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Constitutional Law - Equal Protection - Arkansas' Gender-Based Statutes on Dower, Election, Statutory Allowances, and Homestead are Unconstitutional

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CONSTITUTIONAL LAW—EQUAL PROTECTION—ARKANSAS' GENDER-BASED STATUTES ON DOWER, ELECTION, STATUTORY ALLOWANCES, AND HOMESTEAD ARE UNCONSTITUTIONAL. *Hess v. Wims*, 272 Ark. 43, 613 S.W.2d 85 (1981); *Stokes v. Stokes*, 271 Ark. 300, 613 S.W.2d 372 (1981).

Hoyt Wims died leaving property by will to his two sisters. His widow, Geraldine Wims, elected to take against her husband's will and petitioned for the award of statutory allowances, dower, and homestead. The two sisters subsequently challenged the constitutionality of Arkansas' laws concerning dower, homestead, and statutory allowances, but the trial court found that the laws were constitutional. The Arkansas Supreme Court reversed and held Arkansas' election statute (ARK. STAT. ANN. § 60-501 (1971)),[1] two dower statutes (ARK. STAT. ANN. §§ 61-206[2] and 61-208[3] (1971)), statutory allowances statute (ARK. STAT. ANN. § 62-2501 (1971)),[4] and the homestead provisions in the Arkansas Constitution (ARK. CONST. art. 9, § 6),[5] to be unconstitutional. The holding was based on the premise that these laws represent impermissible gender-based discrimination which violates the equal protection clause of the fourteenth amendment. *Hess v. Wims*, 272 Ark. 43, 613 S.W.2d 85 (1981).

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1. ARK. STAT. ANN. § 60-501 (1971) provided that when a married man dies testate, his widow has the right to elect to take against his will. When a married woman dies testate, however, her husband may not elect to take against the will unless the wife's will was executed prior to the marriage. The interests which may be taken are limited to dower for a widow and curtesy for a widower.

2. ARK. STAT. ANN. § 61-206 (1971) provided that when a husband dies leaving no children, the widow is endowed with one-half of her husband's real estate in fee simple and one-half of his personalty absolutely. However, as against creditors she may receive only one-third of both realty and personalty. If the husband's real estate is ancestral, she will receive a life estate in one-third as against creditors and one-half as against collateral heirs.

3. ARK. STAT. ANN. § 61-208 (1971) provided that actions by the husband in relinquishing his wife's dower interest without her consent cannot operate to pass the wife's interest.

4. ARK. STAT. ANN. § 62-2501 (1971) allowed the widow, executor, or guardian and/or minor children to select personal property worth $2000 as against distributees or $1000 as against creditors, such furnishings as are necessary for family use and occupancy of the dwelling, and up to $500 sustenance. There was no corresponding allowance for widowers.

5. ARK. CONST. art. 9, § 6 provides that if the widow has no separate homestead and the husband dies leaving no children, the homestead generally is not subject to judgment liens during the widow's lifetime. If children survive, they share the homestead with the widow until age twenty-one. There is no comparable provision for a surviving widower.

In a companion case, Charlene Stokes elected to take against her husband's will. Mr. Stokes had executed a will prior to his marriage leaving some property to Charlene Wilson (now Stokes); the residue was to go to his children. The couple married, but the property devised to Mrs. Stokes was sold during their marriage with her assent. After Mrs. Stokes elected to take against the will, and before the probate court assigned dower and statutory allowances, the decedent's son, who was executor of his father's estate, conveyed some of the property in the estate to a third party.[6] Mrs. Stokes claimed dower in the property which had been sold as well as in the property remaining in the estate. The decedent's children challenged the dower law and statutory allowances as a violation of the equal protection clause. In its first opinion, the Arkansas Supreme Court held that the children lacked standing to challenge the constitutionality of the dower and election statutes, but that they had standing to challenge the allowances statute.[7] Nevertheless, the court upheld the constitutionality of the allowances statute, stating that widows' allowances "should withstand equal protection scrutiny because they bear a fair and substantial relation to the object of the legislation, which is to reduce the disparity between the economic capabilities of a man and a woman in today's world."[8] On rehearing, however, the court reversed, holding that the children did have standing and that the allowances statute (ARK. STAT. ANN. § 62-2501 (1971)), election statute (ARK. STAT. ANN. § 60-501 (1971)), and several dower statutes (ARK. STAT. ANN. § 61-201,[9] 61-202,[10] 61-203,[11] 61-207,[12] 61-208, and 61-210[13] (1971)) were unconstitu-

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6. On the day of the conveyance, the grantees mortgaged the property to the Bank of Ozark. The grantees and the Bank of Ozark were made parties to the action.

