medically necessary abortions. Defendant articulates only one interest, that the State has a great interest in ensuring the best possible outcome of pregnancies in Alaska because that will effect the general welfare of our future citizens. Viewed this way, the State interest in women during pregnancy exists only because the State is concerned about protecting its future citizens. The State argues that its ability to direct more funds to the care of pregnant women will mean healthier pregnancies, and that children will have the best possible start in life. Thus, they conclude, the decision to divert funds from the abortion side of the equation to the pregnancy side of the equation serves a compelling state interest.

It is axiomatic that we want all children born into our state to be healthy and to remain healthy. That is not in dispute. However, the State impermissibly treats equally a child after birth and a fetus at the inception of pregnancy. If the best possible care for a child from the inception of pregnancy was a compelling state interest, then *all* restrictions on abortions would be constitutional.

The State's compelling interest argument attempts to merge the rights of a child after birth, and perhaps during the third trimester of pregnancy, with the rights of a fetus during the first and second trimesters of pregnancy. [See endnote 8] In *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), *rehearing denied* 410 U.S. 959, 93 S.Ct. 1409, 35 L.Ed.2d 694 (1973), the United States Supreme Court ruled that a woman's reproductive choice was protected by her fundamental right to privacy. The *Roe* opinion established what is now known as the "trimester" analysis. In *Roe,* the United States Supreme Court concluded that during the first two trimesters of pregnancy, the fetus was not viable and the woman's fundamental right to choose prevailed. Thus, under *Roe,* only in the third trimester could the state have a compelling interest in procreative choice.

The right of privacy under our constitution protects the right to *decide* whether or not to continue a pregnancy. This right exists until the state's interest in protecting the fetus becomes compelling enough to override the women's fundamental right. I need not decide here what that point is. Rather, I conclude that the State's general articulation of the general welfare of future citizens is not a compelling state interest.

Cost savings or resource distribution also cannot provide a basis for the State's alleged interest in the well-being of born, or unborn Alaskans. [See endnote 9] As the court in *Myers* noted:

> [W]hatever money is saved by refusing to fund abortions will be spent many times over in paying maternity care and childbirth expenses and supporting the children of indigent mothers ... the cost of an abortion is much less than the cost of maternity care and delivery. 625 P.2d at 794.

Further, as the *Myers* court also noted, denying funding to women who face special medical risks if they carry the fetus to term will often result in expensive medical care for mother and child. Under this regulatory scheme, fewer health care dollars will be available for distribution among a greater number of children. Not only is the State's purported compelling state interest not served by the current regulations, it is thwarted.

The State's alleged interest in providing the best possible start in life for Alaskans can only cloak a policy decision to favor birth over abortion. The evidence supports the conclusion that the legislative purpose of the program change was to discourage abortion. [See endnote 10] In an April 17, 1998 memorandum from Senator Sean Parnell to Senators Drue Pearce and Bert Sharp, Senator Parnell stated that one of the reasons for de-funding the GRM in 1998 was "the fact that, for several years, the Legislature has strongly discouraged use of the program for elective abortions (demonstrated by a budget reduction in FY 97 specifically aimed at eliminating state funding for elective abortions)...." This same memorandum explained that, when the Legislature's efforts to halt the funding of abortions through budget cuts was unsuccessful, they eliminated the funding for the GRM altogether. *See* April 17, 1998 Parnell Memorandum (stating that since the DHSS ignored the Legislature's policy directive, the GRM was de-funded). I find the evidence supports only one conclusion - that the Legislature de-funded the GRM to discourage abortion.

Discouragement of abortion is not a compelling interest which justifies interference with a constitutional right. In *Valley Hospital,* where the hospital asserted its interest was a "matter of conscience," the Alaska Supreme court found no compelling state interest. *Valley Hospital* at 971.

Alaska is not the first state to address the question whether the State Constitution affords indigent women greater protection than the United States Constitution. Since the Hyde Amendment, many states have dealt with the question presented here. The majority of states have concluded that disparate funding which interferes with reproductive choice is unconstitutional. *See Women of Minnesota v. Gomez,* 542 N.W.2d 17 (Minn. 1995); *Women's Health Center v. Panepinto,* 446 S.E. 658 (W.Va. 1993); *Right to Choose v. Byrne,* 450 A.2d 925 (N.J. 1982); *Committee to Defend Reprod. Rights v. Myers,* 625 P.2d 779 (Cal. 1981); *Moe v. Secretary of Admin. and Fin.,* 417 N.E.2d 387 (Mass. 1981). These states have all concluded that, once the Legislature has determined to provide benefits, it must do so in a neutral manner. And, as the California Supreme Court stated, "it is not neutral to fund services medically necessary for childbirth while refusing to fund medically necessary abortions." *Byrne* at 935.

In conclusion, I find that 7 AAC 43.140 constrains and interferes with a fundamental right and the defendants have failed to show a compelling interest to justify constraining this right. Since I find no compelling interest, I need not consider whether there exists a less restrictive means to achieve the State's interest.

B. EQUAL PROTECTION AND SEX DISCRIMINATION

Because I rule on privacy grounds, I do not need to reach the issues of equal protection and sex discrimination.

However, I note that the Alaska Constitution provides a more flexible but more rigorous standard of equal protection than the United States Constitution. See *Isakson v. Rickey,* 550 P.2d 359, 362 (Alaska 1976).

C. SEPARATION OF POWERS

Defendants assert that 7 AAC 43.140 is a permissible limitation under the Alaska Constitution because of the separation of powers doctrine. They argue that a decision in favor of plaintiffs would mean that this court has impermissibly intervened in

the legislative arena by effectively appropriating or re-appropriating funds. Under this separation of powers theory, defendants argue that they are entitled to summary judgment that 7 AAC 43.140 is constitutional.

