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The Constitutionality of the Feme Sole Estate and the Virginia Supreme Court's Creation of an 'Homme Sole' Estate in Jacobs v. Meade

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THE CONSTITUTIONALITY OF THE *FEME SOLE* ESTATE AND THE VIRGINIA SUPREME COURT'S CREATION OF AN 'HOMME SOLE' ESTATE IN *JACOBS v. MEADE*

On April 27, 1984, the Virginia Supreme Court, in *Jacobs v. Meade*,[1] was confronted with a constitutional challenge in the sensitive area of gender-based classifications. The object of the assault was the separate equitable estate, or feme sole[2] estate. Historically, the feme sole estate was a method of holding property available exclusively to women. In *Jacobs v. Meade*, it was contended that since a man possessed no corresponding right to create a separate equitable estate, the feme sole estate was constitutionally defective on equal protection grounds.[3]

The *Jacobs* court resolved the issue through a process of statutory construction. It held that, by implication, a man has the ability to acquire property as an homme sole estate. This interpretation removed the possibility of constitutional infirmity.

This comment will first sketch the historical background of the feme sole estate, its development in Virginia, and the legal climate preceding *Jacobs v. Meade*. It will then focus on the propriety of the Virginia Supreme Court's decision and discuss the probable outcome had an alternative method of analysis been employed. Finally, this comment will examine the practical effect of the creation of the homme sole estate and its implications in the area of spousal disinheritance.

I. THE LAW BEFORE *Jacobs v. Meade*

A. *Historical Background of the Feme Sole Estate*

The separate equitable estate, or feme sole estate, was originally a device created by the English equity courts to modify the disabilities which the common law imposed upon married women with respect to their property rights.[4] By the eighteenth century, it became possible for a wife

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1. 227 Va. ___, 315 S.E.2d 383 (1984).

2. A "feme sole" usually refers to an unmarried woman, a widow, a divorced woman or a woman who has been judicially separated from her husband. BLACK'S LAW DICTIONARY 556 (5th ed. 1979). However, the term is also used with respect to a married woman who holds property as her sole and separate equitable estate. *See* J. KELLY, A TREATISE ON THE LAW OF CONTRACTS FOR MARRIED WOMEN 233-34 (1882).

3. U.S. CONST. amend. XIV, § 1.

4. At common law, a married woman's contract was invalid and null against her. 9B MICHIE'S JURISPRUDENCE *Husband and Wife* § 4 (Repl. Vol. 1984). A married woman was also unable to convey her realty or encumber her freehold estate without her husband's concurrence; if a husband and wife sold and conveyed her lands, the proceeds belonged to

to have an estate and income free from the control of her husband, a separate equitable estate which could give her virtual economic independence. This was usually accomplished by means of a "sole and separate use" trust for the benefit of the wife. Legal title to property was conveyed to a trustee who had the duty of managing and disposing of the property in accordance with the wife's wishes. The role of trustee could be filled by a third party, by the husband, or even by the wife herself. To insure that the property would be held free from the husband's control and from liability for his debts, the trust instrument had to contain an express provision to that effect. If the settlor of the trust did not explicitly insert such a provision, the husband would immediately acquire an interest in the wife's equitable estate. If designed effectively, however, the separate equitable estate, as created by a separate use trust, enabled a married woman to sell, mortgage, contract, or devise her property.[5]

In the late nineteenth century, Virginia, along with other common law states, enacted a series of statutes known as the married women's property acts.[6] These statutes enlarged the personal rights of married women and secured to them separate legal estates over which they had almost unlimited control. One writer has stated that this legislation rendered the separate equitable estate obsolete,[7] but reference to the applicable Virginia statutes and case law shows that the separate equitable estate retains its viability today as a potential device to exclude the wife's real property from the husband's curtesy.[8]

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the husband without any reservation of rights on the wife's behalf. *Id.* § 6. "[The] presumptions of the common law [that husband and wife are one person and that the wife was under the controlling influence of the husband], from a business standpoint, effectually tied the hands of a married woman and (aided by the common law rule that *her personalty* becomes vested in the husband immediately upon marriage) reduced her to a condition of pupilage and dependence upon her husband . . . ." 2 R. MINOR, THE LAW OF REAL PROPERTY § 1004 (F. Ribble 2d ed. 1928) (emphasis in original).

