In the

Supreme Court of the United States

SALLY M. REED,

Appellant,

vs.

CECIL R. REED,

Respondent.

No. 70-4

Pages 1 thru 38

Washington, D.C.
October 19, 1971

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Tuesday, October 19, 1971.

The above-entitled matter came on for argument at 12:01 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

ALLEN R. DERR, ESQ., 817 West Franklin Street, Boise, Idaho, for Appellant.

CHARLES S. STOUT, ESQ., 608 Idaho Building, Boise, Idaho, for Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 4, Reed against Reed.

(Discussion off the record.)

MR. CHIEF JUSTICE BURGER: Mr. Derr, you may proceed.

ORAL ARGUMENT OF ALLEN R. DERR, ESQ.,

ON BEHALF OF THE APPELLANT

MR. DERR: Mr. Chief Justice, Your Honors, may it please the Court:

We are here today to ask you to do something that this Court has never done since the Fourteenth Amendment was adopted in 1868, and that is to declare a State statute that distinguishes between -- that classifies between males and females as unconstitutional.

We feel that the case could have as -- at least a significant -- significance for women somewhat akin to what Brown v. Board of Education had for the Colored people.

Q We had a case some years back involving qualifications of a bartender in Michigan.

MR. DERR: If the Court please, that was the Goesaert case that you are talking about, sir.

Q I forget the name of it.

MR. DERR: That casewas decided, Your Honor, on a premise that we feel is no longer tenable. It allowed the

wife or daughter of an owner to tend bar, but no other women to tend bar. It seemed to have been felt by the Court that if the -- that the wife or daughter would be protected by the husband or father, and that for some other reason there was a rational relationship to legitimate State purpose.

Now this rational relationship test that has followed through our law has given some indication that wherever there has been a classification on the basis of sex, anything goes -- it's all right. And we admit they are different, but we do feel that the result of this rational relationship test is almost as bad as the sepearate but equal test of Plessy v. Ferguson, holding back women from being considered persons, and holding them back from their entitlements under the Fourteenth Amendment of the United States Constitution, the Equal Protection clauses.

Now just a brief rundown on the facts of this case which might be helpful in our analyzing it.

Q In this connection, could the Idaho Court have appointed Mr. and Mrs. Reed as Joint Administrators?

MR. DERR: There is a serious question on my mind because of the mandatory provisions. In our Supreme Court in the case we are appealing from said that provision is mandatory.

Q Well, what is the practical aspect in the day to day routine of the Idaho Probate Court? Do they do this?

MR. DERR: I have not known them, personally, in my practice, to have done so except by assent and never in this type of equal relationship.

I have had a brother and sister agree with each other, but it seems to me that any time a male contender appears under this statute that the language of the statute is clear: males must be preferred to females. There is no discretion.

Q So that a Court, in your view then, may not appoint both, even though it's inclined to do so and even though both agree.

MR. DERR: I would think that the interpretation that was given to this case is the interpretation that might be given by other Courts and that no, they wouldn't appoint them.

Q Does this statute take up whatever to what a man and woman apply and they are just equally entitled in terms of the class they are in?

MR. DERR: Yes, sir.

Q Is that where it picks up?

MR. DERR: That's where it picks up.

Q Because it says equally entitled and you might say that before the statute makes the choice there would have to be a hearing as to what the respective qualifications are for this is two people and it would only be when they are

found to be absolutely equally qualified to act that the statute would make a choice, but I gather that's not the way it works.

MR. DERR: It isn't the way I read it. Equally entitled, there is another section of the Idaho Code that points out, for instance, husbands and wives. In this case, it is an ex-husband and ex-wife. Or if they were brothers or sisters -- it's the degree of affinity to the decedent.

Q But, excuse me, let's assume now that two people apply and they are in the same category, as you suggest, but then one of them claims that the other is, say, mentally defective.

MR. DERR: There would have to be a hearing on that subject.

Q Well, let's assume there are two people in that category and one of them says, "I am better qualified than the other."

MR. DERR: Perhaps a determination of the judge -- well, except for this mandatory statute, that's really coming back, Justice White, to what we are talking about. Let the Court --

Q Well, what about the mentally defective case, then?

