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UNCONSTITUTIONALITY OF DISCRIMINATION AGAINST ILLEGITIMATES
IN THE AREA OF PARENTAL SUPPORT

R—— v. R——, 431 S.W.2d 152 (Mo. 1968)

An illegitimate minor and his mother brought an action for declaration of parenthood and to compel the alleged father to contribute toward the support of the child.¹ The defendant father moved to dismiss, and this motion was sustained by the trial court. Missouri courts had consistently held that, absent any statute, the common law imposed upon the father no obligation for support of his illegitimate child.² On appeal, the Supreme Court of Missouri held that state action which discriminates between legitimate and illegitimate children in determining the right of a child to compel support from his father is in violation of the Equal Protection Clause of the Fourteenth Amendment.³ The Missouri Court found that this holding was compelled by two recent United States Supreme Court cases.

These two cases concerned a Louisiana statute which limited recovery in wrongful death actions to legitimate or adopted relatives of the deceased.⁴ In *Levy v. Louisiana*,⁵ an action on behalf of minor

1. *R—— v. R——*, 431 S.W.2d 152, 153 (Mo. 1968).

2. *R—— v. R——*, 432 S.W.2d 152 (Mo. 1968); *Heembrock v. Stevenson*, 387 S.W.2d 263 (Mo. 1965); *Easley v. Gordon*, 51 Mo. App. 637 (1892). A Missouri statute made it unlawful to neglect or abandon one's child in or out of wedlock; Mo. REV. STAT. § 559.350 (1959). This provision was repealed in 1965 but was replaced by a statute containing a similar provision; Mo. REV. STAT. § 559.353 (Supp. 1968). Prior to the repeal of the first statute, however, the courts refused to consider the criminal statute as providing a basis for the duty of support. See *State v. White*, 363 Mo. 83, 248 S.W.2d 841 (1952) (dictum); *James—— v. Hutton*, 373 S.W.2d 167, 168 (Mo. Ct. App. 1963). See generally *Christy v. Petrus*, 365 Mo. 1187, 295 S.W.2d 122 (1956).

It is worth noting that only three states, Missouri, Idaho, and Texas, do not give illegitimate children a statutory right of support from their fathers. Note, *Liability of Possible Fathers: A Support Remedy for Illegitimate Children*, 18 STAN. L. REV. 859, 860 (1966); Comment, 30 Mo. L. REV. 154, 155 (1965).

3. *R—— v. R——*, 431 S.W.2d 152, 154 (Mo. 1968).

The principles applied by the United States Supreme Court would render invalid state action which produces discrimination between legitimate and illegitimate children insofar as the right of the child to compel support by his father is concerned. Under the guise of discouraging illegitimacy, states no longer cast the burden upon the innocent child.

Id.

4. LA. CIV. CODE ANN. art. 2315 (Supp. 1967). The statute has been construed as not allowing recovery by illegitimate relatives. *Finn v. Employers' Liab. Assurance Corp.*, 141 So. 2d 852, 878-79 (La. Ct. App. 1962).

illegitimate children was brought to recover for the wrongful death of their mother. In *Glon v. American Guarantee & Liability Insurance Co.*,⁶ the mother sought to recover for the wrongful death of her illegitimate son. In each case, the lower court found recovery was barred by the statute. The United States Supreme Court reversed these decisions on the ground that the Equal Protection Clause forbids discrimination against illegitimates in wrongful death actions.⁷

The Missouri case appears to be one of the first state court decisions based on *Levy* and *Glon*. Two major questions are raised by these three decisions. The first, concerning the validity of the Missouri decision, is analytical: does the holding in this case inevitably follow from the Supreme Court's decisions, or is there a relevant distinction to be made between a common law support action and a statutory wrongful death action which would limit to the latter the equal protection prohibition against discrimination between legitimates and illegitimates? The second question is more speculative and concerns the implications of these decisions. There are other areas of the law in which illegitimates are treated differently than legitimate offspring.⁸ Do the *Levy* and *Glon* decisions make inevitable the end of all discrimination against illegitimates, or are there some circumstances under which discrimination on the basis of legitimacy will not be held invalid under the Equal Protection Clause?

