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In re Estate of Reed, 354 So. 2d 864 (Fla. 1978)

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Constitutional Law—EQUAL PROTECTION—A FLORIDA STANDARD OF EQUAL PROTECTION—*In Re Estate of Reed*, 354 So. 2d 864 (Fla. 1978).

In *In re Estate of Reed*[1] the Florida Supreme Court examined the constitutionality of Florida's 1973 family allowance statute, which provided for a family allowance for the widow and dependents of a decedent, based on a showing of need, but which made no similar provision for widowers.[2] The court determined that the statute's sex based classification violated the equal protection clauses of the Florida Constitution[3] and the United States Constitution.[4] Although the legislature has since amended the statute,[5] *Estate of Reed* is of interest because the court broke from a previous line of reasoning used in cases upholding the constitutionality of statutes containing similar sex based classifications.[6] The court used a separate standard in determining the constitutionality of statutes under the Florida Constitution. *Estate of Reed* indicated that the court will now closely examine the relationship between legislative goals and gen-

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1. 354 So. 2d 864 (Fla. 1978).

2. The relevant portions of the family allowance statute in effect at the time of *Estate of Reed* provided:

> (1) The personal representative shall pay the expenses of administration and claims against the estate in the following order:
>
> . . . .
>
> (d) Class four. If necessary for support, a family allowance of one year's support for the widow or minor children of said decedent . . . .
>
> . . . .
>
> (i) Class nine. If, . . . it shall appear that the family allowance provided under subsection (d) of this Act is insufficient for the reasonable support of said widow or minor children, or both, . . . then the County Judge may order the payment of a supplemental family allowance from the assets of decedent's estate . . . .

Ch. 25274, § 1, 1949 Fla. Laws 638 (repealed 1974). The current version of the family allowance statute is at FLA. STAT. § 732.403 (1977).

3. FLA. CONST. art. I, § 2 provides, "All natural persons are equal before the law . . . ." The Florida Constitution Revision Commission proposed adding the word "sex" to the list of characteristics for which one may not be deprived of any rights. Fla. C.R.C., Rev. Fla. Const., Ballot Packages & Ballot Language, Revision No. 2 (May 11, 1978), 33 Fla. C.R.C. Jour. app. (May 5, 1978). *See* Note, *One Small Word: Sexual Equality Through the State Constitution*, 6 FLA. ST. U.L. REV. 947 (1978) [hereinafter cited as *One Small Word*].

On November 7, 1978, this proposal failed along with the entire slate of proposed changes to the Florida Constitution. Tallahassee Democrat, Nov. 9, 1978, at 1, col. 2. Therefore, the "all natural persons" clause of art. I, § 2 will remain the vital constitutional provision governing sex discrimination cases.

4. U.S. CONST. amend. XIV, § 1.

5. In 1974, the legislature amended the family allowance statute to include widowers as beneficiaries. The act provided that "if the decedent was domiciled in this state, the *surviving spouse* . . . [is] entitled to a reasonable allowance in money out of the estate . . . ." (Emphasis added). Ch. 74-106, § 1, 1974 Fla. Laws 212, 222 (current version at FLA. STAT. § 732.403 (1977)).

6. *See One Small Word*, *supra* note 3, at 959.

der based classifications to determine constitutionality under the Florida Constitution. Prior to *Estate of Reed,* the court made no such examination nor made any distinction between standards for the United States Constitution and standards for the Florida Constitution as applied to a gender based classification. If the Florida Supreme Court continues this trend, Florida's judiciary may develop its own, more egalitarian standards separate from the United States Supreme Court's interpretations of equal protection.

