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BONNIE FAYE GIBSON

MUNICIPAL COURT OF CALIFORNIA

SANTA CLARA COUNTY JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. BONNIE FAYE GIBSON, Defendant.	CASE NO.: B91095704 DEMURRER TO COUNTS 1, 2, 3 & 5 OF THE AMENDED[1] COMPLAINT

COMES NOW the defendant, BONNIE FAYE GIBSON, by and through her counsel, and hereby demurs to Counts 1, 2, 3 & 5 of the amended Complaint, filed October 8, 1991, on the

[1] In reviewing the Court file in this action, counsel can find no "original" Complaint. In the event that the "original" Complaint was never filed, counsel would, and does, move to strike the term "amended" from the Complaint filed October 8, 1991 and would, and does, ask this Court to deem the October 8, 1991 Complaint to be the "original" Complaint for all purposes, including, but not limited to, a determination of the statute of limitations.

following grounds:

1. That the facts stated do not constitute a public offense; and

2. That they contain matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution.

Counsel requests leave of Court to demurrer to Count 4 at a later date, should that count not be dismissed.

DATED: January 16, 1992.

ANNE FLOWER CUMINGS
PAUL N. HALVONIK

By: _____
ANNE FLOWER CUMINGS,
Attorneys for Defendant,
BONNIE FAYE GIBSON

MEMORANDUM OF POINTS AND AUTHORITIES

In counts 1, 2, 3 & 5 of the amended Complaint, Faith Gibson stands charged with violations of Business and Professions Code §16240, practicing without license, registration or certificate. Business and Professions Code §16240 provides:

> Every person who practices, offers to practice, or advertises any business, trade, profession, occupation, or calling, or who uses any title, sign, initials, card, or device to indicate that he or she is qualified to practice any business, trade, profession, occupation, or calling for which a license, registration, or certificate is required by any law of this state, without holding a current and valid license, registration, or certificate as prescribed by law, is guilty of a misdemeanor.

Specifically, the certificate which Faith Gibson is charged with failing to have is the certificate to practice midwifery.

The practice of midwifery is lawful. If one holds a certificate, one may practice midwifery and is authorized to attend cases of normal childbirth (Business and Professions

Code §2505). Midwife certificates issued by the Medical Board of California (prior to the effective date of Division 2, Chapter 6, Article 2.5 of the Business and Professions Code (1974)) are renewable by that Board (Business and Professions Code §2746.3). Nothing in Article 2.5 (Nurse-Midwifery) should be construed to prevent the practice of midwifery by a person possessing a midwife's certificate (Business and Professions Code §2746.4).

No new certificates have been issued since 1949 when then §2135 of the Business and Professions Code was amended to omit midwifery from the list of practices for which new certificates could be issued. (See Bowland v. Municipal Court, 18 Cal.3d 479, 490 (1976).) The amended Complaint indicates that Faith Gibson's date of birth was 9/23/47. Therefore, she was 2 years old when the last new midwifery certificate was issued.

Counts 1, 2, 3 & 5, therefore, charge Faith Gibson with failing to have a certificate that she couldn't possibly get. If one is not capable of performing the required act, one has a legal excuse or justification with regard to the offense charged. It is a defense to omission liability that the person is not capable of performing the required act.[2]

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[2]. A poverty stricken parent cannot be criminally liable for failure to provide food to her or his child.

Clearly, midwifery is a lawful occupation and one of long standing. Those persons who held certificates in 1949 have been, and are, accorded the opportunity to renew them. That no new certificates are issued violates Faith Gibson's rights to equal protection secured to her by the Fourteenth Amendment of the United States Constitution.

"When a State distributes benefits unequally, the distinctions it makes are subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment. ..." Zobel v. Williams, 457 U.S. 55, 60 (1982). Where the "fundamental interests" of those suffering discrimination by virtue of the unequal reach of the law, the challenged legislation must be reviewed under the strict scrutiny standard. "Not only must the classification reasonably relate to the purpose of the law, but also the state must bear the burden of establishing that the classification constitutes a necessary means of accomplishing a legitimate state interest, and that the law serves to promote a compelling state interest." Purdy & Fitzpatrick v. State of California, 71 Cal.2d 566, 578-579 (1969).

In Traux v. Raich, 239 U.S. 33, 41 (1915), the Supreme Court declared "[I]t requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the

Amendment to secure." Midwifery has been for time immemorial a common occupation of the community. That the certificate to practice midwifery is available to some (those who have had them since 1949) and not to others is a clear violation of the Equal Protection Clause of the Fourteenth Amendment.

