

1988

William "Billy Joe" Scheller v. Unknown : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS
DOCKET NO. 880337 STATE OF UTAH

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

BRIEF OF APPELLANT MICHAEL PESSETTO

APPEAL FROM AN ORDER OF FORMAL DETERMINATION OF
HEIRS WITH RESPECT TO THE CONSTITUTIONALITY OF AN
APPLICABLE STATE STATUTE ENTERED BY THE SECOND
JUDICIAL DISTRICT IN AND FOR WEBER COUNTY, STATE OF
UTAH, THE HONORABLE DAVID E. ROTH, DISTRICT COURT
JUDGE

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STATEMENT OF JURISDICTION

This case comes before this Court on an appeal from an Order of Formal Determination of Heirs, with respect to the constitutionality of an applicable Utah state statute. The specific statutory authority confirming jurisdiction on this Court is Utah Code Annotated §78-2-2(3)(i).

STATEMENT OF ISSUES PRESENTED

I

Does Utah Code Annotated §75-2-109(1)(b)(ii) violate Article IV, Section 1 of the Utah Constitution by allowing mothers but not properly adjudicated fathers to inherit through their deceased child?

II

Does Utah Code Annotated §75-2-109(1)(b)(ii) violate the Equal Protection clause of the XIVth Amendment to the United States Constitution by discriminating against fathers on the basis of gender?

III

Does Utah Code Annotated §75-2-109(1)(b)(ii) violate the Due Process clause of XIVth Amendment to the United States Constitution by allowing a mother, but not a father, to inherit through their child solely on the basis of gender?

IV

Does Utah Code Annotated §75-2-109(1)(b)(ii) fail to meet the requirements of the Due Process clause of the XIVth Amendment

to the United States Constitution because it is unconstitutionally vague?

DETERMINATIVE STATUTES AND CONSTITUTIONAL PROVISIONS

Utah Code Annotated §75-2-109. Meaning of child and related terms.

1. If for purposes of intestate succession, a relationship of parent and child must be established to determine by, through or from a person:

a. An adopted person is the child of an adopting parent and not of the natural or previously adopting parents, except that adoption of a child by the spouse of a natural or previously adopting parent has no effect on the relationship of the child and that natural or previously adopting parent.

b. In cases not covered by sub-section 1(a), a person born out of wedlock is the child of the mother. That person is also the child of the father if:

i. The natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void, or

ii. The paternity is established by an adjudication before the death of the father, or is established thereafter by clear and convincing proof, except that the paternity established under this sub-section 1(b)(ii) is ineffective to qualify the father or his kindred to inherit through or from the child unless the father has openly treated the child as his and has not refused to support the child.

Constitution of Utah, Article IV Section 1.

The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of the state shall enjoy equally all civil, political and religious rights and privileges.

Constitution of the United States, Amendment XIV Section 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunity 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 equal protection of the laws.

STATEMENT OF THE CASE

This action was originally brought by Respondent to declare Appellant ineligible to inherit from his son. It was brought in the Second Judicial District Court of Weber County, in the State of Utah, before the Honorable David E. Roth, District Court Judge. That Court held that, pursuant to Utah Code Annotated, §75-2-109(1)(b)(ii), Appellant was ineligible to inherit through his deceased child. The Court found that although Appellant had been properly adjudicated to be the father of the child, and had not refused to support the child, he had failed to treat the child openly as his own. The Court also held that Section 75-2-109(1)(b)(ii) was constitutional and did not violate Article IV, Section 1 of the Utah Constitution, or the Equal Protection and Due Process clauses of the XIVth Amendment of the United States Constitution. Appellant appeals the finding of constitutionality of the statute by the trial court and also that said statute was not unconstitutionally vague. (See Appellant's Docketing Statement at 1, In the Matter of the Estate of William "Billy Joe" Scheller (No. 880116)), Case No. 880116, pages 1-4).