I. SUMMARY OF THE FACTS

The decedent, Dr. Howard W. Reed, married Florence M. Reed in 1959. This was his fourth marriage and her second; he was 67 at that time and she was 64. The parties executed an antenuptial agreement which provided that neither party would make any claim against the other's estate in the event of death or divorce. Both parties had substantial individual wealth. They lived together as husband and wife until Dr. Reed died in 1973.[7]

Florence Reed filed claims in the Volusia County Circuit Court for dower, homestead rights, family allowance, and supplemental allowances. The executor, Howard W. Reed, Jr., the decedent's son by previous marriage, produced the antenuptial agreement asserting that it was a bar to the widow's claims. He also asked the court to determine the constitutionality of Florida's family allowance statute. The circuit court held that the antenuptial agreement was invalid[8] and upheld the constitutionality of the family allowance statute.[9]

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7. The summary of the facts is taken from the Appellants' Brief at 3-4, Estate of Reed, 354 So. 2d 864 (Fla. 1978).

8. The Volusia County Circuit Court found that the antenuptial agreement was invalid under the fairness and reasonableness standards established by Del Vecchio v. Del Vecchio, 143 So. 2d 17 (Fla. 1962). On appeal, the Florida Supreme Court said that "[a]lthough the standards established in *Del Vecchio* have been supplanted by statute, Section 732.702, Florida Statutes (1975)," *Del Vecchio* was controlling due to the date of Dr. Reed's death. 354 So. 2d at 866.

9. 354 So. 2d at 865. The circuit court also upheld the constitutionality of the dower statute, but this issue was not addressed in the supreme court's decision since the supreme court upheld the constitutionality of the dower statute in an intervening decision and stated:

> We recognize that our 1968 Constitution specifically forbids distinctions between married men and married women; nevertheless, where a statute's differing treatment of widows and widowers rests on some ground of reasonable difference having a fair and substantial relation to the object of the legislation, that statute does not violate the equal protection clauses of our state and federal constitutions. We find the distinction between the treatment of the sexes by [the] former [dower statute], to have been reasonably justified by the disparity between their economic capabilities, therefore, we hold that section to have been constitutional.

In Re Estate of Rincon, 327 So. 2d 224, 226 (Fla. 1976) (footnotes omitted).

The executor appealed the circuit court's decision directly to the Florida Supreme Court.[10] The Florida Supreme Court held that the family allowance statute denied equal protection under the Florida and United States Constitutions and remanded the case to the circuit court for further proceedings.[11]

II. 14TH AMENDMENT TESTS FOR SEX BASED CLASSIFICATIONS

The Florida Supreme Court has held that the term "widow" does not include males.[12] Therefore the 1973 Florida family allowance statute treats widowers differently than widows. For this reason, the executor contended that the statute was irrational and denied equal protection under the fourteenth amendment of the United States Constitution. The mere fact that a statute treats different classes of persons in different ways is not per se a violation of the equal protection clause.[13] Different classes of persons may be treated differently if they are not similarly situated.[14]

The United States Supreme Court has determined the constitutionality of statutory classifications using three different "tiers" or levels of judicial inquiry.[15] The traditional rational basis standard involves minimal scrutiny by the court as to whether a statutory classification is reasonable and not arbitrary,[16] and whether under any conceivable fact situation there exists a rational relationship between the legislative objective and the classification.[17] The strict scrutiny standard is applied to statutes which involve suspect classifications or fundamental rights. Under this standard, in order for the statutory classification to be valid, it must serve a compelling state objective which the state could not otherwise achieve.[18] A middle level standard requires that the statutory classification have a fair and substantial relation to the legislative purpose. The Court

10. The Florida Supreme Court is required to accept jurisdiction anytime a trial court directly rules on the validity of a state statute. FLA. CONST. art. V, § 3(b)(1).

11. 354 So. 2d at 866.

12. Shevin v. Kahn, 273 So. 2d 72, 73 (Fla. 1973), *aff'd*, 416 U.S. 351 (1974).

13. For instance, the United States Supreme Court has stated that "this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways." Reed v. Reed, 404 U.S. 71, 75 (1971).