7. Stokes v. Stokes, No. 80-141 (Ark., delivered Dec. 8, 1980), *rev'd and opinion sustituted on rehearing*, 271 Ark. 300, 613 S.W.2d 372 (1981).

8. *Id.* at 308 (original opinion).

9. ARK. STAT. ANN. § 61-201 (1971) provided that when a husband is survived by issue, his widow receives a one-third life estate in her husband's real property. This interest accrues in any land owned by the husband at any time during the marriage, whether it is still owned by him at his death or was sold without release of her interest during the marriage. *See* Hill's Admrs. v. Mitchell, 5 Ark. 608 (1844).

10. ARK. STAT. ANN. § 61-202 (1971) provided that a widow is entitled to one-third of her husband's personalty absolutely when the decedent leaves issue surviving him. This is a forced share in the husband's personalty.

11. ARK. STAT. ANN. § 61-203 (1971) entitled the surviving widow to dower in her husband's bonds, notes, accounts, and evidences of debt when the decedent leaves issue surviving him. This is also a forced share.

12. ARK. STAT. ANN. § 61-207 (1971) provided that dower rights also attach to lands which were sold during the lifetime of the husband without the wife's consent in legal form.

13. ARK. STAT. ANN. § 61-210 (1971) provided that a widow is entitled to dower in

tional. *Stokes v. Stokes*, 271 Ark. 300, 613 S.W.2d 372 (1981).

Arkansas dower laws, like other rules of property in Arkansas, have their origin in medieval law.[14] Their primary purpose is to provide economic protection for surviving widows.[15] At common law, dower was the life estate which a widow enjoyed in her husband's lands.[16] Although some states have preserved features of common-law dower, with statutory modifications, the number of states has been decreasing.[17] Some states have abolished common-law dower and have substituted statutory schemes which allow the widow to take a forced share of her husband's property; other states have adopted community property systems.[18]

At common law, curtesy was a life estate to which the husband was entitled in the lands of his wife.[19] Once issue were born, the husband acquired rights in his wife's lands if he survived her.[20] The primary difference between Arkansas' curtesy statute and the dower statutes was that a husband's curtesy right could be defeated without his consent, while a wife's dower right could not.[21] Wives were free to convey their property without their husband's permission, while husbands have had no corresponding right.[22]

Arkansas' election statute also treated surviving husbands and wives differently; it did not permit a widower to elect to take against his wife's will unless the will was executed before the marriage, but a widow's election right was not similarly restricted.[23] Statutory allowances[24] and homestead rights[25] were likewise provided for a widow, but not for a widower.

In the area of gender-based classifications, the application of the equal protection clause of the fourteenth amendment has under-

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mortgaged lands as against everyone except the mortgagee and those claiming under the mortgagee.

14. Wright, *Medieval Law in the Age of Space: Some "Rules of Property" in Arkansas*, 22 ARK. L. REV. 248, 264 (1968).

15. A. CASNER, AMERICAN LAW OF PROPERTY § 5.3 (1952).

16. *Id.* § 5.1.

17. *Id.* § 5.1 (Supp. 1976).

18. *Id.* § 5.1 (1952).

19. *Id.* § 5.57.

20. *Id.*

21. ARK. STAT. ANN. § 61-229 (1971) provided that the rights of the surviving husband attach only to the property which the wife did not dispose of prior to her death or by will. This makes curtesy a forced share similar to dower in personalty.

22. *Id.*

23. ARK. STAT. ANN. § 60-501 (1971).

24. ARK. STAT. ANN. § 62-2501 (1971).

25. ARK. CONST. art. 9, § 6.

gone significant changes in recent years.[26] Earlier United States Supreme Court cases demonstrated the Court's extreme deference to the legislative purpose of the laws.[27] For example, in *Goesaert v. Cleary*[28] the Supreme Court upheld a Michigan statute which did not allow women to be licensed as bartenders, but made an exception for wives and daughters of bar owners. The Court stated that in spite of the changes in women's social and legal positions, Michigan could forbid all women to work in bars.[29] More recently, in *Kahn v. Shevin*,[30] the Court upheld a Florida statute which granted widows but not widowers a $500 annual property tax exemption. The Court held that the Florida statute rested "upon some ground of difference having a fair and substantial relation to the object of the legislation"[31] and, therefore, the statute withstood equal protection scrutiny.