MR. DERR: Let the Court decide on the basis of the merits.

Q Exactly, but let's assume one person says the other person is deaf and dumb, or he's paralized, something like that, and is unqualified to act as an administrator or an executor.

MR. DERR: I don't think the bear assertion would be sufficient. There would have to be proof.

Q Well, what if the person happens to be a man? The woman says the man is paralized, and he says, "Well, I get the appointment anyway because I am in the same category as you."

MR. DERR: They do have to determine these factors.

Q Well, then you are conceding that there is a determination of comparative aptitude within the scope of the statute?

MR. DERR: No, Your Honor, there is not.

Q Except when somebody alleges the other fellow is disqualified? Paralysis or something --

MR. DERR: They would probably have to have a hearing and proof.

Q Are you saying that a drunken husband has the absolute right over an able, competent, breadwinning wife?

MR. DERR: Unless the wife is able to come in and convince the Court that he is --

Q Well, has she got the right to do it? This is what we are asking.

MR. DERR: We have to read our statutes in --

Q That was my question.

MR. DERR: Together, right.

Q The parties were making other statutes that disqualify anybody, man or woman, if he's deaf, dumb and blind or if he's seven years old or if he's a multiple amputee, or so on, but we are dealing with this statute and we must take it as it's interpreted by the Supreme Court of the State, and the State has interpreted the statute very clearly, has it not?

MR. DERR: Yes, Your Honor.

Q Well, more than that, I gather that there has not been any claim by either this lady or this gentleman suffers any disability.

MR. DERR: The record shows no what -- no such claim --

Q That no such claim has been made.

MR. DERR: No such claim.

Q All that has happened here is -- equally entitled, I gather, is that they are in the degree of consanguinity, whatever it is, which would make them equally entitled, and the statute then operates to compel the appointment of the male.

MR. DERR: This is exactly why we are here.

Now, Sally Reed --

Q But I wish to get your position entirely clear. You are saying, in effect, I take it, that a hearing is not in order, that the statute is mandatory.

MR. DERR: The statute is mandatory but I am not closing the door to someone being able to have a hearing, but let me run down the only other disqualifications in our statute: nonresidents, minors, persons convicted of an infamous crime and persons incompetent by reason of drunkenness, improvidence or want of understanding or integrity, however those are defined.

Q Want of understanding -- if that's claimed. It has to be claimed.

MR. DERR: It has to be claimed.

Q And it's not, at least in this case.

MR. DERR: True.

Q Well, did you make an attempt to claim it on behalf of your client?

MR. DERR: No, we did not, because we felt that our client -- my client was better qualified to administer the estate for many reasons, none of these particular disqualifications came into play.

Q But you made no attempt to display her qualifications otherwise?

MR. DERR: We had no opportunity to. We petitioned, the husband petitioned, the judge issued his order

because of this law in Idaho the man gets the job.

We didn't get a chance to show our client was better educated, for instance, that she had had bookkeeping experience, that she had had secretarial experience.

Q Did you make an offer of proof?

MR. DERR: No, Your Honor.

Q I don't think I've got this clear yet, from some confusion in the answers.

What was to prevent you from presenting the issue to the Court, as an issue, that the wife was better qualified, anything except the statute and its mandatory preference in your way?

MR. DERR: The statute and its mandatory preference was enclosed and, as a matter of fact, I don't think there was even a hearing at all, was there?

VOICE: Yes, there was a hearing.

MR. DERR: Was there?

VOICE: Yes, there was a hearing before Probate Court.

MR. DERR: That it was perfunctory and the decision was based strictly on this statute.

Q The hearing just established that your client was a woman and the defendant was a man.

MR. DERR: Correct.

Q And as the Supreme Court of the State says,

this is one of those areas where a choice must be made and the Legislature by enacting the statute, made the determination. That's the way your Supreme Court has construed your statute.

MR. DERR: Yes, sir.

Q So we should take this case as though the parties had conceded that both parties are equally qualified.

Q That neither is incompetent otherwise.

MR. DERR: I would like to use the language neither is incompetent otherwise.

