1976

Boise Cascade Corporation v. Sterling A. Meyer And Jeanne D. Meyer Et Ux, I Reese Howell, Escrow Agent And Title Insurance Agency : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE

STATE OF UTAH

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BOISE CASCADE CORPORATION, :

Plaintiff and :
Appellant,

v. :

Case No. 14[illegible]

STERLING A. MEYER and
JEANNE D. MEYER et ux., :
REESE HOWELL, ESCROW AGENT
and TITLE INSURANCE AGENCY, :

Defendants and :
Respondents.

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BRIEF OF APPELLANT

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APPEAL FROM THE JUDGMENT
THIRD JUDICIAL DISTRICT COURT
THE HONORABLE MARCELLUS K. [illegible]

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TABLE OF CONTENTS

AUTHORITIES CITED

I. Constitutions

II. Statutory Provisions

III. Case Authority

IV. Secondary Authority

IN THE SUPREME COURT

OF THE STATE OF UTAH

BOISE CASCADE CORPORATION, Plaintiff and Appellant, v. STERLING A. MEYER and JEANNE D. MEYER et ux., REESE HOWELL, ESCROW AGENT and TITLE INSURANCE AGENCY, Defendants and Respondents.	)	Case No. 14833

BRIEF OF APPELLANT

STATEMENT OF THE CASE

This is an action for declaratory relief wherein Plaintiff seeks to have the Utah Statutory Dower provision, § 74-4-3 Utah Code Annotated (1953), declared unconstitutional, both on its face and applied to the case at hand.

DISPOSITION IN LOWER COURT

Defendants' Motion for Summary Judgment in their favor was granted and an Order to that effect entered by the Third Judicial District Court in and for Salt Lake County on October 20, 1976. From the Order granting Summary Judgment, the Plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a reversal of the Summary Judgment and judgment in its favor as a matter of law, on the ground that the Utah Statutory Dower provision, § 74-4-3 Utah Code Annotated (1953) is unconstitutional on its face or as applied.

STATEMENT OF FACTS

1. On or about November 1, 1973, Appellant, Plaintiff below, obtained a judgment from the Third Judicial District Court, Civil No. 210940, against Respondent, Defendant below, Sterling A. Meyer in the sum of $19,158.12. Respondent Jeanne D. Meyer, the wife of Sterling A. Meyer was not a party to that suit or judgment.

2. At the time judgment was entered, Respondents Sterling A. and Jeanne D. Meyer were the fee simple and/or beneficial owners, as joint tenants, of a certain parcel of real property

with a personal residence situated thereon, located at 1761 South 2600 East, Salt Lake City, Salt Lake County, State of Utah.

3. In accordance with § 78-22-1 Utah Code Annotated (1953), upon docketing, said judgment became a lien upon all the real property owned by the Respondent Sterling A. Meyer located in Salt Lake County, including the parcel described above.

4. On or about March 2, 1976, Respondents Sterling A. and Jeanne D. Meyer sold the above-described residence and placed the proceeds from the sale in escrow with the Respondents Title Insurance Agency of Salt Lake City and Reese Howell as Escrow Agent.

5. The Appellant thereafter served a Writ of Execution upon Respondents Title Insurance Agency and Howell, directing them to release said proceeds to Appellant.

6. Respondents and each of them do not dispute that Appellant Boise Cascade Corporation is entitled by law to execute upon Respondent Sterling A. Meyer's 50 per cent share of the proceeds from the sale of the subject property and Appellant asserts no claim against Respondent Jeanne D. Meyer's 50 per cent share of the proceeds from the sale of the subject property.

7. Subsequent to the issuance of the Writ of Execution, Respondents and each of them refused to surrender up one-third

of Respondent Sterling A. Meyer's 50 per cent share of the proceeds from the sale of the subject property, on the ground that said one-third represented Jeanne D. Meyer's statutory dower under § 74-4-3 Utah Code Annotated.

8. Therefore, the sole and exclusive issue before the trial court and this Court is whether § 74-4-3 is constitutional, thus allowing Respondents to withhold the above one-third share from execution by Appellant.