5. *See* 1 AMERICAN LAW OF PROPERTY §§ 5.50-.56 (A. Casner ed. 1952). For a discussion of the married woman's ability to contract concerning property held as her sole and separate equitable estate, see generally J. KELLY, *supra* note 2, at 230-37.

6. For an analysis of the effect of the first married women's property act in Virginia, see generally M. BURKS, NOTES ON THE PROPERTY RIGHTS OF MARRIED WOMEN IN VIRGINIA 59-77 (1894). The modern version of these statutes is found in VA. CODE ANN. §§ 55-35 to -47.1 (Repl. Vol. 1981 & Cum. Supp. 1984).

7. 1 AMERICAN LAW OF PROPERTY § 5.55-.56 (A. Casner ed. 1952). *But see* Rappeport, *The Equitable Separate Estate and Restraints on Anticipation: Its Modern Significance*, 11 MIAMI L.Q. 85 (1956).

8. Curtesy today, like dower, consists of a surviving spouse's fee simple interest in one third of all the real estate whereof the deceased spouse or any other to his use was at any time seised during coverture of an estate of inheritance, unless the right has been lawfully barred or relinquished. VA. CODE. ANN. § 64.1-19 (Repl. Vol. 1980). *See generally* 1 R. MINOR, *supra* note 4, §§ 217-245 (for a historical overview); Lewis, *It's Time to Abolish Dower and Curtesy in Virginia*, 3 U. RICH. L. REV. 299 (1969) (proposes the abolition of dower and curtesy as part of a complete revision of the law of decedents' estates in Virginia); 5C MICHIE'S JURISPRUDENCE *Curtesy* §§ 1-14 (Repl. Vol. 1983).

B. *Acceptance in Virginia*

Although conceived as a creature of equity, the separate equitable estate is expressly acknowledged in the Code of Virginia under section 55-47.[9] Similarly, section 55-35, which defines how a married woman may acquire and dispose of property, states that a husband has curtesy rights in real estate owned by his wife with the exception of any real estate held as part of her separate equitable estate.[10] The most explicit reference to the separate equitable estate as a method of barring a husband's curtesy in his deceased wife's real estate is found in section 64.1-21.[11] Under this section a surviving husband is not entitled to curtesy in the separate equitable estate of his wife if the right has been expressly excluded by the instrument creating the estate or if the creating instrument simply describes the estate as her sole and separate equitable estate.

The Virginia Supreme Court has consistently emphasized that the feme sole estate has an independent, extra-statutory existence.[12] By the late nineteenth century, a separate equitable estate could be created for a woman with relative ease. In *Dezendorf v. Humphreys*,[13] the court held that a will devising property to a married woman "to have for her sole and separate use during her life"[14] created a separate equitable estate.[15] Moreover, the interposition of a trustee was deemed unnecessary to create such an estate.[16] Under former Virginia law, a woman's power to dispose of feme sole real estate during the marriage or by will (thus excluding the husband from curtesy) had to be vested in her by the creating instru-

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The Virginia Code also provides that if a wife conveys, devises or bequeaths any estate, real or personal, to her husband with the intent that it be in lieu of curtesy, his curtesy in the real estate is barred. However, the husband does retain the option of renouncing his wife's will and thereby becoming entitled to curtesy in her estate. VA. CODE ANN. § 64.1-22 (Repl. Vol. 1980). The separate equitable estate is the more effective method of excluding the husband's curtesy with respect to a specific piece of real property, especially in view of the fact that no "renunciation" option exists. *See infra* note 71 and accompanying text.

9. VA. CODE ANN. § 55-47 (Repl. Vol. 1981) states that "[n]othing contained in the preceding sections of this chapter shall be construed to prevent the creation of equitable separate estates. They may be created as heretofore and shall be held in all respects according to the provisions of the instrument by which they are created and with all the powers conferred by such instrument."

10. *Id.* § 55-35.

11. *Id.* § 64.1-21 (Repl. Vol. 1980). The most recent change in this statute was the 1980 amendment which added the words "or if such instrument executed heretofore or hereafter, describes the estate as her sole and separate equitable estate."

12. *See, e.g.*, Andes v. Roller, 98 Va. 620, 622, 37 S.E. 297, 297 (1900); Jones v. Jones, 96 Va. 749, 751, 32 S.E. 463, 463. (1899); Hutchings v. Commercial Bank, 91 Va. 68, 20 S.E. 950 (1895).

