Nova Law Review

Volume 5, *Issue* 3 1981 *Article* 9

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Abstract

In re Estate of Greenberg' addresses the constitutionality of Florida's laws on administration of estates. The central issue is whether a nonresident, unrelated to the testator, can act as personal representative of the decedent's estate.

KEYWORDS: non-resident, estate, fate

The Fate Of A Non-Resident Personal Representative: In re Estate of Greenberg

In re Estate of Greenberg[1] addresses the constitutionality of Florida's laws on administration of estates. The central issue is whether a non-resident, unrelated to the testator, can act as personal representative of the decedent's estate. Reaffirming the states' power to control the administration of estates of their citizens and recognizing the legislative origin of the right to dispose of property after death, the court upheld the constitutionality of Florida Statutes §§ 733.302[2] and 733.304.[3]

1. 390 So. 2d 40 (Fla. 1980). The United States Supreme Court dismissed this case for lack of a substantial federal question. 49 U.S.L.W. 3633, 3642 (March 3, 1981). Since *Hicks v. Miranda*, 422 U.S. 332, 334 (1975), any case dismissed for lack of a substantial federal question constitutes a disposition on the merits. Therefore, the constitutionality of sections 733.302 and 733.304 of the Florida Statutes has been upheld. *See generally* Lewis, *Is the Supreme Court Creating Unknown and Unknowable Law? The Insubstantial Federal Question Dismissal*, 5 NOVA L.J. 11 (1980).

2. FLA. STAT. § 733.302 (1979) provides:

> Subject to the limitations in this part, any person sui juris who is a citizen of the United States and a resident of Florida at the time of the death of the person whose estate he seeks to administer is qualified to act as personal representative in Florida. A person who has been convicted of a felony or who, from sickness, intemperance, or want of understanding, is incompetent to discharge the duties of a personal representative is not qualified.
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> In *In re the Estate of Fernandez*, 335 So. 2d 829 (Fla. 1976), we held that the United States citizenship requirement contained in section 733.302, Florida Statutes (1975), was invalid because such requirement violated the equal protection clauses of the fourteenth amendment to the United States Constitution and article I, section 2 of the Florida Constitution. Therein, we recognized that the statutory requirement that a person appointed as an administrator be a resident of Florida guaranteed the basic ability of one to perform the duties of a personal representative, but we held that the additional requirement of United States citizenship had no bearing on ability. In 1979, the legislature amended section 733.302 to eliminate the requirement of United States citizenship. Chapter 79-343, Laws of Florida (1979). The amendment deleted only the language, "is a citizen of the United States and," but left the remainder of the statute unchanged.

Id. at 41 n.1.

In reaching its conclusion, the supreme court affirmed the trial court's decision denying Meyer Pincus' petition for appointment as co-personal representative to Leo Greenberg's estate. Mr. Greenberg died a resident of Florida. In his will, he named his son and accountant co-personal representatives of his estate and Mr. Pincus as successor personal representative. Before Mr. Greenberg moved to Florida, Meyer Pincus had acted as his attorney and tax advisor. When the accountant renounced his right to serve as co-personal representative, Mr. Pincus agreed to replace him. However, the court denied permission since Mr. Pincus was neither a relative of the testator as defined by section 733.304 nor a resident of Florida as required by section 733.302.[4]

Greenberg illustrates the supreme court's endorsement of the constitutionality of the Florida Statutes controlling the administration of the estates of Florida citizens. According to the court these statutes withstand challenges that they violate the equal protection and due process clauses of the fourteenth amendment[5] and the privileges and immunities clause of article IV, section 2 of the United States Constitution.[6] In *Greenberg*, Mr. Pincus alleged that these statutes denied the testator's fundamental right to choose the person to administer his es-

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3. FLA. STAT. § 733.304 (1977) provides:

A person who is not domiciled in the state cannot qualify as a personal representative unless the person is:

(1) A legally adopted child or adoptive parent of the decedent;

(2) Related by lineal consanguinity to the decedent;

(3) A spouse or a brother, sister, uncle, aunt, nephew, or niece of the decedent; or

(4) The spouse of a person otherwise qualified under this section.

Id. n.2. In 1979 this section was amended. Clause 3 now reads "a spouse or a brother, sister, uncle, aunt, nephew, or niece of the decedent, or someone related by lineal consanguinity to any such person." *Id.* (1979).