(Whereupon, at 12:01, p.m., the argument was recessed, to reconvene at 1:00 p.m., the same day.)

AFTERNOON SESSION

(1:00 p.m.)

MR. CHIEF JUSTICE BURGER: You may continue, Mr. Derr. You have twenty minutes remaining.

MR. DERR: I thought a little bit more about some questions from over here during the noon hour, as usual, I presume.

When we had an automatic disqualification -- we have one Section 15312 that, of course, says that in this case the woman is equally entitled under the fact structure here, but when you have an automatic disqualification she is no longer equally entitled.

Now the Court does have permission, if two people are actually equally entitled under the Idaho law, to appoint one or more.

Q Is that statute perhaps not to be read as meaning, in practical terms, otherwise equally eligible?

MR. DERR: Otherwise would be correct.

Q Otherwise equally eligible, then the male is preferred over the female.

MR. DERR: Uh huh, but 15314 with its preference just takes that right out from under on that one.

Also as far as the size of the estate is concerned, it isn't in the record but I think the Court should know that Cecil Reed was appointed March 12, 1968, as the Administrator,

pursuant to the Probate Court order, and a bond of $1000 was posted in the case.

Q Hasn't an inventory been filed after three years?

MR. DERR: No, Your Honor.

This has been in litigation, and I might point out the Probate Court order which was the subject of the first appeal and this has been through the appellate process ever since.

Q Well, the fact an appeal was pending doesn't prevent or stultify the filing of an inventory --

MR. DERR: I would think not, Your Honor, but in our unique position we didn't feel we had -- we had neither the information nor the right, according to the Probate Court, to do that.

Q In other words, you haven't looked at the files -- the probate file?

MR. DERR: Yes.

Q And there is no inventory.

MR. DERR: No inventory. As a matter of fact, Respondent's brief admits that fact.

We think, gentlemen, that what we're dealing with here is strictly a law with sex-based distinction, which disregards individual ability and capacities and is not rationally related to the factor of sex, and therefore, we

feel it involves invidious discrimination and is in violation of the Fourteenth Amendment.

Q That argument has not succeeded in other contexts in this Court, has it?

MR. DERR: You are absolutely correct, Your Honor.

Q Right to vote, for example?

MR. DERR: The right to vote, of course, are we talking about the early cases?

Q Early cases, yes.

MR. DERR: I believe that the circumstances that existed at that time have long since passed.

Q Also that case did not involve attack under the equal protection clause of the Fourteenth Amendment.

MR. DERR: That is my understanding, Your Honor.

Q Privileges and immunities.

MR. DERR: Right.

And I think that was, if I am not mistaken, true of, wasn't it Bradwell that denied women the right to practice law before the turn of the Century.

Since the turn of the Century, the cases that have come before this Court have ended up in decisions that I felt have been either supposedly beneficial or protective, as far as women are concerned.

Obviously, I can see nothing beneficial in the Idaho law, nor can I see anything protective in the Idaho law.

It's just a bold-face discrimination against women, and once that comes up, the door is locked on the woman. She might as well go home, if that law is allowed to stand.

Now Idaho tried to justify this law on two points, one biological and the other practical, and I don't think either of those points would bear the stiff scrutiny and justify the action that the State has taken here.

Q What was the basis of the biological justification?

MR. DERR: That men are generally better qualified than women. That's basically what the Idaho Supreme Court said, going clear back to the early cases, going back to Muller, even Goesaert. And I think we've cited a great number of statistics to show that women comprise 40% of the labor market now, roughly they are equivalently educated in the labor market, and in spite of all this, and because of sex-based discriminations, we say their income is way below the income of a man.

Q That doesn't fit into this case, does it?

MR. DERR: It really doesn't. This isn't an economic case, except this does, Chief Justice, bring up another point. An administrator does get paid and very little less than the attorney in this State.

Our briefs have extensively exhausted the relationship between sex-based distinctions and race-based

distinctions. And as you know, in alienage, in minority groups, with respect to indigency in some cases, and at least in Levy in respect to illegitimacy, the strict test has been applied and these class of cases have been held not valid. And with such a large segment of our population as women are, I certainly don't think it is valid to them.