14. "[T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

15. For a detailed discussion of standards of review for equal protection cases, see *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

16. Schlesinger v. Ballard, 419 U.S. 498 (1975).

17. *See* McLaughlin v. Florida, 379 U.S. 184, 191 (1964); McGowan v. Maryland, 366 U.S. 420, 426 (1961); F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

18. Shapiro v. Thompson, 394 U.S. 618 (1969).

requires a more complete record for this level of scrutiny and uses these facts to weigh the relative disadvantages of the classification against its utility in achieving the statutory objective.[19]

The United States Supreme Court has not been consistent in the situations in which it has applied these standards. The plurality opinion in *Frontiero v. Richardson* stated that sex is a suspect classification and invoked the strict scrutiny test to strike the statute.[20] However, it appears that in recent years the Court has shown a propensity to use the middle level standard of scrutiny for sex based classifications.[21] In *Reed v. Reed,* the Court used the "fair and substantial relation" language of the middle level standard for a sex based classification, but refrained from explicitly endorsing such a test.[22] In subsequent rulings, the Court has indicated a preference for a middle level examination of sex based classifications by using language similar to that used in *Reed v. Reed,*[23] or by inquiring into the actual purposes of the legislation.[24]

In *Craig v. Boren,* the Court established a new middle level test for sex discrimination cases, stating, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[25] More significantly, the Court actually carried out an intensive examination, rather than accepting the state's rationalization at face value.[26] The Florida

19. *See* Note, *Sex Discrimination: Ad Hoc Review in the Highest Court,* 35 LA. L. REV. 703 (1975) [hereinafter cited as *Sex Discrimination*].

20. 411 U.S. 677 (1973) (statute denying additional benefits to female member of the armed forces unless her spouse was dependent upon her for over one-half of his support unconstitutional).

21. *See The Supreme Court, 1976 Term,* 91 HARV. L. REV. 1 (1977).

22. 404 U.S. 71 (1971). The Court quoted the "fair and substantial relation" language of F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) and stated, "[t]he question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced . . . ." 404 U.S. at 76. *Reed* was a landmark case because prior cases had only given a passing review to sex based classifications. *See Sex Discrimination, supra* note 19, at 703 n.1.

23. Stanton v. Stanton, 421 U.S. 7 (1975); Kahn v. Shevin, 416 U.S. 351 (1974).

24. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

25. 429 U.S. 190, 197 (1976).

26. The issue in *Craig* was whether an Oklahoma statute which prohibited the sale of 3.2% beer to males under age 21 and to females under age 18 denied equal protection. The Court accepted for purposes of discussion the Oklahoma District Court's identification of the legislative objective as "the enhancement of traffic safety." 429 U.S. at 199. But the court examined statistics relating sex differences in traffic accidents in which intoxication was a factor and pointed out that the law didn't prohibit the young males from drinking the beverage purchased by their 18-20 year old girlfriends. *Id.* n.7. The Court accordingly held that the relationship between the sex based classification and traffic safety was too tenuous. *Id.* at 204. *See also* Califano v. Webster, 430 U.S. 313 (1977); Califano v. Goldfarb, 430 U.S. 199 (1977).

Supreme Court seemed to follow these guidelines closely in the present case, stating: "Under the United States Constitution a sexually discriminatory law denies equal protection unless a fair and substantial relationship to a legitimate governmental objective is demonstrated."[27]

III. U.S. SUPREME COURT TREATMENT OF BENIGN DISCRIMINATION

In order to reduce economic disparity between men and women, the United States Supreme Court recognized benign discrimination as a valid legislative purpose in *Kahn v. Shevin.*[28] *Kahn* involved a Florida statute which granted widows a $500 property tax exemption, yet provided no similar exemption for widowers.[29] The Court held that the gender based classification bore a fair and substantial relation to the asserted legislative objective of reducing economic disparity between men and women, but failed to closely analyze the actual purpose of the statute.[30]

Kahn has been criticized for this superficial treatment of actual statutory purpose.[31] Justice Brennan in his dissent stated that the statute should be invalidated because the state's purpose of benign discrimination could be equally served by a more narrowly drawn statute which included only needy widows.[32] Justice White dissented declaring that the state had failed to justify adequately this

27. 354 So. 2d at 865.