The modern approach of the Court has been to apply an intermediate level of scrutiny to gender-based classifications.[32] In *Reed v. Reed*[33] the United States Supreme Court declared unconstitutional an Idaho statute which provided that as between persons equally qualified to administer an estate, a male was to be preferred to a female. Although the Court purported to follow the traditional rational relationship standard of review,[34] the Court struck down the statute as having no fair and substantial relation to the object of the legislation.[35] Only two years later, in *Frontiero v. Richardson*,[36] the Supreme Court again scrutinized a gender-based classification more strictly.[37] In that case a woman in the Air Force successfully challenged the constitutionality of statutes which allowed servicemen to claim their wives as dependents without requiring proof of dependence, but which required servicewomen to prove that their husbands received at least half of their support from their wives

26. G. GUNTHER, CONSTITUTIONAL LAW 864 (10th ed. 1980).

27. *Id.* at 865.

28. 335 U.S. 464 (1948).

29. *Id.* at 465-66.

30. 416 U.S. 351 (1974).

31. *Id.* at 355.

32. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 616 (1978).

33. 404 U.S. 71 (1971).

34. Under the mere rationality standard of review, a statute will withstand equal protection scrutiny if the articulated legislative purpose bears any rational relationship to the classification of the statute. Kahn v. Shevin, 416 U.S. 351, 355 (1974).

35. Reed v. Reed, 404 U.S. 71, 76 (1971).

36. 411 U.S. 677 (1973).

37. *Id.* A plurality of the Justices applied strict scrutiny; however, the position did not receive majority support.

before they could claim their husbands as dependents.[38] Since the different treatment accorded servicewomen was for the purpose of administrative convenience only, the Court struck down the statute, declaring that a statutory scheme which draws a line between the sexes "*solely* for the purpose of achieving administrative convenience . . . involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution] . . . .' "[39]

In 1976 the Supreme Court held in *Craig v. Boren*[40] that an Oklahoma statute which prohibited the sale of 3.2% beer to males under the age of twenty-one and to females under the age of eighteen could not withstand equal protection scrutiny. The Court declared that gender-based classifications must serve important governmental objectives and be substantially related to the achievement of those objectives.[41] The articulated purpose of the statutes involved was the "enhancement of traffic safety."[42] Although the Court conceded that safety is an important governmental objective, the appellees were unable to demonstrate that the distinction served to achieve that objective.[43]

In *Stanton v. Stanton*[44] the United States Supreme Court held that a statute which provided that females reached the age of majority at eighteen and males at twenty-one was unconstitutional. As a result of the statute, a father had discontinued support payments for his daughter when she reached eighteen. The Court held that "under any test—compelling state interest, or rational basis, or something in between—"the different ages for reaching majority in the context of child support could not survive an equal protection attack.[45]

When benign gender-based classifications[46] are challenged the Court has applied a heightened intermediate scrutiny.[47] In *Orr v. Orr*[48] the Supreme Court struck down an Alabama statute which required husbands but not wives to pay alimony. The Court stated

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38. *Id.*
39. *Id.* at 690.
40. 429 U.S. 190 (1976).
41. *Id.* at 197.
42. *Id.* at 199.
43. *Id.* at 200.
44. 421 U.S. 7 (1975).
45. *Id.* at 17.
46. Benign gender-based classifications occur when women receive preferential treatment. *See* G. GUNTHER, *supra* note 27, at 790.
47. *Id.* at 791.
48. 440 U.S. 268 (1979).

that sex was not a reliable classification for determination of need.[49]

In several cases in which social security laws were challenged as violating the equal protection clause, the Supreme Court again applied an intermediate level of scrutiny.[50] In *Califano v. Webster*[51] the Court analogized the social security law under attack to the property tax exemption law in *Kahn v. Shevin*[52] and upheld the law. The statute provided for computation of old age insurance benefits depending upon the sex of the wage earner. Because of the differences, a retiring female could receive slightly higher retirement benefits. The Court considered the "[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women"[53] an important governmental objective which was furthered by the statute. The Court distinguished two prior cases, *Califano v. Goldfarb*[54] and *Weinburger v. Wiesenfeld*,[55] which had struck down statutes because of classifications which actually penalized female wage earners.

In *Wengler v. Druggists Mutual Insurance Co.*[56] a Missouri workers compensation law allowed a widow to qualify for death benefits without having to prove actual dependence on her husband, but required a widower to prove he was physically or mentally incapacitated or actually dependent on his wife's earnings. The Court held the statute unconstitutional since it discriminated against both men and women.[57] Although providing for needy spouses was considered to be an important governmental objective, the statute failed to accomplish that goal.[58]

Recent state court cases have also dealt with gender-based classifications. *In re Estate of Reed*[59] involved a Florida statute which provided for family allowances for the widow and children but did not allow a needy widower to obtain an allowance.[60] The Court held that the gender-based classification was irrational and a viola-

49. *Id.* at 281.