In other words, what I am saying is I think women are every bit as entitled to the protection of the Fourteenth Amendment. They are persons. The action here is State actions as aliens, minority groups, indigency, racial minorities --

Q What did you say is the second justification?

MR. DERR: The second justification is the practical one in which the court said by doing this we'll avoid hearings.

Again, I don't think that's sufficient to State interest to even meet the rational relationship, let alone the strict approach that would be taken under a suspect classification. And, number two, I don't think it's necessarily true.

For instance, a hypothetical: you have two or more men, you have two or more women. They all want to administer the estate.

The men, after hearing, cannot qualify because of these other criminal, drunkard, these other disqualifications. So then the Court would have to turn around and hold another

hearing, as far as the women contenders are concerned.

So that altogether I don't think it's -- number one, I don't think it's true and, number two, I don't think it's sufficient justification to deny Sally Reed the equal protection of the Fourteenth Amendment.

California examined Goesaert very carefully not long ago, and in that case they exhausted most of the authorities. It's a very recent case, a 1971 case.

Q Goesaert could be explained in terms of the Twenty-first Amendment, could it not?

MR. DERR: I presume that's possible.

Q The amendments that repealed prohibition, then it gave the States, certainly as construed by subsequent decisions of this Court, a great deal autonomy in the area of dispensing of alcohol.

MR. DERR: And that's why Goesaert probably isn't supportive of the Respondent's position in this case.

There has been a great deal of progress, too, we might point out, I am sure the Court is well aware of the progress in Congress with the Civil Rights Act, the Equal Pay Act, and some other acts that have come up, and it's frank truth and a lot of cases are set forth in all briefs here that lower courts are disregarding the so-called preachings of Muller, Goesaert and Hoyt. And, of course, there is a great factual movement toward bringing women into

our society as persons.

I think the only satisfactory solution now is to treat any classification of women as suspect unless the classification involves physical characteristics unique to that sex. Anything else can get us off into a lot of other fields. I think that could solve the situation, could give guidelines to other -- to legislatures -- to other courts, in order to allow a woman to take her full place in our society, take advantage of the opportunities that are available, and also take the responsibility that always goes with opportunity.

And I don't think the suspect classification is a bad classification in the sense, and it could be applied in this case, I am sure, that if the State wishes to disadvantage anyone, shouldn't the State then -- shouldn't the burden be on the oppressor instead of the oppressed? Isn't this a fundamental principle of fairness?

Q What if a State had a statute that provided that if several persons claiming and otherwise equally eligible to administer, natural born children shall be preferred over adopted children?

MR. DERR: I don't see really any more significance for a rational basis for that than --

Q Well, do you think that would be bad or good? I am not sure I follow you.

MR. DERR: The way --

Q Fourteenth Amendment forbid that?

MR. DERR: I think the way our State treats adopted children the Fourteenth Amendment would forbid it because adopted children are given all the rights and privileges of naturally born children.

Q Well, you mean the Fourteenth Amendment as aided by the statutes of Idaho would make it constitutional, is that your answer?

MR. DERR: To distinguish, I don't think so.

Q Before going specifically to your statute, of several persons claiming they are equally entitled to administer, males must be preferred to females and relatives of the whole to those of the half blood.

Would you make the same argument on behalf of the half bloods as against those who are related to the whole blood?

MR. DERR: There may be some basis upon which a State could sustain the half blood as equated with whole blood relationship.

Q What would that basis be?

Q One is more closely related than the other, isn't that correct?

MR. DERR: Yes.

Q Wouldn't that be true of adopted children?

Just to back into it then.

MR. DERR: Well, yes, adopted children are the same as --

Q But it isn't true, as between mother and father.

MR. DERR: True.

Q Which is what this case is about.

MR. DERR: Our statute also prefers in the line of the right to administer estates brothers over sisters. We think this is just as bad as -- it's a male over female classification.

To summarize, I think coming into the eighth decade of the 20th Century, that we do have to reexamine the situation as far as sexual classifications are concerned. We have to discard those canards, or canards, however, you pronounce it, that are not based upon facts.

