1980 S.C. Op. Atty. Gen. 155 (S.C.A.G.), 1980 S.C. Op. Atty. Gen. No. 80-103, 1980 WL 81985

Office of the Attorney General

State of South Carolina
Opinion No. 80-103
October 31, 1980

***1 SUBJECT: Marriage and Divorce; Real Property; Inheritance, Discrimination.**

(1) The proposed elective share would be subject to a serious constitutional challenge pursuant to Article 17, § 9 of the South Carolina Constitution.

(2) The terms of Article 17, § 9 could be slightly modified to uphold the proposed elective share.

(3) Dower is subject to serious constitutional challenge under the Equal Protection Clause of the United States Constitution, Amendment 14.

TO: The Honorable Heyward McDonald,
Chairman of the Joint Committee
to Study the Probate Code.

QUESTIONS:

1. Is the proposed elective share constitutional pursuant to Art. 17, § 9 of the Constitution of South Carolina (1895) as amended)?

2. How might Art. 17, § 9 be reworded so as to render the proposed elective share constitutional?

3. Is dower constitutional pursuant to the Constitution of the United States?

STATUTES AND CASES:

Constitution of United States, Amendment 14; Constitution of South Carolina, Art. 17, § 9 (1895 as amended); Constitution of North Carolina, Art. 10, § 4 (1868 as amended 1956, 1964); Code of Laws of South Carolina, § 20–5–20 (1976 as amended); Code of Laws of South Carolina, §§ 21–5–10, et seq., Califano v. Webster, 430 U.S. 317; Kahn v. Shevin, 416 U.S. 351 (1974); Orr v. Orr, 440 U.S. 268 (1979); Bradley v. City of Greenville, 212 S.C. 289, 46 S.E.2d 291; Pickelsimer v. Pratt, 198 S.C. 225, 17 S.E.2d 524; Green v. Cannady, 77 S.C. 193, 27 S.E. 832; Burwell v. South Carolina Tax Commission, 130 S.C. 199, 126 S.E. 29; Townshend v. Brown, 10 S.C. 91, 96; Dudley v. Staton, 257 N.C. 572, 126 S.E.2d 590; Tiddy v. Graves, 126 N.C. 620; 26 S.E. 127; Fullam v. Brock, 271 N.C. 145, 155 S.E.2d 737; In Re Rincon's Estate, 327 So.2d 224; Silberman v. Jacobs, 267 A.2d 209; Cooley, Constitutional Limitations, Vol. I, 134–5; _____, 'Inchoate Dower-An Idea Whose Time Is Past' 60 Ky.Law J., 670.

DISCUSSION:

You have recently requested an opinion from this office concerning the proposed elective share [1] concept and whether it is constitutional pursuant to Art. 17, § 9 of the Constitution of South Carolina (1895 as amended). You have also asked the following: (1) whether dower is constitutional in light of recent United States Supreme Court decisions; (2) the effect upon the

constitutionality of the elective share approach if Art. 17, § 9 were repealed; (3) suggestions for a rewording of Art. 17, § 9 so as to render the elective share provision constitutional.

I.

Article 17, § 9 of the Constitution of South Carolina (1895 as amended) reads as follows:
The real and personal property of a woman held at the time of her marriage, or that which she may thereafter acquire by gift, grant, inheritance, devise or otherwise, shall be her separate property, and she shall have all the rights incident to the same to which an unmarried woman or man is entitled. She shall have the power to contract and be contracted with in the same manner as if she were unmarried. [emphasis added].

***2** In determining the constitutionality of the proposed elective share pursuant to Art. 17, § 9, it must be remembered that all statutes of the General Assembly are presumed to be constitutional. Bradley v. City of Greenville, 212 S.C. 389, 46 S.E.2d 291. The unconstitutionality of an act must appear beyond a reasonable doubt. Pickelsimer v. Pratt, 198 S.C. 225, 17 S.E.2d 524.

Article 17, § 9 was initially adopted in 1868, and was readopted in 1895 in similar form. The only change made in the provision at that time was the insertion of the phrase 'or a man' to follow 'unmarried woman' so that the clause read 'she [married woman] shall have all the rights incident to the same [disposal of property] to which an unmarried woman or a man is entitled.' [emphasis added].