ARGUMENT

POINT I

A TOTALLY NEW CONCEPT IN CONSTITUTIONAL LAW HAS EMERGED IN THE LAST FIVE YEARS RENDERING ALL STATUTORY PROVISIONS RESULTING IN DIFFERENT TREATMENT OF INDIVIDUALS BASED UPON SEX TO BE VOID UNLESS SUPPORTED BY STRONG, COMPELLING AND LEGITIMATE JUSTIFICATION.

The sole and single issue presented to the Court on this Petition for Appeal is whether § 74-4-3 Utah Code Annotated (1953), as amended, generically known as Utah's statutory dower provision is unconstitutional per se or unconstitutional as applied. The statute in question provides as follows:

> 74-4-3. WIFE'S INTEREST IN HUSBAND'S REAL PROPERTY. One-third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, to which the wife has made no relinquishment of her rights, shall be set apart as her property in fee simple, if she survives him; provided, that the wife shall not be

> entitled to any interest under the provisions of this section in any such estate of which the husband has made a conveyance when the wife, at the time of the conveyance, was not and never had been a resident of the territory or state of Utah. Property distributed under the provisions of this section shall be free from all debts of the decedent except those secured by liens for work or labor done or material furnished exclusively for the improvement of the same, and except those created for the purchase thereof, and for taxes levied thereon. The value of such part of the homestead as may be set aside to the widow shall be deducted from the distributive share provided for her in this section. In cases wherein only the heirs, devisees and legatees of the decedent are interested, the property secured to the widow by this section may be set off by the court in due process of administration. [Emphasis added.]

The statute clearly establishes a real property interest in a certain class of individuals based upon sex and sex alone. The statute here under examination creates a special property interest for females, takes away a certain real property interest from males and creates no similar or corresponding interest for males.

The gravamen of Plaintiff's Appeal is founded upon the discriminatory treatment of a special classification of individuals which bears no rational nexus to any legitimate state interest. Such a statutory scheme has been ruled unconstitutional by the United States Supreme Court in a string of developing case authority commencing with the now famous or infamous case of Reed v. Reed, 404 U.S. 71, 92 S. Ct. 251, 30 L.Ed. 2d 225 (1971) and culminating most recently in Craig et. al. v. Boren, 45 Law Week 4057 (Dec. 20, 1976).

The United States Supreme Court has held that statutory classifications based on sex were "inherently suspect and thus subject to close judicial scrutiny." Fronterio v. Richardson, 411 U.S. 677, 93 S. Ct. 1764, 36 L.Ed. 2d 583 (1973).

It is Plaintiff's contention that the Utah statutory dower provision is violative of Due Process and Equal Protection and therefore repugnant to the Fifth and Fourteenth Amendments to the Constitution of the United States as well as Article I, Section 7 and Article IV, Section 1 of the Constitution of the State of Utah. The following decisional authority lends direct support to that proposition: Reed v. Reed, supra; Fronterio v. Richardson, supra; Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208, 31 L.Ed. 2d 551 (1972); Pittsburg Press v. The Commission, 413 U.S. 376, 93 S. Ct. 2553, 37 L.Ed. 2d 699 (1973); Geduldig v. Aiello, 417 U.S. 484, 41 L.Ed. 2d 256, 94 S. Ct. 2485 (1974); Kahn v. Shevin, 416 U.S. 351, 40 L.Ed. 2d 189, 94 S. Ct. 1734 (1974); Daniel v. Louisiana, 420 U.S. 31, 42 L.Ed. 2d 790, 95 S. Ct. 704 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636, 43 L.Ed. 2d 514, 95 S. Ct. 1225 (1975); Stanton v. Stanton, 421 U.S. 7, 43 L.Ed. 2d 688, 95 S. Ct. 1373 (1975); Taylor v. Louisiana, 419 U.S. 522, 95 S. Ct. 692, 42 L.Ed. 2d 690 (1975); Turner v. Department of Employment Security, 423 U.S. 44, 96 S. Ct. 249, 46 L.Ed. 2d 181 (1975); Chandlier v. Roudebush, ___ U.S. ___ 98 S. Ct. 1949, 48 L.Ed. 2d 416 (1976); Craig v. Boren, 45 L.W. 4057, December 20, 1976.