13. 95 Va. 473, 28 S.E. 880 (1898).

14. *Id.* at 474, 28 S.E. at 880.

15. *Id.* at 477, 28 S.E. at 881.

16. *Id.*

ment.[17] Today, under section 64.1-21, as amended in 1980, a surviving husband is not entitled to curtesy in his deceased wife's separate equitable estate "if such instrument, executed heretofore or hereafter, describes the estate as her sole and separate equitable estate."[18] Thus, the trend in Virginia has been to facilitate the creation of separate equitable estates in women and to uphold the use of such estates as potential curtesy-barring devices.[19]

C. *The Legal Climate Prior to* Jacobs v. Meade

The decade of the 1970's witnessed a proliferation of litigation before the United States Supreme Court challenging the constitutional validity of gender-based laws under the equal protection clause of the fourteenth amendment.[20] While a majority of the Court was reluctant to declare sex a "suspect" classification triggering strict scrutiny,[21] many laws which made distinctions between males and females were struck down under less stringent tests.[22] As it struggled to fashion an appropriate and workable standard to apply to gender-based criteria, the Court has appeared to move from a posture of deference to legislative purpose, which is often

17. Whether the husband's marital rights were excluded by the instrument depended on the intention of the grantor. *See, e.g., Jones*, 96 Va. at 752, 32 S.E. at 463; *see also* Kiracofe v. Kiracofe, 93 Va. 591, 25 S.E. 601 (1896) (court construed the creating instrument as containing an implied power to dispose of feme sole real estate by will, since the instrument did not withhold such power); *Dezendorf*, 95 Va. 473, 28 S.E. 880 (creating instrument, the wife's father's will, specifically prohibited the woman from conveying or encumbering the property).

18. VA. CODE ANN. § 64.1-21 (Repl. Vol. 1980).

19. A possible exception or modification of this trend might be discerned from the apparent conflict between case law, which stated that if the husband himself were the creator of his wife's separate equitable estate, his intention to divest himself of his curtesy would be presumed. *See, e.g., Jones*, 96 Va. at 752, 32 S.E. at 464 and VA. CODE ANN. § 64.1-20 (Repl. Vol. 1980) (stating that the fact that a husband conveys real estate to his wife shall not necessarily bar his curtesy in the property).

20. U.S. CONST. amend. XIV, § 1. *E.g.*, Reed v. Reed, 404 U.S. 71, 75 (1971) (statutory classifications which distinquish between males and females are "subject to scrutiny under the Equal Protection Clause").

21. *Cf.* Frontiero v. Richardson, 411 U.S. 677 (1973). Only four members of the Court supported the view that sexual classifications "are inherently suspect and must therefore be subjected to close judicial scrutiny." *Id.* at 682.

22. *See, e.g.*, Orr v. Orr, 440 U.S. 268 (1979) (state statute said only men could be required to pay alimony following divorce; statute invalidated); Califano v. Goldfarb, 430 U.S. 199 (1977) (under Federal Old-Age, Survivors, and Disability Insurance Benefits Program, survivors benefits were payable to the widow of a husband covered regardless of the degree of her dependency, but benefits were payable to a widower of a wife covered only upon proof of support; statute invalidated); Craig v. Boren, 429 U.S. 190 (1976) (state statute allowed women to purchase beer at a younger age than could men; statute invalidated); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (widows, but not widowers, could collect survivors' benefits under Social Security Act; statute struck down); *Reed*, 404 U.S. 71 (statute which preferred men to women as estate administrators struck down).

called the "rational basis" or "minimum scrutiny" test,[23] to a position of "intermediate scrutiny."[24] The formula of intermediate scrutiny is now the incantation most frequently invoked by the Supreme Court in gender-discrimination cases, although occasionally the former deference resurfaces in certain contexts.[25] Whatever the judicial test employed, it is well settled that legal classifications based on sex alone and reflecting "archaic and overbroad generalizations"[26] continue to be "subject to scrutiny under the Equal Protection Clause."[27]

The time-honored feme sole estate was the attempted target of legal reform in Virginia as early as 1968. In that year, the Virginia Code Com-