5. 391 U.S. 68 (1968).

6. 391 U.S. 73 (1968).

7. In the *Levy* case, Mr. Justice Douglas said that illegitimates are clearly persons within the meaning of the Equal Protection Clause of the Fourteenth Amendment. He also stated: While a state has broad power when it comes to making classifications . . . , it may not draw a line which constitutes an invidious discrimination against a particular class. . . . Though the test has been variously stated, the end result is whether the line drawn is a rational one. . . . Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother.

Levy v. Louisiana, 391 U.S. 68, 71-72 (1968).

In the *Glon* case, Mr. Justice Douglas, again speaking for the majority, said:

Yet we see no possible rational basis . . . for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. . . . To say that the test of equal protection should be the "legal" rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such "legal" lines as it chooses.

Glon v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 75-76 (1968).

8. For a brief description of the plight of the illegitimate, both in historical and contemporary terms, see Note, *Rights of Illegitimates under Federal Statutes*, 76 HARV. L. REV. 337, 337-38 (1962). The old common law view that illegitimate children deserved no recognition at all has been under attack. Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829, 842-45 (1966).

I. THE ANALYTICAL PROBLEM

The Supreme Court has often stated that the Equal Protection Clause is not a bar to classifications of different groups;⁹ classifications which do not constitute invidious discrimination are permissible.¹⁰ In order to make a determination of invidiousness, it is essential that the court look to the purpose of the law.¹¹ If the discrimination bears some rational relation to the purpose of the law, and if that purpose is the accomplishment of a proper legislative policy, the Court will usually allow it.¹² Mr. Justice Douglas restated this test in *Levy v. Louisiana*:

While a State has broad power when it comes to making classifications . . . , it may not draw a line which constitutes an invidious discrimination against a particular class. . . . Though the test has been variously stated, the end result is whether the line drawn is a rational one.¹³

Thus, in *Levy*, the Court struck down the discrimination between legitimates and illegitimates because it could find no rational relation between the exclusion of illegitimate children and remuneration for the wrongful death of the mother.¹⁴

In the child support situation, the central question is, once again, whether the discrimination between legitimates and illegitimates bears some rational relationship to the purpose of the support action.¹⁵ In Missouri the distinction between legitimates and illegitimates in the area of rights and duties of child support stems not from statutory mandate, but is a product of the common law.¹⁶ The purposes for which illegitimate children are permitted to maintain a support action against their parents are two-fold: to provide some means by which

9. *Ferguson v. Skrupa*, 372 U.S. 726, 732 (1963); *Metropolitan Cas. Ins. Co. v. Brownell*, 294 U.S. 580, 583 (1935); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-9 (1911); *Tussman & tenBroek, Equal Protection of the Laws*, 37 CAL. L. REV. 341, 343 (1949).

10. *Ferguson v. Skrupa*, 372 U.S. 726 (1962).

11. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 484-85 (1967); *Tussman & tenBroek, Equal Protection of the Laws*, 37 CAL. L. REV. 341, 366 (1949).

12. *Metropolitan Cas. Ins. Co. v. Brownell*, 294 U.S. 580, 583 (1935); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-9 (1911); Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 484-85 (1967).

13. *Levy v. Louisiana*, 391 U.S. 68, 71 (1968).

14. *Id.*

15. Discovering purposes of laws or procedures is not always a simple or clear process. For an article that has explored some of the complexities in this determination, see *Tussman and tenBroek, Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

16. See note 2 *supra*.

the child's welfare can be protected,¹⁷ and to do so at a minimal cost to the state.¹⁸ In light of these purposes, there appears to be no rational basis for the distinction between legitimates and illegitimates made by the prior Missouri case law.

