STATE OF MICHIGAN

COURT OF APPEALS

JOANN ELIZABETH WALSH, Plaintiff-Appellant,	UNPUBLISHED July 31, 2001
v	No. 222434 Macomb Circuit Court Family Division
MICHAEL JOHN WALSH, Defendant-Appellee.	LC No. 98-000905

Before: Doctoroff, P.J., and Murphy and Zahra, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the trial court's opinion and order denying her post-divorce judgment request for: (1) declaratory relief with regard to the constitutionality of a portion of the Eligible Domestic Relations Order Act (the EDRO Act), MCL 38.1701 *et seq.*; and (2) injunctive relief with regard to the refusal of the Macomb County Employees' Retirement System (MCERS) to treat the domestic relations order (DRO), entered in conjunction with her divorce judgment, as an eligible domestic relations order (EDRO) under the EDRO Act. We hold that plaintiff failed to demonstrate that the challenged portion of the EDRO Act is unconstitutional, and we affirm the opinion and order of the trial court.

Plaintiff and defendant had been married for almost forty-four years when they were divorced, pursuant to a consent judgment, in 1998. At that time, their eight children were no longer minors and the only marital asset was a vested pension from which defendant had been receiving monthly payments since he retired at the end of 1992. In conjunction with the consent judgment of divorce, plaintiff and defendant agreed to the entry of a DRO purporting to assign to plaintiff the right to receive, directly from the MCERS, one half of defendant's $573.37 monthly retirement benefit, along with another $200 from defendant's remaining share as alimony. When the MCERS received a copy of the DRO, it made the determination, as required by MCL 38.1710, that the DRO did not qualify as an EDRO, and notified plaintiff, as the named alternate payee, of its conclusion. Subsequently, plaintiff sought to have both defendant and the MCERS held in contempt of court, and moved the trial court to, among other things, declare a portion of the EDRO Act unconstitutional, as violative of the Equal Protection Clause of the Michigan Constitution. Const 1963, art 1, § 2. Specifically, plaintiff asked the court to strike down § 2(e)(viii) of the EDRO Act, which limits the definition of an EDRO to DROs that are "filed

before the participant's retirement allowance effective date." MCL 38.1702(e)(viii). Plaintiff argued that: (1) the EDRO Act unconstitutionally discriminated between those ex-spouses of plan participants who retired before divorce, and those ex-spouses of plan participants who retired after divorce; and (2) § 2(e)(viii) had the net effect of unconstitutionally discriminating between ex-spouses of county employees who divorced after retirement, and ex-spouses of participants in other public retirement systems created or authorized by state law who divorced after retirement. The Macomb County Retirement Commission (MCRC), as administrator of the MCERS, appeared to oppose plaintiff's requests. The Office of the Attorney General was notified, pursuant to MCR 2.209(D), that the constitutionality of a statute was being challenged in a case to which the state was not a party. However, the Attorney General apparently declined to intervene.

The MCRC argued to the trial court, among other things, that an EDRO was less necessary when a divorce post-dates the commencement of benefit payments because all elections by the plan participant have been made, and a current flow of payments was more analogous to income than to property. The trial court determined that, in response to an equal protection challenge, the classifications identified by plaintiff were subject to a rational-basis review. Thereafter, the court reasoned that the limitation at issue evinced a desire by the Legislature "not to complicate matters or drive up costs by having to recalculate as participants' lives change." Consequently, the court concluded that plaintiff had failed to carry her heavy burden of establishing that there was no rational basis for § 2(e)(viii) of the EDRO Act.

On appeal, plaintiff argues that: (1) the trial court erred when it applied a rational-basis review, rather than the "means scrutiny test"; (2) application of the proper test, i.e., the means scrutiny test, requires a determination that § 2(e)(viii) of the EDRO Act violates the equal protection guaranty of the Michigan Constitution; and (3) even if a rational-basis review were applicable, the trial court nonetheless erred when it found a rational basis for § 2(e)(viii). We review constitutional issues de novo. *McDougall v Schanz*, 461 Mich 15, 24; 597 NW2d 148 (1999).

"The Equal Protection Clauses of the United States Constitution and the Michigan Constitution provide that no person shall be denied the equal protection of the law. US Const, Am XIV; Const 1963 art 1, § 2. . . . Michigan's equal protection provision [is] coextensive with the Equal Protection Clause of the federal constitution." *Crego v Coleman*, 463 Mich 248, 258; 615 NW2d 218 (2000). Despite the well-accepted proposition that the Michigan Constitution offers no broader remedy than its federal counterpart when it comes to equal protection analysis, see also *Doe v Dep't of Social Services*, 439 Mich 650, 670-671; 487 NW2d 166 (1992), plaintiff brings her equal protection challenge under only the Michigan Constitution in order to avail herself of language from *Manistee Bank & Trust Co v McGowan*, 394 Mich 655, 668-671; 232 NW2d 636 (1975), articulating the means scrutiny test and describing the circumstances when it might be applicable. Nonetheless, the current rule in Michigan is that, "[w]hen a party raises a viable equal protection challenge, the court is required to apply one of three traditional levels of review, depending on the nature of the alleged classification." *Crego*, *supra* at 259. The highest level of review, known as "strict scrutiny," is applied to inherently suspect classes such as race or national origin. "Absent the implication of one of these highly suspect categories, an equal

protection challenge requires either rational-basis review or an intermediate, 'heightened scrutiny' review." *Id.*