California accords respect for the right to work. "[T]he state may not arbitrarily foreclose to any person the right to pursue an otherwise lawful occupation. Any limitation on the opportunity for employment impedes the achievement of economic security, which is essential for the pursuit of life, liberty and happiness; courts sustain such limitations only after careful scrutiny." Purdy & Fitzpatrick v. State of California, supra, 71 Cal.2d at 579. In Sail'er Inn, Inc v. Kirby, 5 Cal.3d 1, 17 (1971), the Court declared that the right to pursue a lawful profession was a fundamental right and, accordingly, applied the strict scrutiny standard of review to legislation that deprived women of equal opportunities in the profession of bartending. In so doing, the Court declared:

> We have held that the state may not arbitrarily foreclose any person's right to pursue an otherwise lawful occupation (Purdy & Fitzpatrick v. State of California, supra, 71 Cal.2d 566, 579.) The right to work and the concomitant opportunity to achieve economic security and stability are essential to the

pursuit of life, liberty and happiness. As early as 1915, the United States Supreme Court declared that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of [the Fourteenth] Amendment to secure." (Truax v. Raich (1915) 239 U.S. 33, 41 [60 L.Ed. 131, 135, 36 S.Ct. 7].) The California Legislature accords statutory recognition to the right to work by declaring the opportunity to seek, obtain and hold employment without discrimination a civil right. (Lab. Code, §1411.) Limitations on this right may be sustained only after the most careful scrutiny. (Purdy & Fitzpatrick v. State of California, supra, 71 Cal.2d 566, 579; cf. Allgeyer v. Louisiana (1897) 165 U.S. 578, 589-590 [41 L.Ed. 832, 835-836, 17 S.Ct. 427]; Traux v. Raich, supra, 239 U.S. 33, 41; Endler v. Schutzbank (1968) 68 Cal.2d 162, 169, fn. 4, 169-170 [65 Cal.Rptr. 297, 436 P.2d 297]; Blumenthal v. Board of Medical Examiners (1962) 57 Cal.2d 228, 235 [18 Cal.Rptr. 501, 368 P.2d 101].) Bartending and related jobs, though carefully regulated, are lawful occupations and the strict standard of review is therefore justified on this ground. (Ibid.)

It is respectfully submitted that there is no compelling state interest in permitting those who held certificates of midwifery in 1949 to continue their practice while preventing others from joining. Reviewing the time-based legislative classifications which render the midwifery certificate unequally available to qualified applicants under the strict scrutiny standard, there can be no question that this legislative scheme is in violation of the Fourteenth Amendment's Equal Protection Clause.

Even under the lesser standard which requires only that there be a rational relationship between the legislative classifications and a legitimate state interest, this legislative distinction must fail. It does not rationally further a legitimate state purpose for some persons to be able to practice midwifery while others may not. In Blumenthal v. Board of Medical Examiners, 57 Cal.2d 228, the petitioner challenged Business and Professions Code §2552, subd. (a) because it discriminated between those who had served a five year apprenticeship or those who had been licensed for five years in another state and all other persons regardless of their qualifications. The Court reviewed the distinction using the rational relationship standard. It stated:

> [T]o conflict with constitutional provisions, however, the discrimination

"must be 'actually and palpably unreasonable and arbitrary,' or the legislative determination as to what is a sufficient distinction to warrant the classification will not be overthrown. [Citations.] When a legislative classification is questioned, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of existence of that state of facts, and the burden of showing arbitrary action rests upon the one who assails the classification [Citation.]" (People v. Western Fruit Growers, Inc., 22 Cal.2d 494, 506-507 [140 P.2d 13]; Department of Mental Hygiene v. McGilvery, 50 Cal.2d 742, 760 [329 P.2d 689].) "So long as the statute does not permit one to exercise the privilege while refusing it to another of like qualifications, under like conditions and circumstances, it is unobjectionable upon this ground."[3] (Watson v. Division of Motor Vehicles, 212 Cal.279, 284 [298 P.481].)

[3] In this instance we have precisely the situation where a statute permits one group of people to exercise the privilege of working as midwifes and denies that privilege to all others without regard to their qualifications.

> A discrimination, however, that bears no reasonable relation to a proper legislative objective is invalid. Thus, in Accounting Corp. v. State Board of Accountancy, 34 Cal.2d 186 [208 P.2d 984], we held unconstitutional legislation that permitted corporations that had been engaged in the practice of public accountancy for at least three years before the effective date of the statute to continue in business, but made unlawful such practice by all other corporations, because a "statute which permits some corporations to continue operations as public accountants while denying others that privilege where no reasonable grounds exist for such favoritism, denies equal protection to the excluded corporations and grants unlawful privileges to the favored." (P.191) (Ibid.)