4. *See* text of statutes as set forth in notes 2 & 3 *supra.*

5. U.S. CONST. amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

6. U.S. CONST. art. IV, § 2, cl. 1: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

tate. Futher, Mr. Pincus argued that these statutes abridge the testator's fundamental right to travel. Finally, Mr. Pincus argued that the statutes abridged his fundamental right to pursue a livelihood.[7]

I. EQUAL PROTECTION

A. Brief History

The fourteenth amendment to the United States Constitution prohibits the states from denying to any person within their jurisdiction the equal protection of the laws.[8] In modern equal protection cases, the key is to identify the proper standard of judicial review. The rational basis or minimum scrutiny test, generally applied in cases involving equal protection challenges, allows any imaginable state of facts to uphold the legislative enactment as reasonable for achieving a legitimate legislative purpose.[9] A statutory classification will be held "unconstitu-

7. Answer Brief of Amicus Curiae, The Florida Bar, Real Property, Probate and Trust Law Section at 5, In re Estate of Greenberg, 390 So. 2d 40 (Fla. 1980) [hereinafter cited as Answer Brief].

8. *See* note 5 *supra.*

9. The Court in Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911) stated the rules by which this contention must be tested:

> 1. The equal protection of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wise scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.
>
> 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.
>
> 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.
>
> 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary (citations omitted).

In Dandridge v. Williams, 397 U.S. 471 (1970), the Court stated that its business did not include determining whether a regulation is wise, only that it best fulfills the relevant social economic objective. "[T]he equal protection clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all. It is enough that the State's action be rationally based and free from invidious discrimination." *Id.* at 487 (citations omitted).

tionally violative of the equal protection clause under this test if it causes different treatment so disparate" that the classification is "wholly arbitrary."[10] The burden of showing there is no rational basis for the classification is on the party attacking the statute.[11] However, this burden is practically insurmountable for there is almost always some basis for the legislative judgment that the measure promotes public interest.[12]

On the other hand, application of the strict scrutiny test usually nullifies the presumption of constitutionality and "is almost always fatal in its application."[13] This test requires the state to justify its classification as a necessary means to achieve a compelling state interest when either (a) a suspect classification[14] or (b) a fundamental interest[15] ex-

10. 390 So. 2d at 42.

11. *See* note 9 *supra.*

12. *E.g.*, Kelley v. Johnson, 425 U.S. 238 (1976); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949); McDonald v. Board of Election, 394 U.S. 802 (1969).

13. 390 So. 2d at 42-43. *Cf.* note 9 *supra* (when rational basis test is applied the statute is generally upheld).

14. The Supreme Court has identified two types of classification as suspect, calling for strict judicial scrutiny: (1) race, *see, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954) and (2) alienage, *see, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944), and In re Griffiths, 413 U.S. 717 (1973).

15. The Supreme Court has identified two fundamental interests which, if invaded, call for strict scrutiny: (1) equal access to voting, *see, e.g.*, Kramer v. Union Free School Dist. Number 15, 395 U.S. 621 (1969); Dunn v. Blumstein, 405 U.S. 330 (1972); Kusper v. Pontikes, 414 U.S. 51 (1973); Reynolds v. Sims, 377 U.S. 533 (1964); and (2) a cluster of interests related to marriage and procreation, *see, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Zablocki v. Redhail, 434 U.S. 374 (1978); Skinner v. Oklahoma, 316 U.S. 535 (1942); Eisenstadt v. Baird, 405 U.S. 438 (1972).

The Court has also found discrimination against exercise of constitutional rights may invade a fundamental right of privacy, *see, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976); Bellotti v. Baird, 443 U.S. 622 (1979). The Court has also examined discrimination in the context of (1) the right to travel, *see, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Sosna v. Iowa, 419 U.S. 393 (1975); Califano v. Torres, 435 U.S. 1 (1978); Dunn v. Blumstein, 405 U.S. 330 (1972); (2) the right to pursue a livelihood, *see, e.g.*, Hicklin v. Orbeck, 437 U.S. 518 (1978); and (3) first amendment rights, *see, e.g.*, Williams v. Rhodes, 393 U.S. 23 (1968).

plicitly or implicitly protected by the Constitution is present in the case.

