IN THE EIGHTEENTH JUDICIAL CIRCUIT
DUPAGE COUNTY, WHEATON, ILLINOIS

CHARLES D. YAKICH,	)	
Petitioner	)	
-vs-	)	No. 15 F 651
ROSEMARY A. AULDS,	)	
Respondent	)	

MEMORANDUM OPINION AND ORDER

THIS CAUSE comes before the court on the motion of Charles Yakich to declare 750 ILCS sec. 5/513 unconstitutional as applied to him in this case. For the following reasons, the motion is granted.

FACTS OF THE CASE

The parties to this case, Charles D. Yakich (hereinafter "Charles") and Rosemary A. Aulds (hereinafter "Rosemary") are the biological parents of Dylan Yakich (hereinafter "Dylan"). The parties were never married and this action was brought under the Parentage Act (750 ILCS 46/101 et seq.). Primary residency of Dylan was granted to Charles. At the time of the underlying hearing in this case, Dylan was twenty-one years old.

A petition was filed by Rosemary pursuant to 750 ILCS sec. 5/513 seeking contribution from Charles for Dylan's college expenses. The petition was heard before this court on July 22, 2016. The evidence at the hearing showed that Dylan had consistently expressed a desire to become a marine biologist. By way of encouragement, Charles paid for SCUBA classes for Dylan, and upon her certification (PADI Open Water) took her on many dive excursions in the Caribbean, Atlantic and Pacific Oceans. Her expressed desire to become a marine biologist continued through the hearing of this case. When the time came for choosing colleges, Charles was not in any way consulted by Dylan or Rosemary.

Rosemary and Dylan decided that Dylan should attend Florida Gulf Coast University (hereinafter, "FGCU"), and informed Charles of their choice. FGCU enjoys a rating of number 21 in the compilation of "Top Party Schools of Florida", but does not offer a degree in marine biology. It does offer a degree in marine science which is not remotely the same thing. Dylan mistakenly enrolled in the marine science program at FGCU believing that she would be earning a degree equivalent to a degree in marine biology. She testified that her revised plan was to major in biology, graduate with a bachelor's degree, then seek an advanced degree in marine biology.

Charles, in the meantime, offered to pay one hundred percent of Dylan's college expenses, a "free ride" in his words, if she would transfer to Scripps Institute of Oceanography in San Diego, or the University of Hawaii, both of which offer four year degrees in marine biology

and have excellent reputations. Charles's offer was summarily refused by both Rosemary and Dylan.

Subsequent to an evidentiary hearing this court ordered Charles and Rosemary to contribute 40% of Dylan's college expenses each, and that Dylan be responsible for the remaining 20% which could be in the form of grants, scholarships, work-study, or employment. Dylan did not apply for any grants or scholarships or become employed. Instead, her portion was paid by Rosemary.

Charles initially filed a motion on September 23, 2016 asking this Court to declare 750 ILCS 5/513 unconstitutional and gave notice to the Attorney General of the State of Illinois. On October 6, 2016 the Deputy Attorney General advised the attorney for Charles that "the opportunity to intervene will not be pursued by this office at this time."

On January 11, 2017, Charles filed a motion seeking to have his obligation of support either terminated or modified based on the non-compliance of Dylan with the court's previous order. This court denied the motion of Charles based, in sum, on the fact that Charles was not monetarily damaged by Dylan's actions.

On August 1, 2017 Charles filed his instant motion asking this court to declare 750 ILCS 5/513 unconstitutional, and again gave notice to the Attorney General of the State of Illinois. (Copies of relevant notices and correspondence from the Office of the Attorney General are attached to this decision)

ANALYSIS

Chapter 750 ILCS 5/513, provides, in relevant part, as follows:

> (a) The court may award sums of money out of the property and income of either or both parties or the estate of a deceased parent, as equity may require, for the educational expenses of any child of the parties. Unless otherwise agreed to by the parties, all educational expenses which are the subject of a petition brought pursuant to this Section shall be incurred no later than the student's 23rd birthday, except for good cause shown, but in no event later than the child's 25th birthday.

The statute goes on make numerous provisions for financial matters concerning the payment of college expenses for otherwise able bodied adults. It does not contain any provisions for the input, advice or consent of either parent as to the choice of school.

