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Illegitimate Succession--Illinois Statute Denying the Rights of Illegitimate Children to Inherit from Father's Estates is Unconstitutional

Jay Allen Chaffee

RECENT DEVELOPMENT

ILLEGITIMATE SUCCESSION—ILLINOIS STATUTE DENYING THE RIGHTS OF ILLEGITIMATE CHILDREN TO INHERIT FROM FATHER'S ESTATES IS UNCONSTITUTIONAL. *Trimble v. Gordon*, 97 S. Ct. 1459 (1977).

Under common law, illegitimate children had the legal status of *nullius filius*,[1] the child of no one. Certain states have abolished the illegitimate classification,[2] while others have relaxed the inflexible common law rule.[3] The Supreme Court had refrained from dealing with statutes containing illegitimate classifications until 1968. The first applications of the equal protection clause in this area came with the landmark decisions of *Levy v. Louisiana*[4] and *Glona v. American Guarantee and Liability Insurance Co.*[5]

Since 1968, the Court has addressed the question of illegitimate

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1. *See*, W. BLACKSTONE, COMMENTARIES 459 (Cooley 3d ed. 1884); H. CLARK, LAW OF DOMESTIC RELATIONS 155-58 (1968); Note, 47 NOTRE DAME LAW. 392 at 394-95 (1971) [hereinafter cited as *Constitutional Law and Equal Protection*].

2. *E.g.*, N.D. CENT. CODE § 30.1-04-09 (Supp. 1977); OR. REV. STAT. § 109.060 (Supp. 1975-76).

3. For a survey of state laws on inheritance rights of illegitimates, see *Constitutional Law and Equal Protection, supra* note 1, at 398.

4. 391 U.S. 68 (1968). *See also* Gray & Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co.*, 118 U. PA. L. REV. 1 (1969); Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana—First Decisions on Equal Protection and Paternity*, 36 U. CHI. L. REV. 338 (1969).

5. 391 U.S. 73 (1968).

6. Trimble v. Gordon, 97 S. Ct. 1459 (1977) (intestate succession); Mathews v. Lucas, 427 U.S. 495 (1976) (Social Security benefits); Beaty v. Weinberger, 418 F.2d 300 (5th Cir. 1973), *summarily aff'd*, 418 U.S. 901 (1974) (Social Security benefits); Jimenez v. Weinberger, 417 U.S. 628 (1974) (Social Security benefits); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973) (welfare assistance); Griffin v. Richardson, 346 F. Supp. 1226 (D. Md. 1972), *summarily aff'd*, 409 U.S. 1069 (1972) (Social Security benefits); Davis v. Richardson, 342 F. Supp. 588 (D. Conn. 1972), *aff'd*, 409 U.S. 1069 (1972) (Social Security benefits); Gomez v. Perez, 409 U.S. 535 (1973) (right to parental support); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (workmens compensation benefits); Labine v. Vincent, 401 U.S. 532 (1971) (intestate succession); Glona v. American Guar. & Liab. Ins. Co., 391

classifications on a dozen occasions.[6] Prior to *Trimble v. Gordon*,[7] the trend was to strike down statutes that discriminated against illegitimate children. The major exception to that trend was *Labine v. Vincent*,[8] where Louisiana's intestate succession statute was upheld, even though it directly excluded illegitimate children.

The confusing factor present in the Supreme Court's treatment of the illegitimacy controversy has been the inconsistent application of equal protection tests.[9] The Court has vacillated between the different approaches for over a decade, but no classification of illegitimate children has been held to constitute a suspect class requiring strict scrutiny.[10] In *Labine*, Justice Black noted that the power to dispose of the property of a person dying intestate resided with the individual states,[11] and the statute there before the Court was given a minimum of scrutiny.[12] Other cases dealing with the issue have applied a more exacting standard in their equal protection analysis.[13] The Illinois Supreme Court set the stage perfectly because of their total reliance on *Labine*. In *Trimble*, Justice Powell was forced to apply something more than minimum scrutiny to find an equal protection violation.[14]

U.S. 73 (1968) (parents' claim for wrongful death of child); Levy v. Louisiana, 391 U.S. 68 (1968) (child's claim for wrongful death of mother).

7. 97 S. Ct. 1459 (1977).

8. 401 U.S. 532 (1971). *See generally*, Petrillo, *Labine v. Vincent: Illegitimates, Inheritance, and the Fourteenth Amendment*, 75 DICK. L. REV. 377 (1971); Note, *Labine v. Vincent: Louisiana Denies Intestate Succession Rights to Illegitimates*, 38 BROOKLYN L. REV. 428 (1971).

9. *See, e.g.*, Note, *Illegitimacy and Equal Protection: Two Tiers or an Analytical Grab-Bag?*, 7 LOY. CHI. L.J. 754 (1976) [hereinafter cited as *Illegitimacy and Equal Protection*].