STATEMENT OF THE FACTS

Appellant, Michael Pessetto, and Respondent, Jolene Scheller, were the parents of the decedent, William "Billy Joe" Scheller. The decedent was born out of wedlock on or about August 10, 1981.

At the time of the decedent's birth, the decedent was deprived of oxygen for a significant period of time, which resulted in a condition of cerebral palsy with resultant spastic quadriplegia. The resulting condition permanently impaired the decedent throughout his life and ultimately caused his death.

Thereafter, the Respondent and the State of Utah filed an action to determine paternity in the Second District Court in Weber County. On or about May 24, 1983, after a trial on the matter, Appellant was adjudicated to be the father of the decedent. In 1983, Respondent filed an action for professional malpractice against St. Benedict's Hospital and three physicians. In December of 1986, the action was settled without trial. Said settlement resulted in significant amounts of funds being placed in an irrevocable trust and other funds to be paid on a periodic basis.

On or about August 14, 1986, the decedent died in Ogden, Utah at about the age of 5 years. On or about December 1, 1986, Respondent filed a Petition for Formal Determination of Heirs. Said Petition sought to declare Appellant ineligible to inherit from his son, the decedent, pursuant to Utah Code Annotated, §75-2-109(1)(b)(ii) (hereinafter referred to as the subject statute).

The Court subsequently ruled that Appellant could not inherit through his deceased son due to his failure to meet the requirement of openly treating the child as his own under the subject statute. Appellant then appealed the constitutionality of this statute. (See Appellant's Docketing Statement, at 2, in the Matter of the Estate of William "Billy Joe" Scheller (No 880116)).

SUMMARY OF THE ARGUMENT

Section 75-2-109(1)(b)(ii) of Utah Code Annotated discriminates against fathers on the basis of gender. The statute allows mothers but not properly adjudicated fathers to inherit through their deceased child. A mother is allowed to inherit through the child simply by being the mother, but the father of a child must meet two additional requirements imposed by the statute once paternity has been adjudicated. This discrimination violates not only the Utah Constitution but also the XIV Amendment of the United States Constitution.

The statute is discriminatory on its face and violative of the Utah Constitution in that it does not allow "both male and female citizens of this state to enjoy equally all civil, political and religious rights and privileges". Several other states with constitutional clauses similar to Utah's have struck down statutes which, like this statute, are discriminatory on the basis of gender.

The statute also violates the XIVth Amendment of the Constitution of the United States due to its gender-based

discrimination. This discrimination fails to pass the intermediate level of scrutiny which is applied by the Courts. The statute on this basis should therefore fail.

Finally, the statute violates the Due Process clause of the XIVth Amendment of the United States Constitution. In its present form the statute deprives fathers, but not mothers, even though both have been determined to be the proper parents of the child, of their right of inheritance through their child. Further, the requirement that fathers openly treat the children as their own, is unconstitutionally vague and also fails to meet the requirements of the Due Process clause.

For these reasons the Court should strike out the unconstitutional portions of the statute. This would allow both mothers and fathers, who stand on equal footing once paternity of the father has been established, to inherit through their deceased children.

ARGUMENT

I. UTAH CODE ANNOTATED SECTION 75-2-109(L)(B)(II) VIOLATES ARTICLE IV, SECTION 1 OF THE UTAH CONSTITUTION BY ALLOWING MOTHERS BUT NOT "PROPERLY ADJUDICATED" FATHERS TO INHERIT THROUGH THEIR DECEASED CHILD.

Article IV, Section 1 of the Utah State Constitution provides: "Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges." The purpose of the section is to abolish discrimination even where it appears appealing and benign and that all consitutional rights are jeopardized if discrimination is permitted. Beehive Medical Electronics v. Industrial

Commission, 538 P.2d 53 (Utah 1978). In Stoker v. Stoker, 616 P.2d 590 (Utah 1980), Article IV, Section 1 was cited with approval by the Court to invalidate an interspousal tort prohibition. In an important decision, [Pusey v. Pusey], 728 P.2d 117 (Utah 1986), the Supreme Court recently rejected gender-based discrimination in an award of child custody basing its decision on Article IV, Section 1. These cases demonstrate that the Supreme Court has been willing to use Article IV, Section 1 to strike down statutes which are discriminatory.