B. Mr. Pincus' Argument

Realizing the futility of presenting his challenge under the rational basis test, Mr. Pincus argued that the strict scrutiny test should be applied. This test would have been applicable had the statutes actually impinged upon the testator's fundamental right to appoint his personal representative, penalized his fundamental right to travel[16] or abridged Mr. Pincus' fundamental right to pursue a livelihood.[17] However, the United States Supreme Court has carefully and narrowly defined the list of fundamental rights explicitly or implicitly guaranteed by the Constitution. Therefore, unless Mr. Pincus' allegations involved either a suspect classification or a recognized fundamental right, the rational basis test had to be applied.[18]

"Mr. Pincus characterize[d] as fundamental the testator's right to appoint a personal representative; thus impelling application of the strict scrutiny test."[19] However, Pincus attempted to bootstrap the right to appoint a personal representative to the definition of "liberty" in *Meyer v. Nebraska*[20] and the recognized fundamental right which protects family relationship,[21] thereby creating a new fundamental in-

16. *See* note 15 *supra.*

17. *Id.*

18. The Court has confronted other classifications arguably suspect in nature, but has not yet held them to be suspect. These classifications include: illegitimacy, *see, e.g.*, Mathews v. Lucas, 427 U.S. 495 (1976); gender, *see, e.g.*, Craig v. Boren, 429 U.S. 190 (1976); Califano v. Goldfarb, 430 U.S. 199 (1977); Califano v. Webster, 430 U.S. 313 (1977); wealth or indigency, *see, e.g.*, James v. Valtierra, 402 U.S. 137 (1971); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Maher v. Roe, 432 U.S. 464 (1977); and age, *see, e.g.*, Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976). The Court also refused to extend the list of fundamental interests to other important areas such as adequate housing, *see, e.g.*, Lindsey v. Normet, 405 U.S. 56 (1972); welfare assistance, *see, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970); employment, *see, e.g.*, Idaho Dep't of Employment v. Smith, 434 U.S. 100 (1977).

19. In re Estate of Greenberg, 390 So. 2d at 43.

20. 262 U.S. 390 (1973).

21. *See* note 15 *supra.*

terest which would protect an "individual's family decisions."[22]

The Florida Supreme Court held that this right to appoint a personal representative was not a fundamental right and properly followed United States Supreme Court precedent establishing that "the Supreme Court does not pick out particular . . . activities, characterize them as fundamental, and then give them added protection."[23] The United States Supreme Court emphasized that it is not within its "province to create substantial rights by guaranteeing equal protection."[24] Further, the Court declared that it is not sufficient to characterize a right as fundamental "just because state legislation affects a matter gravely important to society."[25] "The Constitution does not provide judicial remedies for every social and economic ill and the Supreme Court will only recognize an established constitutional right and give to that right no less protection than the Constitution itself demands."[26]

The Constitution does not govern the right to control inheritance, descent, or distribution. The power to create rules establishing, protecting and strengthening life, as well as regulating the disposition of property, is reserved to the legislatures of the states.[27] The vague generalities of the equal protection clause are not applicable.[28] Therefore, since the power is reserved to the states, "nothing forbids the legislatures from limiting, conditioning or even abolishing the power of testamentary disposition of property within their jurisdiction."[29]

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22. Brief for Appellant at 8, In re Estate of Greenberg, 390 So. 2d (Fla. 1980).

23. 390 So. 2d at 43. *See also* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 31 (1973).

24. 390 So. 2d at 43. "The Supreme Court of the United States has refused to expand fundamental rights beyond those explicitly guaranteed by the constitution." *Id.*

25. Lindsey v. Normet, 405 U.S. 56, 73-74 (1972).

26. 390 So. 2d at 43.

27. Labine v. Vincent, 401 U.S. 532, 538 (1971).

28. *Id.* at 538-40. *See also* Mager v. Grima, 49 U.S. (8 How.) 490, 493 (1850).

> Now the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it.

Id.

29. 390 So. 2d at 43. *See also* Trimble v. Gordon, 430 U.S. 762, 771 (1977).

The Florida Supreme Court reemphasized this position stating "that the power to alienate any species of property by a last will and testament has never been an inherent right in the citizen, but is derived from legislation."[30] In most jurisdictions, statutes create the decedent's right to name a personal representative to administer his estate. However, since this right is created by statute, the requirements must be strictly complied with.[31] State legislation has established that courts have no jurisdiction to issue letters of administration to the personal representative nominated in the will unless such discretion is granted by statute.[32] Thus, sections 733.302 and 733.304 of the Florida Statutes specifically disqualify Pincus from serving as personal representative, since he is not related to the testator or a resident of Florida.[33]

In certain instances, the United States Supreme Court has recognized the right to domestic travel as a protectable fundamental interest, requiring the strict scrutiny analysis, which cannot be abridged by the states.[34] Whether it is protected against congressional action may be an open question in light of the deferential treatment given to such legislation by the United States Supreme Court.[35] The right to foreign travel

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The Court there stated that orderly disposition of property at death is a matter particularly within the competence of the state.