10. Mathews v. Lucas, 427 U.S. 495, 505 (1976).

11. 401 U.S. at 538.

12. Justice Black admitted: "It may be possible that some of these choices are more 'rational' than the choices inherent in Louisiana's categories of illegitimates." *Id.*

13. "[T]he scrutiny by which their showing is to be judged is not a toothless one . . . ." Mathews v. Lucas, 427 U.S. 495, 510 (citing Jimenez v. Weinberger, 417 U.S. 628 (1974); Frontiero v. Richardson 411 U.S. at 691 (1973)). For commentary about the possibility that the two tier analysis system has been eclipsed, see *Illegitimacy and Equal Protection, supra* note 9, at 759-67.

14. In an interesting footnote, Justice Powell compared the statutes of the two states, and finally admitted that a different standard of equal protection had been applied in Trimble v. Gordon, 97 S. Ct. 1459 (1977):

> The Illinois statute can be distinguished in several respects from the Louisiana statute in *Labine*. The discrimination in *Labine* took a different form, suggesting different legislative objectives. . . . In its impact on the illegitimate children excluded from their parents' estates, the statute was significantly different. Under Louisiana law, all illegitimate children, "natural" and "bastard," were entitled to support from the estate of the deceased parent. . . . Despite these differences, *it is apparent that we have examined the Illinois statute more critically* than the Court examined the Louisiana statute

Illinois maintained a descent and distribution statute denying illegitimate children the right to inherit from their natural fathers.[15] The plaintiff, an illegitimate daughter, challenged the statute claiming the right to inherit from her deceased natural father.[16] The Supreme Court of Illinois denied the claim[17] and upheld the validity of the statute. In *Trimble*, the United States Supreme Court reversed, holding that the plaintiff was entitled to inherit from her natural father and that the Illinois statute was a violation of the equal protection clause of the fourteenth amendment.

The *Labine* and *Trimble* cases have many factual similarities. In each case, the purported father had been lawfully determined to be the parent.[18] Both the Louisiana and Illinois statutes required the fathers to formally legitimize their illegitimate children.[19] Because of these factual similarities, the Illinois Supreme Court had denied the plaintiff's claim.[20] What Illinois did not foresee was an apparent change of

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in *Labine*. To the extent that our analysis in this case differs from that in *Labine* the more recent analysis controls.

97 S. Ct. at 1468 n.17 (citations omitted) (emphasis added).

15. ILL. REV. STAT. ch. 3, § 12 (1961) provides:

> An illegitimate child is heir of its mother and of any maternal ancestor, and of any person from whom its mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if living. An illegitimate child whose parents intermarry and who is acknowledged by the father as the father's child shall be considered legitimate.

The statute was revised in ILL. REV. STAT. ch. 3, § 2-2 (Supp. 1976-77) with no major changes.

16. Sherman Gordon was determined to be the natural father of the plaintiff, Deta Mona Trimble, in the Circuit Court of Cook County, Illinois. The court entered a paternity order against Gordon requiring the payment of $15 per week for the support of the plaintiff. Trimble v. Gordon, 97 S. Ct. 1459, 1462 (1977).

17. The Illinois Supreme Court had dealt with Respondant Trimble's claim *sub nom. In Re* Estate of Karras, 61 Ill. 2d 40, 329 N.E.2d 234 (1975). *Karras* was a consolidation of two separate cases dealing with similar fact situations. Plaintiff Trimble was allowed to file an amicus curiae brief.

18. In Labine v. Vincent, 401 U.S. 532 (1971), the father, Ezra Vincent, had executed a form acknowledgment before the Louisiana State Board of Health. The form contained the specific admission that Vincent was the natural father of his illegitimate daughter, Rita Vincent. In Trimble v. Gordon, 97 S. Ct. 1459 (1977), the father was judicially designated in a paternity proceeding. *See* note 16, *supra* and accompanying text.

19. Louisiana required a formal legitimazation or adoption, Labine v. Vincent, 401 U.S. 532, 534 (1971). Illinois required that the parents have intermarried and that the father have acknowledged the illegitimate child. *See* note 15, *supra* and accompanying text.