A. UTAH CODE ANNOTATED §75-2-109(1)(B)(II) IS
DISCRIMINATORY BY GENDER ON ITS FACE.

The subject statute is on its face discriminatory on the basis of gender. The statute allows a mother to unconditionally inherit through her child while precluding inheritance by a man properly adjudicated as the child's true father. The relevant portion of the statute reads as follows:

...the paternity established under this sub-section, (1)(b)(ii), is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his and has not refused to support the child. (Utah Code Annotated §75-2-109(b)(ii))

In other words, once a father has properly been adjudicated as a parent, he must meet two further requirements in order to inherit through his child. He must (1) openly treat the child as his and (2) not refuse to support the child. A mother, on the other hand, must only be the mother. She need not meet any further requirements in order to inherit through her deceased child.

The additional requirements of Paragraph (ii) are only imposed upon fathers, and not mothers. It is therefore discriminatory on its face. This discrimination becomes very clear when we place the mother in the shoes of the father. By simply being the mother, she is allowed to inherit through her children. She is not required as is the father to show that she has openly treated the child as her own and that she has not refused to support the child. The result being that if both the mother and the father were to abandon a child immediately after birth, the mother could recover automatically, yet the father could not. The only basis for making this distinction is that of gender.

B. THE SUBJECT STATUTE'S GENDER DISCRIMINATION IS VIOLATIVE OF THE UTAH CONSTITUTION.

Such discrimination might be reasonable before paternity is established, but not after. Maternity is a natural process and is established from the moment of conception, which is not true with the legal paternity of the father. However, once paternity is established, the mother and father become similarly situated. Both are parents of the child, and as such should be treated equally and not discriminated against by gender.

This concept was well illustrated in the case of Parham v. Hughes, 441 U.S. 347, 354 (1979) where the U. S. Supreme Court upheld a statute which would not allow the father of a child to bring a wrongful death action until paternity had been established. The Court said that mothers and fathers of illegitimate children are not similarly situated. The

controlling factor in Parham was the fact that the father had not become the legitimate father of the child.

Appellant's situation is much different in that he has been "properly adjudicated" to be the father of the child. Paternity was established and the child was legitimized. Therefore, Appellant and Respondent have become similarly situated and should be treated equally.

In the case of Laird v. Robertson, 463 U.S. 248 (1983) which is relied upon by the Respondent, the Supreme Court upheld a statute which would not allow the father of a child being adopted to have a role in the adoption decisions, unless or until paternity had been found. The father in Laird had not established paternity and therefore was denied a right in the adoption process.

In a Utah case, Ellis v. Social Services Department of the Church of Jesus Christ of Latter-Day Saints, 615 P.2d 1250 (Utah 1980) the Utah Supreme Court upheld a paternity requirement which required an unmarried father to file a claim of paternity within a certain period of time or lose the right to prevent the adoption of his child. Both cases support Appellant's position that a statute can discriminate on the basis of paternity, but once paternity is established, the mother and father stand on equal ground and no discrimination is allowable.

The discrimination against Appellant in the case at bar is clear. He has properly been adjudicated as the father, yet he still is not allowed to inherit through his child. The Respondent, on the other hand, as the child's other parent, need

do nothing in order to inherit through her deceased child. It is therefore clear that under the subject statute "Both male and female citizens of this state ..." do not "... enjoy equally all civil, political and religious rights and privileges." (Ut. Const. Art. IV §1).

C. PROVISIONS IN OTHER STATES' CONSTITUTIONS SIMILAR TO ARTICLE IV, SECTION 1 OF THE UTAH CONSTITUTION, HAVE BEEN USED TO INVALIDATE GENDER-BASED DISCRIMINATORY LEGISLATION.

