1980 S.C. Op. Atty. Gen. 84 (S.C.A.G.), 1980 S.C. Op. Atty. Gen. No. 80-43, 1980 WL 81926

Office of the Attorney General

State of South Carolina
Opinion No. 80-43
April 25, 1980

SUBJECT: Marriage, Divorce; Adoption

***1** (1) Section 20–1–10, Code of Laws of South Carolina, 1976, prohibits a marriage between an adoptive brother and his sister.

(2) The State may constitutionally prohibit such marriages where the adoptive brother and his sister have lived in the same house for a significant period of time as brother and sister.

TO: Honorable Marshall Cain
Member
House of Representatives

QUESTIONS:

Should the Probate Court issue a marriage license to an adoptive brother and his sister?

STATUTES AND CASES:

South Carolina Code of Laws, (1976) as amended, §§ 15–45–10 et seq., 20–1–10, 16–15–20; Wagener v. Parrott, 51 S.C. 489; Galloway v. Galloway, 249 S.C. 157, 153 S.E.2d 326; Cribbs, et al. v. Floyd, et al., 188 S.C. 443, 199 S.E. 677; Tyson v. Weatherly, 214 S.C. 336, 52 S.E.2d 410; State v. Smith, 101 S.C. 293, 85 S.E. 958; Zablocki v. Redhail, 434 U.S. 374; Mass. Bd. of Retirement v. Murgia, 427 U.S. 307; Loving v. Virginia, 388 U.S. 1; Griswold v. Connecticut, 381 U.S. 479; Carey v. Population Services, 431 U.S. 678; Prince v.Massachusetts, 321 U.S. 158; Ginsberg v. New York, 390 U.S. 629; Smith v. Org. of Foster Families, 431 U.S. 816; ?? v. Walcott, 434 U.S. 241; Rhodes v. McAfee, 224 Tenn. 495, ?? S.W.2d 522; Israel v. Allen, 577 P.2d 762; State v. Lee, 196 ?? 311, 17 So.2d 277; State v. Youst, 74 Ohio App. 381, 59 N.E.2d 167; State v. Rogers, 260 N.C. 406, 133 S.E.2d 1; In re NEW and MLB, ?? Fam.L.R. 2601; Wadlington, 'The Adopted Child and Intra-Family Marriage Restrictions,' 49 Va.L.R. 478; 'Adoptive Sibling Marriage In Colorado; Israel v. Allen," 51 Univ. of Colo. L.R., 135; Masters, Patterns of Incest, 60.

DISCUSSION:

Under South Carolina law, an adoptive sibling enjoys the same legal status and recognition as a natural sibling.
. . . [A]ll rights, duties and other legal consequences of the natural relations of child and parent shall thereafter exist between such adopted child and the person adopting such child and the kindred of the adoptive parents. Code of Laws of South Carolina, § 15–45–130 (1976 as amended) [emphasis added].

As long ago as 1897 the South Carolina courts recognized the policy of placing the adopted individual in the same status as the natural child. The Court noted in a case involving the homestead exemption that

[i]t seems that the trial Judge was unwilling to accord the same position in a family to an adopted child as a child of the blood. Why should there arise any such difference in the law? One originates in nature and one in choice-but the same result obtains in each instance. Wagner v. Parrott, 51 S.C. 489. [emphasis added].

See also, Galloway v. Galloway, 249 S.C. 157, 153 S.E.2d 326; Cribbs, et al. v. Floyd, et al., 188 S.C. 443, 199 S.E. 677.

***2** The South Carolina statutory adoption scheme evidences the state's policy to remove any legal distinction between adopted individuals and natural children. Section 15–45–150 provides for the issuance of an amended birth certificate which replaces the original for all purposes. In addition, all proceedings and records held under the acts are confidential. See, § 15–45–140. This treatment of 'adopted children as though they were born into the family is the manifestation of the policy against drawing distinctions in family relationships between blood members and members by adoption'. 2 C.J.S., Adoption of Persons, § 133. Pursuant to this policy, an adoptive child in South Carolina is explicitly recognized as a sibling of the natural children of the adoptive parents.

Section 20–1–10 prohibits persons within designated familial relationships from marriage in South Carolina. [1] Inclusive therein is prohibited the marriage of a man to his sister. This provision contains no express requirement of consanguinity in order for the marital relationship to be prohibited. Cf., Tyson v. Weatherly, 214 S.C. 336, 52 S.E.2d 410. For example, the statute includes a prohibition of marriage between man and his son's wife or a woman and her granddaughter's husband. In State v. Smith, 101 S.C. 293, 85 S.E. 958, the criminal incest statute was construed as applicable to relations of the half blood, though not expressly within the statute's prohibitions. The Court reasoned that the words in the statute must be taken in their 'ordinary meaning,' Supra at 296.