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23. *E.g., Reed*, 404 U.S. at 76 (stating 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 . . . .'") (quoting Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)); *see also* Schlesinger v. Ballard, 419 U.S. 498, 508 (1975) (attempting to find a rationale for Congress' actions, the Court speculated that "[i]n enacting and retaining [the challenged statute] Congress *may* thus quite rationally have believed that women line officers had less opportunity for promotion . . . ." (emphasis added)); Kahn v. Shevin, 416 U.S. 351, 355 (1974) (Court upheld a Florida statute which gave a property tax exemption to widows, but not to widowers, because "Florida's differing treatment of widows and widowers 'rest[s] upon some ground of difference having a fair and substantial relation to the object of the legislation . . . .'"). *But see* G. GUNTHER, CONSTITUTIONAL LAW 792 n.3 (10th ed. 1980) (expressing the view that the *Reed* court was applying "deferential scrutiny in theory but somewhat heightened scrutiny in fact."). *See generally* Note, *Preferential Economic Treatment for Women: Some Constitutional and Practical Implications of* Kahn v. Shevin, 28 VAND. L. REV. 843 (1975) (taking the position that *Kahn v. Shevin* represents a retreat from heightened intermediate scrutiny). For the view that *Kahn v. Shevin* did not apply the rational basis test, see Note, Kahn v. Shevin *and the "Heightened Rationality Test": Is the Supreme Court Promoting a Double Standard in Sex Discrimination Cases?*, 32 WASH. & LEE L. REV. 275 (1975).

24. This standard was articulated in *Craig*, 429 U.S. at 197, where the Court declared that in order to survive constitutional challenge, "classifications by gender must serve important government objectives and be substantially related to achievement of those objectives." For a critical view of intermediate scrutiny, calling for the application of the strict scrutiny advocated by the *Frontiero* plurality, see Emden, *Intermediate Tier Analysis of Sex Discrimination Cases: Legal Perpetuation of Traditional Myths*, 43 ALB. L. REV. 73 (1978). For more recent criticism see Seeburger, *The Middle of the Middle Tier: The Coming Crisis in Equal Protection*, 48 MO. L. REV. 587 (1983) (expressing the view that the Court, by employing intermediate scrutiny, is making inconsistent, means-oriented value judgments to overturn legislative choices). Specific suggestions for improving the quality of analysis in intermediate scrutiny cases are found in Note, *Refining the Methods of Middle-Tier Scrutiny: A New Proposal for Equal Protection*, 61 TEX. L. REV. 1501 (1983) (offering a method of defining each element of the test with greater precision).

25. *See* Rostker v. Goldberg, 453 U.S. 57, 66 (1981) (6-3 decision), where the Court upheld draft registration for males only while according "a healthy deference" to congressional decisions in the area of military affairs. *See generally* Note, *Retreat from Intermediate Scrutiny in Gender-Based Discrimination Cases*, 32 CASE W. RES. L. REV. 776 (1982) (calling for a return to genuine intermediate scrutiny because a more lenient standard would result in judicial approval of gender-based discrimination).

26. Schlesinger v. Ballard, 419 U.S. 498, 508 (1975).

27. *Reed*, 404 U.S. at 75.

mission proposed to the General Assembly that section 64-22[28] be made gender-neutral.[29] The result would have been that a husband could hold real property as his separate equitable estate and vitiate his widow's dower interest. This suggestion was rejected by the General Assembly and the statute remained essentially in its present form. Then, in 1977, "[a]pparently in response to *Frontiero* and other Supreme Court decisions involving gender-based classifications,"[30] the General Assembly enacted section 64.1-19.1, which provides that the terms "dower" and "curtesy" are to be regarded as synonymous for all purposes.[31] The configuration of these two statutes would become significant when the Virginia Supreme Court addressed the constitutionality of the feme sole estate in *Jacobs v. Meade*.[32]

II. The Case of *Jacobs v. Meade*

A. *The Facts*

In 1960, Leona C. Foltz and her then husband, Henry L. Foltz, purchased a parcel of real estate in Prince William County as tenants by the entirety with the right of survivorship.[33] Henry Foltz died in 1975. His widow, Leona, executed a will in 1976 devising this real estate to her daughter and granddaughter. On April 8, 1977, Mrs. Foltz recorded a feme sole deed conveying the property to herself as her sole and separate equitable estate. That same day Mrs. Foltz married Jack E. Jacobs. Leona Foltz Jacobs died in 1980. In February 1981, Jack Jacobs filed a renunciation of his wife's will and sought to claim curtesy rights in her feme sole real estate.[34]

