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Equal Protection - Gender-Based Discrimination - Death Benefits to Spouse of Insured Deceased under Social Security §402(g) Cannot be Limited to Widows - Weinberger v. Wiesenfeld, 420 U.S. 636 (1975)

Florence Baum Schechtman

RECENT CASES

Equal Protection—Gender-Based Discrimination—DEATH BENEFITS TO SPOUSE OF INSURED DECEASED UNDER SOCIAL SECURITY §402(g) CANNOT BE LIMITED TO WIDOWS—*Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

Rapidly disintegrating under equal protection attack are many statutory schemes based upon widely held generalizations concerning the capabilities and needs of women in our society.[1] These sexual stereotypes have been reflected in and perpetuated by numerous government benefit programs,[2] among them the Social Security Act.[3] One social security provision, section 402(g),[4] was recently invalidated on equal

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1. *Compare* the philosophies exemplified by Muller v. Oregon, 208 U.S. 412 (1908) (upholding the right of the state to establish minimum hours and wages for women despite the fact that similar legislation regulating men's hours was held unconstitutional); or Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1872) (affirming the right of the state of Illinois to refuse women admission to the bar):

> Man is, or should be, women's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

with Reed v. Reed, 404 U.S. 71 (1971) (invalidating an Idaho statute giving preference to men in the administration of an intestate's estate); *and* Frontiero v. Richardson, 411 U.S. 677, 684 (1973) (invalidating a statute requiring that servicewomen prove spousal dependency as a prerequisite to receiving benefits while imposing no such burden on servicemen).

> There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage.

2. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973). *See* note 32 and accompanying text *infra*. Geduldig v. Aiello, 417 U.S. 484 (1974) (upholding a California insurance program excluding maternity benefits). Numerous unemployment benefit programs such as ILL. REV. STAT. ch. 48, § 420(c)(4) (1973) along with 28 other jurisdictions automatically exclude pregnant women regardless of their ability to work. Walker, *Sex Discrimination in Government Benefit Programs*, 23 HASTINGS L.J. 277, 278 (1972).

3. 42 U.S.C. §§ 301 *et seq.* (1970).

4. 42 U.S.C. § 402(g) (1970), which provides:

> Mother's Insurance Benefits
>
> (1) The widow and every surviving divorced mother. . . of an individual, if such widow or surviving divorced mother
>
> (A) is not married,
>
> (B) is not entitled to a widow's insurance benefit,
>
> (C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual,
>
> (D) has filed application for mother's insurance benefits, or was entitled to wife's insurance benefits on the basis of the wages and self-

protection grounds by the United States Supreme Court in *Weinberger* v. *Wiesenfeld*,[5] illustrating that generalizations regarding spousal dependency, which ultimately prove detrimental to women, will no longer justify gender-based distinctions in legislation.

The purpose of this case note is to examine the extent to which *Wiesenfeld* represents a metamorphosis of existing equal protection standards. At least two notable departures from previous decisions dealing with gender-based classifications may be observed. In contrast to its traditional deference to the government's assertion of legislative purpose, the Court critically examined and ultimately rejected the asserted purpose. Previously, the Court focused primarily upon the rationality of the purpose asserted by the government rather than questioning whether that purpose was genuine. Inasmuch as the remedial purpose rejected by the Court was identical to that upheld in *Kahn v. Shevin*,[6] *Wiesenfeld* indicates that use of a remedial purpose as justification will not be expanded beyond circumstances similar to those in *Kahn*. Furthermore, the silence of the Court as to the nature of the classification evidently marks a retreat on the part of Justices Brennan, Marshall, and White from their position that gender-based classifications are constitutional suspect.

Stephen Wiesenfeld was left with the sole care of his infant son upon the death of his wife. She had been the principle source of the couple's income[7] and had contributed maximum social security deductions for seven years prior to her death.[8] Wiesenfeld applied for and received social security survivor's benefits for his son[9] but was denied such bene-

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employment income of such individual for the month preceeding the month in which he died,

(E) at the time of filing such application has in her care a child of such individual entitled to a child's insurance benefit . . . shall . . . be entitled to a mother's insurance benefit. . . .