Charles argues that the statute is unconstitutional pursuant to the equal protection clause of the Fourteenth Amendment to the Constitution of the United States, which provides, in relevant part as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property,

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Charles contends that he has been denied the equal protection of the law because section 513 requires the parents of divorced or unmarried couples to pay for the college expenses of their children, while not requiring the same of married couples. Further, Charles contends that section 513 creates two different classes of children, those whose parents are divorced or unmarried and those whose parents are married. Finally, Charles argues that he has been denied the same right to make parental decisions regarding the education of his child that is enjoyed by parents of married couples or single parents.

EQUAL PROTECTION (Different Classes)

In *Whitaker v. Kenosha Unified School District*, et al., 858 F.3d 1034 (7th Cir., 2017) the Seventh Circuit Court of Appeals stated: "The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) (citing Plyler v. Doe, 457 U.S. 202, 216 (1982)). It therefore, protects against intentional and arbitrary discrimination. See Vill. Of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (per curiam). Generally, state action is presumed to be lawful and will be upheld if the classification drawn by the statute is rationally related to a legitimate state interest. City of Cleburne, 473 U.S.at 440. "

858 F. 3d at 1050

Charles agrees that the rational basis standard, set forth above, is properly applicable to this case, rather than the strict scrutiny standard.

In 1978, almost forty years ago to the date of this order, the Illinois Supreme Court decided the case of *Kujawinski v. Kujawinski*, 71 Ill. 2d 563 (1978). That case was an action for declaratory judgment, and a class action, which sought to have section 513, among others, of the Illinois Marriage and Dissolution of Marriage Act, declared unconstitutional on equal protection grounds. The Court applied the rational basis standard and held the statute constitutional. The rational basis stated by the Court, in sum, was that children of divorced parents were less likely to receive assistance from their parents for college education than children of married or single parents, citing *Maitzen v. Maitzen*, 24 Ill. App. 2d 32, 38 (1959). The quote from *Maitzen* used by the Court stated:

"In a normal household, parents * * * direct their children as to when and how they should work or study. That is on the assumption of a normal family relationship, where parental love and moral obligation dictate what is best for the children. Under such circumstances, natural pride in the attainments of a child * * * would demand of parents provision for a college education, even at a sacrifice. When we turn to divorced parents a disrupted family society cannot count on normal protection for the child, and it is here that equity takes control to mitigate the hardship that may befall children of divorced parents."

71 Ill.2d at 579-580

In *Rawles v. Hartman*, 172 Ill. App. 3d 931 (2d. Dist., 1988), the Second Appellate District found that section 513 was applicable to parentage cases.

Faced with the Court's ruling in *Kujawinski*, Charles contends that the rational basis for the Court's ruling in 1978, no longer exists in view of changed demographics, societal attitudes and developments in case law in both state and federal courts.

In *Troxel v. Granville*, 537 U.S. 57 (2000), Justice O'Connor noted:

"The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household. While many children may have two married parents and grandparents who visit regularly, many other children are raised in single-parent households. In 1996, children living with only one parent accounted for 28 percent of all children under age 18 in the United States. U.S. Dept. of Commerce, Bureau of Census, Current Population Reports, 1997 Population Profile of the United States 27 (1998)."

537 U.S. at 63-64.

While traditional two parent, married families were the norm in 1978, in 2018 they make up less than half. In fact, if considered in statistical terms, children from either non-married or divorced parents would be considered "normal" based on today's demographics. Unmarried women account for 40% of the birth rate in the United States as of 2014. The divorce rate in Illinois as of 2011 was 46%. Only 46% of children under the age of eighteen live in a two parent married home.

See: Births: Final Data for 2014 by Brady E. Hamilton, Ph.D.; Joyce A. Martin, M.P.H.; Michelle J.K. Osterman, M.H.S.; Sally C. Curtin, M.A.; and T.J. Mathews, M.S., Division of Vital Statistics; Illinois Department of Public Health, Marriage, Divorces and Annulments Occurringin Illinois 1958-2011, available at http://www.idph.state.il.us/health/bdmd/marr_div_annul.htm;
CDC National Center for Health Statistics, National Marriage and Divorce Rate Trends 2000-2014, available at http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm.

Livingston, Gretchen "Fewer than Half of U.S.Kids Today Live in a 'Traditional' Family," PewResearch Center, December 22, 2014, http://www.pewresearch.org/fact-tank/2014/12/22/lessthan-half-of-u-s-kids-today-live-in-a-traditional-family.

The rational basis standard utilized in *Kujawinski* presumes that never married or divorced couples are less normal, and less likely to provide post-secondary education for their offspring than couples who are married, or single parents. While this may have been true in 1978, there is no basis for such a conclusion today.