30. Thomas v. Williamson, 51 Fla. 332, _, 40 So. 831, 834 (1906) (Taylor, J., concurring). *See also* In re Sharp's Estate, 133 Fla. 802, 183 So. 470 (1938); Taylor v. Payne, 154 Fla. 359, 17 So. 2d 615 (1944), *appeal dismissed*, 323 U.S. 666 (1944). *See generally* REDFEARN, WILLS AND ADMINISTRATION IN FLORIDA § 20.13 (5th ed. 1977).

31. State v. North, 159 Fla. 351, _, 32 So. 2d 14, 18 (1947).

32. *Id. See also* In re Crosby's Estate, 218 Minn. 149, _, 15 N.W.2d 401, 505 (1944). "The legislature has the unquestioned power to qualify a testator's right of appointing an executor and may even wholly deprive the testator of that right, for the right to make a will is purely a statutory right, subject to the complete control of the legislature." *Id.* (citations omitted).

33. *See* notes 2 & 3 *supra.*

34. *See* note 15 *supra.*

35. *See* Oregon v. Mitchell, 400 U.S. 112, 286 (1970) (Stewart, J., concurring): "[A]s against the reserved power of the states, it is enough that the end to which Congress has acted be one legitimately within its power and that there be a rational basis for the measures chosen to achieve that end." *See also*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819): "Let the end be legitimate, let it be within the scope of the court, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the Consti-

is protected against congressional invasion by the due process clause of the fifth amendment.[36]

This right to travel has been protected as a fundamental right only when a durational residency requirement is imposed by a state as a condition precedent to receiving the privileges and benefits of a state,[37] and when the requirement serves to penalize the exercise of that right to travel.[38] However, the United States Supreme Court has cautioned that an appropriately defined and uniformly applied residency requirement will be upheld.[39] But generally "the right to interstate travel must be seen as insuring new residents the same right to vital governmental benefits in the state to which they migrate as are enjoyed by other residents" of that state.[40]

Mr. Pincus alleged that sections 733.302 and 733.304 of the Florida Statutes violate the testator's right to travel in that the testator should be allowed the same rights and privileges in Florida as he enjoyed in the state from which he came. The United States Supreme Court has specifically rejected such a proposition.[41] The Court reasoned that "the broader implications of this transposition, in other areas of substantive law, would destroy the independent power of each state

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tution, are constitutional."

36. Kent v. Dulles, 357 U.S. 116 (1958); *cf.* Zemel v. Rusk, 381 U.S. 1 (1965) (Congress can constitutionally authorize the President to deny passports for travel to designated areas where justified by national security concerns).

37. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330, 343 (1972): "We emphasize again the difference between bona fide residence requirements and durational residency requirements." "Obviously, durational residency laws single out the class of bona fide state and county residents who have recently exercised this constitutionally protected right, and penalize such travelers directly." *Id.* at 338. *See also, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976); Califano v. Torres, 435 U.S. 1 (1978); United States v. Guest, 383 U.S. 745 (1966).

38. Memorial Hosp. v. Maricopa County, 415 U.S. 250, 261 (1974).

39. Dunn v. Blumstein, 405 U.S. 330, 342 (1972); *cf.* Sosna v. Iowa, 419 U.S. 393 (1975) (a one-year residency requirement as a condition on seeking a divorce in state courts is valid). *See also* Marston v. Lewis, 410 U.S. 679 (1973).

40. 415 U.S. at 261.

41. In *Califano v. Torres*, 435 U.S. 1, 4 (1978), the Court stated that the right to interstate travel does *not* require that a person who travels from one state to another be given benefits superior to those enjoyed by residents of states to which he travels merely because he enjoyed those rights in the state from which he came.

under the Constitution to enact laws uniformly applicable to all of its residents."[42]

Sections 733.302 and 733.304 of the Florida Statutes do not contain a durational residency requirement and nothing prohibits a nonresident personal representative from taking up residence in Florida prior to qualifying as a personal representative.[43] Thus, these statutes do not penalize the testator's right to travel as defined by the United States Supreme Court where it has applied the strict scrutiny test.