In Dege, for instance, they were trying to rely on -- way back in the early 1800's -- ideas, but Holmes set that at ease, and I think what he said is pretty interesting :

"It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since and the rule simply persists from blind imitation of the past."

We think if the Idaho rule in this case is allowed

to persist, that it will be from blind imitation of the past and not based upon our current understanding of the Fourteenth Amendment or the facts of today's society.

Q Mr. Derr, last term we had a case involving a Maine criminal statute. It described the crime of escape and the penalties imposed were if it were a women, 11 months, if it were a man, 3 years. Do you think this is equally susceptible to your equal protection argument?

MR. DERR: I think it is, Your Honor, based on those --

Q In reverse?

MR. DERR: I agree that the laws have to be applied equally both ways.

Q So this would cut across, presumably, all sorts of imaginable things, alimony, criminal laws about rape and prostitution, perhaps?

MR. DERR: Yes. It depends on how you define rape, of course.

Q And all sorts of purported social welfare laws, limiting the working conditions of women in contradistinction to men, such as in Muller v. Oregon?

MR. DERR: Yes. We have a law in Idaho in the mining country that requires them to furnish women with chairs, but not men. I think it should be both or none.

Q What would you say about Selective Service?

MR. DERR: I think that women should be in Selective Service. As a matter of fact, in 1957 --

Q Would a male, under your view, today have an equal protection thing?

MR. DERR: An equal protection claim because --

Q Not to be inducted because women are not?

MR. DERR: I don't know that he could avoid the service himself, on that basis, but he might be effective in getting it extended to cover women as well as men.

Q If he is being discriminated against, what other remedy would he have?

MR. DERR: He wouldn't have much, would he?

Q He would either have to be given the same treatment or else your argument doesn't hold.

Q Well, it wouldn't be the equal protection clause, as such, because that clause isn't applicable to the Federal Government.

MR. DERR: It would be some other law.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Derr.

Mr. Stout.

ORAL ARGUMENT OF CHARLES S. STOUT, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. STOUT: Mr. Chief Justice, and may it please the Court:

The Respondent, in this case, is an employee of the State Highway Department. He is a man of moderate means. He is a mechanic, and he is about ready to retire. Some aspersions have been cast on his character in the argument, it sounded like to me, and also in the brief. He is a man of good character.

This matter was determined in the Probate Court of Idaho on adversary petitions. A hearing was had before the Probate Judge, and the matter was open for all the testimony as to the qualifications of each of the applicants.

The Probate Judge determined that the scales of justice were even on the matter as far as qualifications were concerned and under the statute, in view of the interpretations of the law as interpreted by our Supreme Court on these preference statutes, and the interpretation that has been made for a period of one hundred and twenty-five years, over that time, he awarded the administration to the male applicant.

He observed in his opinion that the woman was protected by the order and the man had to qualify by giving a bond, and she is protected and -- as in all probate proceedings, all of the heirs are protected.

In this case --

Q Was the decedent an adopted child?

MR. STOUT: The child was an adopted child, yes, Your Honor.

Q And the litigants in this case are divorced, are they?

MR. STOUT: They are what?

Q They are divorced, are they?

MR. STOUT: They were divorced in 1958.

Q How old was the decedent at the time?

MR. STOUT: How old was the child?

Q Yes.

MR. STOUT: Sixteen years old.

Q And in whose custody was he -- the child was a minor and in whose custody was he?

MR. STOUT: The woman filed a divorce suit against her husband. The District Court awarded the divorce to the husband. The Court awarded the child, which was of tender years, to the woman. The Probate Court of Ada County later took it from her custody and put it in the Children's Home for a time and then gave it to the father, and the child was in the custody of the father at the time of its death.

Those are the facts. I might say here that the Probate Court in Idaho at the time this was decided was a constitutional court. It is held a court of record by the

Supreme Court. However, no reporter's transcript is ordinarily made unless the attorneys get a reporter up there at their own expense. The practice is not to make one.

At the beginning of this year, the jurisdiction was transferred to the District Court under a new judicial code we have there, which is a court of general jurisdiction, which is merely background and has nothing to do with the case except that's the history of the matter.