Following adoption of the 1895 Constitution, the provision in this form received several interpretations by the Supreme Court of South Carolina. For example, in Green v. Cannady, 77 S.C. 193, 57 S.E. 832, the Court characterized the constitutional provision as 'sweeping' in nature and noted that
. . . [w]ith respect to the right of a married woman to acquire property, control and dispose of it as if unmarried . . . the Constitution of 1868 and pursuant statutes make her right absolute. Supra at 200. [emphasis added].

In short, the Court saw no significant difference between the 1868 and 1895 constitutional provisions; for purposes of constitutional analysis, the married woman's property rights were scrutinized by comparing them to those of the 'unmarried woman.' The Court continued:
. . . the broad design of the Constitution and statutes was to separate her [married woman's] property interest from the property interest of her husband, remove his control over it, and give her absolute control thereof . . .. Supra.

The Court further articulated the purpose of Art. 17, § 9 in Burwell v. South Carolina Tax Commission, 130 S.C. 199, 126 S.E. 29, another case decided well after the adoption of the 1895 version of the provision. There, the Court spoke of 'the changes wrought in the common law statutes of a married woman by the present Constitution and status.'
. . . [T]hey [Constitution and statutes] withdraw from the husband the ownership, control, disposition and enjoyment of the wife's estate; that the same are secured to her as though she were feme sole. Supra at 212. [emphasis added].

These cases, together with a similar longstanding legislative interpretation of the Constitutional provision as adopted in 1895, see e. g., Code of Laws of South Carolina, § 20–5–20 (1976 as amended), make it clear that the framers of that provision sought to secure to the married woman the same rights of property and disposition thereof as enjoyed by the unmarried woman. While it might to argued that insertion of the phrase 'or a man' was intended as a limitation in the form of an alternative upon Art. 17, § 9, thereby validating any statutory scheme which simply treated the married woman similarly to 'a man' [her husband], South Carolina courts have apparently not construed the Constitutional provision in this manner.

***3** Thus, when Art. 17, § 9 is read broadly as our courts appear to have done, the proposed elective share provision does not allow the married woman 'all the rights incident to the [disposition of her property] to which an unmarried woman . . . is entitled.' In this elective share scheme, the unmarried woman would maintain an unfettered right to dispose of her property at death, whereas a married woman's estate would be subject to the elective share. The wife's right of property disposition could not be deemed 'absolute'. Green v. Cannady, supra.

Case law in North Carolina lends persuasive support to this conclusion. North Carolina possessed a similar constitutional provision to Art. 17, § 9, with the exception that North Carolina did not possess the 'or a man' alternative. North Carolina's General Assembly enacted a law in 1959 which granted the husband the right to dissent from his wife's will and take a share of her real and personal property. In Dudley v. Staton, 257 N.C. 572, 126 S.E.2d 590, the North Carolina Supreme Court held the enactment unconstitutional as violative of this Constitutional provision. The Court in Dudley focused entirely upon the language which granted the married woman the right to devise and bequeath her property 'as if she were unmarried.' Observed the Court,
It seems perfectly clear and plain to us that these words used by the framers of our present Constitution plainly and explicitly show an intention to write into the Constitution that a married woman could dispose of her property by will as if she were unmarried, so as to put it beyond the power of the General Assembly to restrict or abridge such right and that they did so effect their intent by the words they used. It is difficult, if not impossible, to conceive of any words that the framers of our present constitution could have used to express such an intent and purpose more directly, plainly, clearly, unambiguously and explicitly. Supra at 597.

Certainly, Dudley demonstrates a literal reading of North Carolina's Constitutional provision. However, the case represents the only decision which has been found dealing directly with the issue presented here. As such, it is entitled to considerable weight. Moreover, the language employed by the North Carolina Court in Dudley, is clearly not dissimilar to that used in Green v. Cannady, supra and Burwell v. South Carolina Tax Commission, supra, where as noted, our courts have termed the right bestowed upon Art. 17, § 9 as 'absolute'.[2] This would indicate a tendency by the South Carolina Supreme Court to follow Dudley and strike down any burden placed upon the property disposition of a married woman, even though, as here, she is being treated similarly to her spouse.