Further attempting to invoke the strict scrutiny test, Mr. Pincus contended that his fundamental right to pursue a livelihood[44] was violated by the statutes at issue. In *Hicklin v. Orbeck*,[45] the United States Supreme Court held that an Alaskan "hire law," which contained a one year durational residency requirement before non-residents could work on the Alaskan pipeline, violated the non-resident's right to pursue a livelihood. However, in *Baldwin v. Montana Fish and Game Commission*,[46] the Court stated that (1) it did not decide the full range of activities sufficiently basic to the livelihood of the nation and (2) that the states may not interfere with a non-resident's participation without similarly interfering with a resident's participation.

The Florida Supreme Court held that, since there was no fundamental right to appoint a personal representative explicitly or implicitly guaranteed by the United States Constitution,[47] there was no fundamental right to serve as a personal representative.[48] Mr. Pincus' argument did not persuade the court. He claimed that serving as a personal representative and earning an incidental fee was equivalent to the fundamental right to pursue a livelihood.[49] Moreover, Pincus was not li-

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42. *Id.* at 4-5.
43. Answer Brief at 15.
44. *See* note 15 *supra.*
45. 437 U.S. 518 (1978).
46. 436 U.S. 371, 381 (1978). *See also* Davis v. Rose, 97 Fla. 710, 122 So. 225 (1929).
47. In re Estate of Greenberg, 390 So. 2d at 43.
48. *Id.* at 45.
49. This court [should] have little sympathy for that sideline to the practice of law, just as it would regard real estate commissions generated by a lawyer's law practice if he held a brokerage license, as a part of his livelihood entitled to protection as a fundamental right. Moreover, in instances which a testator's attorney is named a personal representative, it is with

censed to practice law in Florida.[50]

Similar to the fundamental right to travel, residency requirements also have been considered when analyzing the fundamental right to pursue a livelihood. When confronted with the question of whether a residency requirement for admission to the Puerto Rico Bar unconstitutionally deprived an individual of his right to pursue a livelihood, the Court in *Ward v. Board of Examiners*,[51] held that residency is not a suspect classification. The Court further stated that the actual residency requirement did not burden a fundamental right. The Court utilized the rational basis analysis and upheld the non-durational residency requirement for admission to the bar. In *Greenberg*, the Florida Supreme Court expressly recognized the state residency requirement of section 733.302 of the Florida Statutes.[52]

Since the legislation in question affected neither a suspect class nor a fundamental right, the rational basis or minimum scrutiny test invalidated this equal protection challenge.[53] Utilizing this test, the Florida Supreme Court held that the statutes bear a reasonable relationship to a legitimate state objective and therefore did not deny Mr. Pincus the right to pursue a livelihood.[54]

> the thought that administration expenses will be saved by virtue [of] combining the personal representative and the personal representative's attorney into one office. In the typical example in which the testator migrated to Florida having named his northern lawyer as personal representative, the assumption that the testator had made in naming the lawyer would be no longer valid, because the lawyer's inability to practice law in the State of Florida would prevent the saving in administration expenses that had been contemplated.

Answer Brief at 17.

50. *Id.; see also* Leis v. Flynt, 439 U.S. 438 (1979).

51. 409 F. Supp. 1258, 1259 (D.P.R. 1976). In re Estate of Fernandez, 335 So. 2d 829 (Fla. 1976).

52. 390 So. 2d at 45.

53. *Id.*

54. *Cf.* Fain v. Hall, 463 F. Supp. 661 (M.D. Fla. 1979) (The court applied strict scrutiny analysis and held blood requirement for qualification of non-resident personal representative was unconstitutional). *But see* 390 So. 2d at 43, where the court stated that "[n]otwithstanding the decision of the federal district court in [*Fain*], which [they found] to be wholly unpersuasive . . . that the right to appoint a personal representative is not one of the fundamental rights implicating utilization of the strict scrutiny test."

What then are the legitimate state interests? The state "recognized that the administration of a decedent's estate is an intensely localized matter requiring the personal representative to be thoroughly informed on local matters and to be available to the court, beneficiaries and creditors of the estate."[55] Even though availability is used in a broader sense than when the word is used in reference to service of process,[56] the search for a legitimate state interest could have ended here. The United States Supreme Court held that if there exists a reasonably conceived state of facts, the classification of a law will be sustained.[57] Amenability to service of process has been recognized as a legitimate state interest for upholding the residency requirement in section 733.302 of the Florida Statutes,[58] and has passed the strict scrutiny test.[59]