28. 416 U.S. 351 (1974).

29. Ch. 7838, § 10(17), 1919 Fla. Laws 109 (current version at FLA. STAT. § 196.202 (1977)). *See also* FLA. CONST. art. VII, § 3(b).

30. 416 U.S. at 352, 355. *Kahn* has inspired many commentators: *see, e.g.,* Note, Kahn v. Shevin—*Sex: A Less-Than-Suspect Classification,* 36 PITT. L. REV. 584 (1974); Note, *Preferential Economic Treatment for Women: Some Constitutional and Practical Implications of* Kahn v. Shevin, 28 VAND. L. REV. 843 (1975); Note, Kahn v. Shevin *and the "Heightened Rationality Test": Is the Supreme Court Promoting a Double Standard in Sex Discrimination Cases?* 32 WASH. & LEE L. REV. 275 (1975).

31. *See* Erickson, Kahn, Ballard, and Wiesenfeld: *A New Equal Protection Test in "Reverse" Sex Discrimination Cases?* 42 BROOKLYN L. REV. 1 (1975). For a discussion of whether the statute in *Kahn* has any ameliorative value *see The Supreme Court, 1973 Term,* 88 HARV. L. REV. 13, 129-39, (1974).

32. Justice Brennan stated:

> The statute nevertheless fails to satisfy the requirements of equal protection, since the State has not borne its burden of proving that its compelling interest could not be achieved by a more precisely tailored statute or by use of feasible, less drastic means. [The homestead exemption statute] is plainly overinclusive, for the $500 property tax exemption may be obtained by a financially independent heiress as well as by an unemployed widow with dependent children. The State has offered nothing to explain why inclusion of widows of substantial economic means was necessary to advance the State's interest in ameliorating the effects of past economic discrimination against women.

416 U.S. at 360.

classification.[33] Justice White took issue with the paternalistic presumption "that all widows are financially more needy and less trained or less ready for the job market than men."[34] Justice White also pointed out that had Florida actually wanted to compensate women, the statute could have extended a tax exemption to all women, who were presumably equally victimized by "past discrimination," rather than extending the tax exemption only to widows.[35]

In *Weinberger v. Wiesenfeld,* the Court later clarified its position on gender based benign discrimination by emphasizing inquiry into legislative purpose, as opposed to accepting a mere recitation of some benign intent.[36] The emphasis on vigorous inquiry into this relationship has been continued by the Court in subsequent cases.[37]

IV. FLORIDA CASE LAW

Prior to *Estate of Reed,* Florida courts did not inquire closely into the relation between gender based classifications and legislative purpose when determining constitutionality under the equal protection provisions contained in article I, section 2 of the Florida Constitution. Statutes come to the Florida Supreme Court with a strong presumption of constitutionality.[38] A statute which does not treat all persons who are similarly situated as equal denies equal protection and, thus, rebuts the presumption.[39]

In *Shevin v. Kahn,* Justice McCain stated that a sex based classification will be upheld if it is shown to be based on some difference having a "fair and substantial relation to the object of the legisla-

33. *Id.* at 360-62.

34. *Id.* at 360-61. The possible harm of paternalistic statutes is discussed by Erickson:

> What is most emphatically *not* needed, however, is any law or practice that would encourage people to maintain the attitude that women are weaker or less able or should have different societal roles than men, an attitude that reverse discrimination ultimately fosters. A statute such as that challenged in *Kahn* is thus harmful to women in a very deep sense, and this harm to all women cannot be neutralized by the resultant financial benefit to a few women.