"Means scrutiny" (a/k/a the "fair-and-substantial-relation-to-the-object-of-the-legislation test") is simply a label that was given by one legal commentator to what, at the time, was the emerging concept that later developed into what became known as intermediate scrutiny or heightened scrutiny (a/k/a the "substantial relation test"). See *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 718; 575 NW2d 68 (1997). See also, *Manistee Bank & Trust Co, supra* at 668-669. "The fair-and-substantial-relation-to-the-object-of-the-legislation test" refers to the review utilized by the United States Supreme Court in 1971 when it examined an Idaho statute mandating a preference for men over women in the selection of an administrator for an intestate estate. The Court said that, "[a] 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.'" *Reed v Reed*, 404 US 71, 76; 92 S Ct 251; 30 L Ed 2d 225 (1971), quoting *Royster Guano Co v Virginia*, 253 US 412, 415; 40 S Ct 560; 64 L Ed 2d 989 (1920). After the Michigan Supreme Court's decision in *Manistee Bank & Trust Co*, the United States Supreme Court decided *Craig v Boren*, 429 US 190; 97 S Ct 451; 50 L Ed 2d 397 (1976), wherein it held that the lesson from *Reed* and its progeny was that, "[t]o withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197. This, of course, is the formulation for intermediate scrutiny that is applied today under both the federal and Michigan Equal Protection Clauses, and is typically applicable to sex-based classifications and classifications based on illegitimacy. See *Clark v Jeter*, 486 US 456, 461; 108 S Ct 1910; 100 L Ed 2d 465 (1988); *Crego, supra* at 260-261.

Plaintiff would have this Court apply intermediate scrutiny to the classifications created by § 2(e)(viii) of the EDRO Act on the theory that it fits within the rule from *Manistee Bank & Trust Co* that, "where the challenged statute carves out a discrete exception to a general rule and the statutory exception is no longer experimental, the substantial-relation-to-the-object test should be applied." *Id.* at 671. However, despite the fact that this statement has never been expressly overruled, since the Michigan Supreme Court determined that Michigan's Equal Protection Clause offers no more protection than its federal counterpart, the Court has consistently held that, "[u]nless the discrimination impinges on the exercise of a fundamental right or involves a suspect class, the inquiry . . . is whether the classification is rationally related to a legitimate governmental purpose." *Frame v Nehls*, 452 Mich 171, 183; 550 NW2d 739 (1996). See also, e.g., *Yaldo v North Pointe Ins Co*, 457 Mich 341, 349; 578 NW2d 274 (1998) ("Defendant is not a member of a protected class, nor are fundamental rights involved. Therefore, defendant's equal protection claim is reviewed using a rational basis test."); *Vargo v Sauer*, 457 Mich 49, 60; 576 NW2d 656 (1998) ("Because there is no fundamental right or suspect classification involved, the rational-basis standard of review governs in the present case").

More recently, in *Crego, supra*, the Court considered a statute that clearly carved out a discrete exception to a general rule. Specifically, it was a statute that, for over forty years, permitted illegitimate children whose paternity had not been legally ascertained to be treated differently from all legitimate children as well as from those illegitimate children whose paternity had been determined. The Court held that intermediate scrutiny would apply if the classification

was considered to be based on illegitimacy (which the Court viewed as a reasonable characterization) but that a rational-basis review would apply if the classification was considered to be one that distinguished between children whose paternity had not been ascertained and children whose paternity had been ascertained (which the Court also viewed as a reasonable characterization). *Crego, supra* at 262-264. Importantly, the Court expressly rejected the notion that a classification based on whether paternity had been established was entitled to more than a rational-basis review, noting that such a classification "neither implicates a fundamental right or an inherently suspect class, nor has it been recognized by this Court or the United States Supreme Court as deserving of any heightened standard of review." *Id.* at 265 n 7.

More recent Michigan Supreme Court cases take precedence over prior Michigan Supreme Court cases, and it is the current principles of law that this Court is obligated to follow. See *Chambers v Trettco, Inc*, 463 Mich 297, 309, n 3; 614 NW2d 910 (2000). Consequently, this Court is not permitted to disregard more recent binding Michigan Supreme Court precedent in order to reach back to a rule from an older Michigan Supreme Court case and employ something more than rational-basis review to a classification that does not impinge on a fundamental right or involve either an inherently suspect class or a class that has been recognized by the United States Supreme Court or the Michigan Supreme Court as deserving of intermediate scrutiny. Accordingly, the trial court did not err by employing rational-basis review.

Having determined that rational-basis review is the proper level of scrutiny to employ, we now turn to the substance of plaintiff's equal protection challenge.