Similarly, the United States Supreme Court struck down the time-based legislative scheme in Zobel v. Williams, supra, where benefits were unequally available. In dispensing the windfall profits from the discovery of large oil reserves on state-owned land, Alaska proposed to distribute benefits to the citizens of the state in varying amounts, based upon the citizen's length of residence. The Court reviewed this legislation under the rational

relationship standard. The legislation failed to pass constitutional muster, the Court ruling that it violated the Equal Protection Clause.

The failure to make the certificate to practice midwifery available to all who may qualify is a denial of the equal protection afforded by the Fourteenth Amendment. Faith Gibson should be permitted to apply for and obtain a certificate to practice midwifery. The equal protection clause compels such a result. Likewise, it forbids a prosecution for failure to have an unconstitutionally unavailable certificate.

Given that the midwifery certificate has been unconstitutionally unavailable to Faith Gibson, counts 1, 2, 3 & 5 of the amended Complaint do not and cannot state facts that constitute a public offense and, further, those counts contain matter which constitutes a legal justification or excuse of the offense charged, or other legal bar to the prosecution.

It is respectfully submitted that the demurrer should be sustained, without leave to amend, and that counts 1, 2, 3 & 5 should be dismissed. Should count 4 not be dismissed by the prosecution, leave of court is sought to demur to that

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count at a later date.

DATED: January 16, 1992.

Respectfully submitted,

ANNE FLOWER CUMINGS
PAUL N. HALVONIK

By: _____
ANNE FLOWER CUMINGS
Attorneys for Defendant,
BONNIE FAYE GIBSON

Background Information/California Midwives

The traditional (non-medical) practice of midwifery was statutorily neutral (no laws existed) before the 1917 passage of Article 24 (midwifery provision) and after the 1949 repeal of Article 9 (midwife's application) as neither the 1917 statute itself or its repeal in 1949 penalized the uncertified or "lay" practice of midwifery. The Medical Practice Act itself does not define normal childbirth to be a medical or pathological condition. Except for the 32 years that Article 24 was active (1917-49) the Medical Practice Act did not regulate non-medical assistance to women during spontaneous childbirth. No law requires a pregnant woman to seek out professional care prenatally or to have a skilled attendant present during childbirth. No law prohibits a lay person from providing non-medical assistance to a woman during normal childbirth.

The first legal action against lay midwives was the 1974 prosecution of 3 midwives from the Santa Cruz Women's Health Collective. Since there were no California statutes which made uncertified midwifery practice a criminal offense (prior to SB 350), these midwives were charged with an illegal practice of medicine. The criminalizing of non-nurse midwifery occurred simultaneously with the legalization of nurse-midwifery legislation in 1974-75.

Within two years of the original midwifery-unfriendly decision, midwives succeeded in establishing an effective professional organization that began working towards a legislative "remedy". From 1978 to 1982 midwives had the active cooperation of the Department of Consumer Affairs in promoting state certification of non-nurse midwives as well as their assurance that practicing midwives would not be randomly harassed by DCA. Estimates by CAM of the number of midwives in practice ran from 300 to 500. After the election of a Republican governor in 1982, agencies of California government embarked on a policy of prosecution of non-nurse midwives for the illegal practice of medicine. Simultaneously, our legislative efforts to de-criminalize midwifery were repeatedly defeated by organized opposition of the CMA, ACOG, and the American Academy of Pediatrics in 1979, 1980, 1982, 86, and 92. As a direct result of these circumstances, **many politically moderate and conservative midwives ceased to practice after 1982 for fear of legal consequences.** Some sought licensure via nurse-midwifery programs and a small number came under the umbrella of the Religious Exemptions Clause.

The effectiveness of the legislative efforts were further reduced as more and more midwives abandoned practice or moved to midwifery-friendly states such as Oregon and Washington. The number of currently practicing midwives had fallen to around 75 in May of 1993. A dwindling and beleaguered number of politically-active California midwives remained actively involved in the legislation effort. For the most part, they found it necessary to suspend practice. In additional to the psychological strain of the legal issues on them and their families, it is almost impossible to participate effectively in the legislative process while maintaining an active practice (with 24 hr. on-call schedules).

These are the leaders and elders of the midwifery community and MUST NOT be prohibited from applying for licensure by an artificial and arbitrary cut-off date.

Please contact me if you have any questions about the materials i have enclosed or other comments

God Bless.....,

faith Gibson, domiciliary midwife (1917 Article 24/Exempt)

cc: Senator Killea, Author SB350
Dr. Milke, Member MBC
Maggie Bennett, President CAM
Linda Whitney, Staff MBC
Tony Arjil, Staff MBC