Nevertheless, the state also declared

> that these statutes serve the valid function of insuring that the personal representative, if not a relative of the testator, is close enough in proximity to the Florida estate to protect the rights of the creditors, insure that the estate will be probated without needless delays caused by travel, and reduce the cost of representation to the estate by reducing travel costs or preventing the need to associate an in-state representative.[60]

The dissent agreed that the rationality standard of review was appropriate, but argued that the state's interest in reducing "delay in the administration of estates," and costs incurred through "travel and the association of an in-state representative" and insuring "proximity to the interests of the Florida estate to protect interested parties' rights" did not pass the rational basis test.[61] It argued that the "state's classification for qualified non-resident personal representative [was] arbitrary and irrational . . . denying equal protection of the laws."[62] On one

55. 390 So. 2d at 45.
56. Answer Brief at 23A. *See generally* FLA. STAT. § 733.612 (Supp. 1980).
57. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).
58. In re Estate of Fernandez, 335 So. 2d 829, 830 (Fla. 1976).
59. *Id.* at 831.
60. 390 So. 2d at 45, 46.
61. 390 So. 2d at 49, 50 (dissenting opinion).
62. *Id.* at 49.

hand, the dissent wanted to act as a super-legislature[63] and strike down the residency statute. On the other hand, it called on the legislature to gather its collective mind and make the statute applicable to personal representatives, resident and non-resident.[64]

However, "[e]qual protection does not require a state to choose between attacking every aspect of a problem or not attacking it at all. . . ."[65] Further, a statutory classification will not be set aside if any set of facts may reasonably be conceived to sustain the classification.[66] Additionally, the dissent cannot overlook decisions of its own court which reiterate the same propositions.[67] The Florida Supreme Court has stated that "it is not unreasonable for an exception to be created for non-resident relatives because, more than likely, the non-resident relative will also be a beneficiary of the decedent's estate.[68] Furthermore, the argument that the statute has not gone far enough to provide equal protection of the laws was specifically rejected by the United States Supreme Court.[69]

In summary, since none of Pincus' arguments fall within the definition of a suspect class or a fundamental interest the rational basis test must be applied. In the application of this test, the court held that sections 733.302 and 733.304 of the Florida Statutes bear a reasonable relationship to a legitimate state objective. Hence, these sections do not violate the equal protection clause of the fourteenth amendment.

II. Privileges And Immunities

Additionally, Pincus contended that the operation of the residency requirement in the challenged statutes violated the privilege and immunities clause of article IV, section 2 of the United States Constitution.[70] The United States Supreme Court has upheld as permissible "[s]ome

63. *See* note 9 *supra.*

64. 390 So. 2d at 51 (dissenting opinion).

65. 390 So. 2d at 46; Dandridge v. Williams, 397 U.S. 471, 486-87 (1970).

66. Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

67. *See, e.g.*, Newman v. Carson, 280 So. 2d 426, 429 (Fla. 1973); Finlayson v. Conner, 167 So. 2d 569, 571 (Fla. 1964); Liquor Store Inc. v. Continental Distilling Corp., 40 So. 2d 371, 384 (Fla. 1949).

68. 390 So. 2d at 46.

69. 397 U.S. at 487.

70. *See* note 6 *supra.*

distinctions between residents and nonresidents [which] merely reflect . . . that this is a nation composed of individual states. . . ." On the other hand, the Court prohibits those distinctions which hinder the formation, purpose, or development of a single union.[71]

The Florida Supreme Court explained that the privileges and immunities clause secures for the citizens of a state the same freedoms existing in other states as to the acquisition and enjoyment of property, pursuit of happiness and guarantee of equal protection of the laws.[72] Thus, the privileges and immunities clause secures to citizens of each state those virtues of their status as citizens which are common to the citizens in other states under their constitution and law.[73] "Performing the task of personal representative does not rise to the level of a privilege or immunity bearing upon the vitality of the nation as a single entity"[74] and certainly is not common to all states.[75] Therefore, the residency requirement for personal representatives does not violate the privileges and immunities clause.

III. Due Process of Fourteenth Amendment (Irrebuttable Presumptions)

During the 1970's, the United States Supreme Court employed a new form of heightened scrutiny to review statutory classifications which contained rules denying a benefit or placing a burden on all individuals possessing a certain defined characteristic. This scrutiny was characterized as an irrebuttable presumption[76] (e.g., all women after their fifth month of pregnancy are incapable of working).

Under equal protection standards and other standards utilizing strict scrutiny, a perfect meeting between the purpose of the state statute and the classification created by the statute is not required. The

71. Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371, 383 (1978).