As noted, the statutory adoption scheme, § 15–45–10 et seq., in South Carolina makes an adopted child a sibling of the natural children of the adoptive parent. To give effect to the legislative intent of these enactments, the prohibition of sibling marriage must be deemed to apply to adoptive siblings as well as natural siblings. A contrary construction would preference § 20–1–10 over the state's adoption scheme and render the adoption process meaningless for the purposes of the incest statutes.

Moreover, § 20–1–10 quite clearly applies to familial relationships other than those of consanguinity. Among the statute's purposes is the promotion of the integrity and harmony of the family unit and the prevention of domestic discord. Post at 6; In re MEW and MLB, 3 Fam. L.R. 2601 (1977). A construction of § 20–1–10 which includes adoptive persons within the prohibition of sibling marriages would be entirely consonant with the provision and would effectuate the legislative intent of the state's adoption laws. Accordingly, § 20–1–10 prohibits marriage between adoptive siblings. [2]

Having so concluded, the issue requires ascertainment whether the statutory provision is unconstitutional as applied to the above factual setting. The relevant constitutional question is whether prohibiting adoptive siblings from marriage is violative of the Equal Protection Clause. It is the opinion of this Office that under the given set of facts, it is not.

***3** Initially, the applicable standard of review under the Equal Protection Clause must be determined. It is fundamental that '. . . equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.' Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976). Pertinent to the inquiry is whether the right to marry is deemed 'fundamental'. Zablocki v. Redhail, 434 U.S. 374 (1978) is controlling. Involved in Zablocki was a constitutional challenge to a Wisconsin statute prohibiting Wisconsin residents having minor issue not in their custody and under an obligation to support by court order or judgment from marrying without first obtaining court permission.

The Court initially posed the question whether the right to marry was fundamental. Relying upon such prior precedents as Loving v. Virginia, 388 U.S. 1 (1967), Griswold v. Connecticut, 381 U.S. 479 (1965) and Carey v. Population Services, 431 U.S.

678 (1977) the Court concluded that 'the right to marry is of fundamental importance' and, thus, worthy of special constitutional protection. Supra at 383.

Next, the Court inquired whether the Wisconsin provision under scrutiny 'significantly interfere[s] with the decision to enter into the marital relationship . . ..' It was obvious, said the Court that '[s]ome of those in the affected class, like appellee will never be able to obtain the necessary court order . . .', thereby creating an absolute ban on marriage for those persons. Supra at 387.

Finally, the Zablocki Court articulated the relevant Equal Protection analysis.
When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests. Supra at 388.

Thus, it becomes necessary to determine whether § 20–1–10 as construed above survives constitutional scrutiny pursuant to the Zablocki standard of review.

Unquestionably, § 20–1–10 'significantly interfere[s] with the decision to enter into the marital relationship'. Adoptive siblings are absolutely precluded by the statute from exercising their fundamental right of marriage with respect to certain family members. Accordingly, Zablocki requires that § 20–1–10 be 'supported by sufficiently important state interests.'

While no South Carolina cases which explicitly enunciate the legislative purpose prompting passage of § 20–1–10 have been found, it is well recognized that one of the principal objectives of similar statutes is 'to promote domestic peace and social purity.' See, 42 C.J.S., Incest, § 1. 'If there were no statutes prohibiting such marriages there not only could but very likely would result in discord and disharmony in the family.' Rhode v. McAfee, 224 Tenn. 495, 502, 457 S.W.2d 522, 524. While one purpose for proscribing incestuous relationships is based upon the avoidance of hereditary defects, clearly a broader 'purpose of the [ban on intra-family marriage is an elimination of] competition for sexual companionship within the home and, thus, maintain family harmony.' Wadlington, 'The Adopted Child and Intra-Family Marriage Restrictions,' 49 Va.L.R. 478, 483. [3] See also, In re MEW and MLB, supra. That the South Carolina General Assembly recognized this important public policy objective is emphasized by the language of the statute itself, which prohibits marriages based upon certain familial relationships, rather than limiting the prohibition strictly to relationships of consanguinity. Ante at 4.

***4** Moreover, as noted above, South Carolina has sought to extend the definition of the family unit well beyond consanguineous relationships through the enactment of its adoption laws. Through these provisions, the General Assembly has mandated that adopted persons be placed upon the same legal footing vis-a-vis their adoptive parents and kindred as blood relatives. See, § 15–45–130. Therefore, it is important to recognize that South Carolina has chosen to make adopted children an integral part of the family unit for all purposes and has sought to preserve and protect the integrity of this unit by proscribing marriage among its members. These are clearly important and significant state interests. See, Prince v. Massachusetts, 321 U.S. 158, 168 (1944); Ginsberg v. New York, 390 U.S. 629 (1968), Smith v. Organization of Foster Families, 431 U.S. 816, 844–846 (1977).

