

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

May 11, 1995

The Honorable C. Alexander Harvin, III
Member, House of Representatives
304C Blatt Building
Columbia, South Carolina 29211

Re: Informal Opinion

Dear Representative Harvin:

You have asked for our opinion regarding the constitutionality of the requirement that the surviving spouse of a deceased Judge or Solicitor is entitled to certain retirement benefits of his or her deceased spouse, provided the surviving spouse does not remarry. Your concern is that this requirement "is different than the law covering other retirement systems ...". I have examined the case law in this area and have concluded that the courts generally uphold similar requirements as constitutionally valid. Therefore, I am of the opinion that our courts would consider this requirement that the surviving spouse must not remarry in order to remain eligible for these benefits, as passing constitutional muster.

S.C. Code Ann. Section 9-8-110 provides in pertinent part:

(1) [e]xcept as provided in subsections (2) and (3) of this section, upon the death of any member of the System, a lump sum amount shall be paid to such persons as he shall have nominated by written designation, filed with the Board, otherwise to his estate. Such amount shall be equal to the amount of his accumulated contributions.

(2) Unless a married member has designated a beneficiary other than his spouse in accordance with subsection (1), upon his death prior to retirement an allowance

of the educational system. This interest outweighs Mrs. Hamilton's somewhat attenuated claim that her constitutional right to marry has been infringed upon.

282 S.C. at 523-524.

Similarly, in Califano v. Jobst, supra, the United States Supreme Court upheld the termination of a dependent child's Social Security benefits upon remarriage. Specifically, an amendment to the Social Security law provided that marriage would not terminate a child's disability benefits if the child married a person also entitled to benefits. Widows, widowers, divorced wives and parents received the same treatment, but any other marriage was deemed by the Act to be a terminating event.

The Court recognized that [g]eneral rules are essential if a fund of this magnitude is to be administered with a modicum of efficiency, even though such rules inevitably produce seemingly arbitrary consequences in some individual cases." 434 U.S. at 53.

Both tradition and common experience support the conclusion that marriage is an event which normally marks an important change in economic status Frequently, of course, financial independence and marriage do not go hand in hand. Nevertheless, there can be no question about the validity of the assumption that a married person is less likely to be dependent on his parents for support than one who is unmarried.

Supra. Thus, the general rule, which had previously terminated all child's benefits upon remarriage, was "unquestionably valid." Supra at 54.

As to any constitutional question with respect to Congress' continuing benefits beyond marriage where marriage was between beneficiaries, but terminating benefits for others who married, the Court stated that it "was reasonable for Congress to ameliorate the severity of the [general rule] by protecting both spouses from the dual hardship which it effected". 434 U.S. At 55. Marriage between beneficiaries was deemed a "reliable indicator of probable hardship." Supra at 57. Thus, such disparate treatment was held valid.

Moreover, in another case, Board of Trustees v. Cardwell 400 So.2d 402, 406 (Ala. 1981), upholding a statute terminating pension benefits to a surviving spouse and children of firefighters who were killed in the line of duty upon remarriage of the surviving spouse,

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the Court generally commented upon the reason for a termination-upon-remarriage provisions as follows:

[t]he purpose of terminating benefits to the surviving spouse and children on the remarriage of the surviving spouse is to limit the number of individuals who receive benefits and the period of coverage in order to aid the system financially. A state legislature has a rational purpose and legitimate interest when it attempts to prevent a pension system from being unduly burdened.

The case of McCourtney v. Cory, 123 Cal. App. 3d 431, 176 Cal. Repr. 639 (9181) is particularly instructive with respect to the situation you have referenced. That decision involved an attack upon California's Judicial Retirement Law. The Law allowed in certain cases, such as the judge dying in office, for judicial retirement benefits to continue to a surviving spouse even upon remarriage; however, such benefits terminated in other circumstances, such as where the spouse of a retired or disabled judge remarried. The plaintiff contended that this disparate treatment violated the Equal Protection Clause and infringed upon the right to marriage.

Dispensing first with the argument that the right to marry was being infringed, the Court cited Califano v. Jobst, discussed above. Stated the Court,

[i]n our view the remarriage provision of the Social Security Act upheld in Jobst is comparable to the remarriage provisions of the Judges' Retirement Law. The latter's provisions do not attempt to ban or restrict marriage, nor do they significantly interfere with the exercise of that right.