Case law from other jurisdictions over the last forty years (fifty nine years since *Maitzen v. Maitzen)* supports the argument made by Charles. For example, in *Curtis v. Kline*, 666 A.2d 265 (Pa. 1995), the Supreme Court of Pennsylvania directly addressed the constitutionality of the Pennsylvania statute which required payment of post-secondary educational expenses of emancipated adult offspring of divorced or never married parents. In *Blue v. Blue*, 532 Pa. 521, 616 A.2d 628 (1992), the Pennsylvania Supreme Court had declined to recognize a duty requiring a parent to provide college educational support because no such legal duty had been imposed by the General Assembly of Pennsylvania or developed by the case law of that state. As a result of the *Blue* decision, the Pennsylvania legislature promulgated a new law which stated:

(a) General rule. . . . a court may order either or both parents who are separated, divorced, unmarried or otherwise subject to an existing support obligation to provide equitably for educational costs of their child whether an application for this support is made before or after the child has reached 18 years of age. 23 Pa.C.S. § 4327(a).

The question then became whether the new act violated the Equal Protection Clause of the Fourteenth Amendment. The Pennsylvania appeals court ruled that it did, which resulted in a direct appeal to the Pennsylvania Supreme Court. In the preamble to the new act, the Pennsylvania legislature had inserted the following:

"Further, the General Assembly finds that it has a rational and legitimate governmental interest in requiring some parental financial assistance for a higher education for children of parents who are separated, divorced, unmarried or otherwise subject to an existing support obligation."

Despite the stated legislative purpose of the act, which appears to have been inserted in order to satisfy a "rational basis" analysis, the Pennsylvania Supreme Court went through its own equal protection analysis and concluded:

"Recognizing that within the category of young adults in need of financial help to attend college there are some having a parent or parents unwilling to provide such help, the question remains whether the authority of the state may be selectively applied to empower only those from non-intact families to compel such help. We hold that it may not. In the absence of an entitlement on the part of any individual to post-secondary education, or a generally applicable requirement that parents assist their adult children in obtaining such an education, we perceive no rational basis for the state government to provide only certain adult citizens with legal means to overcome the difficulties they encounter in pursuing that end." 666 A2d at 258-259

In sum, the social changes that have occurred since 1978 make the rational basis cited in *Kujawinski* no longer tenable. Further, there is no apparent rationale basis for the statute other than that cited in *Kujawinski.*

EQUAL PROTECTION /DECISION MAKING

In this case the objection made by Mr. Yakich does not go directly to whether he should have to pay for college. He has stated adamantly and often that he is willing and able to pay the full

college expenses of his child. His complaint is that he was never consulted and his input never considered. He argues that if he were married to the respondent, his desire to send his daughter to an excellent college would have the full force of his economic largesse, and if his daughter wished to attend what is colloquially described as a "party" school, she would do so on her own. In other words, Mr. Yakich argues that parental decision making with respect to college contribution continues for married persons but ends for others, while non-married parties bear a financial burden that does not exist for those that are married or single. This, he believes, is a violation of equal protection.

In the case of *Troxel v. Granville*, 530 U.S. 57 (2000), the U.S. Supreme Court dealt with a case of grandparent visitation and the paramount rights of parents to make decisions regarding their offspring. In that opinion, the Supreme Court discussed and reaffirmed the constitutional protections afforded to parents in the upbringing and education of their children. Specifically, the Court stated:

"The liberty interest at issue in this case-the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in Meyer v. Nebraska, 262 U. S. 390, 399, 401 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in Pierce v. Society of Sisters, 268 U. S. 510, 534-535 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in Pierce that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Id., at 535. We returned to the subject in Prince v. Massachusetts, 321 U. S. 158 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Id., at 166."

530 U.S. at 64

This was not the argument made in *Kujawinski*, nor was it addressed by the Court. The court in *Kujawinksi*, did note, the following:

"We have no hesitation, therefore, in concluding that it is reasonably related to that legitimate purpose for the legislature to permit the trial court, in its sound discretion, to compel divorced parents to educate their children to the same extent as might reasonably be expected of nondivorced parents."

71 Ill. 2d at 580

However, section 513 does not permit divorced or never married parents the same input and ability to educate their children as is afforded to married or parents. This court finds that there is no rational basis for this difference.

CONCLUSION

For the reasons set forth above, this Court concludes that equal protection was denied to Mr. Yakich in this case, and that section 513 is unconstitutional as applied. This Court further finds that section 513 cannot reasonably be construed in a manner that would preserve its validity in this case. Finally, this Court finds that this finding of unconstitutionality is necessary to this decision and that this decision cannot rest on an alternative ground. Therefore, the order entered by this court on July 16, 2016 is vacated.