Erickson, *supra* note 31, at 18 (footnote omitted).

35. 416 U.S. at 361.

36. 420 U.S. 636 (1975). The Court stated: "[t]he 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." *Id.* at 648. To remove any lingering doubts, the Court further added, "[t]his Court need not in equal protection cases 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." *Id.* at n.16 (citations omitted).

37. *See* Califano v. Goldfarb, 430 U.S. 199 (1977); Califano v. Webster, 430 U.S. 313 (1977).

38. Gammon v. Cobb, 335 So. 2d 261, 264 (Fla. 1976).

39. Selby v. Bullock, 287 So. 2d 18, 21 (Fla. 1973).

tion."[40] This indicates that the Florida Supreme Court used the United States Supreme Court standard rather than a separate Florida standard. The court, however, failed to examine any such relationship closely, and merely relied on an unsupported assertion in the brief submitted by the state attorney to hold that the purpose of the statute was "to reduce to a limited extent the tax burden on widows who own property to the value of $500 and . . . thereby to 'reduce the disparity between the economic . . . capabilities of a man and a woman,' . . . ."[41]

The constitutionality of gender based classifications was at issue again in *In re Estate of Rincon,*[42] which dealt with Florida's former dower statutes.[43] As in *Shevin,* the court applied a federal standard and combined the state and federal constitutions. The Florida Supreme Court adhered to the "fair and substantial relation" standard but failed to inquire deeply into that relationship. In fact, the court did not identify the particular legislative objective involved, merely stating: "We find the distinction between the treatment of the sexes by the [former dower statute] to have been reasonably justified by the disparity between [widows' and widowers'] economic capabilities, therefore, we hold that section to have been constitutional."[44]

It has been argued that the rationale used in *Shevin* and *Rincon* is patronizing and in fact serves to justify continuation of the disparity between the economic opportunities available to men and women respectively. This rationale is founded on sex based stereotyping which assumes the dependency of women upon men. The ultimate result of upholding statutes which discriminate against men as a class is to reinforce the idea that women as a class need such favors.[45]

If the state's purpose is to reduce economic disparity between men

40. 273 So. 2d 72, 73 (Fla. 1973), *aff'd,* 416 U.S. 351 (1974) (quoting Reed v. Reed, 404 U.S. 71, 76 (1971)).

41. 273 So. 2d at 73. When Justice McCain discussed this legislative purpose in the *Shevin* decision, he placed the statement in quotes. However, there is no citation following the quoted language to indicate the source of this finding regarding legislative purpose. Presumably Justice McCain merely accepted the appellant's opinion as to the legislative purpose because the quoted language appeared (again without citation to source) in the appellant's brief. Brief of Appellant at 6, Shevin v. Kahn, 273 So. 2d 72 (Fla. 1973). Interestingly, the United States Supreme Court also used similar language and attributed it to the Florida Supreme Court. 416 U.S. 351, 352. This treatment is indicative of the shallow examination of the alleged statutory purpose.

42. 327 So. 2d 224 (Fla. 1976).

43. Ch. 16103, § 35, 1933 Fla. Laws 554 (repealed 1974).

44. 327 So. 2d at 226 (footnote omitted). The *Rincon* court also stated that the finding of constitutionality was bolstered by FLA. CONST. art. X, § 5, which specifically excepts dower from provisions which otherwise forbid distinctions between married men and married women.

45. Erickson, *supra* note 31, at 18.

and women, extending benefits to widows does not accomplish that purpose. If benefits are extended to widows, the class is overinclusive because it includes financially secure widows who have never been exposed to economic discrimination. This class is also underinclusive since the statute will ignore the economic interests of nonwidows, who presumably also suffer the same economic disability as widows. Therefore, the rationale used by the Court in *Shevin* and *Rincon* is at best only tenuously related to the achievement of the asserted purpose.