72. Hoadley v. Insurance Comm'r, of Fla., 37 Fla. 564, _, 20 So. 772, 775 (1896).

73. *Id.*

74. 390 So. 2d at 49. *See* In re Mulford, 217 Ill. 242, _, 75 N.E. 345, 346 (1905).

75. Answer Brief at A-6 & A-7 (see survey of eligibility of non-resident personal representative statutes).

76. Note, *The Irrebutable Presumption Doctrine In The Supreme Court*, 87 Harv. L. Rev. 1534 n.7 (1974).

irrebuttable presumption analysis was a furtive maneuver, under the guise of due process, to impose "extraordinarily strict safeguards on overinclusive classification."[77] "In practice, the application of this analysis invalidated the generalization and produced a requirement for individualized hearings."[78] The Court in *Vlandis v. Kline*, held that if it is not necessarily or universally true in fact the basic fact implies the presumed fact, and the statute's irrebuttable presumption denies due process of law.[79]

However, as rapidly as the irrebuttable presumption doctrine emerged in the early 1970's, its decline was not far behind. Chief Justice Burger wrote in his dissenting opinion in *Vlandis* that this doctrine represented a transfer of the compelling state interest test from the equal protection area into the due process area.[80] He further stated that the Court's function in constitutional adjudication is "not to see whether there is some conceivably less restrictive alternative to the statutory classification under review since all legislation might be improved by such an individualized determination."[81] In *Cleveland Board of Education v. LaFleur*,[82] Mr. Justice Powell (concurring in result)[83] and Mr. Justice Rehnquist (dissenting)[84] espoused similar views.

Finally, in *Weinberger v. Salfi*,[85] the Court addressed a claim that a federal statute violated due process. The majority stated the issue as "whether Congress, [concerned] . . . by the possibility of an abuse which it legitimately desired to avoid, could have *rationally* concluded both that a particular limitation or qualification would protect against its occurrence, and that the expense and other difficulties of individual determinations justified the inherent imprecission of a prophylactic rule."[86] Two years later in *Ulsery v. Turner Elkhorn Mining Co.*,[87] the

77. G. GUNTHER, CONSTITUTIONAL LAW 969 (10th ed. 1980).
78. *Id.* at 970.
79. 412 U.S. 441, 452 (1973). *See also* Stanley v. Illinois, 405 U.S. 645 (1972); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).
80. 412 U.S. 441, 459-60 (1973) (dissenting opinion).
81. *Id.* at 460.
82. 414 U.S. 632 (1974).
83. 414 U.S. 632, 651 (1974) (Powell, J., concurring in result).
84. 414 U.S. 632, 657 (1974) (dissenting opinion).
85. 422 U.S. 749 (1975).
86. *Id.* at 777.
87. 428 U.S. 1 (1976).

Court further clarified its holding in *Weinberger* and applied the rational basis analysis to uphold a federal law containing two irrebuttable presumptions.[88]

The *Weinberger* and *Turner Elkhorn* decisions illustrate that "[j]ust as . . . severe limitations [were] placed upon the strict scrutiny test in equal protection cases, the irrebuttable presumption doctrine . . . has now been limited . . . so that legislation that creates an irrebuttable presumption will be examined by the deferential test of a rational relationship in matters of economic legislation."[89] A strict scrutiny analysis will only be applied when a classification is at least arguably suspect[90] or when there is an interest that is at least arguably fundamental.[91]

In this instance, Pincus had no fundamental right compromised and he did not belong to a suspect class. Therefore, the rational basis analysis was proper in light of *Weinberger* and *Turner Elkhorn.* Hence, sections 733.302 and 733.304 of the Florida Statutes do not violate the due process clause of the fourteenth amendment since they represent a rational means of accomplishing a legitimate state goal.

IV. The Contention of Amicus Curiae - Dual Probate

The Florida Supreme Court properly concluded that sections 733.302 and 733.304 of the Florida Statutes are constitutional. The court arrived at this decision based upon principles established by the United States Supreme Court under the privileges and immunities clause and the equal protection and due process clauses of the fourteenth amendment to the Constitution of the United States.[92]

However, this lengthy analysis may have been unnecessary had consideration been given to an argument put forth in the answer brief of amicus curiae.[93] This well taken argument deals with the concept of dual probate which vitiates all constitutional arguments made by Mr.

88. 422 U.S. 749 (1975).
89. Answer Brief at 34.
90. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).
91. Stanley v. Illinois, 405 U.S. 645 (1972).
92. 390 So. 2d at 49.
93. Answer Brief at 3.