(2) Such mother's insurance benefit for each month shall be equal to three-fourths of the primary insurance amount of such individual. . . .

5. 420 U.S. 636 (1975).

6. 416 U.S. 351 (1974).

7. As the Court noted:

> In 1970, Paula earned $9,808, and Stephen earned $3,100 as a self-employed consultant; in 1971, Paula earned $10,686 and Stephen $2,188; in 1972, Paula earned $6,836.35 before she died, and Stephen $2,475 for the entire year. Stephen completed his education before the marriage.

420 U.S. at 639 n. 4.

8. *Id.* at 639. In making those social security contributions the deceased wife was "fully insured" for purposes of section 402(g). Had she been a male, her spouse would have been entitled to the survivor's benefits. *See id.* at 639 n.3.

9. 42 U.S.C. § 402(d) (1970) provides survivor's benefits for children of eligible employees.

fits for himself as they were available under section 402(g) only to widows.[10]

Wiesenfeld filed suit before a three-judge federal district court in New Jersey,[11] contending that this social security scheme, allowing survivor's benefits to only widows, violated his right to equal protection[12] guaranteed by the fifth amendment.[13] Applying traditional two-tiered equal protection standard,[14] the court found in favor of the Plaintiff. It asserted that sex-based classifications were inherently suspect[15] and,

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10. *See* note 4, *supra*.

11. Wiesenfeld filed suit seeking: (1) a declaration that section 402(g) is unconstitutional in that similarly situated men and women were treated differently; (2) an injunction restraining appellant from denying benefits under 42 U.S.C. § 402(g) on the basis of sex; and (3) payments of past benefits commencing with the date of application. 420 U.S. at 641-42.

12. It should be noted that the Plaintiff Wiesenfeld, a male, was allowed to assert the rights of his deceased wife Paula in addition to his own. It appears to be settled that an individual need not be a member of the excluded class in order to assert the constitutionally protected rights of said class. Taylor v. Louisiana, 419 U.S. 522, 526 (1975) (in which a male convicted by a jury composed solely of males was allowed to assert the exclusion of women from jury service as a violation of equal protection).

13. It appears well settled that the due process clause of the fifth amendment includes the identical equal protection guarantee found in the fourteenth amendment equal protection clause. As noted in *Wiesenfeld*, 420 U.S. at 638 n.2:

> [W]hile the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' ". . . This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment (citations omitted).

14. The three judge district court in *Wiesenfeld* described the traditional two-tiered equal protection analysis as follows:

> The Supreme Court has utilized two equal protection tests. If a statute is based upon an "inherently suspect" classification such as race, alienage, or national origin, or it concerns a "fundamental interest". . .it is subject to strict or "close judicial scrutiny" and will be held invalid in the absence of a countervailing "compelling" governmental interest. In all other circumstances, under the "traditional" equal protection standard, a legislative classification must be upheld unless it is "patently arbitrary" and bears no "rational relationship" to a legitimate governmental interest.

367 F.Supp. 981, 987 (1973).

15. *Id.* at 990-91. Having affirmed the two-tiered concept of equal protection, the court was faced with the dilemma of choosing the standard applicable to gender-based classifications, a decision complicated by the Supreme Court's ambiguous position on the issue. While recognizing that only a plurality of the Supreme Court have viewed sex-based classifications as suspect, the district court was nonetheless pursuaded by the argument espoused by Justice Brennan in Frontiero v. Richardson, 411 U.S. 677 (1973) to apply close judicial scrutiny. Examples of suspect classifications include race, Loving v. Virginia, 388 U.S. 1, 11 (1967); alienage, Graham v. Richardson, 403 U.S. 365 (1971); and national origin, Korematsu v. United States, 323 U.S. 214 (1944).

finding no countervailing compelling interest to justify the classification, concluded that section 402(g) of the Social Security Act effected an impermissible discrimination against working women.[16]

The United States Supreme Court affirmed the lower court decision.[17] However, the Court completely disregarded the district court rationale, and instead ostensibly applied the rational relationship test.[18] Although this test has traditionally entailed the application of minimal scrutiny, the Court in *Wiesenfeld* expressly rejected the purpose proffered by the government in favor of its own determination of purpose.