50. *See* Califano v. Webster, 430 U.S. 313 (1977); Califano v. Goldfarb, 430 U.S. 199 (1977); Weinburger v. Wiesenfeld, 420 U.S. 636 (1975).

51. 430 U.S. 313 (1977).

52. 416 U.S. 351 (1974).

53. 430 U.S. at 317 (1977).

54. 430 U.S. 199 (1977).

55. 420 U.S. 636 (1975).

56. 446 U.S. 142 (1980).

57. *Id.* at 147.

58. *Id.* at 151.

59. 354 So. 2d 864 (Fla. 1978).

60. The statute has since been amended and no longer makes a sex-based clasification. FLA. STAT. ANN. § 732.403 (West 1975).

tion of the equal protection clause. In *Peters v. Narick*[61] the West Virginia Supreme Court of Appeals applied strict scrutiny to a gender-based alimony statute which permitted wives but not husbands to seek separate maintenance. The court considered the classification to be suspect and required a compelling interest to justify the classification.[62] The remedy was to apply the statute in a gender-neutral fashion by extending the right to seek separate maintenance to both men and women.[63] In *Peddy v. Montgomery*[64] the Alabama Supreme Court struck down a statute which denied a wife the power to alienate or mortgage land without her husband's consent.

In *Dodson v. Arkansas Activities Association*[65] the United States District Court for the Eastern District of Arkansas held that rule differences between girls' and boys' junior and senior high school basketball programs were unconstitutional. The court stated that no justification was offered for the differences between the rules except that this was the way the rules had always been.[66]

In *Hatcher v. Hatcher*[67] the Arkansas Supreme Court held that an Arkansas alimony statute could not survive the application of the principles of *Orr v. Orr*.[68] The statute authorized temporary maintenance and attorney's fees in divorce actions to women but not to men.[69]

The Arkansas Supreme Court relied primarily upon the reasoning of *Orr v. Orr*[70] in deciding *Hess v. Wims*[71] and *Stokes v. Stokes*.[72] In *Hess* the court began with an analysis of Arkansas' election statute which provided for disparate treatment between surviving husbands and wives.[73] As a result of the statute, if a wife executed a will following her marriage she could effectively cut off her husband's curtesy right. In contrast, a husband could not similarly defeat his wife's dower right. The court was able to find no

61. 270 S.E.2d 760 (W. Va. 1980).
62. *Id.* at 764-65.
63. *Id.* at 768.
64. 345 So. 2d 631 (Ala. 1977).
65. 468 F. Supp. 394 (E.D. Ark. 1979).
66. *Id.* at 398.
67. 265 Ark. 681, 580 S.W.2d 475 (1979).
68. 440 U.S. 268 (1979).
69. ARK. STAT. ANN. § 34-1210 (1962) was amended by the legislature after the decision in *Orr, Hatcher* was remanded to the chancery court for reconsideration in light of *Orr*, the amendment to the statute, and the holding of the case.
70. 440 U.S. 268 (1979).
71. 272 Ark. 43, 613 S.W.2d 85 (1981).
72. 271 Ark. 300, 613 S.W.2d 372 (1981).
73. 272 Ark. 43, 46, 613 S.W.2d 85, 86 (1981).

"valid compensatory purpose or justifiable governmental function"[74] to sustain the gender-based classification and, therefore, held ARK. STAT. ANN. § 60-501 (1971) to be unconstitutional.[75] The court relied on several United States Supreme Court cases which held that gender-based laws which discriminate against males on the presumption that all males are superior to females in financial matters are unconstitutional.[76] The court also relied on recent Arkansas cases such as *Hatcher v. Hatcher*,[77] *Noble v. Noble*,[78] and *Lucas v. Handcock*.[79] The court then turned to Arkansas' dower and curtesy statutes which treated differently men and women who were similarly situated. The court could find no justification for such discrimination and, therefore, found ARK. STAT. ANN. §§ 61-206 and 61-208 (1971) to be unconstitutional.[80]

In *Stokes* the court stated that the time had come to change Arkansas' gender-based statutes.[81] Following the precedent of several United States Supreme Court cases[82] the court found that Arkansas' election statute did not meet the two-prong test of serving an important governmental objective and actually accomplishing that objective. It was, therefore, held to be unconstitutional.[83] The court applied the rationale of *Orr*, which it had followed in *Hatcher v. Hatcher*,[84] to invalidate the following dower statutes: ARK. STAT. ANN. §§ 60-501, 61-201 to -203, -207, -208, and -210 (1971).[85] The court also held the allowances statute[86] invalid as it related to dower provisions.[87] The court did not, however, determine the constitutionality of Arkansas' laws concerning homestead and minor chil-

74. *Id.*

75. *Id.*

76. *Id.* at 46-47, 613 S.W.2d at 86. The court cited Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142 (1980); Califano v. Goldfarb, 430 U.S. 199 (1977); Weinburger v. Wiesenfeld, 420 U.S. 636 (1975); Reed v. Reed, 404 U.S. 71 (1971).