The fountain head case of Reed v. Reed decided in November 1971, was truly a landmark decision in the sense that although the holding seemed innocuous enough at the time, it pressaged a spectacular development of constitutional law not seen since the Slaughter House Cases of 1872[1].

The judicial development of the anti-sex discrimination doctrine announced in Reed is somewhat analogous to the erosion of the "privity of contract" doctrine in area of product liability beginning with McPhearson v. Buick, 217 N.Y. 382, 111 N.E. 1050 (1916) and culminating in an entirely new cause of action not previously existant. See Prosser, THE ASSAULT UPON THE CITADEL, 69 YALE L.J. 1099 (1960), and Prosser, THE FALL OF THE CITADEL, 78 YALE L.J. 1066 (1969). So it is with the sex discrimination cases; they have laid to rest some of the ernstwhile "archaic and overbroad generalizations"[2] concerning the sexes and created an entirely new concept in constitutional rights heretofore totally nonexistent.

Reed itself was concerned only with an Idaho probate statute giving preference to males over females in granting letters of administration. The court found even a preference to be irrational and therefore unconstitutional as a denial of both Due Process and Equal Protection.

1/ 16 Wall. 36, 21 L.Ed. 394 (1872)

2/ 45 Law Week 4059; Schlesinger v. Ballard, 419 U.S. 498 (1975)

Reed was not thereafter confined to its facts. The following year in Frontiero v. Richardson, supra, the court held that an army nurse's husband could not constitutionally be treated differently as a dependent than a male army officer's wife. The Frontiero decision was important as it established sex as a suspect classification along with race, religion, and national origin.

In Taylor v. Louisiana, supra, the Supreme Court held the systematic exclusion of women from jury duty to be violative of inter alia the Equal Protection of the law.

Later in 1975 Weinberger v. Wiesenfeld, supra, the high Court held the Social Security Act's provision allowing survivors benefits to widow mothers with minor children, but not to widower fathers in the same situation was held violative of both Due Process and Equal Protection.

In Stanton v. Stanton, supra, a 1975 case from Utah, a statute compelling a divorced father to support his male child to age 21 while permitting the father to terminate support for his female child at age 18 was held to be an unlawful denial of Equal Protection.

A second case from Utah Turner v. Department of Employment Security, supra, decided in 1975, held a Utah statute making pregnant women ineligible for unemployment benefits for a period from 12 weeks before expected date of child birth until 6 weeks after child birth to be violative of Due Process.

Most recently in Craig v. Boren, supra, the U.S. Supreme Court struck down an Oklahoma state statute differentiating between males and females in the purchase of 3.2% beer holding the act did not "substantially further important governmental interests"and was therefore violative of equal protection.

The foregoing summary is not exhaustive, but touches only upon some of the more significant decisions. A quick review of their holdings, however, makes it clear that the "Equal Rights Amendment" may already be in existency by judicial fiat and that the frenetic efforts of the E.R.A. proponents may be superfluous.

Clearly one conclusion can be drawn from a collective reading of the above-cited cases, that being a statutory scheme drawing a distinction between classes of citizens based only on gender without strong justification cannot meet constitutional muster and must therefore be set aside.

POINT II

UTAH'S STATUTORY DOWER PROVISION § 74-4-3, UTAH CODE ANNOTATED (1953), AS PRESENTLY CONSTRUED BY THE COURTS OF THE STATE OF UTAH AS GRANTING A FEMALE A PROPERTY INTEREST IN THE REAL PROPERTY OWNED BY A MALE, WITHOUT PROVIDING FOR A CORRESPONDING INTEREST FOR THE MALE IN THE PROPERTY OF THE FEMALE, CREATES A STATUTORY DISCRIMINATION BASED ON SEX AND SEX ALONE, CONSTITUTES A "SUSPECT CLASSIFICATION" NOT SUPPORTED

BY ANY COMPELLING STATE INTEREST AND IS, THEREFORE, VIOLATIVE OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA, AS WELL AS ARTICLE IV, SECTION I OF THE CONSTITUTION OF THE STATE OF UTAH.