20. However, it is interesting to note that the Supreme Court of Ohio distinguished Labine v. Vincent, 401 U.S. 532 (1971), and reached the same result as Trimble v. Gordon, 97 S. Ct. 1459 (1977), in Green v. Woodard, 40 Ohio App. 2d 101, 318 N.E.2d 397 (1974); *See*, Note, 44 U. CINN. L. REV. 415 (1975).

heart by the Supreme Court since *Labine*.[21]

In *Trimble*, the Court balanced the purposes of the discriminatory statute[22] against its impact on illegitimate children, and found that "the reach of the statute extends well beyond the asserted purposes."[23] The fact that the natural father had been judicially determined was inconsistent with the state claim of necessity for an established "method of property disposition."[24] The Court felt that a more accurate system could be devised to protect against unfounded claims by illegitimate children. Justice Powell noted the underlying policy rationale against punishing illegitimate children for the transgressions of their parents.[25]

Unfortunately, the Supreme Court's decision has left several questions unanswered. Presumably, illegitimate children are still not a suspect class which requires strict scrutiny; however, *Trimble* is not an example of deference to the state legislatures.[26] Further, the decision does not give states any guidelines for developing a constitutional intestate statute. The Uniform Probate Code[27] may provide an answer

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21. Labine v. Vincent, 401 U.S. 532 (1971), was a five to four decision with Justices Black, Harlan, Stewart and Blackmun, along with Chief Justice Burger, comprising the majority. Justices Brennan, Douglas, White and Marshall dissented. Trimble v. Gordon, 97 S. Ct. 1459 (1977), was a five to four decision. Justice Powell delivered the opinion of the Court, joined by Justices Marshall, Brennan, White and Stevens. Chief Justice Burger, along with Justices Stewart, Blackmun and Rehnquist, dissented.

22. The major state interests involved were the state's motivation to "encourage (legitimate) family relationships," *In re* Estate of Karras, 61 Ill. 2d 40, —, 329 N.E.2d 234, 238 (1975), and the prevention of "spurious claims against an estate." *Id.* at —, 329 N.E.2d at 240.

23. 97 S. Ct. at 1466 (citing Jimenez v. Weinberger, 417 U.S. 628, 637 (1974)).

24. *In Re* Estate of Karras, 61 Ill. 2d 40, —, 329 N.E.2d 234, 238 (1975). *See also* note 16, *supra* and accompanying text.

25. Powell stated:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liasons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrong-doing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent.

Trimble v. Gordon, 97 S. Ct. 1459, 1465 (1977) (footnote omitted) (quoting from Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)).

26. *See A. Bickel*, THE LEAST DANGEROUS BRANCH (1962) for a discussion of the need for judicial restraint.

27. UNIFORM PROBATE CODE § 2-109(2) (1974) provides:

> In cases not covered by (1), a person born out of wedlock is a child of the mother. That person is also a child of the father, if:
>
> (i) the natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or
>
> (ii) the paternity is established by an adjudication *before the death*

for states whose laws are similar to Illinois, even though it discriminates between different classes of illegitimate children.[28] Legislatures will have to become fully aware that statutes dealing with illegitimacy will be subjected to a more exacting standard of review.[29] For constitutional scholars, *Trimble* represents one of the growing number of "middle ground" equal protection cases.[30]

Impact of Trimble on Oklahoma

Oklahoma has enacted three statutes dealing with illegitimacy generally[31] and one specifically with the illegitimate child's inheritance rights.[32] These statutes have, in effect, wiped out the general distinc-

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> *of the father* or is established thereafter by clear and convincing proof, except that the parernity established under this subparagraph (ii) is ineffective to qualify the father or his kindred to inherit from or through the child *unless the father has openly treated the child as his, and has not refused to support the child.*

(emphasis added).

28. It should be noted that in cases where the natural father is dead, the Uniform Probate Code allows inheritance only where there is proof of paternity *and* the father had openly treated the child as his own. *Id.* The added criteria of de facto acknowledgement could potentially exclude a class of illegitimate children.

29. *See generally* Lee, *The Changing American Law Relating to Illegitimate Children*, 11 WAKE FOREST L. REV. 415 (1975).

30. *See, e.g.*, Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria*, 27 VAND. L. REV. 971, 1006 (1974); *Illegitimacy and Equal Protection, supra* note 9, at 759.

31. The three amendments to title 10 (Children), in 1974 were:

> *Reference to "illegitimate" or "bastard" deemed to refer to "child born out of wedlock"*: Wherever reference is made in the Oklahoma Statutes to "illegitimate" or "bastard" it shall be deemed to refer to a "child born out of wedlock."
>
> After the operaitve date of this act, the term "child born out of wedlock" shall be used in lieu of the terms "illegitimate" or "bastard."

Act of May 29, 1974 OKLA. SESS. LAWS ch. 297, § 7 (codified at OKLA. STAT. tit. 10, § 1.1 (Supp. 1977)).

> *Children deemed legitimate*: On and after the date this act becomes operative, all children born within the State of Oklahoma shall be legitimate.

Act of May 29, 1974, 1974 OKLA. SESS. LAWS ch. 297, § 8 (operative July 1, 1974) (codified at OKLA. STAT. tit. 10, § 1.2 (Supp. 1977)).