77. 265 Ark. 681, 580 S.W.2d 475 (1975).

78. 270 Ark. 602, 605 S.W.2d 453 (1980) (declaring discriminatory division of property statutes unconstitutional).

79. 266 Ark. 142, 583 S.W.2d 491 (1979) (declaring unconstitutional a statute which allowed an illegitimate child to inherit from his mother but not his father).

80. Hess v. Wims, 272 Ark. 43, 47, 613 S.W.2d 85, 87 (1981).

81. 271 Ark. 300, 304, 613 S.W.2d 372, 375 (1981).

82. The court cited Wengler v. Druggist Mut. Ins. Co., 446 U.S. 199 (1980); Califano v. Westcott, 443 U.S. 76 (1979); Orr v. Orr, 440 U.S. 268 (1979); Trimble v. Gordon, 430 U.S. 762 (1977); Califano v. Goldfarb, 430 U.S. 199 (1977); Stanton v. Stanton, 421 U.S. 7 (1975).

83. 271 Ark. at 304, 613 S.W.2d at 375.

84. 265 Ark. 681, 580 S.W.2d 475 (1979).

85. 271 Ark. at 304-05, 613 S.W.2d at 376.

86. ARK. STAT. ANN. § 62-2501 (1971).

87. 271 Ark. at 305-6, 613 S.W.2d at 376.

dren's rights since those issues were not before the court.[88]

The Arkansas Supreme Court's reasoning was basically sound, but it was not well-developed. The court failed to consider possible legislative objectives which the statutes may have served and, instead, simply stated that there were not any valid purposes. The court merely concluded that the time had come to change these outdated laws and then proceeded to do so.

Hess and *Stokes* represent an attempt by the Arkansas Supreme Court to update Arkansas' laws concerning surviving spouses. There is no justification for continuing to utilize laws which were written before the turn of the century and were based on common law which was even more antiquated. People no longer need inheritance laws which are based *solely* on the sex of the surviving spouse. Such dissimilar treatment is not fair.

As a result of the two cases, the Arkansas General Assembly recently passed Act 714 of 1981.[89] The Act amends a number of Arkansas statutes including the election statute, the allowances statutes, and the dower and curtesy statutes.[90] Questions remain concerning events which occurred during the period of time between the decisions in *Hess* and *Stokes* (February 23, 1981) and the date that the new law became effective (March 24, 1981). For example, during the interim, could a surviving spouse elect to take against the will? A death which occurred during the interim could raise questions about the existence of dower and curtesy during that period. Also, deeds executed during that time period may be incomplete.

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88. *Id.* at 306, 613 S.W.2d at 376.

89. 1981 Ark. Acts 714.

90. 1981 Ark. Acts 714, § 17 provides that the surviving spouse may elect to take against the will provided that he or she was married to the decedent for at least one year.

1981 Ark. Acts 714, § 18 provides that if a person dies leaving a surviving spouse and children, the surviving spouse will be endowed with a one-third life estate in the real property unless it is relinquished in legal form. This is a very significant change in the law. The wife will no longer be free to alienate her property without her husband's consent. Although the law is now applied equally to both husbands and wives, the better solution would have been to forego requiring either spouse to consent to such alienation during marriage. Other dower statutes have now been amended to require equal treatment for either surviving spouse.

1981 Ark. Acts 714, § 68 has amended the allowances statute to include both surviving spouses, and § 72 has extended homestead rights to both surviving spouses as well.

For the most part, these amendments represent much-needed improvements in the protection for surviving spouses. Dower and curtesy have been equalized, both spouses may now elect to take against the will, and homestead and allowances are granted equally. Because of the one year waiting period on the election statute, newly married husbands and wives will be encouraged to make new wills providing for their new spouses immediately upon marriage.

There will almost certainly be litigation to solve these problems.[91]

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91. One complicating factor can be found in the basic dower and curtesy statute which now requires relinquishment by either spouse before the other may dispose of his or her property.