Several other states have provisions in their constitutions which, like Utah, provide for equal enjoyment of rights by both men and women. No other state has specifically addressed the statute in question, but many similar statutes have been held to be unconstitutional for the reason that they provide for a gender-based discrimination.

For example, a state statute permitting only the mother of an illegitimate child to consent to adoption and not the father was held to violate the state constitution. Adoption of Walker, 360 A.2d 603 (Pa. 1976). Also, statutes which use gender-based distinctions of the property rights of husbands and wives have uniformly been held to be in violation of state constitutional provisions. Bell v. Bell, 379 A.2d 419 (Md. 1977); DeFlorido v. DeFlorido, 331 A.2d, 174 (Pa. 1975); Forbes v. U. S., 472 F. Supp. 840 (D. C. Mass. 1979). Further, it has been well established that state constitutional provisions require burdens of child support to be borne by both parents and not just by fathers. Kemp v. Kemp, 411 A.2d 1028 (Md. 1980); Silvia v. Silvia, 400, N.E.2d 1330 (Mass. 1980); Conway v. Dana, 318, A.2d,

324 (Pa. 1974); Friedman v. Friedman, 521 SW.2d 111 (Tx. 1975).

Similarly, laws which create gender-based distinctions in alimony awards have been held to violate state constitutions. Henderson v. Henderson, 327 A.2d 60 (Pa. 1974); Smith v. Smith, 382 So.2d 972 (La. 1980); Kenner v. Morris, 600 F.2d 22 (Tenn. 1979).

As in Pusey, supra., other states which have addressed the issue of maternal preference in recent years have uniformly held such statutes to be unconstitutional stating that a statutory preference for mothers in child custody issues is a violation of state constitutional guarantees. Weber v. Weber, 414 A.2d 682 (Pa. 1979); Irby v. Dubois, 354 NE 2d 562 (Ill. 1976).

The Utah Supreme Court and the high courts in several other states have held that adoptions, property rights, child support, alimony and child custody legislation must all be gender-neutral. There is no reason why inheritance should be treated differently. To limit inheritance by gender should therefore be condemned as a violation of Article IV Section 1 of the Utah Constitution.

II. SECTION 75-2-109(1)(B)(II) VIOLATES THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION BY DISCRIMINATING AGAINST FATHERS ON THE BASIS OF GENDER.

The 14th Amendment to the United States Constitution provides that "no state shall make or enforce any law which ... denies a person within its jurisdiction equal protection of the laws". (U.S. Const. amend. XIV, §1) Over the years the United States Supreme Court has applied the Equal Protection clause of the Constitution so as to invalidate discriminatory legislation.

A. EQUAL PROTECTION ANALYSIS, AS DEVELOPED BY THE UNITED STATES' SUPREME COURT, REQUIRES THAT UTAH CODE ANNOTATED S75-2-109(1)(B)(II) PASS AN INTERMEDIATE LEVEL OF SCRUTINY.

The United States Supreme Court has developed a two tiered analysis of equal protection issues. (1) Traditional basis of analysis. Under this analysis, the state statute must bear some rational relationship to the end the state desires to achieve. Under this analysis, the statute is presumed to be constitutional. (2) Strict scrutiny analysis. If the statute discriminates against some suspect classification (for example, race or national origin) or where it has an impact on a fundamental right, the state has a very heavy burden to prove that the classification serves a compelling state interest. The statute is presumed to be unconstitutional.

