

1988

# William "Billy Joe" Scheller v. Unknown : Reply Brief

Utah Court of Appeals

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Priority No. 7

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IN THE UTAH COURT OF APPEALS

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IN THE MATTER OF THE ESTATE OF	)	
	)	
WILLIAM "BILLY JOE" SCHELLER	)	
	)	Case No. 880337-CA
Deceased	)	
	)	
	)	Priority No. 7
	)	
	)	

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### SUMMARY OF THE ARGUMENT

The equal protection clauses of both the Utah and the United States Constitutions protect against discrimination among individuals who are similarly situated. Mothers and fathers who have been properly adjudicated as such are similarly situated. Both are equally responsible for their children and are therefore entitled to similar treatment. Utah Code Section 75-2-109(1)(b) treats mothers and fathers differently by requiring fathers to meet requirements which are not also imposed upon mothers. The statute is therefore unconstitutional.

The gender-based discrimination created by the subject statute can only be upheld when it serves important governmental objectives and is substantially related to those objectives. The subject statute does not provide for a fair and efficient system of property disposition, nor does it ensure that only a "nurturing" parent will inherit through its deceased child. The discrimination created by the subject statute therefore, cannot be upheld.

The requirements which the subject statute places upon fathers are unconstitutionally vague and in violation of Due Process. Not only are fathers "uncertain as to what is prohibited", but judges and jurors are also "free to determine" the meaning of those requirements.

Although all legislative enactments are presumed constitutional, this Court has an imperative duty to strike down unconstitutional provisions. The unconstitutional provisions of

the subject statute are evident and should therefore be stricken.

### ARGUMENT

#### I

SECTION 75-2-109(1)(b) OF THE UTAH CODE PROVIDES DISSIMILAR TREATMENT FOR MALES AND FEMALES WHO ARE SIMILARLY SITUATED AND VIOLATES ARTICLE 4, SECTION 1 OF THE UTAH CONSTITUTION.

Utah Code Annotated §75-2-109(1)(b) ("the subject statute") gives mothers a right to inherit through their children automatically, simply because the mother is the mother of the child. A father, on the other hand, must not only prove that he is the father, but he must meet additional requirements which are not imposed upon the mother. The subject statute thereby presumes fathers are "undeserving", and "categorically eliminates" them from an inheritance through their children. See Parham v. Hughes, 441 U.S. 347, 368 (1979); (White, J., dissenting). The Constitutional defect with the subject statute is therefore that only a father and not a mother must meet specific requirements in order to inherit through his child.

A. ONCE PATERNITY HAS BEEN ESTABLISHED, BOTH PARENTS BECOME RESPONSIBLE FOR THEIR CHILD AND ARE THEREFORE SIMILARLY SITUATED.

The Supreme Court of Florida has said: "...there can be no discrimination between the parents based upon sex since both are equal in the eyes of the law." (Emphasis added). Yorden v. Savage, 279 S.2d 844 (Fla. 1973). And the Supreme Court of the United States has said: "...maternal and paternal roles are not invariably different in importance." Caban v. Mohammed, 441 U.S.



380, at 388 (1979). Mothers and fathers are therefore equally responsible for their children.

This fact is evidenced by the existence of paternity suits and the requirement of child support payments. Respondent would have us believe that a mother becomes "automatically responsible" for a child when she becomes pregnant, and that a father "is not automatically responsible" for the child. (See Brief of Respondent, pg. 5). Although the mother's pregnancy may force some responsibility upon her, a paternity adjudication has the same effect upon the father. This means that once a father's paternity has been established, he bears the same rights and responsibilities as the mother. In other words, absent a termination of a parent's right and duty, both are equally responsible for their children, (See 59 Am Jur 2d, Parent and Child §22), and both are therefore similarly situated with respect to their children.

The appellant, Michael Pessetto, was properly adjudicated to be the father of William "Billy Joe" Scheller, and subsequent to this finding did make child support payments. (See transcript of proceedings of October 16, 1987, pages 1 and 2, Case No. 16434; and Findings of Fact, November 3, 1987, paragraphs 4 and 5). Once this paternity was established therefore, the Appellant became responsible for his child. It was at this time that the Appellant, as the father, became similarly situated with the Respondent as the mother. It follows then, that both the Appellant and the Respondent, as parents of the child, are

entitled under Article IV, Section 1 of the Utah Constitution to similar treatment. Malan v. Lewis, 693 P.2d 62 (Utah 1984).

The Respondent relies heavily upon the United States Supreme Court Opinion in the Parham case. In that case the United States Supreme Court held that mothers and fathers of illegitimate children are not similarly situated. The Court's use of "illegitimate" indicates that its focus was on the fact that the child hadn't been legitimized. It is likely that had the father in Parham legitimized his child, the Court would have allowed his action. In the present case, unlike Parham, the Appellant was adjudicated as the father of the child, and the child then became legitimized. Parham is therefore inapplicable since it dealt with mothers and fathers of illegitimate children.

The Respondent's reliance upon Parham is misplaced due to the distinction between the parents of "illegitimate" children and the parents of "legitimate" children.