Such a conclusion is not clear, however. It might well be argued that such a literal reading of the provision is in conflict with Art. 17, § 9's purpose in matters such as the elective share, not envisioned by the framers of the constitutional provision. As emphasized earlier, the underlying purpose of Art. 17, § 9 was merely to emancipate the married woman in matters of property disposition, not bestow upon her a superior status to her husband. As the Court noted in Townshend v. Brown, 10 S.C. 91, 96,
***4** the real purpose . . . does not appear to have been to confer any new powers upon a married woman by changing her legal status but . . . to release [her property] even from the partial control of the husband by dispensing with the necessity which had previously existed of obtaining his assent and concurrence before her property could be disposed of. Supra at 96.

It is well recognized that a constitutional provision should be construed in light of the evil sought to be removed. Kirkland v. Allendale County, 128 S.C. 541, 123 S.E. 648. See also, Cooley, Constitutional Limitations, Vol. 1 at 134–135.

However, despite these arguments militating in favor of the validity of the proposed elective share concept, the language of Art. 17, § 9 cannot be ignored. Dudley, supra. The proposed elective share would undoubtedly be subject to a serious constitutional challenge, pursuant to Art. 17, § 9 and the foregoing authority. It is suggested that, unless the issue is subjected to the scrutiny of the courts in a declaratory judgment ruling, Art. 17, § 9 be revised or the proposed elective share be modified.

II.

As a result of the North Carolina Supreme Court's ruling in Dudley, as well as to allow the General Assembly to enact laws regulating a married woman's disposal of property, North Carolina's constitutional provision was revised. In Fullam v. Brock,

271 N.C. 145, 155 S.E.2d 737, the North Carolina Court this time upheld a statute abrogating the wife's absolute right to devise her property. The statute was challenged under a Constitutional provision which read as follows:
"The real and personal property of any female in this State acquired before marriage, and all property, real and personal, to which she may, after marriage, become in any manner entitled, shall be and remain the sole and separate estate and property of such female, and shall not be liable for any debts, obligations, or engagements of her husband, and may be devised and bequeathed and conveyed by her, subject to such regulations and limitations as the General Assembly may prescribe. Every married woman may exercise powers of attorney conferred upon her by her husband, including the power to execute and acknowledge deeds to property owned by herself and her husband or by her husband.' Art. 10, § 4, Constitution of North Carolina (1868 as amended 1956, 1964).

It is suggested that this language would enable the General Assembly to go forward with the proposed elective share concept, without a reversion to the harsh common law standard relating to the disposition of property by married women.

III.

Concerning the final question posed, the constitutionality of dower, Orr v. Orr, 440 U.S. 268 (1979), is the touchstone decision. Orr involved the question of the constitutionality of Alabama's alimony statutes under the Equal Protection Clause. These statutes provided that husbands, but not wives, might be required to pay alimony on divorce.

***5** The Court in Orr articulated the Equal Protection standard of review, i.e. whether
such classifications by gender [served] important governmental objectives and [were] substantially related to achievement of those objectives. Supra at 279.

Several governmental interests justifying discrimination on the basis of sex in the payment of alimony were argued to the Court. Among these were the reinforcement of the wife's traditional 'role' in the society, the provision of financial assistance for wives who require such assistance as a result of broken marriages, and the compensation of women for past discrimination during marriage.

The first of these interests, maintenance of the woman's traditional subservient role in society, was immediately dismissed by the Court as no longer justifiable. However, the Court noted that the latter two interests were 'important governmental objective[s].' Nevertheless, the majority concluded that such
[l]egislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection. Thus, even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored. Where, as here, the State's compensatory and ameliorative purposes are as well served by a gender-neutral classification as one that gender classifies and, therefore, carries with it the baggage of sexual stereotypes, the State cannot be permitted to classify on the basis of sex. Supra at 283.

The Court, thus, found Alabama's alimony statutes to be violative of the Equal Protection Clause.