In our brief, we've raised two questions, one of which is whether or not there is a substantial Federal question involved in this case. The second one assuming that the Court holds that there is, it is our position that this particular statute is not unconstitutional as violating the equal protection clause of the Fourteenth Amendment of the Constitution.

Q Mr. Stout, suppose the statute said that only males may be administrators or executors in probate procedure in the State of Idaho. Would that violate the equal protection clause?

MR. STOUT: I don't believe it would, Your Honor, because we are talking about a matter of procedure that's only incidental to the distribution of property. It has always been a matter that's been legislated on by the States. The Federal Legislature has never legislated in this field and I don't believe it would. Of course --

Q The equal protection clause is in the Constitution. You do recognize that, don't you?

MR. STOUT: What was that?

Q The equal protection clause of the Fourteenth Amendment is in the Constitution, and is mine even in Idaho, right?

MR. STOUT: That's true, Your Honor.

Q And doesn't that prohibit the State of Idaho from saying that no woman may be --

Q While you are thinking on that one, let's take the more interesting question: what if the Idaho Legislature provided that only females could be administrators or representatives in the estates of decedents, or that they would be preferred.

MR. STOUT: I think the same rule would be applicable.

Q You simply say it is not an equal protection problem? A State question.

MR. STOUT: No, I don't feel that it is an equal protection problem.

In our brief, however, we consider that first question first, and we cite this new Idaho statute which was adopted in 1971, last session of the Legislature. It is Chapter 111 of the Idaho Session Laws of 1971. It has got a lengthy title, it's a lengthy law.

I've studied it thoroughly in respect to the issues in this case. It's an act relating to affairs of decedents, including nonprobate transfers at death of missing persons, protected persons, minors, incapacitated persons and constituting the uniform probate code.

Now that statute enacts an entirely new probate law for Idaho. The controversy wasn't over the statutes that we are arguing about here, it was over the time and expense of probate proceedings and the design of the statute as to avoid the proceedings as much as possible.

The statute does enact a new probate law and does repeal, effective next July 1st, the statutes in the controversy here. Nowwe don't claim that that makes this case practically moot, but it does show the apparent present intent and attitude of the Idaho Legislature.

Q Mr. Stout, I asked Mr. Derr whether this new statute is the result of this litigation. He didn't know. Do you know whether it is? Whether this litigation has prompted the adoption of a new code in --

MR. STOUT: No, I think it had nothing to do with it.

Q Is it a uniform code?

MR. STOUT: Yes, I think it had nothing to do with it. It has been under consideration for several years there, and I didn't know it was until I got investigating it in this

matter here and found that it has.

Q Are you counsel for Mr. Reed as administrator?

MR. STOUT: I am counsel for him, yes, and I represented him in probate court at the time of the hearing -- the original hearing in this case.

Q Do you have a requirement in your present code that an inventory be filed by a certain date?

MR. STOUT: Yes.

Q And has it been filed?

MR. STOUT: It has not, because I thought that the appeal suspended the procedure in the probate court and I wasn't authorized to file one.

Q Is that true in your practice?

MR. STOUT: That's what I understand it to be.

Q So an appeal just stops everything?

MR. STOUT: Yes, I fugured that stopped us right there when the appeal was taken.

Q Creditors can't file claims, or anything?

MR. STOUT: I'm not sure about that. The notice to creditors was published and I didn't consider that. No claims were filed. However, I didn't figure we were justified in proceeding in the matter in view of the appeal status of the case.

Q If this had been a large estate with substantial investments, could you have had a special

representative appointed in the interim to deal with problems pending the resolution of the appeal?

MR. STOUT: Those under the Idaho statutes are only appointed where there is some reason for it, like property is liable to depreciate or for some purpose. No, I don't think there would have been. There was really no occasion for it here. There was nothing that could depreciate. This alleged bank account, that's referred to in Sally Reed's petition and some personal clothing, small amount of personal property that a minor boy that age would have.

The second point that we have raised under that is the holdings of this Court, holding that the matter of probate procedure is a matter for the States to determine, and the Federal Courts have never, as such, probated estates, and don't probate estates.