Pincus.[94]

As previously set forth, Mr. Pincus alleged that the testator's constitutional right to travel and his fundamental right to choose a personal representative were denied. Additionally Mr. Pincus' own right to earn fees for administering the estate was prohibited by sections 733.302 and 733.304 of the Florida Statutes which disallow an unrelated non-resident from becoming a personal representative in Florida.

The concept of dual probate has been widely employed by other states and was adopted in Florida in 1978.[95] In essence the original probate of the will of a decedent, domiciled in Florida at the time of death, will be simultaneously probated in Florida and New York. The New York administration, with Mr. Pincus as personal representative, could have disposed of most or all of the decedent's estate, including all of the personal property owned by the decedent even though it was situated in Florida at the time of death.[96]

Dual probate should not be confused with the concept of ancillary administration. Ancillary administration applies when a person dies leaving real property in another state. Primary administration takes place in the state of the decedent's domicile and ancillary administra-

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94. *Id.* at 5.

95. FLA. STAT. § 731.106(2) (Supp. 1980):

When a non-resident decedent who is a citizen of the United States or a citizen or subject of a foreign country provides in his will that the testamentary disposition of his tangible or intangible personal property having a situs within this state, or of his real propery in this state, shall be construed and regulated by the laws of this state, the validity and effect of the dispositions shall be determined by Florida law. The court may, and in the case of a decedent who was at the time of his death a resident of a foreign country the court shall, direct the personal representative appointed in this state to make distribution directly to those designated by the decedent's will as beneficiaries of the tangible or intangible property or to the persons entitled to receive the decedent's personal estate under the laws of the decedent's domicile, as the case may be.

96. N.Y. [EST., POWERS & TRUSTS] LAW § 3-5.1(h) (Consol. 1979):

Whenever a testator, not domiciled in this state at the time of death, provides in his will that he elects to have the disposition of his property situated in this state governed by the laws of this state, the intrinsic validity, including the testator's general capacity, effect, interpretation, revocation or alteration of any such disposition is determined by the local law of this state. The formal validity of the will, in such case is determined in accordance with paragraph (c).

tion takes place in the state where the real property is situated.[97] On the other hand, "[i]n a typical dual probate estate, a Florida [domiciliary could] have all his personal property, tangible and intangible, probated by an unrelated non-Florida resident [e.g., the decedent's tax advisor or attorney], in another state, under the judicial supervision of the other state."[98]

In other words, a person emigrating to a foreign state could direct in his will that all property, wherever situated, be subject to administration in the state from which he emigrated. This tactic is useful especially where the named personal representative cannot qualify under the new state's residency statute. For instance, Mr. Pincus could not qualify as a personal representative in Florida and had Mr. Greenberg so directed in his will, Mr. Pincus could have administered the bulk of Greenberg's estate in New York even if it was situated in Florida. Had Greenberg chosen this tactic, "the only assets subject to the simultaneous original probate in Florida would [have been] the real property located in Florida which in many instances passes outside of probate by virtue of joint ownership."[99]

CONCLUSION

Florida Statutes sections 733.302 and 733.304 do not prevent the estate of a Florida resident from being probated within the state from which he emigrated.[100] Therefore, in applying the statutes to Mr. Greenberg's case, no violation can be found of his "fundamental" right to appoint Mr. Pincus, an unrelated non-resident, as successor personal representative to his estate. Moreover, this application would preclude any alleged impingement on the testator's fundamental right to travel. In addition, these Florida Statutes contain no provisions to prevent such an unrelated, non-resident personal representative from earning a personal representative's commission approved by the court of a foreign state.[101] "It is only if the decedent or his family *chooses* to forego dual

97. *See generally* REDFEARN, *supra* note 30, at § 20.13.
98. Answer Brief at 3.
99. *Id.* at 5.
100. *Id.*
101. *See* note 96 *supra.*

probate and submit all the intangible personal property to probate in the Florida Court that sections 733.302 and 733.304 will apply."[102]

Since Mr. Greenberg *chose* to submit his estate to the laws of Florida, sections 733.302 and 733.304 of the Florida Statutes were applied. In light of a challenge that the Florida Statutes violate the equal protection and due process clauses of the fourteenth amendment and the privileges and immunities clause of article IV, section 2 of the United States Constitution, the Florida Supreme Court properly applied the United States Supreme Court precedent and upheld the constitutionality of the Florida law.

Peter S. Broberg

102. Answer Brief at 5.