Where a statute is discriminatory on the basis of gender, (as is the subject statute) the United States Supreme Court has adopted an analysis which involves an intermediate level of scrutiny. It is into this category which the subject statute falls. This intermediate level of analysis requires the governmental interest to be important and substantially related to the achievement of the end sought. In addition, the Supreme Court has required proof that the end sought to be achieved by the statute could not be achieved with a gender-neutral distinction. Craig v. Boren, 429 U.S. 190 (1976); Orr v. Orr, 440 U.S. 268 (1979); Parham v. Hughes, 441 U.S. 347 (1979); Caban v. Mohammad, 441 U.S. 300 (1979); M. Sonoma Co. Super Crt, 450

U.S. 455 (1981).

- B. SECTION 75-2-109(1)(B)(II) CANNOT SURVIVE AN INTERMEDIATE LEVEL OF SCRUTINY SINCE THE END SOUGHT TO BE ACHIEVED COULD BE ACCOMPLISHED WITH A GENDER-NEUTRAL DISTINCTION AND SEVERAL OTHER FEDERAL COURTS HAVE STRUCK DOWN SIMILAR STATUTES.

In Orr supra, the Supreme Court struck down an alimony statute as a violation of the equal protection clause, stating that the purposes of that statute could have been accomplished with gender-neutral classifications and it was therefore a violation of the Equal Protection clause. In the present case, the subject statute likewise could accomplish its purposes with a gender-neutral classification, that is, the statute could have been written to disinherit both men and women under the same circumstances and therefore not violate the equal protection clause.

A number of federal courts have struck down state statutes under the Equal Protection clause for such gender-based discriminations. The following cases are illustrative:

- (1) Kirchberg v. Feenstra, 450 U.S. 455 (1981) struck down a statute which permitted a husband to dispose of jointly held property without the wife's consent, but did not allow the wife to dispose of property without her husband's consent;
- (2) Johnston v. Hodges, 372 F.2d 1015, (Ky. 1974) struck down a Kentucky statute which required a minor's driver's license application be signed by a father, but not a mother;

- (3) Bowen v. Hackett, 361 F. Supp 854 (D.C. R.I. 1973) struck down differing gender-based procedures for determining dependant's allowances under unemployment statutes. The gender-based procedures violated the equal protection clause.
- (4) Wengler v. Druggist Mutual Insurance, 446 U.S. 142 (1980), a statute which allowed compensation benefits to a widow unconditionally, but to a widower only upon proof of dependency was declared unconstitutional for violating equal protection.

The subject statute is similar to all of these cases in that it places requirements on the father, but not the mother even though both are seeking to obtain the same right. It attempts to prevent a father from inheriting through his child after paternity has been adjudicated, but does not attempt to prevent the mother from inheriting through the child. It should follow, therefore, that such a statute does not pass the intermediate level of scrutiny as it is applied by the courts in such situations. Indeed, the statute may not even pass the traditional basis of scrutiny since the mother need do nothing to inherit. The subject statute should therefore be declared as a violation of the Equal Protection clause of the XIVth Amendment of the United States Constitution.

III. SECTION 75-2-109(1)(B)(II) VIOLATES THE DUE PROCESS CLAUSE OF THE XIVTH AMENDMENT OF THE UNITED STATES CONSTITUTION BY ALLOWING A MOTHER, BUT NOT A FATHER, TO INHERIT THROUGH THEIR CHILD SOLELY ON THE BASIS OF GENDER.

The XIVth Amendment to the Constitution of the United States

prohibits any "state from making or enforcing any law which ... deprives any person of ... due process of law ...". (U.S. Const. amend. XIV, §1) The United States Supreme Court has, as a violation of the Due Process clause, invalidated statutes and procedures which provide financial benefit in a discriminatory way based upon sex or gender.

In Califano v. Goldfarb, 430 U.S. 199 (1977), the Supreme Court struck down a social security law which permitted all widows to get survival benefits, but widowers were not allowed to get benefits unless they could show dependency. The practice was struck down as a violation of the Due Process clause. In Weinberger v. Wissenfeld, 420 U.S. 636 (1975), the social security law which provided benefits to mothers with children and deceased husbands, but not the same for fathers with children was struck down as violating the Due Process clause. Similarly, Califano v. Webster, 440 U.S. 313 (1977) struck down a social security law which provided greater benefits for women reaching 62 then for men. This was termed a "Due Process violation". Finally, Califano v. Wescott, 443 U.S. 76 (1979) held that aid to families with unemployed fathers, but not unemployed mothers violated the due process clause of the federal Constitution.