We have also pointed out in our brief that this particular statute was enacted in 1864 by the First Territorial Legislature in Idaho and it has been in effect since that time. During that time, the women for the past seventy-five years have had the right to vote and could have changed it. It would have been changed, no doubt, if there had been enough interest in it.

We had a similar statute in Idaho that disqualified married women. It was enacted in the same statute as this, '64. It was deleted fifty years ago.

In our briefs, we have cited cases upholding this statute. These preference statutes have been upheld by the Courts every time they have come before the Courts, back as far as 1845 in New York. There are a number of New York cases. There is a California case. There are two Montana cases, a recent Idaho case and the constitutionality has never been questioned before this particular matter here.

So far as women being qualified to act as administrator in Idaho, they are qualified. There is no disqualification there, except this one statute and the one before that that makes these classifications, that when other things are equal there is this preference.

Q Your position is that men just happen to be more equal?

MR. STOUT: Excuse me. I didn't --

Q You said that if they equally qualify the men get the jobs as administrators.

MR. STOUT: Yes, that would be right.

Q Doesn't that make the men more equal?

MR. STOUT: The Court inquired about the basis on which the Supreme Court decision was made and I will quote from some of the provisions there:

"This Court has before said that the priorities established by Idaho Code 15312 are mandatory leaving no room for discretion by the Court in the appointment of

administrators," citing an Idaho case.

Similarly the preference given males by Idaho Code 15314 is also mandatory. The statute itself says that males must be preferred to females.

Other courts, construing similar provisions have also held that the preference is mandatory.

The Respondent, however, contends that Idaho Code 15314 violates the Fourteenth Amendment, equal protection clause.

It is well settled that the equal protection clause of the Fourteenth Amendment does not preclude the legislature from making classification and drawing distinction between classes. It merely prohibits classifications which are arbitrary and capricious.

It is for the court to determine in each instance whether a particular classification rests upon rational grounds or is in effect without justification and arbitrary.

It is equally well settled that legislative enactments are entitled to a presumption of validity and that a classification will not be held unconstitutional absent a clear showing that it is arbitrary and without justification.

By Idaho Code 15314, the Legislature eliminated two areas of controversy. If both the man and woman of the same class seek letters of administration, the male would be entitled over the female the same as a relative of the whole

blood is entitled over a relative of the same class but of only the half blood.

Provision of the statute is neither illogical nor arbitrary method devised by the Legislature to resolve an issue that would otherwise require a hearing as to the relative merits as to which of the two or more petitioning relatives should be appointed.

Philosophically, it can be argued with some degree of logic that the provisions of Idaho Code 15314 do discriminate against women on the basis of sex. However, nature itself has established distinction and this statute is not designed to discriminate, but is only designed to alleviate the problem of holding hearings for the court to determine eligibility to administer.

This is one of those areas where a choice must be made and the Legislature by enacting Idaho Code 15314 made the determination.

The Legislature when it enacted this statute evidently concluded that, in general, men are better qualified to act as an administrator than are women.

A classification having some reasonable basis does not offend against that clause of equal protection, merely because it is not made with mathematical nicety or because in practice it results in some inequality.

One who assails the classification of such a law

must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

And they go on to say that while the classification may not be entirely accurate, and doubtless there are instances in which it is incorrect, they are not prepared to say it is completely without a basis of fact, as to be irrational and arbitrary.

And then they go on to show what other classifications on the basis of sex have been made.

It is our opinion that the State has a legitimate interest in promoting the prompt administration of estates and that the statute in question promotes this interest by curtailing litigation over the appointment of administrators.

In addition, it is supported by the presumption of constitutionality.

Appellant, in its brief, has criticized the decision of the Supreme Court and in its words misquotes it. They say, declaring that nature itself has established the distinction the Idaho Supreme Court seemingly justified the discrimination challenged here by finding it rational to assume the mental inferiority of women to men.

They rolled in the mental. There is no statement in the Supreme Court decision like that, and the Court doesn't think that.