Based upon the foregoing analysis on Orr, it would appear that South Carolina's scheme for providing the wife an interest in her husband's property in the form of dower, see Code of Laws of South Carolina, §§ 21–5–10 et seq., is subject to serious constitutional challenge. Like alimony, the purpose of dower is one of compensation, 'to protect the widow and prevent her from becoming a burden on society.' _____, 'Inchoate Dower-An Idea Whose Time is Past', 60 Ky. Law Journal at 670. Such a scheme places this burden of compensation upon the husband's estate; no corresponding benefit is available to the husband on the death of his wife. The statutory scheme clearly discriminates on the basis of sex. Thus, even if dower is now viewed as a method for rectifying past discrimination against women during marriage, [3] an important governmental objective, there

appears no significant distinction between this form of compensation from that declared unconstitutional in Orr. Without such a distinction, the courts would clearly be hesitant to uphold South Carolina's system of dower in light of Orr v. Orr. [4]

CONCLUSION

1. The proposed elective share would be subject to a serious constitutional challenge pursuant to Art. 17, § 9 of the South Carolina constitution.

***6** 2. The terms of Art. 17, § 9 could be slightly modified to uphold the proposed elective share.

3. Dower is subject to serious constitutional challenge under the Equal Protection Clause of the United States Constitution, Amendment 14.

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Footnotes

1 [Right to Elective Share.]
'(a) If a married person domiciled in this state dies, the surviving spouse has a right of election to take an elective share of one-third of the argumented estate under the limitations and conditions hereinafter stated.
(b) If a married person not domiciled in this state dies, the right, if any, of the surviving spouse to take an elective share in property in this state is governed by the law of the decent's domicile at death.' Uniform Probate Code (U.L.A.) § 2–201.

2 Dudley relied at least in part upon a prior North Carolina decision, Tiddy v. Graves, 126 N.C. 620, 36 S.E. 127, which had observed that 'with this explicit provision in the constitution . . . no statute and no decision could restrict the wife's power to devise and bequeath her property as fully and completely as if she had remained unmarried. There is little to distinguish this language, even if viewed as mere dicta, from a characterization of the wife's right of disposition as 'absolute'. Green v. Cannady, supra.

3 The Court in Orr cautioned that it would carefully examine 'whether the statutory structure and its legislative history revealed that the classification was not enacted as compensation for past discrimination.' Supra at 281, n.11, quoting Califano v. Webster, 430 U.S. at 317. Dower appears to have been originally based upon the paternalistic presumption that the widow would not be able to support herself and her children. 60 Ky. L.J., supra. Thus, it would appear that this scheme more closely comports with the notion of 'archaic and overly broad generalizations . . . about women' see Orr at 279, n.9, than one which operates 'directly to compensate women for past economic discrimination.' Califano v. Webster, 430 U.S. at 317–318. Unlike the situation in Califano, there is nothing in South Carolina's dower statutes or the common law of dower to indicate an interest by the General Assembly to compensate married women for past sexual discrimination. But see, Kahn v. Shevin, 416 U.S. 351 (1974).

4 This conclusion is again not free from doubt. No case or scholarly writing has been found which either strikes down or attacks the constitutionality of dower under the Equal Protection Clause. In fact, prior to Orr, state court decisions have clearly upheld this method of property distribution. See, e.g., In Re Rincon's Estate, 327 So.2d 224; Silberman v. Jacobs, 267 A.2d 209.
Moreover, it might be argued that dower is distinguishable from the facts in Orr, where the Court placed emphasis upon the presence in Alabama's statutory scheme of individualized hearings, necessary to determine the relative financial positions of the spouses. So long as such hearings were. available in any event, the Court concluded that no purpose, such as administrative convience, was served by using sex as a proxy for determining this need. With respect to dower, however, such individualized hearings do not usually occur; rather, the interest is generally bestowed as a matter of routine.
Thus, an argument can be made that, as far as dower is concerned, it would be permissible to use sex as an economic determinant, especially if the state scheme is 'reasonably designed to further the state policy of cushioning the financial impact of spousal less upon the sex for which that loss imposes a disproportionately heavy burden.' Kahn v. Shevin, supra, at 355. Just such a disproportionate burden was found in Rincon's Estate, supra; there, Kahn was relied upon to uphold Florida's dower statute. Moreover, the Kahn case was not expressly overruled in Orr, being cited by the Court with some approval. Thus, it must still be presumed to ?? good law. Compare, Califano v. Goldfarb, 430 U.S. 179 at 217–224 (Stevens, J. concurring).

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