The subject statute, if held constitutional, would allow a mother, but not a father, to receive financial benefits through her child's inheritance. The mother and the father are indistinguishable after paternity has been established, as in the present case, yet the father would be denied his right to

financial benefits from his child's inheritance. The Respondent will be allowed to inherit through her child while the Appellant will not, even though both are similarly situated. This is a violation of Due Process and as such, should be found unconstitutional.

IV. SECTION 75-2-109(1)(B)(II) IS UNCONSTITUTIONALLY VAGUE AND THEREFORE FAILS TO MEET THE REQUIREMENTS OF THE DUE PROCESS CLAUSE OF THE XIV AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

In 1964, the United States Supreme Court held that "A law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates due process of law". Baggett v. Bullett, 377 U.S. 360 at 367, (1964), (citing Conley v. General Construction Co., 269 U.S. 385). The Utah Supreme Court in 1981 ruled:

The United States Supreme Court has stated: It is established that a law fails to meet the requirements of the due process clause if it 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 in each particular case." In re: Boyer, 636 P.2d 1085 (Utah 1981).

In addition, the high courts of other states have declared statutes void and unconstitutional due to their vagueness. L.D.S., Inc., v. Healy, 589 P.2d 490 (Colo. 1979) and State in the interest of Hunter, 387 So.2d 1086 (La. 1980). It is therefore clear that a state statute can be declared unconstitutionally vague.

A. SUBPARAGRAPH (II) OF 75-2-109(1)(B) IS UNCONSTITUTIONALLY VAGUE SINCE IT ALLOWS SUBJECTIVE STANDARDS TO BE USED AND FORCES MEN OF COMMON INTELLIGENCE TO GUESS AT ITS MEANING.

The Utah Supreme Court, in an explanation about a vague standard said: "The breadth and imprecision of that standard permit the determination ... to be based on factors subjective to the trier of fact and factors extraneous to the legitimate interests of the state". The Court went on further to explain that language should be unconstitutionally vague when it "... lends itself to a completely subjective and therefore potentially arbitrary and nonuniform evaluation of what is decided rather than an objective evaluation of the method by which the decision is reached". In re: Boyer, 636 P.2d at 1088. In other words, a statute is unconstitutional "if it is so vague that men of common intelligence must necessarily guess at its meaning". In re: Boyer, 636 P.2d at 1088 and L.D.S. Inc., v. Healy, 589 P.2d at 491. A statute should allow an objective determination of its standards.

Sub-paragraph (ii) of the subject statute requires a father to have "openly treated the child as his own" in addition to "not refuse to support the child". The language "openly treated as his own" is just the type of vague language referred to by the Courts in the above decisions. What constitutes openly treating a child as your own? There are several problems with such a standard. It is clear that everyone would have his own and a different definition of what "openly treating his child as his

own" would mean. Some would say mere support of a child would satisfy the requirement, while others would say that nothing short of living in the same home as the child would satisfy the requirement. It becomes clear that such a standard is purely subjective.

The Colorado Supreme Court in discussing what constitutes a vague standard described it as "a concept that brings forth certain general feelings in the minds of all of us. The parameters of those feelings and reactions, however, vary widely between individuals". L.D.S. Inc. v. Healy, 589 P.2d at 492. The subject statute raises different feelings among different individuals. The language "openly treated ... as his own" is "so vague and standardless that it leaves judges free to decide without legally fixed criteria when an individual must suffer the imposition of burdens or forfeiture of rights". (Emphasis added). State in the interest of Hunter, 387 S.3d at 1087. Under these definitions, the requirement of "openly treating a child as his own" is clearly a vague and unconstitutional standard.