The case was heard in the Circuit Court of Prince William County on July 9, 1981. The complainant, Jacobs, argued that section 64.1-21, which states that a surviving husband is not entitled to curtesy in his deceased wife's separate equitable estate, "is unconstitutional on equal protection grounds because the statute fails to grant husbands the same rights

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28. Va. Code Ann. § 64-22 (1950). According to this provision, if a wife's creating instrument expressly excluded curtesy, then the husband was not entitled to a share in his wife's equitable estate. *Id.* § 64.1-21 (Repl. Vol. 1980).

29. Revision of Title 64 of the Code of Virginia: Report of the Virginia Code Commission to the Governor and General Assembly of Virginia, H.D. 5, Regular Session (1968).

30. Jacobs v. Meade, 227 Va. ___, ___, 315 S.E.2d 383, 384 (1984).

31. Va. Code Ann. § 64.1-19.1 (Repl. Vol. 1980).

32. 227 Va. ___, 315 S.E.2d 383.

33. A tenancy by the entirety is defined as a "tenancy which is created between a husband and wife and by which together they hold title to the whole with right of survivorship so that, upon death of either, other takes whole to exclusion of deceased heirs." Black's Law Dictionary 1313-14 (5th ed. 1979).

34. Joint Appendix at 5, Jacobs v. Meade, 227 Va. ___, 315 S.E.2d 383 (1984).

granted wives."[35] The defendant, Cheryl Lynn Meade, as executrix of her deceased mother's estate, claimed the exclusion of curtesy was proper because her mother had held the property as a separate equitable estate.[36]

The circuit court declined to consider the constitutional question and ruled in favor of the executrix. It held that section 64.1-21 must be construed together with section 64.1-19.1, which states that the terms "dower" and "curtesy" are synonymous for all purposes. Therefore, a husband also had the ability to create a separate equitable estate with the potential to bar his wife's dower rights.[37] A fortiori, there was no constitutional infirmity. The complainant, Jacobs, appealed to the Virginia Supreme Court.

B. *The Virginia Supreme Court's Decision and Rationale*

On appeal to the Virginia Supreme Court, Jacobs argued that the trial court erred in not addressing the constitutionality of section 64.1-21,[38] and in not concluding that the statute violates the federal equal protection clause. Citing *Frontiero v. Richardson*,[39] Jacobs asserted that the statute violates the fourteenth amendment of the Constitution because it permits a wife to exclude her husband's curtesy rights in real property held as her separate equitable estate, without conferring a corresponding right upon the husband.[40]

The Virginia Supreme Court declined to reach the constitutional question in *Jacobs v. Meade*.[41] According to the court, the threshold question was not whether it was constitutional for a wife to be able to create a feme sole estate and thereby deprive her husband of his curtesy. Rather, "[t]he dispositive issue in this appeal is whether the statutory law of Virginia enables a husband, as well as a wife, to acquire a sole and separate equitable estate in real property."[42]

The court looked for a permissible construction of section 64.1-21 because "[e]very act of the legislature is presumed to be constitutional. Morever, 'a statute will be construed in such a manner as to avoid a constitutional question wherever this is possible.' "[43] The court pursued such a construction by juxtaposing section 64.1-21 and section 64.1-19.1.[44] Sec-

35. 227 Va. at ___, 315 S.E.2d at 384.
36. *Id.*
37. Joint Appendix at 19, *Jacobs*, 227 Va. ___, 315 S.E.2d 383.
38. VA. CODE ANN. § 64.1-21 (Repl. Vol. 1980).
39. 411 U.S. 677 (1973). *See supra* note 21.
40. Brief for Appellant at 18-20, Jacobs v. Meade, 227 Va. ___, 315 S.E.2d 383 (1984) (available in Virginia Supreme Court library).
41. 227 Va. ___, 315 S.E.2d 383.
42. *Id.* at ___, 315 S.E.2d at 385.
43. *Id.* (quoting Eaton v. Davis, 176 Va. 330, 339, 10 S.E.2d 893, 897 (1940)).
44. VA. CODE ANN. §§ 64.1-19.1, -21 (Repl. Vol. 1980).

