1995 WL 803564 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
May 11, 1995

Re: Informal Opinion

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

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 equal to one third of the allowance which would have been payable to him, assuming he was then eligible to retire and had retired on the date of his death, shall be paid to his surviving spouse until her death or remarriage. This allowance is payable in lieu of the lump sum amount payable in accordance with subsection (1). Upon the death of a retired member who has not designated a beneficiary other than a spouse an allowance equal to one third of the allowance which would have been payable to him, shall be paid to the surviving spouse until death or remarriage. (Emphasis added).

The Legislature appears to have adopted one other similar provision in a limited circumstance with respect to the Police Officers Retirement System. See, Section 9-11-140, [death of police officer killed in line of duty, surviving spouse receives benefit "to continue during her widowhood."] Laws governing other Retirement Systems do not appear to contain a similar provision. Thus, the question you raise is whether this distinction in treatment would survive constitutional scrutiny. [1]

Law / Analysis

A reviewing court always presumes the constitutionality of any statute and would do so with respect to Section 9-8-110. The Court does not declare an Act of the General Assembly void unless the Act's constitutionality is clear beyond all reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939); All doubt is resolved in favor of a statute's validity. While this Office can give its view of the constitutionality of particular legislation, only the courts are empowered to strike the legislation down. Op. Atty. Gen., February 18, 1992.

***2** In Hamilton v. Bd. of Trustees, 282 S.C. 519, 319 S.E.2d 717 (1984), our Supreme Court addressed the question of a policy which allegedly impinged upon the right to marry. There, a school district did not renew the employment contract of an employee because of her marriage to the District Superintendent. The Court concluded that the District's regulation was constitutionally valid:

[a]s part of her equal protection argument, Mrs. Hamilton claims she is being discriminated against because of her marriage to the Superintendent of Education, the right of freedom of choice in marriage relations is a fundamental right, and any law or policy restricting this choice is subject to "strict scrutiny" in determining its constitutionality. In support of this proposition, she cited Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967).

Mrs. Hamilton's proposition of law is quite correct, but not applicable to her situation. To be entitled to a strict scrutiny review of a law impinging upon this undeniably fundamental right, Mrs. Hamilton must show the law directly and substantially interferes with the right to marry. Zablocki v. Redhail, 434 U.S. 374, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978). Any reasonable law, regulations, or policy which does not significantly interfere with decisions to marry and does not operate to prohibit or penalize the right to marry will not be subject to rigorous scrutiny. Califano v. Jobst, 434 U.S. 47, 98 S.Ct. 95, 54 L.Ed.2d 228 (1977); Southwestern Community Action Council v. Community Service Administration, 462 F.Supp. 289 (S. D. W. Va. 1978).

Mrs. Hamilton has failed to show the policy in question substantially interferes with her right to marry. She has shown no direct infringement on the rights of cohabitation, sexual intercourse, or procreation. Since the Board's policy does not significantly interfere with the exercise of this fundamental right, a strict scrutiny review is not proper .... [citation omitted]. The application of strict scrutiny is appropriate only where the obstacle to marriage is a direct one, i.e., one that operates to preclude marriage entirely for a certain class of people. Mapes v. U.S., 576 F.2d 896, 217 Ct. Cl. 115 (1978).

We find policy 8250 to be a reasonable regulation. Its purpose is entirely proper and valid: preventing conflicts of interest and nepotism .... The state's interest in providing its children with a meaningful education is fully and directly served by preventing conflicts of interest in the administration 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 State 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.

***3** 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, 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. Reptr. 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.

***4** 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, possesses different histories, are credited with different contributions, and face different problems. Presumptively, the legislature can treat these different categories in different fashion.

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

***5** 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 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.

***6** With kind regards, I am
Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

Footnotes

1 The General Assembly, apparently in recognition of the "unfairness" argument, has legislation pending which would abolish both of the termination requirements. See, S-146 and pending Appropriations Bill.

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