Estate of Reed concerned a classification which made a distinction between widows and widowers, as did the statutes considered in *Shevin* and *Rincon*. The court, however, found that the classification served a different purpose in *Estate of Reed,* holding that the purpose of the 1973 family allowance statute was to aid the needy spouse of a decedent during the probate process. The court arrived at this conclusion by examining circuit court cases which merely held that it isn't an abuse of the trial court's discretion to refuse to grant an allowance to the widow or to the decedent's dependents absent a showing of need.[46] Citing *Levine v. Feuer,*[47] the court stated, "[i]n this case the need is due not to past sexual discrimination but to the lethargy of probate proceedings."[48] *Levine* contains no such definitive language as to the source of need, but merely states that the family allowance is an emergency application for support which should be handled expeditiously by the court "to prevent suffering by those deprived of their natural support."[49]

Although the classification in *Estate of Reed* is the same as in *Shevin* and *Rincon,* the Florida Supreme Court rejected the classification stating:

> Female spouses of decedents do not as a class necessarily suffer from this problem [economic need during probate]. Some widows may not have been dependent upon the decedent. By requiring a showing of need, the statute recognizes this. Since the factors causing need are not attributable to sex, there is no reasonable relation between the classification by sex and the statute's purpose. We expressly reject the statute's implicit assumption that women are naturally dependent upon men.[50]

46. 354 So. 2d at 865 (citing In re Estate of Sacks, 267 So. 2d 888, 889 (Fla. Dist. Ct. App. 1972); Youngelson v. Estate of Youngelson, 114 So. 2d 642, 645 (Fla. 3d Dist. Ct. App. 1959); In re Estate of Stein, 106 So. 2d 2, 3 (Fla. 3d Dist. Ct. App. 1958)).

47. 152 So. 2d 784 (Fla. 3d Dist. Ct. App. 1963).

48. 354 So. 2d at 865.

49. 152 So. 2d at 787.

50. 354 So. 2d at 865.

Had the Florida Supreme Court followed the rationale of *Shevin* and *Rincon*, it would have held that the 1973 family allowance statute did not violate the equal protection clauses of the Florida Constitution or the United States Constitution. The Florida Supreme Court could have analyzed the classification in *Estate of Reed* as it did in *Shevin* and *Rincon* and held that the purpose of the statute was to aid needy widows and that, therefore, the classification was justified to reduce the disparity between the economic capabilities of men and women. Instead, the court made a thorough inquiry into the statutory objective.

In *Estate of Reed*, the Florida Supreme Court stated in its discussion of article I, section 2 of the Florida Constitution, that "[a]ny classification of persons must bear a just and reasonable relation to a legitimate purpose."[51] This quote is followed by citations to *Gammon v. Cobb*,[52] *Rincon*, *Selby v. Bullock*[53] and *Shevin*. The above quoted standard was not used in any of these cases as a separate standard of constitutionality under the Florida Constitution. In *Selby v. Bullock*, a case concerning classification of persons who are required to prove negligence in order to recover for injuries sustained by animals, a similar standard for equal protection is mentioned, but the court fails to articulate which constitution it is referring to.[54] In *Gammon v. Cobb*, *Rincon*, and *Shevin*, the court merely combined its discussion of the federal and state constitutions applying the same federal standard to both. It is evident that the court was groping for precedent to support the separate standard it enunciated in *Estate of Reed* for determining the constitutionality of gender based classifications under article I, section 2 of the Florida Constitution.

The Florida Supreme Court focused on the need rather than the sex of the intended beneficiaries of the family allowance statute and distinguished *Shevin* and *Rincon* without overruling them. It noted that widowers may be as needy as widows, and thus rejected the sex based classification as "irrational" and in violation of the equal protection provisions of the United States and Florida Constitutions.[55] The court's strong language directly contradicts the presumptions underlying the rationale of *Shevin* and *Rincon*.