tion 64.1-21 provides that "[a] surviving husband shall not be entitled to curtesy in the equitable separate estate of the deceased wife if such right thereto has been expressly excluded by the instrument creating the same, or if such instrument, . . . describes the estate as her sole and separate equitable estate."[45] Section 64.1-19.1 provides that "[w]here the word 'curtesy' appears in this chapter of the Code, it shall be taken to be synonymous with the word 'dower' as the same appears in this chapter or this Code, and shall be so construed for all purposes."[46]

Section 64.1-19.1 had been applied only once prior to *Jacobs v. Meade.* In *God v. Hurt*,[47] the litigated issue arose from a contract with a married woman for the purchase of real estate. The purchasers claimed they were entitled to specific performance of the contract, together with an abatement in the purchase price due to the refusal of the woman's husband to release his curtesy rights. In searching for judicial precedent, the court in *God* could only find cases discussing the applicable rule of law with respect to an unreleased dower right. Due to the existence of section 64.1-19.1, however, the court was able to apply the principles of the earlier cases to the present situation of an unreleased curtesy right.[48] The application of section 64.1-19.1 to common law principles in *God*, however, offered little guidance to the *Jacobs* court in its interpretation of section 64.1-21. The *Jacobs* court did observe that section 64.1-19.1 had been enacted "[a]pparently in response to *Frontiero* and other Supreme Court decisions involving gender-based classifications . . . ."[49]

The *Jacobs* court realized that the mere substitution in section 64.1-21 of the word "dower" for the word "curtesy," without more, would produce an absurdity. It acknowledged that "[i]t is the court's duty, however, to construe statutes so as to avoid absurd results."[50] By this reasoning, the court felt free to substitute also the operative nouns and pronouns, such as "wife" for "husband," "his" for "her," so that the statute would be logically coherent. The Virginia Supreme Court ultimately held in *Jacobs* that the application of section 64.1-19.1 to section 64.1-21 creates, by implication, an homme sole estate. The court's interpretation means that, pursuant to section 64.1-21, a husband has the ability to bar his widow's dower rights. Since a man, as well as a woman, can have a separate equitable estate, there is no statutory gender discrimination in section 64.1-21; an equal protection challenge is not viable.[51]

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45. *Id.* § 64.1-21.

46. *Id.* § 64.1-19.1.

47. 218 Va. 909, 241 S.E.2d 800, *rev'd on other grounds on reh'g*, 219 Va. 160, 247 S.E.2d 351 (1978).

48. *Id.* at 913, 241 S.E.2d at 803.

49. *Jacobs*, 227 Va. at ___, 315 S.E.2d at 384.

50. *Id.* at ___, 315 S.E.2d at 385.

51. At this point no appeal to the United States Supreme Court is planned. Telephone interview with Robert Henry Klima, counsel for appellant (Aug. 10, 1984).

III. Analysis of the Court's Opinion and its Ramifications

A. *The Constitutionality of the Feme Sole Estate—The Unanswered Question*

The focal point of the *Jacobs v. Meade* decision, creating an homme sole estate, was the court's analysis of the interrelationship of two statutes. It is a basic principle of constitutional adjudication that a court will seek to avoid constitutional questions. Through its initial inquiry, a court will normally determine whether a constitutional question may be avoided through a rational construction of the particular statute.[52] This is precisely what the *Jacobs* court did. In the process, however, the court missed an opportunity for further refinement of Virginia's approach to the constitutionality of gender-based classifications.

Assume, hypothetically, that the 1968 Virginia General Assembly (whose members rejected the proposal to make the predecessor of section 64.1-21 explicitly gender-neutral[53]) were to be "resurrected" in order to rewrite section 64.1-19.1[54] so that it would be inapplicable to section 64.1-21.[55] Would section 64.1-21, which provides that a woman's separate equitable estate may exclude her husband's curtesy, be able to survive constitutional scrutiny unaided by section 64.1-19.1?

Because the feme sole estate is a property-holding device available to women and not to men, it embodies, superficially at least, a benign sex classification.[56] "When sex classifications are defended as benign aids to women, the Court applies exactly the same level of scrutiny as it does to disadvantaging classifications: the *Craig v. Boren* intermediate level of scrutiny governs . . . ."[57] Under the *Craig* standard, a gender-based classification must "serve important governmental objectives and be substan-

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52. Ashwander v. TVA, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring). *See also* Eaton v. Davis, 176 Va. 330, 339, 10 S.E.2d 893, 897 (1940) (Virginia enunciation of this principle).