Turning now to the Utah Statute here challenged §74-4-3, set forth completely at page 4 supra this brief, the section clearly creates a gender based classification. It is now a well-settled principle of constitutional law that "classifications based on sex are inherently suspect and thus subject to the close and strict scrutiny" of the courts. The United States Supreme Court, in Frontiero v. Richardson, supra, while striking down a statutory provision which allowed increased benefits to a male member of the armed services with dependents but disallowing similar benefits for a female member with dependents, held per Justice Brennan:

> With these considerations in mind, we can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny. Applying the analysis mandated by that stricter standard of review, it is clear that the statutory scheme now before us is constitutionally invalid. 411 U.S. at 688. [Emphasis added].

Equally settled in constitutional law is that in order for a suspect classification, here one based solely on sex, to withstand strict judicial scrutiny, it must be shown that the state has a compelling interest to protect by the statutory

classification. See e.g., Shapiro v. Thompson, 394 U. S. 618, 22 L.Ed. 2d 600, 89 S. Ct. 1322 (1969).

In the case at bar it cannot be doubted that § 74-4-3 creates a classification based on sex alone. In a very real way the statute commands "dissimilar treatment for men and women who are . . . similarly situated." Reed v. Reed, supra. It further cannot be disputed that the state is without a compelling state interest which it is protecting by the statute. The statutory dower provision is a classic and paradigm example of the codification of "archaic and overbroad generalizations" which are now constitutionally impermissible. The original version of §74-4-3 stems of course from ancient English common law, was first enacted in Utah in 1898 and has remained essentially unchanged since that day. See Hilton v. Thatcher, 31 Utah 360 88 P. 20 (1906). The provision was enacted in a day when women were looked on with an attitude of, as Justice Brennan stated it, "romantic paternalism." See Frontiero, supra, at 684. At that stage of society's development women commonly did not have separate property or separate means of support, insurance benefits, social security or pension and profit sharing programs. Whereas, today women are just as likely to be able to support and maintain themselves as are men. Moreover, the conclusion that § 74-4-3 is violative of both the United States and the Utah Constitution is not only supported but practically inescapable under the following case authority in addition to those cases discussed above. Stanton v. Stanton,

421 U.S. 7, 43 L.Ed. 2d 688, 95 S. Ct. 1373 (1975); Weinberger v. Wiesenfeld, 420 U.S. 636, 43 L.Ed. 2d 514, 95 S. Ct. 1225 (1975); Schlesinger v. Ballard, 419 U.S. 498, 42 L.Ed. 2d 610, 95 S. Ct. 572 (1975); Geduldig v. Aiello, 417 U.S. 484, 41 L.Ed. 2d 256, 94 S. Ct. 2485 (1974); Kahn v. Shevin, 416 U.S. 351, 40 L.Ed. 2d 189, 94 S. Ct. 1734 (1974); Adoption of Walker, __ Pa. ___, 360 A. 2d. 603 (1976).

POINT III

ASSUMING, ARGUENDO THE CONSTITUTIONALITY OF THE STATUTE, IT IS CLEAR THAT § 74-4-3 IS UNCONSTITUTIONAL AS APPLIED TO THE CASE AT HAND.

The facts of the instant case show that the property to which Respondent Jeanne D. Meyer asserts her one-third dower interest was sold by both herself and her husband. By so doing each party relinquished any and all rights he or she had to the property. It is further undisputed that Respondent Sterling A. Meyer, the husband of Jeanne is presently alive. Under this set of facts it is clear that § 74-4-3 does not and was never intended to allow the wife to withhold one-third of the husband's portion of the proceeds from the sale in which both spouses joi

The statute clearly sets forth two conditions which must be met before the wife can claim her one-third interest. Secti § 74-4-3 reads, in pertinent part:

> One-third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, to which the wife has made no relinquishment of her rights, shall be set apart as her property in fee simple, if she survives him . . . . (Emphasis added.)