The main rationale for not allowing an illegitimate to compel support from his father is historical. Although at common law the illegitimate was not recognized at all, Missouri common law places the duty of support on the mother. In addition, the courts now protect the illegitimate's rights where he has been given some specific right by legislative enactment.¹⁹ It would seem that discrimination based solely on history has no relevance to, and conflicts with, the purposes of support—providing for the welfare of individuals in a way least burdensome to the state.²⁰ Where it is legally possible to compel support for an illegitimate child from the father as well as the mother, there are two private sources of support for the child, and the likelihood of the state having to support the child out of public funds will diminish. It would thus seem that the application by the Missouri Supreme Court of the equal protection standard enunciated in *Levy*²¹ and *Glon*²² was proper.

II. THE SPECULATIVE QUESTION

There remains to consider the extent to which the standards set and holdings enunciated in these cases will be extended. The question at issue is whether there are any areas in which discrimination between legitimates and illegitimates is not devoid of rational purpose and would not be prohibited by the Equal Protection Clause. The bulk of

17. Note, *Rights of Illegitimates under Federal Statutes*, 76 HARV. L. REV. 337, 353 (1962).

18. *Id.* at 352.

19. *State ex rel. Canfield v. Porterfield*, 292 S.W. 85 (Mo. Ct. App. 1927); *Easley v. Gordon*, 51 Mo. App. 637 (1892). The Missouri rationale is not at all uncommon. Many other states look to the historical discrimination as the basis for distinguishing between rights of legitimates and illegitimates. *E.g.*, *State v. Miller*, 3 Del. 518, 52 A. 262 (1902); *State v. Byron*, 79 N.H. 39, 104 A. 401 (1918); *People v. Fitzgerald*, 167 App. Div. 85, 152 N.Y.S. 641 (1915); *Creisar v. State*, 97 Ohio St. 16, 119 N.E. 128 (1917).

20. One author makes the point that an illegitimate child, in terms of support, is situated similarly to a father's children by a previous marriage and the law compels support in such a case. *Krause, Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 500 (1967).

21. 391 U.S. 68 (1968).

22. 391 U.S. 73 (1968).

discrimination against illegitimates occurs in two areas; welfare law and inheritance.²³ Therefore the possible impact of these decisions in these two areas will be considered.

A. *Welfare*

In talking about the applicability of these decisions in the area of welfare laws, it might first be helpful to delimit the category of such laws. One author lists the following laws under the category of welfare: statutes enacted for the protection of public health, liquor control legislation, statutes enacted for the public safety, death statutes, workmen's compensation statutes, laws regulating employer-employee contracts, legislation providing for the care of the poor, statutes granting pensions to public officers, old age pensions and social security legislation, curative acts, conservation laws, statutes regulating public elections, and statutes pertaining to national defense.²⁴ Both wrongful death and support²⁵ are within this category.

There are certain unifying purposes to these welfare actions and laws. They were designed to deal with pressing social problems which were not being dealt with adequately without government intervention.²⁶ Certain of these actions, such as support, wrongful death and workmen's compensation, were designed to care for the individual welfare in a relatively inexpensive manner in order to prevent greater difficulties for the society as a whole.²⁷ These purposes are virtually the same as the purposes of the laws or procedures discussed earlier in relation to the United States and Missouri Supreme Court decisions. The implication is clear: in the area of welfare laws there seems to be no reason for limiting remedies to legitimate offspring only; in fact this historical discrimination defeats the purposes for which the laws were passed.²⁸ At least in the area of welfare laws, discrimination be-

23. Another author does not make these same groupings but rather lists five categories: support; inheritance; custody, visitation and adoption; father's name; state and federal welfare laws. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 478-82 (1967).

24. 3 J. SUTHERLAND, STATUTORY CONSTRUCTION 396-97 (3d ed. 1943).

25. One case specifically refers to support as an area of welfare legislation. *Armijo v. Wesselius*, 73 Wash. 2d 721, 440 P.2d 471 (1968).

26. 3 J. SUTHERLAND, STATUTORY CONSTRUCTION 396 (3d ed. 1943).