53. *See supra* note 29 and accompanying text.

54. Va. Code Ann. § 64.1-19.1 (Repl. Vol. 1980).

55. *Id.* § 64.1-21.

56. *See generally* Erikson, Kahn, Ballard & Wiesenfeld, *A New Equal Protection Test in Reverse Discrimination Cases?*, 42 Brooklyn L. Rev. 1 (1975) (warning that compensatory laws that purport to help women actually foster sexual stereotyping and paternalism); Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 Conn. L. Rev. 813, 823 (1978) (which sees a continued but limited use of benign classifications and suggests that the court "will uphold a gender classification justified as compensatory only if in fact adopted by the legislature for remedial reasons rather than out of prejudice about 'the way women (or men) are,' and even then, only if the classification neatly matches the remedial end."); Kanowitz, *"Benign" Sex Discrimination: Its Troubles and Their Cure*, 31 Hastings L.J. 1379 (1980) (proposing complete abrogation of the doctrine of benign discrimination in the area of gender bias).

57. G. Gunther, *supra* note 23, at 791.

tially related to the achievement of those objectives."[58]

A survey of several major Supreme Court decisions which applied intermediate scrutiny to laws characterized by their proponents as "benign" (in the sense of being preferential or compensatory to women) reveals that, in many instances, their asserted benignity did not save the challenged statutes.[59] "[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."[60]

In *Orr v. Orr*,[61] a landmark Supreme Court case in domestic relations law, a majority of the Court voted to strike down an Alabama statute which provided that only husbands could be made to pay alimony. Alabama attempted to defend its statute on the ground that it served important government objectives. The state's alleged objectives were to help needy spouses and to compensate women for past discrimination during marriage which rendered them ill-equipped to earn their own livings. The Supreme Court noted, however, that the statute also provided for hearings in which the parties' relative economic needs would be assessed.[62] This was the fatal flaw. Although Alabama's purposes may have been legitimate, gender-classification was unnecessary to effectuate those purposes. In this case, the use of sex classifications could only produce "perverse results."[63] The Court concluded that "[a] gender-based classification which . . . generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny."[64]

In *Mississippi University for Women v. Hogan*,[65] the Court considered the constitutional validity of a state-supported nursing school's policy of excluding men from enrollment for academic credit. Mississippi argued that the women-only policy compensated women for discrimination in the job market. As applied to a nursing school, however, this was a weak argument. Statistics demonstrate that nursing jobs are predominantly held by women. Thus, while the Court acknowledged that "[i]n limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened,"[66] it found that women were not burdened with a lack of opportunity in the nursing profession and struck down the statute.

In *Hogan* and *Orr*, the potential beneficiaries of the gender classifica-

58. Craig v. Boren, 429 U.S. 190, 197 (1976).
59. *See supra* note 22 (with the exception of Reed v. Reed, 404 U.S. 71 (1971)).
60. Weinberger v. Wiesenfeld, 420 U.S. 636, 648 (1975).
61. 440 U.S. 268 (1979).
62. *Id.* at 281.
63. *Id.* at 282.
64. *Id.* at 282-83.
65. 458 U.S. 718 (1982).
66. *Id.* at 728.

tions were, respectively, financially secure (or non-needy) divorced women and women in a predominantly female profession. The asserted compensatory purposes were either misconceived or ill-served by the discriminatory classification.

Against this background, last year, in *Schilling v. Bedford County Memorial Hospital, Inc.*,[67] the Virginia Supreme Court examined an inherently gender-based common law doctrine, the doctrine of necessaries, which makes a husband responsible for providing the elements of basic subsistence for his wife, but which does not impose a similar duty on a woman. Virginia applied the *Craig v. Boren* level of scrutiny and abolished the doctrine. It characterized the necessaries doctrine as one "which provided unequal benefits to men and women on the assumption that women were more financially dependent."[68] Premised as it was on sweeping, sex-based generalizations, the necessaries doctrine had to be stricken.[69]