The government attempted to justify the classification on the basis of its being designed to alleviate the effects of past gender-based discrimination.[19] In response to this assertion of a remedial legislative purpose, undoubtedly reflecting an attempt to characterize the legislation in a manner such that it might be upheld under *Kahn* v. *Shevin*,[20] the Court observed:

> the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme. . . .
>
> This Court need not in equal protection analysis accept at face value assertions of legislative purposes when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.[21]

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16. 367 F. Supp. at 991.

17. 420 U.S. at 653.

18. The language utilized by the Court in *Wiesenfeld* indicates that it is ultimately determining whether the social security scheme at issue is rationally related to the legislative purpose. "Given the purpose of enabling the surviving parent to remain at home to care for a child, the gender based distinction of § 402(g) is entirely irrational." 420 U.S. at 653. However, the Court's decision to invalidate section 402(g) indicates that a closer form of scrutiny was used.

19. The government seeks to characterize the classification here as one reasonably designed to compensate women beneficiaries as a group for the economic difficulties which still confront women who seek to support themselves and their families.

420 U.S. at 648.

The Government also attempted to justify the classification on the grounds that section 402(g) benefits were non-contractual, and therefore due process guarantees were not involved. *See, e.g.*, Flemming v. Nestor, 363 U.S. 603 (1970). The Supreme Court summarily rejected this argument. It observed that social security benefits are traditionally awarded as a matter of right to a covered employee.

20. 416 U.S. 351 (1974) (allowing property tax exemptions to widows and upheld by the Supreme Court as being rationally designed to alleviate the effects of past discrimination against women).

21. 420 U.S. at 648 & n.16.

It concluded that the actual legislative purpose was to enable the surviving parent to remain at home to care for the dependent children.[22] A critical examination of the statutory scheme resulted in the determination that section 402(g) was wholly irrational with respect to this purpose.[23]

The Court's decision and rationale suggest that the Court is here departing from the traditional two-tier analysis in favor of a new form of intermediate level of review. In contrast to its traditional deference to legislative purpose in such cases, the Court critically examined the purpose asserted by the Government, ultimately rejecting it.[24] It is this result, attained through the Court's intensive analysis of the asserted legislative purpose, rather than the presence of any significant language, which implicitly indicates, that closer scrutiny was used.[25]

The requirement of a rational legislative purpose is by no means an innovation.[26] However, the Court's preliminary scrutiny of the validity

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22. *Id.* at 648-49, 651.

23. *Id.* at 651.

24. In *Kahn* where the court used the rational relation test, it did not require that the state prove that alleviating the effects of past economic discrimination was the actual purpose of the Florida statute. Rather, it accepted at face value statistical data concerning the disparities between the earning of males and females as proof that the asserted remedial purpose was the actual legislative purpose and that this purpose was furthered. This purpose, however, was only marginally consistant with the statutory scheme, as supported by the empirical data.

> The statistics cited by the Court may establish that many women are underpaid but they demonstrate nothing about the relative economic needs of widows *vis-a-vis* widowers. . . . The Court's statistics bear more closely on the plight of single women than of widows but the former class are excluded from the exemption by definition. The exemption also fails to benefit widows with no property, arguably the class in most need of economic relief.

Note, 88 HARV. L. REV. 129, 132 n. 29 (1974).

25. Had the Court, in *Kahn*, applied closer scrutiny, the obvious inconsistencies in that case would have perhaps proven fatal in the absence of a compelling state interest. Thus, closer scrutiny such as that demonstrated in *Wiesenfeld* would perhaps have resulted in a finding of unconstitutionality. Similarly, had the Court in *Wiesenfeld* accepted the legislative purpose asserted by the Government, it would most probably have upheld the legislation since the generalizations upon which the scheme was premised could have been supported by statistical data, similar to that adduced in *Kahn*.

