Touro Law Review

Volume 11 | Number 3 Article 34

1995

Equal Protection

York State Constitution when no suspect class or fundamental right is at issue.

SURROGATES COURT

NEW YORK COUNTY

In re Petri[256]
(printed April 4, 1994)

Respondent, Dean Mitchell, a surviving partner in a gay relationship, alleged that his constitutional rights under the United States[257] and New York State[258] Constitutions had been violated, in that section 1001(1)(a) of the New York Surrogate's Court Procedure Act [hereinafter SCPA][259] and section 4-1.1 of the New York Estates, Powers and Trusts Law [hereinafter EPTL],[260] precluded him from inheriting his partner's estate.[261] The court held that the respondent did not fall within the statutory

256. N.Y. L.J., Apr. 4, 1994, at 29 (Sur. Ct. New York County).

257. U.S. CONST. amend. XIV, § 1. The Federal Equal Protection Clause provides in pertinent part: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

258. N.Y. CONST. art. I, § 11. Article 1, section 11 provides in pertinent part: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof." *Id.*

259 N.Y. SURR. CT. PROC. ACT § 1001(1)(a) (McKinney 1981 & Supp. 1994). Section 1001(1)(a) provides in pertinent part: "Letters of administration must be granted to the persons who are distributees of an intestate and who are eligible and qualify, in the following order: (a) the surviving spouse . . ." *Id.*

260. N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney 1981 & Supp. 1994). Section 4-1.1 provides in pertinent part:

> The property of a decedent not disposed of by will shall be distributed as provided in this section . . . (a) If a decedent is survived by: (1) A spouse and issue, fifty thousand dollars and *one-half* of the residue to the spouse, and the balance thereof to the issue *by representation.*

Id. (emphasis added).

261. *Petri*, N.Y. L.J., Apr. 4, 1994, at 29.

definition of "spouse" therefore, his constitutional rights had not been violated.[262]

The decedent, Gary A. Petri, died intestate and letters of administration were granted to his father.[263] Although Mitchell and Petri were of the same sex, Mitchell alleged that because he and the decedent lived together for eleven years and held themselves out to the public as a couple, he should be included within the statutory meaning of "spouse." Mitchell concluded that the letters of administration should be revoked and issued to him.[264]

There being no direct authority on the issue, the court looked to analogous precedent for help in deciding Mitchell's claim. In *In re Cooper*,[265] the Appellate Division, Second Department held that a surviving partner of a homosexual relationship was not a "surviving spouse" within the definition of the elective share statute.[266] The statute provided that a surviving spouse may elect against a decedent's will.[267] In addition, the court looked to

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262. *Id.*

263. *Id.*

264. *Id.*

265. 187 A.D.2d 128, 592 N.Y.S.2d 797 (2d Dep't 1993). In *Cooper*, the survivor in a homosexual relationship alleged that he had lived with the decedent in a "spousal-type relationship" for approximately four years and that the only reason they were not legally married was because New York does not issue marriage licenses to persons of the same sex. *Id.* at 129-30, 592 N.Y.S.2d at 797-98.

266. N.Y. EST. POWERS & TRUSTS LAW § 5-1.1(c)(1)(B) (McKinney 1981 & Supp. 1994). Section 5-1.1(c)(1)(B) provides in pertinent part:

> (c) Election by surviving spouse against wills executed and testamentary provisions made after August thirty-first, nineteen hundred sixty-six. . .
>
> (1) Where, after August thirty-first, nineteen hundred sixty-six, a testator executes a will disposing of his entire estate, and is survived by a spouse, a personal right of election is given to the surviving spouse to take a share of the decedent's estate, subject to the following: . . . (B) The elective share . . . is one-third of the net estate if the decedent is survived by one or more issue and, in all other cases, one-half of such net estate.

Id.

267. *Cooper*, 187 A.D.2d at 129, 592 N.Y.S.2d at 797.