/s/ Else

JUDGE THOMAS A. ELSE
May 4, 2018

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September 23, 2016

Attorney General Lisa Madigan
Chicago Main Office
100 West Randolph Street
Chicago, IL 60601

Re: *Yakich v. Aulds*, No. 15 F 651

Dear Attorney General Madigan:

Pursuant to Illinois Supreme Rule 19, enclosed please find a copy of Petitioner's Motion and Memorandum in Support of Petitioner's Motion challenging the constitutionality of 750 ILCS § 5/513. That statute violates the Equal Protection Clause by arbitrarily classifying similarly-situated individuals based on marital status. The Motion was filed on September 23, 2016 in the Circuit Court of the Eighteenth Judicial Circuit, Du Page County, Illinois. The Memorandum will be filed pending a Court order granting Petitioner's Motion for Leave to File a Memorandum in Excess of ten (10 pages). As indicated on the enclosed Notice of Motion, they will be presented to the Court before the Honorable Thomas A. Else in Courtroom 2011 on September 30, 2016 at 9:15 a.m.

Very truly yours,

DITOMMASO ♦ LUBIN

Vincent L. DiTommaso

Enc.

cc: Nicola K.B. Latus
William J. Arendt
Honorable Thomas A. Else

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

October 6, 2016

Vincent L. DiTommaso
DiTommaso Lubin, P.C.
17W 220 22nd Street, Suite 410
Oakbrook Terrace, IL 60181

Re: Charles D. Yakich v. Rosemary A. Aulds
No. 15 F 651

Dear Mr. DiTommaso:

This letter acknowledges receipt of your September 23, 2016 notice of claim of unconstitutionality in the above-referenced matter. Based upon a review of the notice and enclosed documents, the opportunity to intervene will not be pursued by this office at this time.

Kindly advise me of the Court's resolution of this constitutional claim. Thank you for your cooperation. Should you have any questions, please contact me at 100 West Randolph Street, 12th Floor, Chicago, Illinois 60601 or at (312) 814-1030.

Very truly yours,

Roger P. Flahaven
Deputy Attorney General
Civil Litigation

RPF/amr

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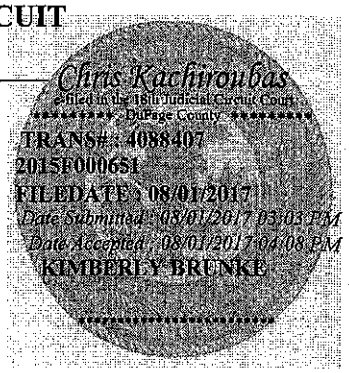
Attorney No. 23

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
DU PAGE COUNTY, WHEATON, ILLINOIS



CHARLES D. YAKICH	)	
	)	
Petitioner,	)	
	)	No. 15 F 651
and	)	
	)	
ROSEMARY A. AULDS,	)	Honorable Thomas A. Else
	)	
Respondent.	)	

NOTICE OF MOTION

TO: William J. Arendt
Nicola K.B. Latus
William J. Arendt & Associates, P.C.
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Burr Ridge, IL 60527
William.Arendt@wjarendtlaw.com
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Roger P Flahaven
Deputy Attorney General
Office of the Attorney General
100 W. Randolph Street, 12th Floor
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rflahaven@atg.state.il.us

PLEASE TAKE NOTICE that on September 15, 2017, at 9:15 a.m., or as soon thereafter as counsel may be heard, I shall appear before the Honorable Thomas A. Else, or any judge sitting in his stead, in the courtroom usually occupied by him in Courtroom 2001, DuPage Judicial Center, 505 North County Farm Road, Wheaton, Illinois and shall then and there present the attached PETITIONER'S MOTION TO DECLARE 750 ILCS § 5/513 UNCONSTITUTIONAL, a copy of which is herewith served upon you.

CHARLES YAKICH

By: /s/ Vincent L. DiTommaso
One of his attorneys

Vincent L. DiTommaso
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CERTIFICATE OF SERVICE

I, Vincent L. DiTommaso, the undersigned attorney, hereby certify that on August 1, 2017, I caused copies of the foregoing NOTICE OF MOTION and PETITIONER'S MOTION TO DECLARE 750 ILCS § 5/513 UNCONSTITUTIONAL to be served upon:

William J. Arendt
Nicola K.B. Latus
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via e-mail transmission.

/s/ Vincent L. DiTommaso
Vincent L. DiTommaso