26. The Court has declared unconstitutional many legislative schemes in which the purposes were rationally related to the challenged legislation, and yet the Court did not identify the interests as "fundamental" or the classification as "suspect." Reed v. Reed, 404 U.S. 71 (1971) (invalidating a sex-based classification creating a preference for males over females in the administration of intestate estates); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (invalidating a statute discriminating between acknowledged and unacknowledged illegitimates in the distribution of workmen's compensation benefits); James v. Strange, 407 U.S. 128 (1972) (finding unconstitutional a Kansas provision for

of the legislative purposes, coupled with a realistic review of its relation to the disputed legislation, resulted in the imposition of a closer standard of review than would have been afforded by the utilization of this intermediate, ends/means analysis. The latter form of analysis characteristically requires that legislative means substantively further legislative ends and that those ends be constitutionally permissible.[27] For example, *Reed* v. *Reed*[28] involved scrutiny of the means utilized in furthering the interest of the state in simplifying its probate proceedings.[29]

Wiesenfeld also marks an apparent departure by Justices Brennan, Marshall, and White from their position that sex-based classifications are inherently suspect. While a majority of the Supreme Court has never declared sex a suspect classification, at least four Justices have so stated in *Frontiero v. Richardson*,[30] observing the parallels between sexual and racial discrimination.[31] In *Frontiero*, the Supreme Court overturned fed-

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the recoupment of legal fees expended by the state on behalf of indigent defendants). All three statutes could be rationally justified as a reasonable simplification of administrative proceedings. Such decisions have led many commentators to conclude that an intermediate level of review has been utilized in some cases. Gunther, *The Supreme Court 1971 Term Foreword: In Search of Evolving Doctrine on A Changing Court: A Model For a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Getman, *The Emerging Constitutional Principle of Sexual Equality*, 1972 Sup. Ct. Rev. 157; Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee: Prohibited, Neutral and Permissive Classification*, 62 GEO. L.J. 1071 (1974); Note, 87 HARV. L. REV. 121 (1973); *see, e.g.*, Geduldig v. Aiello, 417 U.S. 484 (1974) (Brennan, J., dissenting).

27. This intermediate, or ends/means, analysis has been described by various legal scholars in subtle different ways, primarily to conform the Court's decisions to their particular models of equal protection. One view suggests that the Court employed a "means" analysis to put "consistent new bite into the old equal protection." Gunther, *supra* note 26, at 21. Another argues the ends/means test requires that actual proof be adduced that the legislative end is furthered. Note, 87 HARV. L. REV. *supra* note 26, at 124. Finally, Nowak utilizes the ends/means test in an attempt to align the past decade of equal protection decisions into a tripartite system of prohibited, neutral, and permissive classifications. Nowak, *supra* note 26, at 1071-81.

28. 404 U.S. 71 (1971).

29. The Court concluded that male preference was not rationally related to such an end. *Id.* at 71-77. The Court in *Reed* did not question whether the purpose espoused by the state was the actual intent of the legislature. Had the *Wiesenfeld* Court not looked for and discovered a legislative purpose different from that asserted, it would have perhaps been forced to sustain the challenged provision even if the Court used traditional ends/means analysis. Otherwise, the Court would have been faced with the difficult task of justifying the overturning of a statutory scheme which was prima facie reasonable.

30. 411 U.S. 677 (1973).

31. [T]hroughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names. . . .

Id. at 685.

eral legislation based upon a presumption similar to section 402(g) of the Social Security Act.[32] In that decision, Justice Brennan, writing for only a plurality, stated that classifications based upon gender, like those based upon race, alienage or national origin, are inherently suspect.[33]

Paradoxically, Brennan's decision in *Wiesenfeld* invoked *Frontiero* to support its invalidation of section 402(g), arguing that the disputed provision was based on an obsolete and overbroad generalization "indistinguishable from that invalidated in *Frontiero*," that wives are financially dependent upon their husbands.[34] Yet, the *Wiesenfeld* Court surprisingly ignored the issue essential to the *Frontiero* decision: is sex a suspect classification? The Court's silence appears even more startling in light of the lower court's total reliance upon Justice Brennan's *Frontiero* opinion in reaching its decision.[35]

The Supreme Court's refusal to address important issues in *Wiesenfeld* primarily reflects judicial restraint; apparently, the Court is reluctant to intrude into an area foreshadowed by the controversy over the Equal Rights Amendment.[36] It is understandable, therefore, that the Court tempered its strict review of legislative purpose with a refusal to declare sex a suspect classification.

