2001

James H. Magleby v. State of Utah : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JAMES H. MAGLEBY,

Plaintiff-Appellant

-vs-

STATE OF UTAH, by and through its DEPARTMENT OF BUSINESS REGULATIONS and DEPARTMENT of REGISTRATION, and FLOY W. McGINN,

Defendants-Respondents

CASE NO. 14681

BRIEF OF RESPONDENTS

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NATURE OF THE CASE

Plaintiff-Appellant filed suit to obtain a declaratory judgment that Rules and Regulations promulgated by the Defendants-Respondents violated Appellant's constitutional rights under the First, Fifth and Fourteenth Amendments of the United States Constitution, and Article One, Sections One, Seven, and Fifteen of the Utah Constitution.

DISPOSITION IN THE LOWER COURT

Plaintiff-Appellant filed a motion for summary judgment supported by an affidavit and a memorandum. Defendants-Respondents filed a counter motion for summary judgment, supported by a memorandum of points and authorities. The District Court granted Defendants' motion for summary judgment on the grounds that "the Rules and Regulations with regard to the advertising

by a marriage and family counselor which plaintiff complains of are a reasonable exercise of defendants' authority resting on a rational basis to protect the public from advertising which is or tends to be misleading, and plaintiff's claim of denial of free speach and of property without due process of law is without merit."

RELIEF SOUGHT ON APPEAL

The respondent seeks to have the decision of the District Court affirmed in its entirety.

STATEMENT OF THE FACTS

Appellant is a licensed marriage and family counselor within the State of Utah. Pursuant to the laws of Utah, respondents have properly promulgated certain rules and regulations which regulate the practice of Utah licensed marriage and family counselors. Appellant complains that certain portions of the Rules and Regulations of the Marriage and Family Counselor Advisory Committee of the State of Utah violate his constitutional rights. Specifically, appellant complains of Section 3910 which establishes certain standards for public information and advertising.

The appellant owns the premises from which his practice is conducted, and he is the only licensed marriage and family counselor who conducts a practice from these premises.

ARGUMENT

THE RULES AND REGULATIONS PROMULGATED BY THE DEFENDANTS ARE CONSTITUTIONAL.

It should be noted that the entire burden of proving the unconstitutionality of a statute falls upon the party denying

constitutionality. Thomas v. Daughters of Utah Pioneers, 114 Utah 108, 197 P.2d 477 (1948); State v. Spiers, 12 Utah 2d 14, 361 P.2d 509 (1961). This burden falls upon the appellant in this case, and the appellant has not met this burden.

A statute cannot be held unconstitutional if it has been enacted pursuant to a state's police power and if it reasonably tends to protect the public welfare or health from a threat or menace of evil, even though the statute operates to deprive a citizen of the right which he might otherwise enjoy to maintain a business, pursue a profession, or endeavor to gain a livelihood in the manner proscribed. Campbell v. State, 12 Wash. 2d 362, 122 P.2d 458 (1942). Every presumption is in favor of the constitutionality of a statute, every doubt is resolved in favor of the statute, and a statute is to be held as valid unless violation of the constitution is clear, complete and unmistakable. Snow v. Keddington, 113 Utah 325, 195 P.2d 234 (1948); Parkinson v. Watson, 4 Utah 2d 191, 291 P.2d 400 (1953); Thomas v. Daughters of Utah Pioneers, supra. Statutes should not be declared unconstitutional if there is any reasonable basis on which they may be sustained as falling within the constitutional framework. State v. Packard, 122 Utah 369, 250 P.2d 561 (1952). It follows that the same principles apply to rules and regulations promulgated pursuant to statutory authority.

Appellant has conceded that the defendants have the authority "to promulgate rules and regulations in the interest of the public weal." Hence, it becomes necessary to examine the rules and regulations that appellant complains of as well as the

policy supporting such rules and regulations.

The rules and regulations with regard to improper advertising by a marriage and family counselor are as follows:

> 3910. Improper Advertising. For the purposes of Section 58-39-3(2), Utah Code Annotated, 1953, as amended, improper advertising in connection with the practice of marriage, family and child counseling shall include, among other things, the following:
>
> (1) Employing any degree obtained from a school which is not accredited by one of the accrediting agencies accepted by the Board, or any honorary degree.
>
> (2) Making any statement in advertising which would or may tend to mislead the public as to the individual's competence, education, qualifications or experience.
>
> (3) Making of other false or misleading claims in advertising.
>
> (4) Advertising contrary to the code of ethics of the American Association of Marriage and Family Counselors.

It is only subsection (4) of which appellant is complaining. The entire appendix is attached to appellant's brief. Note that none of the manners of advertising which appellant claims are prohibited are entirely prohibited. A marriage and family counselor's specialty is allowed both in the telephone directory listings and in printed professional materials. Appendix I. B (7) and II. A (3). Also allowed is the distribution of public informational materials in which simple statements of services offered and factual presentations of the practitioner's relevant training and experience are to be emphasized. See Appendix, II. B.