Rovira v. AT&T,[268] where a lesbian life partner and her children were not considered "beneficiaries" entitled to benefits under a death benefit plan.[269]

Respondent argued that the court should apply a "heightened or strict scrutiny review in analyzing his claim because he had been discriminated against due to his sexual orientation."[270] Respondent relied on *Baehr v. Lewin*,[271] where the court held that "sex-based classifications are subject, as a per se matter, to some form of 'heightened' scrutiny, be it 'strict' or 'intermediate,' rather than a mere 'rational basis' analysis."[272]

The administrator in *Mitchell* argued that the court should apply the "rational basis test."[273] This test provides that legislation "'is presumed to be valid and will be sustained if the classification drawn . . . is rationally related to a legitimate state interest.'"[274]

The Surrogates Court, in the case at bar, however, held that there was a compelling state interest in the *Mitchell* case which would fulfill any level of scrutiny.[275] The court proclaimed that the state has a compelling interest "in having its descent and distribution scheme clear, simple, predictable and capable of determining heirs at the moment of death."[276]

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268. 817 F. Supp. 1062 (S.D.N.Y. 1993). *See In re* Szabo, N.Y. L.J., July 16, 1990, at 31 (Sur. Ct. Westchester County 1990) (noting that homosexual partners were denied a spousal right of election because the court defined a spouse as a "person to whom one is married").

269. *Rovira*, 817 F. Supp. at 1071.

270. *Petri*, N.Y. L.J., Apr. 4, 1994 at 29.

271. 852 P.2d 44, 57 (Haw. 1993) (holding that the Hawaii Constitution does not give rise to fundamental right of privacy for persons of the same sex to marry).

272. *Id.* at 65.

273. *Petri*, N.Y. L.J., Apr. 4, 1994, at 29.

274. *Cooper*, 187 A.D.2d at 133, 592 N.Y.S.2d at 799-800 (quoting Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985)).

275. *Petri*, N.Y. L.J., Apr. 4, 1994, at 29.

276. *Id. See* Trimble v. Gordon, 430 U.S. 762, 771 (1977) (stating that "[t]he orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual States"); *In re* Smith, 114 Misc. 2d 346, 349, 451 N.Y.S.2d 546, 548 (Surr. Ct. Queens County 1982) (stating that the state's compelling interest is "to insure the orderly settlement of estates and

Because of the strong possibility of fraudulent claims, the State abolished common law marriages earlier in the century. The Foley Commission to Investigate Defects in the Law of Estates found that "attempts to collect funds from decedents' estates were a fruitful source of litigation,"[277] and that "there was no built-in method for distinguishing between valid and specious claims . . . thus . . . the doctrine served the State poorly."[278]

The *Petri* court held that a marriage license is needed to meet the state's compelling interest in the avoidance of fraudulent claims.[279] Marriage certificates provide documentary proof against fraudulent claims, which provides for security and certainty of the finality of a case.[280]

This need for security and certainty can also be seen in the fact that unmarried couples must enter into express contracts for personal services. In *Robin v. Cook*,[281] the court held that "it was beyond the court's authority to" define a "spousal-type" relationship existed between two lesbian lovers who were seeking spousal maintenance and a declaration of inheritance rights.[282] The *Robin* court reasoned that "the law does not permit two individuals to declare themselves married and to thereby become endowed with the statutory rights bestowed upon the parties to a marriage legally solemnized."[283]

The court found that the above considerations apply to homosexuals as well as heterosexuals and that Mitchell could not

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dependability of titles to property passing under intestacy laws") (quoting *In re* Lalli, 43 N.Y.2d 65, 69-70, 371 N.E.2d 481, 482-83, 400 N.Y.S.2d 761, 763 (1977)).

277. Morone v. Morone, 50 N.Y.2d 481, 489, 407 N.E.2d 438, 441, 429 N.Y.S.2d 592, 596 (1980) (refusing to "recognize an action based upon an implied contract for personal services between unmarried persons living together").

278. *Id.* Thirty years later, the Commission on the Modernization, Revision and Simplification of the Law of Estates made similar findings. *Petri*, N.Y. L.J., Apr. 4, 1994, at 29.

279. *Petri*, N.Y. L.J., Apr. 4, 1994, at 29.