Although no clear standard had been articulated, a current trend toward closer review of sex-based classifications appears to be emerging. Regardless of the precise rationale underlying the *Wiesenfeld* decision, it is of significant precedential impact that eight members of the Court held section 402(g) invalid. One can conclude that gender-based discrimination in the distribution of governmental benefits will most likely continue to be held unconstitutional. While the test currently utilized does not guarantee such a result,[37] it is unlikely that gender-based classifications which prove harmful to women could withstand the scrutiny exemplified in *Wiesenfeld*.

Unfortunately, the *Wiesenfeld* decision also has serious negative im-

32. *Id.* at 679-80. 37 U.S.C. § 403 (1970) provided benefits to dependents of members of the uniformed services. However, while the wife of any serviceman was labeled a dependent, the husband of a servicewoman was considered a dependent only if he was, in fact, dependent upon his wife for over one-half of his support.

33. *Id.* at 688.

34. 420 U.S. at 642-45.

35. *See* note 15, *supra*.

36. At the time of this writing thirty-four states have passed the Equal Rights Amendment. Proposed Amendment to the United States Constitution, H.R.J. Res. 208, 92d Cong., 1st Sess. (1971); S.J. Res. 8, 92d Cong., 1st Sess. (1971). Four more states must ratify it before the 1979 deadline.

37. Gunther, note 26 *supra*, at 8, notes that strict scrutiny is "strict in theory and fatal in fact."

plications. While the tactics employed in *Wiesenfeld* to review gender-based legislative classifications allow greater flexibility in reviewing equal protection challenges in varying factual contexts, they can only promote conflicting lower court decisions. Furthermore, the vesting of so great an amount of discretion in the judicial branch subjects the *Wiesenfeld* standard to potential abuse. As legitimate legislative purposes may be arbitrarily set aside, the precedent set by *Wiesenfeld* is truly a double-edged sword.

Florence Baum Schechtman

Criminal Procedure—Competency—USE OF PRESCRIBED MEDICATIONS TO MAINTAIN MENTAL CAPABILITIES RENDERS A DEFENDANT COMPETENT TO STAND TRIAL—*People v. Dalfonso*, 24 ILL. APP. 3d 748, 321 N.E.2d 379 (1st Dist. 1974).

In *People v. Dalfonso*,[1] the Illinois Appellate Court for the First District held that a criminal defendant whose mental capabilities are maintained through the use of prescribed medications is competent for trial.[2] This was a case of first impression for Illinois. Adopting the analysis used in several other jurisdictions,[3] the court looked solely to the present condition of the defendant and his fitness to stand trial.[4] In order to appreciate the impact of this recent case, this Casenote will examine the purposes of the competency rule.[5]

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1. 24 Ill.App.3d 748, 321 N.E.2d 379 (1st Dist. 1974).
2. *Id.* at 750-51, 321 N.E.2d at 381.
3. *See* notes 28-33 and accompanying text *infra*.
4. 24 Ill.App.3d at 751, 321 N.E.2d at 382.
5. In Illinois, competency is defined in ILL. REV. STAT. ch. 38, §1005-2-1(a) (1973):
   (a) For the purposes of this Section a defendant is unfit to stand trial or be sentenced if, because of a mental or physical condition, he is unable:
      (1) to understand the nature and purpose of the proceedings against him; or
      (2) to assist in his defense.

The statute now uses the term "fitness" rather than "competency to further clarify its intent." This use of terminology also makes explicit the fact that either mental or physical defects may render a defendant unfit for trial. ILL. ANN. STAT. ch. 38, § 1005-2-1, Council Commentary (Smith-Hurd 1973). Considering the widespread use of the word "competency" in the cases and commentaries, and because "competency" is the correct term when referring to a mental defect, the term will be used throughout this Casenote, unless reference is made to specific terms of the statute.

For an examination of statutes from other states and a comparison of their scope *see* AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW, Table 11-2, at 444-53 (S. Brakel & R. Rock eds. 1971).