B. THE VAGUE LANGUAGE OF S75-2-109(1)(B)(II) SHOULD BE DECLARED UNCONSTITUTIONAL SINCE IT DEPRIVES APPELLANT OF HIS RIGHTS TO PROPERTY.

The Utah Supreme Court, along with the Supreme Court of Colorado and the Supreme Court of Louisiana have held such language to be unconstitutional when it deprives one of rights or property. Appellant has been deprived of a right to inherit through his child by such an unconstitutionally vague statute.

The subject statute falls squarely within the problems cited by the differing courts and must fail for vagueness. As the Colorado Supreme Court said, "Due process requires that the prohibition be explicit enough to allow for meaningful judicial review", L.D.S., Inc. v. Healy, 589 P.2d at 491. This statute hardly allows for meaningful judicial review. The only standards which judges may use when seeking to deprive Appellant of his rights, are completely subjective. The subject statute should therefore be declared unconstitutionally vague.

CONCLUSION

Utah Code Annotated §75-2-109(1)(b)(ii) is discriminatory on its face. It allows mothers to inherit through their children, but properly adjudicated fathers cannot inherit through their children. These requirements, (1) open treatment of the child as his own, and (2) no refusal to support the child, do not even apply to the mother. The sole basis for this discrimination is gender.

Such discrimination by gender violates Article IV, Section 1 of the Utah Constitution. It does not allow "both male and female citizens of this state to enjoy equally all civil, political and religious rights and privileges". It must necessarily, therefore, be declared unconstitutional.

The subject statute also violates the XIVth Amendment of the United States Constitution. It is a violation of the Equal Protection clause in that it discriminates on the basis of gender against fathers who have been properly adjudicated as such, but

it does not discriminate against mothers. Such discrimination cannot stand up to the intermediate level of scrutiny used by the Courts to examine state legislation which is discriminatory on the basis of gender. The state cannot show an important and substantially related purpose for the achievement of the end sought and the state could accomplish the same thing with a gender-neutral statute.

The subject statute also violates the Due Process clause of the XIVth Amendment. It deprives a properly adjudicated father of his right to inherit through his child. At the same time, the mother is not deprived but allowed to inherit through her child. In addition, the requirement that the father "openly treat the child as his own" is unconstitutionally vague and falls far short of the requirements of the Due Process clause.

The strength of Appellant's argument was recognized by the trial court, when it said: It is a pretty good argument and this is a close case... I wouldn't be devastated if the Su[reme Court told me I was wrong". (See Transcript of Proceedings, Case NO. 16434, pags. 17, 19). For these reasons, Appellant requests that the Court strike the unconstitutional portions of the statute (Celebrity Inc., v. The Utah Liquor control Commission, 657 P.2d 1243 (Utah 1982)), which results in the same standard being applied to both mothers and fathers. This is consistent with the lower courts' finding that the proper cure to a constitutional defect is to strike the language from the statute, rather than to

add additional language and rewrite the statute, as this is not a proper judicial function.

RESPECTFULLY SUBMITTED this 28 day of June, 1988.

15/
RANDALL L.SKEEN
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify a copy of the foregoing Brief of Appellant Michael Pessetto was mailed to Paul T. Kunz at Suite 300, 2605 Washington Blvd., Ogden, Utah 84401 on this 28th day of June, 1987.

15/

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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

ADDENDUM TO BRIEF OF APPELLANT

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75-2-109. Meaning of child and related terms.

(1) If, for purposes of intestate succession, a relationship of parent and child must be established to determined succession by, through, or from a person:

(a) An adopted person is the child of an adopting parent and not of the natural or previously-adopting parents except that adoption of a child by the spouse of a natural or previously-adopting parent has no effect on the relationship between the child and that natural or previously-adopting parent.