280. *Id.*

281. N.Y. L.J. Oct. 30, 1990, at 22, (Sup. Ct. New York County 1990).

282. *Id.*

283. *Id.*

be placed in a better position than participants in a common law marriage, which is in fact "no position at all."[284]

There is no requirement in the Domestic Relations Law that would disqualify same-sex couples from qualifying for marriage licenses. The sole authority underlying New York's prohibition against same-sex marriage can be found in two lower court decisions.[285] However, these cases do not address the constitutional issues of the prohibition.

In *Baker v. Nelson*,[286] the Minnesota Supreme Court held that a statute governing marriage does not authorize marriage between persons of the same sex.[287] This statute was held to be constitutional. The court referred to marriage as a term of "common usage, meaning the state of union between persons of the opposite sex,"[288] and further stated that it would be "unrealistic" to believe that the draftsmen of the statute would have meant anything different.[289] "The institution of marriage as a union of man and woman . . . is as old as the book of Genesis."[290] An appeal was taken to the United States Supreme Court. It was dismissed, however, for want of a substantial

284. *Petri*, N.Y. L.J., Apr. 4, 1994, at 29.

285. *See* Frances B. v. Mark B., 78 Misc. 2d 112, 117-18, 355 N.Y.S.2d 712, 716-17 (Sup. Ct. Kings County 1974) (finding that there was never a valid marriage where defendant fraudulently represented that the defendant was a male person capable to marry a female person when, in fact, defendant was a female person); Anonymous v. Anonymous, 67 Misc. 2d 982, 985, 325 N.Y.S.2d 499, 501 (Sup. Ct. Queens County 1971) (finding that there was no valid marriage where the male plaintiff went through a marriage ceremony with the defendant, believing that the defendant was female but, in fact, was male).

286. 191 N.W.2d 185 (Minn. 1971). In *Baker*, a gay couple was denied a marriage license. The couple argued that the prohibition of same-sex marriages violated the Ninth Amendment of the Constitution and that they were "deprived of liberty and property without due process and are denied the equal protection of the laws . . . guaranteed by the Fourteenth Amendment." *Id.* at 186.

287. *Id.* at 185.

288. *Id.* at 185-86.

289. *Id.* at 186.

290. *Id.*

federal question.[291] "Such a dismissal is a holding that the constitutional challenge was considered and rejected."[292]

The reasoning in *Baker* was followed by the court in *Singer v. Hara*,[293] where prohibition of same-sex marriages was found not to violate the Equal Protection Clause because "marriage is so clearly related to the public interest in affording a favorable environment for the growth of children." In addition, there is a "rational basis upon which the state may limit the protection of its marriage laws to the legal union of one man and one woman."[294]

Rational basis scrutiny has also been applied in cases where equal protection challenges have been advanced, under the Due Process Clause of the Fifth Amendment,[295] to classifications based upon sexual preference. In *Bowers v. Hardwick*,[296] the Supreme Court ruled that homosexual activity is not a fundamental right protected by substantive due process. Therefore, the proper standard of review under the Fifth Amendment was the rational basis review.[297]

In *High Tech Gays v. Defense Industrial Security Clearance Office*,[298] the court applied the rational basis standard and rejected an equal protection challenge to a Department of Defense

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291. *See In re* Cooper, 187 A.D.2d 128, 134, 592 N.Y.S.2d 797, 800 (2d Dep't 1993) (citing Baker v. Nelson, 409 U.S. 810 (1972)).

292. *Id.* at 134, 592 N.Y.S.2d at 800 (citing *In re* Cooper, 149 Misc. 2d 282, 284, 564 N.Y.S.2d 684, 686 (Surr. Ct. Kings County 1990)).

293. 522 P.2d 1187 (Wash. 1974) (holding that the constitutional rights of a gay couple were not violated when the state denied them a marriage license).

294. *Id.* at 1197. *But see* Baehr v. Lewin, 852 P.2d 44, 65 (Haw. 1993) (holding that a statute that restricts marital relations to males or females establishes "sex-based classifications" which are subject to "strict scrutiny" test in an equal protection challenge).

295. The United States Supreme Court has held that "[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." Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1974) (citations omitted).

296. 478 U.S. 186 (1986).

297. *Id.* at 194-96.