Additionally, the State possesses an important interest in protecting adopted children from 'the psychological harm which can flow from permitting them to develop romantic relations' with each other. See, 'Adoptive Sibling Marriage in Colorado: Israel v. Allen', 51 Univ. of Colo. L.R., 135, 146 (1979). To allow an adoptive child to develop a relationship with and marry any of his siblings, while others in the same household could not, would surely jeopardize that child's psychological well-being by creating or promoting peer disapproval, rejection by others, etc. In short, this would amount to treating the adopted child differently. Such a policy would not be in the 'best interests' of the child, an interest in which the State possesses an important stake. See, Quilloin v. Walcott, 434 U.S. 246 (1978). Taken together, it would seem that the dual interests of preservation of family integrity and avoidance of psychological harm to the child would meet the 'sufficiently important' criteria, the first part of the Zablocki test.

However, as noted above, Zablocki also mandates that a statute which directly infringes upon the right to marry be 'closely tailored to effectuate only those interests' for which it was designated. In this respect, § 20–1–10 as applied to adopted family members may, in certain factual settings, be overinclusive for the narrow accomplishment of its purpose, i.e. the preservation of family harmony and the protection from psychological harm of adopted children. 'Family discord is most likely to occur in incestuous situations where the siblings grew up together in the same household, and developed otherwise normal relations with their adoptive families . . ..' See, In re MEW and MLB, supra at 2602 (McKenna, J. dissenting). See also, 'Adoptive Sibling Marriage in Colorado . . .' supra at 149. Thus, the constitutional application of § 20–1–10 probably depends upon whether in a particular situation the adoptive sibling has been part of the family household for any period of time or whether instead he or she was adopted after other siblings had left the household. It would, thus, appear that pursuant to Zablocki v. Redhail, the statute would be constitutional as applied.

***5** It should be noted that this conclusion is not free from doubt. The only case which has directly confronted the constitutional issue in a similar factual situation is Israel v. Allen, 577 P.2d 762. There, the Court concluded that application of an incest statute to preclude the marriage of adoptive siblings was in violation of the Equal Protection Clause. However, the case did not consider the statute in light of the foregoing analysis in Zablocki; neither did it consider in any depth the importance of the state's interest, discussed above. Significantly in Israel the adoptive siblings were never part of the same household. Further, the case has been soundly criticized as being based upon the false premise that the purpose of prohibiting consanguineous marriages is simply 'the physical detriment to the offspring', therefore, concluding that such a purpose was in no way served by proscribing marriages based upon relationships of affinity or adoption. Supra at 764. See, 'Adoptive Sibling Marriage in Colorado . . .' supra at 136–139.

Neither did the Court in Israel consider the language of Zablocki as stated in concurring opinions. Such language implies the Court would uphold bans on incestuous marriages. There, the Court, per Stewart, J. succinctly observed that '[s]urely, for example, a State may legitimately say that no one can marry his or her sibling. . . .' Supra at 392 [emphasis added]. Moreover, said the Court,

[t]he individual's interest in making the marriage decision independently is sufficiently important to merit special constitutional protection . . .. It is not, however, an interest which is constitutionally immune from evenhanded regulation. Thus, laws prohibiting marriage to a child [or] a close relative . . . are unchallenged even though they 'interfere directly and substantially with the right to marry.' Supra at 404 (Stevens, J. concurring) [emphasis added].

In view of the well recognized public policy which seeks to treat adoptive siblings similarly to natural siblings, there is no reason to believe that the Court would depart therefrom when confronted with the question of the constitutionality of its application to laws prohibiting incestuous marriages.

CONCLUSION

It is the opinion of this Office that the marriage of an adoptive brother and his sister who have lived in the same household for a significant period of time as brother and sister are prohibited.

Edwin E. Evans
Assistant Attorney General
Robert D. Cook
State Attorney

Footnotes

1 Section 16–15–20 criminally proscribed incest within these same designated familial relationships.

2 This conclusion is not free from doubt. Contra is State v. Lee, 196 Mass. 311, 17 So.2d 277, 151 A.L.R. 1143; State v. Youst, 74 Ohio App. 381, 59 N.E.2d 167. See also, State v. Rogers, 260 N.C. 406, 133 S.E.2d 1 [Here, however, the statute under scrutiny explicitly proscribed only consanguineous relationships.]

3 'The family would be disrupted and in some cases destroyed were its members permitted sexual access to one another. Sexual rivalries with their consequent hatreds would spring up in some cases. Incentives to exploitation would be maximal; deterrents minimal. Roles within the family would be confused and discipline would be impossible to impose . . .. These objections all apply . . . to incest within the home: incestuous relationships of parents with their children, and of siblings with one another when all are members of the same household.' Masters, Patterns of Incest, 60 (1963).

1980 S.C. Op. Atty. Gen. 84 (S.C.A.G.), 1980 S.C. Op. Atty. Gen. No. 80-43, 1980 WL 81926

End of Document