27. Note, *Rights of Illegitimates under Federal Statutes*, 76 HARV. L. REV. 337, 338, 352-53 (1962).

28. See *Armijo v. Wesselius*, 73 Wash. 2d 721, 440 P. 2d 471, 474 (1968).

Justice Douglas in *Levy and Glona* disposes of one of the traditional reasons for discriminating against illegitimates, that such discrimination discourages illegitimacy. *Levy v. Louisiana*, 391 U.S. 68 (1968); *Glona v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968).

tween legitimate and illegitimate offspring bears no rational relation to the purposes of such laws. It follows that such discrimination is prohibited by the Equal Protection Clause.

Significant strides have already been taken in eliminating discrimination in this area.²⁹ The Missouri wrongful death statute³⁰ seems to allow for recovery by an illegitimate offspring. The Missouri Workmen's Compensation Act clearly allows for recovery by illegitimate as well as legitimate offspring.³¹ Discrimination between legitimates and illegitimates often arises from state court interpretations of "child." The interpretation of state statutes is crucial because of the way in which federal courts have dealt with federal statutes in which the word "child" has been used. Generally they have followed the definition of the state in which the case was presented when no federal guidelines were evident.³²

B. *Inheritance*

The other major areas of discrimination against illegitimates is inheritance³³—in cases of intestacy and construction of wills. In terms of the Equal Protection Clause, the important question is whether discrimination against illegitimates bears any relation to the purposes involved in the distribution of a decedent's property.

If one assumes that the basic guideline of distribution of property is the dead person's probable intent, it is not unreasonable to suppose that he would prefer that his property pass solely to his legitimate relations.³⁴ The laws of intestacy as well as judicial constructions of the

29. 3 J. SUTHERLAND, *STATUTORY CONSTRUCTION* 343 (3d ed. 1943).

30. MO. REV. STAT. § 537.080 (Supp. 1968). Not all states are free of discrimination in the area of wrongful death. *E.g.*, *L. T. Dickason Coal Co. v. Liddil*, 49 Ind. App. 40, 94 N.E. 411 (1911); *Andrzejewski v. Northwestern Fuel Co.*, 158 Wis. 170, 148 N.W. 37 (1914).

31. MO. REV. STAT. § 287.240 4(b) (1949). Some states follow the Missouri procedure. Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829, 856-57 (1966). Others do not. *E.g.*, *Bell v. Terry & Trench Co.*, 177 App. Div. 123, 162 N.Y.S. 733 (1917).

32. Comment, 67 COLUM. L. REV. 984, 985 (1967). One article contains an extended discussion of this problem with regard to particular federal statutes. Note, *Rights of Illegitimates under Federal Statutes*, 76 HARV. L. REV. 337 (1962).

33. The common law rule with regard to inheritance by illegitimates is the same as was mentioned in connection with the welfare discussion. *E.g.*, *Bent's Adm'r v. St. Vrain*, 30 Mo. 268 (1860); *Rhode Island Hosp. Trust Co. v. Hodgkin*, 48 R.I. 459, 137 A. 381 (1927); Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829, 854-56 (1966).

34. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 501-502 (1967).

word "children" are based on this assumption.³⁵ Because there is a rational relationship between the purpose of the statute—i.e., a not irrational way of justifying discrimination against illegitimates—such discrimination could probably be allowed even in the face of a challenge based on the Equal Protection Clause.³⁶

Even if it is admitted that there are other considerations in the distribution of property besides the intent of the deceased, discrimination against illegitimates might still stand in the face of an equal protection challenge. Legislatures draft intestate succession laws with a view toward the support of the deceased's dependents, as well as to give effect to his probable intent. Thus, such laws may be said to have certain welfare aspects. If it could be assumed that the sole purpose for laws of intestacy were to insure the support of the intestate's relatives, there would be no ground for distinguishing between welfare and inheritance statutes; the proscription of the Fourteenth Amendment would apply to both. This assumption would be difficult to justify, however, and since only discrimination devoid of a rational basis is prohibited, the "intent of the deceased" aspect of intestacy laws almost certainly provides a sufficient basis to sustain the discrimination.