Turning next to the Equal Protection and Due Process arguments, the Court rejected those also. The essence of plaintiff's argument, said the Court, was the mistaken belief that "once provision has been made under any pension plan for life allowances for a particular category of surviving spouses, similar provision must be made for all other categories of surviving spouses." The proper Equal Protection test for this type of statute was not that of strict scrutiny, but was "whether the classification bears a rational relation to a constitutionally permissible objective ...", concluded the Court. 123 Cal. App. 2d 439. Moreover, plaintiff's argument that the California Legislature was constitutionally compelled to treat all officers and employees alike for retirement purposes, was legally unsound in the eyes of the Court.

Plaintiffs' argument brushes to one side the fact that surviving statutes in different categories are differently situated, possess different histories, are credited with different contributions, and face different problems. Presumptively, the legislature can treat these different categories in different fashion.

123 Cal. Repr., at 440. Therefore, the Retirement statutes did not violate Equal Protection:

... it cannot be said that the legislature acted unreasonably or irrationally when it specified that the surviving spousal allowances created in 1968 (Gov. Code, § 75093) and those created in 1973 (Gov. Code, § 75033.5) would continue for the life of the beneficiary and not terminate on remarriage, as do other spousal allowances. "The legislature is not bound, in order to adopt a constitutionally valid statute, to extend it to all cases which might possibly be reached but is free to recognize degrees of harm and to confine its regulation to those classes of cases in which the need is deemed to be the most evident." ... [citation omitted]. In enacting section 75093 the legislature authorized life allowances for surviving spouses of judges dying in office before becoming eligible for retirement benefits. The legislature could have concluded that such surviving spouses formed an especially needy category, in that its members were required to face a catastrophic and traumatic event for which they may have been ill-prepared. Having so concluded, the legislature was not required to eliminate from the Judge's Retirement Law the termination-on-marriage provisions which affect other categories of surviving spouses.... These reasons need not be comprehensive, or all-inclusive, or even fully persuasive. Indeed, the classification which they support may be imperfect, illogical or unscientific.

123 Cal. App. 3d at 442-443.

Clearly, judges and solicitors in South Carolina have a separate retirement system. Legislative enactments governing judicial and solicitors' retirement is contained in a separate chapter of the Code. Section 9-8-10 et seq. We have recognized previously that

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"the Solicitors' [and Judges] Retirement System is a separate entity from the South Carolina Retirement System...." Op. Atty. Gen., April 25, 1979.

In Hargrove v. Bd. of Trustees, 310 Md. 406, 529 A.2d 1372 (1987), the Court recognized the sharply differing characteristics of various State pension and retirement plans and that the State need not justify such disparities between systems for constitutional purposes:

[m]oreover, not all variances among different pension systems need be justified by the State.

... "The class of statutes usually known as retirement acts which provide pensions for different classes of State employees need not be alike as to all employees." The Judicial Pension Plan for retired Maryland judges contains some advantages not found in other plans As the various state pension plans have evolved with many amendments to one or another over the years, each one is different from the others. In some respects the Judicial Pension Plan is superior to the others and in some respects inferior. These discrepancies do not invalidate the plan on constitutional grounds.

529 A.2d at 1381.

While I certainly sympathize with your situation, I cannot conclude that the statutory requirement that retirement benefits paid to a surviving spouse of a Judge or Solicitor must terminate upon remarriage is unconstitutional. Clearly, as the foregoing cases have demonstrated, this requirement does not unconstitutionally infringe upon the right to marry because it does not significantly interfere with that right. Moreover, the Judges' and Solicitors' Retirement System is separate from all others, and the Legislature could have reasonably determined that the financial integrity of that System required that the benefits paid to a surviving spouse should terminate upon remarriage.

The general rule, unless there is statutory authority otherwise, has previously been that benefits paid to a surviving spouse terminate upon remarriage. See Anno., 85 A.L.R. 2d 242 and State ex rel. Fouche v. Verner, 30 S.C. 277, 9 S.E. 113 (1888) [Confederate veteran pension paid as long as widow remains unmarried]. This being the case, the State would not be constitutionally required to alter this rule for every single Retirement System at one time. The Legislature could reasonably conclude, after weighing the advantages

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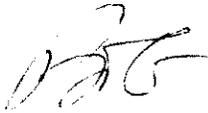
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and disadvantages of the various Retirement Systems, as well as considering the unique positions of both Judges and Solicitors, that the longstanding general rule of termination upon remarriage be maintained with respect to the Judges' and Solicitors' Retirement System. While this requirement, as well as the provision mandating that the surviving spouses of law enforcement officers killed in the line of duty not remarry to maintain benefits may be unfair, because no such provision exists as to other Systems, the best remedy would be corrective legislation. As noted, this is presently pending.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,



Robert D. Cook

Assistant Deputy Attorney General

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