Based upon their equal duties and responsibilities, mothers and fathers of legitimate children are similarly situated. The Appellant's paternity has been established and he is therefore similarly situated with the Respondent. The subject statute has the effect, of denying the Appellant inheritance through his child solely because he is the father of the child. It is indisputable that, in this case, had both parents abandoned the child after Defendant's paternity was established, Respondent would be entitled to inherit and Appellant, pursuant to the trial court's decision, would not.

**B. THE FACT THAT SIMILAR GENDER-BASED LEGISLATION OF OTHER STATES HAS NEVER BEEN DECLARED UNCONSTITUTIONAL DOES NOT MAKE THE SUBJECT STATUTE CONSTITUTIONAL.**

The idea that the subject statute, as it has been adopted by other states, has never been declared unconstitutional, (See Brief of Respondent, page 10), does not make the subject statute constitutional. The fact that a statute has been construed and applied for a considerable period of time does not necessarily render it free from constitutional attack: and acquiescence over a period of many years will not render an unconstitutional statute valid. See 16 Am Jur. 2d. Constitutional Law, §229.

Although the subject statute as it exists in other states has not been held unconstitutional, it has been interpreted very liberally. In Matter of Estate of Spencer, cited by the Respondent, the Michigan Court of Appeals said:

...[W]e do not believe that the Legislature intended to require a distinct kind of relationship in order for a child coming within the preview of this provision to inherit, rather we believe that the Legislature's concern was to insure that a biological relationship of parent and child did indeed exist. Accordingly, we believe that the statute requires a mutually acknowledged biological relationship of parent and child. ...We do not believe that this statute should be construed to require an ongoing social relationship ....

Matter of Estate of Spencer, 383 NW 2d 266 at 268 (Mich. 1985).

And the Supreme Judicial Court of Maine stated:

The father of a child born out of wedlock has the right to inherit from the child if the father acknowledges paternity before a justice of the peace or a notary.... It is now clear that unwed fathers have important interests in their offspring that are entitled to constitutional protection.

Johannesen v. Pfeiffer, 387 A.2d 1113 at 1114 (Me. 1978).

The mere fact that the subject statute has never before been declared unconstitutional does not make it constitutional. Indeed, the cases dealing with the subject statute as it has been enacted in other states indicate that it has been interpreted liberally in order to avoid any constitutional difficulty. The subject statute cannot therefore escape judicial scrutiny in this case merely because it has never before been declared unconstitutional.

## II

**ALTHOUGH THE STATE HAS A CONSIDERABLE INTEREST IN THE MAINTENANCE OF A FAIR AND EFFICIENT METHOD OF INTESTATE SUCCESSION, THE SUBJECT STATUTE DOES NOT SERVE THIS OBJECTIVE.**

A statute which discriminates upon the basis of gender "must serve important governmental objectives and must be substantially related to achievement of those objectives in order to withstand judicial scrutiny under the equal protection clause". Caban 441 U.S. at 387. The subject statute as it is written does not serve any of these "important governmental objectives" and cannot therefore withstand judicial scrutiny.

The Respondent argues that the subject statute provides: (1) an accurate, fair and efficient system for the disposition of property at death, and (2) that an inheritance from an illegitimate child goes to a parent who has participated actively in the nurturing of the child and that a parent who has taken no active role in the birth or rearing of a child is prevented from reaping a financial windfall. See Brief of Respondent, pages 11 and 12. Contrary to the Respondent's argument, the subject

statute does not provide for "fair" treatment of unwed mothers and fathers and it does not ensure that an inheritance goes to the nurturing parent.

First, it is unfair to the father. A father must not only establish paternity to inherit through his child, but he must also "openly treat the child as his" and "not refuse to support the child". The mother on the other hand must do nothing. She is automatically entitled to inherit through the child. This is grossly unfair to the father who is thereby prevented from inheriting through his child merely on the basis of gender.

Second, the subject statute does not ensure that only the "nurturing" parent be entitled to the child's inheritance. The subject statute allows the mother to inherit from her child regardless of what she has done. The mere fact she gave birth to the child entitles her to an inheritance through the child. Theoretically, a mother could abandon the child and take no active role in its nurturing or support and still not be prevented from taking an inheritance through the child. It is clear therefore, that the subject statute does not ensure that the "nurturing" parent will be the only one entitled to inherit through the child.

The Respondent also suggests that the Court's holding in Caban was based upon the fact that the father had a "substantial relationship" with the child. It is interesting to note, however, that the Court in Caban said that a state's legitimate interest in withholding a father's right was proof of paternity.

See Caban, 441 U.S. at 393, footnote number 15. The Court also noted that the statute in question, much like the subject statute, "enabled some alienated mothers arbitrarily to cut off the paternal rights of the fathers". Caban, 441 U.S. at 394. The Court's holding in Caban therefore was actually based upon its finding that mothers and fathers are similarly situated and that the statute discriminated against fathers.