To say that discrimination on the basis of legitimacy in the judicial construction of wills and the laws of intestacy does not offend the Equal Protection Clause as a general matter is not to condone the practice in all cases, however. Assuming that the probable intent of the deceased should be an important factor in such constructions, the disturbing fact is that the supposed probable intent—in fact, an educated guess by courts and legislatures—may not correspond with actual intent. Yet this assumption of probable intent to disinherit illegitimates is given much weight in the distribution procedure.

The above considerations suggest that the foundation of discrimination in this area is somewhat shaky. A new approach with a double aspect would avoid needless and unfounded discrimination: (1) when it is possible by any reliable means to find the actual intent of the dead person, that intent should be given effect; (2) when it is not possible to ascertain such intent, the principle that devolution of the property is to be determined by some fictitious intent imputed to the decedent

35. See *Tuttle v. Woolworth*, 74 N.J. Eq. 310, 77 A. 684 (1908); Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 502 (1967).

36. One state seems almost to have foreseen this possibility. A Maryland statute states that illegitimates and legitimates should stand on equal footing in all areas except in "matters of inheritance, descent or distribution of real and personal property. . . ." MD. ANN. CODE art. I § 16 (1957).

should be abandoned. In the latter event, other policies would be consulted to decide who should take. It does not seem necessary that a judicially constructed "dead hand of the past" should exert such sway over property distribution.

The law in the area of inheritance has not been static since common law days.³⁷ Two states have completely abolished distinctions between legitimates and illegitimates.³⁸ Missouri³⁹ and several other states⁴⁰ have allowed illegitimates to inherit through, as well as from, the mother. In spite of these advances, however, it would seem that the illegitimate's rights to inherit property are far from being equal to those of legitimate offspring in most jurisdictions. Further, it appears that illegitimates must await legislative change to be placed on complete parity with their legitimate counterparts.

CONCLUSION

The *Levy* and *Glon* cases gave notice that the Supreme Court was willing to place discrimination on the basis of legitimacy under scrutiny. The principles enunciated in those cases create doubt in assessing the validity of this practice in other areas of the law. *R. . . . v. R. . . .* may be a harbinger of a new wave of litigation which will clarify these questions. The area of welfare laws appears especially susceptible to attack by illegitimates. However, in the case of inheritance, where discrimination is arguably related to the purpose of the statutes and instruments construed, equal protection arguments may be of no avail. In the absence of legislative reforms, it may be hoped that courts will begin to apply more liberal rules of construction which correspond more closely with the spirit of the Fourteenth Amendment.

37. Two articles discuss in considerable detail the extent to which the different states allow illegitimates to inherit. Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 *TEX. L. REV.* 829, 854-56 (1966); Note, *Illegitimacy*, 26 *BROOKLYN L. REV.* 45, 67 (1959).

38. *ARIZ. REV. STAT. ANN.* § 14-206(A) (1956); *ORE. REV. STAT.* §§109.060, 111.231 (1957).

39. *MO. REV. STAT.* § 474.060 (1959). Cases have followed this section or its earlier equivalents. This section is said to give illegitimates complete inheritable blood so far as the mother is concerned. *Martin v. Claxton*, 308 Mo. 314, 274 S.W. 77 (1925); *Hahn v. Hammerstein*, 272 Mo. 248, 198 S.W. 833 (1917); *Moore v. Moore*, 169 Mo. 432, 69 S.W. 278 (1902); *Dyer v. Brannock*, 66 Mo. 391 (1877); *Bent's Adm'r v. St. Vrain*, 30 Mo. 268 (1860); *Baker v. Stucker*, 213 Mo. App. 245, 248 S.W. 1003 (1923).

40. *E.g.*, *Smith v. Garber*, 286 Ill. 67, 121 N.E. 173 (1918) (illegitimate children could inherit if such was the intent of the testator); *Rhode Island Hosp. Trust Co. v. Hodgkin*, 48 R.I. 459, 137 A. 381 (1927); *Wasmund v. Wasmund*, 90 Wash. 274, 156 P. 3 (1916).