The first condition precedent to the wife's taking one-third is that she has not relinquished her rights to said property. In the case at hand, Respondent Jeanne Meyer has joined in a sale of said property to a third party. A more thorough and complete relinquishment of her dower rights can hardly be imagined. In In re Madsen's Estate, 123 Utah 327, 259 P. 2d 595, (1953) this court held that where a woman had joined in a contract for the sale of land owned by her husband, she had thereby "relinquished her inchoate right of dower in the real property covered by that contract." 259 P. 2d at 603. See also In re Estate of Willson, 28 Utah 2d 197, 499 P. 2d 1298 (1972).

In addition, the statute requires that the wife survive the husband, before she is permitted to take her one-third portion. The fact of survival of the wife as a condition precedent to taking under § 74-4-3 is an established rule of law in Utah. In the seminal case of Gee v. Baum, 58 Utah 445, 199 Pac. 680, 683 (1921) the court stated unequivocally:

> While it is true that under our statute dower by that name is abolished and the wife takes one-third of her husband's real estate in fee if she survives him, yet unless she does survive him, she has no interest in his real estate. The interest of the wife, although in fee, is, nevertheless, a mere inchoate interest, and depends entirely upon the condition that she survive her husband. In joining with him in a deed of lands to which he holds the legal title she therefore merely releases her inchoate right . . . .

Finally, it is equally well established in the Utah law on dower interests that the interest of the wife is only in the real property itself and not in the proceeds from any sale or other disposition of the property. The landmark case enunciating this rule is In re Park's Estate, 31 Utah 255, 87 Pac. 900 (1906). There the wife attempted to retain one-third of her deceased husband's estate, claiming that he had conveyed certain property away to which she had not relinquished her dower interest. The Court, in affirming the trial court, held that the wife's only interest was in the real property itself and not in the proceeds from the husband's general estate. This Court stated:

> We . . . feel constrained to hold that the wife, if she desires to recover her interest in her husband's lands alienated by him during marriage, without her consent, must resort to the lands themselves . . . . The interest of the wife is in the land itself to be apportioned to her one-third in value out of each parcel. 87 Pac. at 903.

In the case at hand, Respondent Jeanne D. Meyer is not seeking her one-third from the land itself, but is seeking her one-third from the proceeds from the land. This, under Park, she is not permitted to do.

The conclusion is inescapable. Not only did Respondent Jeanne Meyer relinquish her inchoate dower right by joining with her husband in a conveyance of the property to a third party, but she has not yet met the requirement of survival and she is seeking her dower from proceeds, not real property.

This being so, §74-4-3 is not authority for the withholding, by Respondents, of one-third of the husband's share of the proceeds. The application by the court below, of §74-4-3 to the facts of the case at hand clearly amounts to a denial of due process and renders the statute unconstitutional as applied.

CONCLUSION

The case before the court on this appeal is not rendered moot because the Utah State Legislature has repealed the statutory dower provision with the adoption of the New Uniform Probate Code, as the new Probate Code does not take effect until July, 1977, and does not have retroactive application. The case before the court is important because it is a test case for a number of other similar cases where a debtor attempts to use the Dower Statute as a shield or defense from recovery of judgment by the husband's creditors. For this reason, the constitutional question here presented remains and is in great need of clarification.

Simply stated, Utah's Statutory Dower Provision, §74-4-3, Utah Code Annotated (1953) creates a suspect classification based on sex which is not supportable by any compelling state interest and must therefore be held unconstitutional. The Summary Judgment granted by the court below, in favor of Appellees should be reversed and judgment entered, as a matter of law.

in favor of Appellants. Finally the statute in this case has been applied to living parties where the wife herself has joined in the conveyance, such an application is irrational and not related to any legitimate state purpose as the dower right is inchoate and cannot take effect until the husband's death, and is completely abrogated by her signature on the deed. The court's application of the statute to the facts present in the instant case lacks logical nexus and constitutes a denial of Due Process and the statute, even if constitutional on its face, is here unconstitutional as applied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I herewith certify that two copies of the foregoing Brief have been served upon IRVING H. BIELE, attorney for Respondents, 80 West Broadway, Salt Lake City, Utah, by depositin copies of the same in the U.S. Mails, postage prepaid thereon, this _____ day of January, 1976.

Donna M. Dell