> Under rational-basis review, courts will uphold legislation as long as that legislation is rationally related to a legitimate government purpose. *Dandridge v Williams*, 397 US 471, 485; 90 S Ct 1153; 25 L Ed 2d 491 (1970). To prevail under this highly deferential standard of review, a challenger must show that the legislation is "arbitrary and wholly unrelated in a rational way to the objective of the statute." *Smith v Employment Security Comm*, 410 Mich 231, 271; 301 NW2d 285 (1981). A classification reviewed on this basis passes constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable. *Shavers v Attorney General*, 402 Mich 554, 613-614; 267 NW2d 72 (1978). Rational-basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with "mathematical nicety," or even whether it results in some inequity when put into practice. *O'Donnell v State Farm Mut Automobile Ins Co*, 404 Mich 524, 542; 273 NW2d 829 (1979). Rather, the statute is presumed constitutional, and the party challenging it bears a heavy burden of rebutting that presumption. *Shavers, supra.* [*Crego, supra* at 259-260.]

Importantly, when the Legislature chooses to address a problem, it is permitted, in cases subject to a rational-basis review, to do so one step at a time. *O'Brien v Hazelet & Erdal*, 410 Mich 1, 18-19; 299 NW2d 336 (1980), citing *Williamson v Lee Optical of Oklahoma, Inc*, 348 US 483; 75 S Ct 461; 99 L Ed 563 (1955).

Because a rational-basis review encompasses the consideration of any set of facts that could reasonably be presumed, plaintiff has the enormous task of proving the lack of any possible

or presumable rational justifications. In this case, two potential justifications have been posited: (1) the MCRC argued that EDROs are not as necessary after all pension elections have been finalized and the benefits have taken the form of a current stream of payments; and (2) the trial court deduced that the Legislature was concerned with the burden on county pension systems of recalculating benefits, and that this burden would not be as keenly felt by larger retirement systems. These proposed justifications each appear to primarily address one of the two allegedly unfair classifications identified by plaintiff.

Initially, plaintiff complains that there is no rational reason for the EDRO Act to treat her differently than it would if the DRO had issued before defendant retired and began drawing benefits. Although we do not adopt the MCRC's distinction between property and income, we can readily accept the argument that permitting the assignment of pension benefits is more necessary when divorce occurs before retirement than when it occurs afterward. For instance, a pre-retirement EDRO keeps the participant from being able to make elections that might otherwise adversely affect the non-participant spouse's interest. In addition, it serves to compartmentalize those retirement benefits that have already accrued and are subject to distribution from those yet to be accrued and which are not a marital asset. However, these considerations do not come into play when the divorce post-dates the commencement of payments. While there may remain reasons why an ex-spouse in a post-retirement divorce may also desire to receive an assignment of an otherwise unassignable benefit (such as in the instant case, i.e., assurance of payment[1]), the Legislature is permitted to address the problems presented by nonassigability of public pension benefits one step at a time.

However, plaintiff points out a second, and potentially more problematic, set of classifications. Plaintiff notes that a wide variety of legislation governing other public retirement systems in Michigan permits pension benefits to be alienated pursuant either to an EDRO or to certain judgments of the court. Typical of these statutes is a provision of the State Employees' Retirement Act that declares pension benefits accrued under that retirement system to be subject to: (1) any order pursuant to MCL 552.18; (2) "any other order of a court pertaining to alimony or child support"; or (3) an eligible domestic relations order under the EDRO Act. MCL 38.40(2). By comparison, the statutory provision governing county retirement plans simply provides that payment of retirement benefits from such a system are subject to EDROs under the EDRO Act. MCL 46.12a(31).

Assuming for present purposes that the challenged classifications flow from the EDRO Act, rather than from the statutes that govern the various public retirement systems, the trial

[1] Plaintiff argued to the trial court, as she does on appeal, that her interest in the pension benefits is rendered worthless by her inability to get paid directly from the MCERS. There are several flaws in her reasoning, however. First, she is not without recourse directly against defendant. It is not as if defendant can disappear with the money, since the MCRS will have to know where he is in order to forward the payments. Plaintiff can invoke the court's powers of contempt and can attach the pension benefits once they are in defendant's possession. Second, and more importantly, the mere fact that plaintiff can envision a statutory scheme that would make her ability to get what is coming to her easier does not, by itself, provide a basis for this Court to declare a statute, or any part of a statute, unconstitutional.

court's reasoning regarding the perceived burden of cost recalculations on county retirement systems provides a rational basis for the differing treatment. Although plaintiff argues that she presented evidence that the increased cost of administration would be negligible, she misses the point of a rational-basis review. It is worth repeating that a "[r]ational-basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with "mathematical nicety," or even whether it results in some inequity when put into practice. *Crego, supra*, 463 Mich 260 (citation omitted). Hence, the challenged statutory scheme passes a rational-basis review.

Affirmed.

/s/ Martin M. Doctoroff
/s/ William B. Murphy
/s/ Brian K. Zahra