298. 895 F.2d 563 (9th Cir. 1990). In *High Tech Gays*, the court held that "the [lower] court erred in applying heightened scrutiny to the regulations at issue and that the proper standard [wa]s rational basis review." *Id.* at 571.

policy of mandatory investigations into the backgrounds of all gay and lesbian applicants for secret and top secret security clearance.[299] The court held that "homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny,"[300] because, although homosexuals have a history of discrimination, homosexuality is not an immutable characteristic. Homosexuality is behavioral and, therefore, is "fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes."[301]

In addition, in *Adams v. Howerton*,[302] the court held that a citizen's "spouse," within the meaning of the Immigration and Nationality Act, must be an individual of the opposite sex. Applying rational basis scrutiny, a bar against an alleged homosexual "spouse" was not unconstitutional.[303]

Although the *Petri* court found that a marriage license would be needed to recognize a "spouse" under SCPA section 1001 and EPTL section 4-1.1, which is justified by the state's compelling interest, "in the orderliness of transfer of property rights on death,"[304] the opinion was skeptical of the practice of denying marriage licenses to gay couples.[305] The court stated that "[i]t is questionable whether, in this era of domestic partnerships and alternative lifestyle education in grammar schools, it can still be

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299. *Id.* at 565.

300. *Id.* at 574.

301. *Id.* at 573.

302. 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982). The *Adams* court held that conferring spousal status only to heterosexual marriage comports with the Due Process Clause and its equal protection requirements. *Id.* at 1042.

303. *Id.* at 1043.

304. *Petri*, N.Y. L.J., April 4, 1994, at 29.

305. *Id.* The court states that "the assumption that same sex marriages are prohibited in New York is premature." *Id. See* Genesis of Mt. Vernon v. Zoning Bd. of Appeals of Mt. Vernon, 81 N.Y.2d 741, 745, 609 N.E.2d 122, 125, 593 N.Y.S.2d 769, 772 (1992) (holding that "it was premature for [the] Supreme Court to address the constitutionality of the Zoning Ordinance's definition of 'family'") (citations omitted).

said that marriage has one universal meaning which does not include couples of the same sex."[306]

The New York Court of Appeals has held that same-sex partners were "family members" for purposes of rent control regulations prohibiting certain evictions.[307] However, the appellate division subsequently held that a lesbian partner was not a "parent" under the Domestic Relations Law.[308] The New York Court of Appeals subsequently affirmed this decision.[309] Although the *Alison* holding had been limited to a visitation context, it indicated that the New York state courts are still hesitant to broaden the term "surviving spouse" to include homosexual life partners when applying EPTL section 5-1.1.[310]

Under both state and federal analysis, a rational basis test was applied. The decision in the case at bar, therefore, was "justified on the basis of the compelling state interest in the orderliness of transfer of property rights on death" which clearly meets the requirements of the rational basis test.[311] In conclusion, the respondent's equal protection rights under both the State[312] and Federal[313] Constitutions were not violated when a surviving homosexual partner was precluded from inheriting the estate of his deceased companion who died intestate.

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306. *Petri*, N.Y. L.J., Apr. 4, 1994, at 29.

307. *See* Braschi v. Stahl Assocs. Co., 74 N.Y.2d 201, 211, 543 N.E.2d 49, 54, 544 N.Y.S.2d 784, 789 (1989) (concluding that "in using the term 'family' the legislature intended to extend protection to those who reside in households having all of the normal familial characteristics").

308. Matter of Alison D. v. Virginia M., 155 A.D.2d 11, 13, 552 N.Y.S.2d 321, 322 (2d Dep't 1990), *aff'd*, 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 (1991) (limiting the definition of "parent" to biological parent concluding that a woman who had been a "live-in lover" with the child's mother was not entitled to visitation rights).

309. Matter of Alison D. v. Virginia M., 77 N.Y.2d 651, 572 N.E.2d 27, 569 N.Y.S.2d 586 (1991).

310. *See In re* Cooper, 187 A.D.2d 128, 132, 592 N.Y.S.2d 797, 799 (2d Dep't 1993) (refusing to extend the holding in *Braschi* to be interpreted as including homosexual life partners as "surviving spouses").

311. *Petri*, N.Y. L.J., Apr. 4, 1994, at 29.

312. N.Y. CONST. art. 1, § 11.

313. U.S. CONST. amend. XIV.