In analyzing the constitutionality of the feme sole estate in the absence of legislative history, one might posit that such an estate compensates women for their relative economic disadvantages by enabling them to hold property in a manner unavailable to men. The women benefitted by such a classification, however, would be women owning real property, women who may enjoy more financial advantages than many men. Today, the feme sole estate is used primarily as a means of excluding a husband's curtesy. Is this compensatory or retaliatory? The burden of such a classification could conceivably fall on a needy widower. The initial benefit would be to a woman of property, giving her an option regarding that property's disposition upon her death which is unavailable to a similarly situated man. The direct beneficiary would be the person to whom the woman devised her real estate; this devisee could be a woman or a man, a needy person or an affluent person. Viewed from this perspective and buttressed by the analysis of sex classification decisions discussed above, it is difficult to conceive that the feme sole estate could pass constitutional muster as a benign aid to women under the standards of *Craig v. Boren*.[70]

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67. 225 Va. 539, 303 S.E.2d 905 (1983).

68. *Id.* at 543-44, 303 S.E.2d at 908.

69. In *Schilling*, the Virginia Supreme Court decided that it would be inappropriate for the court to cure the constitutional defect of the necessaries doctrine by extending its application to wives because "this task, if advisable, is better left to the General Assembly." *Id.* at 544, 303 S.E.2d at 908. For a discussion of the factors to be considered when deciding whether to extend or to eliminate the necessaries doctrine, see Mahoney, *Economic Sharing During Marriage: Equal Protection, Spousal Support and the Doctrine of Necessaries*, 22 J. FAM. L. 221, 237-44 (1984).

70. For recent state and federal cases dealing with related types of benign gender classifications, see generally Annot., 18 A.L.R.4th 910 (1982).

B. *The Homme Sole Estate*

As a result of *Jacobs v. Meade*, a man can now acquire a separate equitable estate in real property with the ability to bar his wife's dower rights. Thus, the situation is "evened up" with respect to a particular method of spousal disinheritance. In the past, if a man wished to defeat his surviving spouse's dower rights in real property, he had to circumvent the dower interest by acquiring the real estate as personal property (usually through a corporation or a partnership) and by holding the property in a probate-avoidance device.[71]

These technicalities are no longer necessary. Now a man can block his wife's dower interest as easily as she can defeat his curtesy interest. If one believes that "turnabout is fair play," there is cause to rejoice in this development. On the other hand, the *Jacobs* decision, while safeguarding equal protection in the constitutional sense, has the practical result of making males and females equally vulnerable to disinheritance by means of the separate equitable estate. Because *Jacobs* has exacerbated the already vexing problem of spousal property rights at death, perhaps the decision will stimulate legislative reform in this important area.

IV. Conclusion

The feme sole estate is a judicially created, statutorily sanctioned relic of an earlier era when married women had little or no control over property. In all probability, had the Virginia Supreme Court addressed the substantive constitutional issue, the feme sole estate would not have survived constitutional scrutiny. By means of statutory construction, the court effected the gender-neutralization of a property holding device formerly available only to women. This method of analysis preserved and extended the separate equitable estate. With the creation in *Jacobs v. Meade* of a corresponding homme sole estate, a historical method of spousal disinheritance with respect to real property is now an option for both men and women.

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71. The two steps were necessary because if the property in question was acquired as real property, the wife had a dower interest in it; if the property was acquired as personal property and remained in the decedent's net probate personal estate, the widow could renounce the will and take a fractional share of the net probate personal estate as provided in Va. Code Ann. § 64.1-16 (Repl. Vol. 1980). Thus, to prevent the surviving spouse from acquiring any interest in the property the husband had to: (1) acquire the real estate as personal property through a corporation or partnership, thus barring dower (because dower is an interest in real property) and (2) place the personal property in a probate avoidance device (such as an inter vivos trust over which he exercised a non-general power of appointment), thus preventing the widow from claiming a forced statutory share in the property. *See* Johnson, *Interspousal Property Rights at Death*, 10 Va. Bar Assoc. J., Summer 1984, at 10, 13. For an earlier, but more detailed, treatment, see generally Spies, *Property Rights of the Surviving Spouse*, 46 Va. L. Rev. 157 (1960).

From the perspective of a student of constitutional law seeking insight into Virginia's approach to gender-based classifications, the decision reached in *Jacobs v. Meade* is unenlightening. From the viewpoint of those who value increased freedom of testation, the result is laudable. Most significantly, however, for those who are concerned about the property rights of surviving spouses in Virginia, *Jacobs v. Meade* represents an additional complication of an already troublesome area.

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