> *Use of certain words in reference to children born out of wedlock prohibited*: A. On and after the date upon which this act becomes operative, the designations "illegitimate" or "bastard" shall not be used to designate a child born out of wedlock. B. No person, firm, corporation, agency, organization, the State of Oklahoma nor any of its agencies, boards, commission officers or political subdivisions, nor any hospital, nor and institution supported by public funds, nor any employee of any of the above, shall use the term "illegitimate" of "bastard" in referring to or designating any child born on or after the operative date of this act.

Act of May 29, 1974, 1974 OKLA. SESS. LAWS ch. 297, § 1 (codified at OKLA. STAT. tit. 10, § 6.5 (Supp. 1977)).

32. The new descent and distribution section became effective October 1, 1977, and provides:

> *Inheritance by and from illegitimate child*: For inheritance purposes, a child

tion between legitimate and illegitimate children. However, the legislature appears to have created several different subclasses of illegitimate children.[33] Oklahoma law is now unclear on whether all children that have been born in Oklahoma are legitimate, or only those after July 1, 1974.[34] The statute openly discriminates against illegitimate children born in the other forty-nine states. Oklahoma males could father children outside the state and possibly avoid the consequences of their misdeeds. Therefore, possibly two classes of illegitimate children fall outside the legitimation statute; those born before July 1, 1974, and those born in another state.

Another unsettled question is whether the amendments of 1974 to title 10 have anything to do with the 1977 amendment dealing with inheritance by and from illegitimate children. There is a strong likelihood that the new inheritance amendment will be interpreted separately because it was passed subsequent to the title 10 amendments.[35] The new law provides four methods[36] for an illegitimate child to acquire the same status as a legitimate child for inheritance purposes. Three of the methods involve consent of the natural father, the fourth requires a paternity proceeding.

If the *Trimble* case had been brought in Oklahoma at the present

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born out of wedlock stands in the same relation to his mother and her kindred, and she and her kindred to the child, as if that child had been born in wedlock. For like purposes, every such child stands in identical relation to his father and his kindred, and the latter and his kindred to the child, whenever: (a) the father, in writing, signed in the presence of a competent witness acknowledges himself to be the father of the child, (b) the father and mother intermarried subsequent to the child's birth, and the father, after such marriage, acknowledged the child as his own or adopted him into his family, (c) the father publicly acknowledged such child as his own, receiving it as such, with the consent of his wife, if he is married, into his family and otherwise treating it as if it were a child born in wedlock, or (d) the father was judicially determined to be such in a paternity proceeding before a court of competent jurisdiction.

For all purposes, the issue of all marriages null in law, or dissolved by divorce, are deemed to have been born in wedlock.

Act of May 6, 1977, 1977 OKLA. SESS. LAWS ch. 36, § 1 (codified at OKLA. STAT. tit. 84, § 215 (Supp. 1977)).

33. The actual intent of the legislature is unclear. *See* Aldridge, *Illegitimacy and Legitimation in Oklahoma*, in CHILDREN AND THE LAW 142 (1976).

34. Due to the ambiguous language, *see* note 31, *supra* and accompanying text, there is a real question as to whether the legislature intended the statute to cover all children or only those after July 1, 1974.

35. OKLA. STAT. tit. 84, § 215 (Supp. 1977) contains no reference to the legitimation proclamation announced in OKLA. STAT. tit. 10, § 1.2 (Supp. 1977). Without this specific cross reference, the courts may be forced to deal with it separately.

36. A natural father legitimizes by the following; 1) written acknowledgment; 2) intermarriage of parents and subsequent acknowledgment; 3) public acknowledgment plus taking the child into his family; 4) loss in a paternity proceeding. OKLA. STAT. tit. 84, § 215 (Supp. 1977). See note 32, *supra* for the full text of the statute.

time, the plaintiff would have prevailed because the natural father had been determined through a paternity proceeding.[37] However, this does not mean the Oklahoma statute is immune from a successful equal protection challenge. A significant loophole lies in the possibility that a paternity proceeding would not be held before the death of the natural father.[38] If this situation arose, the illegitimate child would be unable to gain the same status as a legitimate child.[39] If *Trimble* is construed liberally, Oklahoma may not pass the exacting standard of the present Supreme Court.

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37. *See* note 16, *supra* and accompanying text.

38. In Oklahoma, a paternity action cannot be maintained after the death of the alleged father. Pryor v. Jump, 193 Okla. 560, 83 P.2d 828 (1938).

39. The same problem confronts the Uniform Probate Code even though it allows some paternity actions after death. *See* notes 27 and 28, *supra* and accompanying text. The question becomes how far will the states have to extend their laws dealing with intestate succession. Trimble v. Gordon, 97 S. Ct. 1459 (1977), does not reveal if discrimination between different classes of individual children is constitutional.