(b) In cases not covered by subsection (1)(a), a person born out of wedlock is a child of the mother. That person is also a child of the father, if:

(i) The natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or

(ii) The paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof, except that the paternity established under this subsection (1)(b)(ii) is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his and has not refused to support the child.

Constitution of Utah, Article IX, Section 1

Section 1.

The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges.

Constitution of the United States, Amendment XIV, Section 1

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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 laws.

1 the statute to make it constitutional. What it allows
2 the Court to do is to strike the unconstitutional portion
3 of the statute. In this case if you strike the unconstitutional
4 language from the statute, then you are back to an even
5 handed standard and the laws of intestate succession would
6 apply to our client, as well as to Mr. Kunz' client, because
7 they would both be legal heirs entitled to take under the
8 laws of intestacy. And certainly the Utah Supreme Court
9 has been clear I think in the liberty to which the Court may
10 take in reforming a statute. And that is limited to actually
11 striking the unconstitutional language.

12 We are prepared to submit it.

13 THE COURT: In dealing with your final issue of
14 whether I would be in a position to reform the statute, I
15 tend to agree with you, Mr. Morton, that I wouldn't feel
16 comfortable in rewriting this kind of a statute. If I could
17 cure the constitutional defect by striking the language from
18 it, that would be the way to do it. But to add additional
19 language, rewrite the statute, I don't think would be
20 appropriate.

21 We are left with the issue as to whether the statute,
22 as written, is constitutional. It is my opinion it could
23 be a much better statute. There is no question about that.
24 In my mind it would be better if it required the same burden
25 be placed on both the mother and the father, once the father

1 had been adjudicated the father.

2 The issue, I suppose, that was faced, or facing, the
3 Legislators was to set up something to determine who would
4 inherit from an illegitimate child. Their determination
5 was that the mother would in all cases, and that the father
6 was in a different position, and therefore would have to do
7 something more than what the mother would in order to be
8 able to inherit. And they have required that he either be
9 adjudicated the father, or establish that fact by clear and
10 convincing evidence. And beyond that, openly treat the child
11 as his, and not refuse to support the child.

12 It is the father's argument, as I understand it, that once
13 he has been adjudicated the father, that he would stand in
14 an equal position with the mother, and from that point on,
15 if he would have to openly treat the child as his by statute,
16 and not refuse to support the child, it makes sense the same
17 burden be placed on the mother. It is a pretty good argument,
18 and this is a close case in my mind.

19 I find the individuals are not similarly situated, in
20 that the mother is biologically determined to be the mother.
21 The father, in order to prove he is entitled to inherit, must
22 do some things. Even though I don't think it is the best
23 statute, I think to either have him prove that he is the father,
24 or be adjudicated, and also openly treat the child as his
25 and not refuse to support is not an unreasonable burden.

1 Therefore, I find that the statute is constitutional,
2 although not perfect. I think it is a close call. I wouldn't
3 be devastated if the Supreme Court told me I was wrong. But
4 that's where I see it.

5 MR. MORTON: Could I just ask a housekeeping
6 matter, your Honor? Mr. Kunz has submitted some Proposed
7 Findings and Conclusions, I think, to supplement his original
8 Findings and Conclusions at the January 25th hearing. Would
9 it be possible to have five days just to review those under
10 Rule 2.9?

11 THE COURT: That sounds fair enough.

12 MR. KUNZ: Well, your Honor, my thinking was to
13 prepare new Findings because the Court said at the beginning
14 of this hearing that hearing is vacated. And I would prepare
15 new Findings, and recite the fact that Respondent was present
16 in Court, because I had recited--

17 MR. MORTON: We have no objection to that. We would
18 prefer that.

19 MR. KUNZ: So I would prepare new Findings. Now,
20 as I recall, I believe the Court has said essentially the
21 same thing today that they said at that time, except the
22 Court referred to the Parham case, that he found the Parham
23 case to be persuasive.

24 THE COURT: I do find it to be persuasive; not
25 directly in point, but persuasive.