The use of the word "center" is allowed when a group practice includes at least three professionals. Appendix, I.D.

The limitation on the use of the word "center" is a reasonable rule based on a rational basis. Use of the word "center" in a title certainly connotes a group practice or a place from which more than one counselor conducts his practice. Because of this connotation, the rules and regulations allow the use of the word "center" only if a group practice includes at least three professionals". To allow only one or two professional to use in their title the word "center" would mislead the public.

Marriage is more than a civil contract between a man and a woman, it is a status or personal relation in which the state is deeply concerned and over which the state has exclusive dominion; it is a foundation upon which society depends for its survival. Morris v. Morris, 220 N.Y.S. 2d 590, 591, 31 Misc. 2d 548 (1961). Thus, it is apparent that those things, such as marriage and family counseling, which have a direct and important effect on marriage and family, are a proper subject of regulation under the state's police power.

Appellant cites three cases in support of his argument. All three cases deal with the regulation of advertising of prices of standard commodities and thus have no application in the instant case. The instant case is concerned with the advertising of professional services, not the advertising of prices of commercial products.

The first case cited by appellant is Ritholz v. City of Salt Lake, 3 Utah 2d 385, 284 P.2d 702 (1955), hereinafter Ritholz.

In Ritholz the court struck down an ordinance which prohibited the advertising of the prices of prescription eyeglasses on the ground that "[t]he evil sought to be corrected by the ordinance is a business evil. The ordinance has no relation to public health and is an unlawful interference with private business." The court emphasized the fact that price advertising of commodities was being regulated. In the instant case, an entirely different situation exists. The vital interest of the state in marriage and family counseling was demonstrated above. By regulating the advertising of such professional services, the state is attempting to protect the public from misleading statements. The goal of the state is to allow the public to be informed without being misled; as a result, some limits are necessary.

Appellant also cites Pride Oil Company v. Salt Lake County, 13 Utah 2d 183, 370 P.2d 355 (1962), hereinafter Pride Oil. Pride Oil is very similar to Ritholz; in fact the court cited Ritholz in its opinion in Pride Oil. The case is not applicable law in the instant case for the same reasons Ritholz does not apply. In Pride Oil, the challenged statute regulated the advertising of a standardized commercial product, gasoline. The court struck down the law in question and, in doing so made it clear that the right to advertise was not absolute. The court said:

> The validity of appellant's contention that these rights [of advertising] are not absolute is acknowledged. One who desires to assert them and have them enforced by public authority must do so in an awareness that when in the

> judgment of the legislature it appears necessary for the protection of some important interest of the public which involves safeguarding its health, morals, safety and welfare, even those basic personal rights may be limited to the extent necessary to so protect the public interest."

The instant case is not concerned with the advertising of the price of some consumer good; it deals with the protection of the public through reasonable limitations placed on the advertising of professional services.

Appellant also relies on a very recent United States Supreme Court opinion in Virginia State Board of Pharmacy, et.al. v. Virginia Consumer Council, et. al., 425 U.S. ___, 96 S. Ct. 1817 (1976), hereinafter Virginia Board of Pharmacy. This case, like Ritholz and Pride Oil, deals with the regulation of price advertising of a product, not the advertising of professional services. In any event, the Supreme Court makes it quite clear that it is not their intention to make any and all advertising constitutionally protected "commercial free speech." At page 1830 of the opinion, the court states:

> In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible. We mention a few only to make clear that they are not before us and therefore are not foreclosed by this case.

The Court goes on to say:

> Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First

> Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flows cleanly as well as freely.

In a concurring opinion, the Chief Justice echoes these ideas:

> I think it important to note also that the advertisement of professional services carries with it quite different risks than the advertisement of standard products. The Court took note of this in Semler, 294 U.S., at 612, 55 S. Ct., at 572, 79 L. Ed., at 1090, in upholding a state statute prohibiting entirely certain types of advertisement by dentists:
>
> > The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. (emphasis added).

The Court recently emphasized the fact that not all advertising is protected by the Constitution. In California Board of Optometry v. California Citizens Action Group, 44 L.W. 2337, 3651, 3702, California statutes prohibiting advertising of prices for commodities or services offered by optometrists were challenged. A three judge Federal Court issued a preliminary injunction prohibiting California from enforcing the statutes. The U.S. Supreme Court vacated that judgment and remanded the case to the District Court for further consideration in light of Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.

So, not only did the court make it clear in Virginina Board of Pharmacy that the right to advertise is not absolute, but the court underscored that point by vacating the judgment of

the District Court in California Board of Optometry v. California Citizens Action Group.

CONCLUSION

The Respondents have the power and authority to promulgate rules and regulations to regulate the advertising of marriage and family counselors. The rules and regulations complained of are constitutional because they are a reasonable exercise of the defendants' authority. The rules and regulations are founded on a rational basis of protection of the public welfare from advertising which may tend to be misleading. Appellant's claim's of denial of free speech and denial of property without due process of law are totally without merit. Consequently, the judgment of the District Court should be affirmed.

Respectfully submitted,

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