"The doctrine of separation of powers is implicit in the Alaska Constitution." *State v. Fairbanks North Star Borough,* 736 P.2d 1140, 1142 (Alaska 1987). In the Constitution, there is a "deliberate, clear, and exclusive grant of power" to the legislature to appropriate funds. *Id.* at 1142. Article II of the Alaska Constitution.

Although the legislature has the exclusive appropriations power, this does not mean that the exercise of that power is without limit and not subject to judicial scrutiny. Since *Marbury V. Madison,* 5 U.S. (1 Cranch) 137, 178, 2 L.Ed 60 (1803), courts have imposed constitutional requirements on the exercise of executive and legislative power.

The Alaska Supreme Court has held that, when infringement of a constitutional right results from legislative action, the court cannot defer to the legislature. *Valley Hospital* at 972. Other courts faced with the same issue have reached the same conclusion. *Doe v. Maher,* 515 A.2d 134, 151 (Conn.Super. 1986)(finding that, "[e]ven if the state is not obligated to pay for medical expenses of an indigent person, 'when a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations' "), *quoting* Maher v. Roe, 432 U.S. 464, 469-70, 97 S.Ct. 2376, 2380-81, 53 L.Ed.2d 484 (1977); *Moe* at 402 (finding that, while the Legislature is not required to subsidize any of the costs associated with child bearing, or with health care generally, once it does so, it is not free to inject coercive financial incentives favoring childbirth into a decision that is constitutionally protected from government intrusion), *quoting* Lawrence Tribe, *American Constitutional Law,* sec. 15-10 at 933 n. 77 (1978).

In this instance, the separation of powers doctrine is not a bar to this decision. As the California Supreme Court said in *Myers,*

> There is no greater power than the power of the purse. If the government can use it to nullify constitutional rights, by conditioning benefits only upon the sacrifice of such rights, the Bill of Rights could eventually become a yellowing scrap of paper. Once the state furnishes medical care to poor women in general, it cannot withdraw part of that care solely because a woman exercises her constitutional right to choose to have an abortion. *Myers* at 798.

Finally, this opinion does not result in a reapropriation of funds. The Legislature need not subsidize any of the costs associated with child bearing, or with health care generally. But once it undertakes to fund medical treatment for indigent Alaskans, it cannot with hold funds from some eligible persons because they choose to exercise a constitutional right. The conclusion I have reached is based upon the right of the individual to the constitutional guarantee of privacy, not on the right of women to government funding.

V. *CONCLUSION*

The Court, having considered the memoranda and arguments of the parties, HEREBY ORDERS that the plaintiffs', Planned Parenthood of Alaska, Inc., Jan Whitefield, M.D., and Susan Lemagie, M.D.'s, Motion For Summary Judgment is GRANTED, and the defendants', Karen Perdue, Commissioner, Department of Health and Social Services, and the Department of Health and Social Services, State of Alaska, Cross-Motion for Summary Judgment is DENIED.

DATED this 16th day of March, 1999.

SEN K. TAN

Superior Court Judge.

ENDNOTES

Endnote 1

Historically, the Alaska Medicaid program regulations limited abortion payments to reimbursement for only those procedures necessary to save the life of the woman. By emergency regulation effective July 1, 1998, the Department of Health and Social Services amended 7 AAC 43.140 to reflect the current federal policy, which also provides for reimbursement for abortions of pregnancies resulting from rape or incest.

Endnote 2

Specifically, the current version of the Hyde Amendement provides, SEC 510. (a) The limitations established in the preceding section shall not apply to an abortion --

> (1) if the pregnancy is the result of an act of rape or incest; or
>
> (2) in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed. P.L. 105-78 sec. 510 (1997).

Endnote 3

Department of Labor, Health & Human Services, Education, & Related Agencies Appropriation Act, Pub.L. No. 105-78, secs. 509, 510, 111 Stat. 1467, 1516 (1997).

Endnote 4

Medicaid funding of abortions is limited to the following:

(1) when the life of the mother would be endangered if the pregnancy were carried to term; or

(2) when pregnancy is the result of an act of rape or incest. 7 AAC 43.140.

Endnote 5

On August 10, 1998, in anticipation of the needs of these lower-income women, Planned Parenthood of Alaska ("PPA") established with a $5,000 donation a loan program. By August 13, PPA had already approved two loans, one of which was for $550, for women seeking abortions to preserve their health.

Endnote 6

Plaintiffs assert that there are no questions of material fact in dispute which prohibit summary judgment. Defendants assert that there are questions of fact material to plaintiffs' case which prohibit summary judgment in plaintiffs' favor but that there are no facts in dispute relevant to their motion for summary judgment. Because I do not rely on the facts allegedly in dispute in reaching my decision, summary judgment is appropriate.

Endnote 7

She will receive no coverage through the abortion. After the abortion, she is apparently entitled to 60 days postpartum coverage.

Endnote 8

The Alaska Supreme Court has not adopted *Roe,* but has stated that the scope of the fundamental right to reproductive choice under the Alaska Constitution is similar to that expressed in *Roe. Valley Hospital* at 969.

Endnote 9

Although not explicitly asserted as a State interest, because it may be an implied interest, I address the resources issue.

Endnote 10

That they may have also intended to provide more funding for pregnant women does not change this. Indeed, that the legislature intended both outcomes supports the conclusion that they intended to encourage women to have babies while discouraging them to abort pregnancies.