51. *Id.* (citation omitted).
52. 335 So. 2d 261 (Fla. 1976).
53. 287 So. 2d 18 (Fla. 1978).
54. *Id.*
55. 354 So. 2d at 865.

V. RATIONALE

Estate of Reed is significant for three reasons.[56] First, the Florida Supreme Court used a middle level test similar to the test used in *Shevin* and *Rincon,* but made a more searching inquiry into the purpose of the statute. Second, the strong language used concerning the dependence of women represents a change from the patronizing reasoning previously seen in Florida Supreme Court decisions. Third, the court used a separate standard for equal protection under article I, section 2 of the Florida Constitution.

As previously mentioned, the legislature changed the family allowance statute in 1974 to eliminate the sex based classification, thus giving some substantiation to the court's emphasis on amelioration of need. Had the court wished, it could have deferred to the legislature and indicated that this statutory change merely clarified the legislative objective of the 1973 family allowance statute. Rather, the court chose to rely on its own interpretation of lower court decisions. The court's interpretation and the strong language used, coupled with the fact that the court created a new standard for equal protection under article I, section 2 of the Florida Constitution, indicates that the court wished to emphasize its changed attitude toward the examination of sex based statutory classifications.

The Florida Supreme Court did not expressly state that a strict level of scrutiny, similar to that used by the United States Supreme Court in *Frontiero v. Richardson*[57] should be the method of testing the constitutionality of sex based classifications. Despite the strong tone of *Estate of Reed,* retention of the "fair and substantial relation" standard may leave the way open for future validation of discriminatory classifications in other areas where rationalizations

56. A short chronology is helpful in understanding *Estate of Reed. Rincon* was decided on February 11, 1976. Craig v. Boren, which emphasized inquiry into legislative purpose, was decided December 20, 1976. Although *Craig* no doubt influenced the Florida Supreme Court's reasoning in *Estate of Reed,* decided in January, 1978, Weinberger v. Wiesenfeld, which required examination of the actual legislative objective, had been decided prior to *Rincon.* Therefore, *Craig* alone does not explain the break from *Shevin* and *Rincon,* because had the court wished, it could have used *Weinberger's* standard in *Rincon* to achieve a different result. *Rincon* and *Shevin* both examined legislative purpose, albeit superficially, yet neither examined the classification's relation to achievement of alleged purpose.

A brief look at personnel changes is also helpful, because the Florida Supreme Court is composed of relatively new members, most of whom did not participate in the prior leading sex discrimination cases. Justices Boyd and Adkins joined the court in 1969. Justice Overton joined the court in 1974, and Justices England, Sundberg, and Hatchett joined in 1975. Justice Karl joined the court in 1976, left in 1978, and was replaced by Justice Alderman. Justice Karl participated in *Estate of Reed,* but his departure does not affect the author's conclusions, because Justice England was the sole dissenter in this 6-1 decision.

57. 411 U.S. 677 (1973).

as to the benign nature of the statute are offered as justification. The Florida Supreme Court offered precisely this type of justification in *Shevin* and *Rincon,* which were distinguished rather than overruled.

Perhaps the court hesitated to take a stronger position because of judicial inhibitions toward criticizing United States Supreme Court precedent (*Kahn*) and its progeny (*Rincon*). The Florida Supreme Court took care to separate its discussion of the state's equal protection clause from its discussion of the fourteenth amendment of the United States Constitution, presumably to avoid a possible appeal based on *Kahn.*[58]

The strong language in *Estate of Reed* indicates a new attitude on the part of the Florida Supreme Court and a corresponding willingness to scrutinize the actual purpose of statutes involving sex based classifications. It is regrettable that the court did not take a further step and require a showing that the gender based classification in fact contributes to the achievement of alleged legislative purpose. Hopefully, the court will take these steps if a more broadly applicable case comes before it.

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58. For general discussion of state constitutions as sources of rights for individuals, see Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977).