The Respondent further relies upon Lehr v. Robertson, where a statute which discriminated upon the basis of gender was upheld by the United States Supreme Court. An analysis of the Court's opinion in Lehr indicates that it is simply another case which illustrates the importance of paternity. In Lehr, the Court refused to recognize a father's right in his child's adoption since paternity had not been established. Although the Court did address the fact that a substantial relationship with the child was important, it found that the father had not established his paternity and he should therefore be denied his rights in the adoption.

By requiring the father, but not the mother, to do more than establish paternity, the subject statute falls short of serving any legitimate interest. Such an interest is necessary for a gender-based distinction to be upheld by the Courts. The subject statute favors mothers over fathers and it does not ensure that only a "nurturing" parent will inherit from his child. The subject statute therefore does not pass the intermediate level of scrutiny and should be declared

unconstitutional.

### III

THE SUBJECT STATUTE IS UNCONSTITUTIONALLY VAGUE SINCE THE LANGUAGE OF THE STATUTE IS OPEN TO MANY DIFFERENT INTERPRETATIONS AND ALLOWS JUDGES AND JURORS TO DETERMINE ITS MEANING WITHOUT ANY LEGALLY FIXED CRITERIA.

As stated in the Brief of the Appellant, a statute which is "so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide without any legally fixed standards what is prohibited and what is not" fails to meet the requirements of the due process clause. (Brief of Appellant, page 17 (citing In re Boyer, 636 P.2d 1085.) The language of the subject statute which requires a father to have "openly treated the child as his own" and "not refused to support the child" is the type of vague and standardless statute referred to by the Court in In re Boyer.

The Respondent claims that the language is not vague since the trial judge had no difficulty in interpreting it and since the terms used are of "common usage". (Brief of Respondent, page 19). Although these claims may be true, these factors are irrelevant in determining whether the statute is vague. Under In re Boyer the relevant criteria are: (1) Is the public uncertain as to what is prohibited?; and (2) Are judges and jurors free to determine its meaning without any legally fixed criteria? If the answer to both of these questions is yes, then a statute is unconstitutionally vague.

In response to these criteria, it is evident that one in the Appellant's position would not know what to do in order to

inherit through his child. Is paying child support enough? Must he send cards? Should he spend time with the child? If so, how much time should be spent with the child? The statute leaves all these questions unanswered and one who is in the Appellant's position uncertain as to what is prohibited and what is required under the statute.

In addition, judges and jurors have no legally fixed standards to guide them. In order to determine whether the requirements have been met, they are left to their own personal views. They are free, as was the trial court judge, to define what is required of one in the Appellant's position. One could be forced to give up his rights to an inheritance if his interpretation of "openly treating the child as his own" was different than the judge's interpretation. In this case, the Appellant did pay child support, but according to the trial court judge, that was not enough. Until the judge made his interpretation of the statute, the Appellant had no way of knowing what was expected of him. The subject statute is therefore vague and unclear and in violation of the due process clause.

#### IV

**ALTHOUGH STATUTES SHOULD BE PRESUMED CONSTITUTIONAL, THE COURTS HAVE AN IMPERATIVE DUTY TO STRIKE DOWN LEGISLATION WHICH VIOLATES THE CONSTITUTION.**

The Wyoming Supreme Court has said: "Although the Supreme Court has the duty to give great deference to legislative announcements and to uphold constitutionality when possible, it



is the court's equally imperative duty to declare a legislative enactment invalid if it transgresses the state constitution".

White v. Fischer, 689 P.2d 102 (Wyo. 1984).

The subject statute both discriminates against fathers and is vague. Although it is entitled to a presumption of validity, it is now clear that it is in violation of both the United States and the Utah Constitutions. This Court therefore has the imperative duty to strike those provisions of the subject statute which are unconstitutional.

### CONCLUSION

Utah Code Annotated §75-2-109(1)(b) discriminates against fathers on the basis of gender. This discrimination is in violation of the Equal Protection clauses of both the Utah and the United States Constitutions, since mothers and "properly adjudicated" fathers are similarly situated and entitled to similar treatment. The statute also fails to serve any "important government objective" and therefore cannot withstand judicial scrutiny.

The requirements of the subject statute which are imposed upon fathers but not mothers are in violation of due process and unconstitutionally vague. These portions of the statute should therefore be stricken.

Appellant, Michael Pessetto, respectfully requests that this Court reverse the Judgment and Decree of Judge David E. Roth of the Trial Court and declare §75-2-109 of Utah Code Annotated unconstitutional. Appellant further requests that those portions

of the statute which provide dissimilar treatment of mothers and fathers be stricken with the result being that both mothers and fathers be treated equally and Appellant, as the properly adjudicated father, be allowed to inherit through his child.

RESPECTFULLY SUBMITTED this 2nd day of <sup>September</sup>~~August~~, 1988.

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#### MAILING CERTIFICATE

The foregoing Reply Brief was mailed to Paul T. Kunz at Suite 300, 2605 Washington Blvd., Ogden, Utah 84401 on this 2nd day of <sup>September</sup>~~August~~, 1987.

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SECRETARY