Q -I take it from the passage you read from your

court opinion that you would agree that under the Idaho law since the purpose of the statute is to avoid hearings about relative qualifications --

MR. STOUT: In some instances, yes --

Q -- that it wouldn't do a woman any good to petition for a hearing on the grounds that -- I've just had a lot of experience in business and I'm just better qualified than the man who has had no experience in business. It wouldn't do her any good to try to get a hearing on that.

MR. STOUT: I think that's correct. In the absence of some disqualification on the part of the man.

Q On statutory disqualification.

MR. STOUT: We urge that this statute has been in effect for over 125 years. It has been in effect for over 100 years in Idaho. It has been applied by the Courts. Attorneys have followed it and applied it.

I am a general practicioner. My business is to advise clients as to what the law is, what to expect and by reason of the decisions heretofore made on this law, it is reasonable to me to assume that I was justified in going ahead on the basis I did.

Now the Legislature showed its intention to comply and to enact a statute here that more adequately possibly reflects modern thought and now that will give the attorneys some basis to go ahead on, and the people some basis to

proceed on.

Q But under the old statute, which has now been superseded, the man would receive the appointment even if the woman were better qualified to have it.

MR. STOUT: I think there is a presumption there --

Q She would never have the chance to show she was better qualified.

MR. STOUT: I think that is correct, yes. I think there is a presumption there based on the general experience which existed more at the time the statute was enacted in '64 than it does now, that men as a rule are better qualified than the women and on that basis the court didn't hear a hearing on that particular phase of it.

As I say, the length of time the statute has been in effect and been followed seem to me should take a very strong case under this uncertain and elusive provision of the Fourteenth Amendment to be declared unconstitutional. It has been acted on. The attorneys have acted on it. It has been useful. I don't say that it's any better classification than there is in the new law, maybe it's not as good. The attorneys will follow the new law.

In this case, I just want to point out one more thing and that is that Respondent is quite disadvantaged in this case by the lack of funds, but not anything involved in the estate, and he received -- I received a bill for printing

the Appendix of almost $300, which is about three times what it cost in Boise, and extensive briefs have been filed in opposition to Respondent. We don't urge that as a matter of law here, but we do point it out, and as a matter of law we do think that the Court should either dismiss this case or affirm the decision of the Idaho Supreme Court.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Stout.

You have two minutes left, Mr. Derr.

REBUTTAL ARGUMENT OF ALLEN R. DERR, ESQ.,

ON BEHALF OF THE APPELLANT

MR. DERR: Thank you, Your Honor.

Just a few things in response to Mr. Stout's argument.

Probate Court order that was entered in here and we find the grounds recited in 2(a) of the jurisdictional statement, recited only that the statute violated 15314, preference statute in support. No other facts in support of it.

Another thing that should be pointed out to the Court, that under Idaho law each of the parents, in this case the child died without a will, are entitled to one-half of the estate.

So Sally Reed is interested here in the protection of her own property, whatever that be, too.

Q Of course, by now, the estate has long since

been consumed by the cost of litigation, although I suppose that is irrelevant.

MR. DERR: My client hasn't seen any, Your Honor.

I think the argument of long acquiescence was certainly put to bed with Brown, and was more recently pronounced in Brown v. Williams. I don't think that it has any merit.

We don't deny that probate is a State matter, but when it -- when portions of it, a law in connection therewith contravenes the Constitution of the United States it then becomes a substantial Federal question that must be resolved.

The statute in this case is simple. The actual wording of the Fourteenth Amendment is very simple, but the case itself presents a large, and I think significant, problem.

Q Mr. Derr, I seem to remember a case in this Court involving the constitutional claim of women, young women, to attend a State Military Academy or take ROTC or something. It rings a faint bell and I can't find that case in the brief anywhere. Are you familiar with any such case?

MR. DERR: I am not familiar with the case of the women wanting to attend Military School, but I am familiar with the case -- the recent case that allowed a State to maintain one women's school.

Q Well, there is the University of Virginia.

That's in the District Court, the other way.

I am thinking of an older case in this Court and I simply can't find it in the brief or anywhere else.

MR. DERR: I did not run across it.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Derr.

Thank you, Mr. Stout.

The case is submitted.

(Whereupon, at 1:45 p.m. the case was submitted.)