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CONSTITUTIONAL LAW—EQUAL PROTECTION—BASTARDS—ILLEGITIMATE CHILDREN HAVE A RIGHT EQUAL WITH THAT OF LEGITIMATE CHILDREN TO REQUIRE SUPPORT BY THEIR FATHER. *E— M— R—* and *G— P— R— v. G— E— R—*, 431 S.W.2d 152 (Sup. Ct. of Mo., 1968).

This was an action for declaration of parenthood and to compel the alleged father of an illegitimate child to contribute to the child's support. Although the statutes of Missouri provided for the support of legitimate children by their father and for the enforcement of that duty by criminal action, there was no statutory or common law duty imposed on the father to support an unrecognized illegitimate child. The appellant attacked the rule of law on the grounds that it was in violation of the equal protection clause of the United States Constitution and a similarly worded provision in the Missouri Constitution. The trial court dismissed the action on the motion of the defendant that the plaintiff failed to state a cause of action. Held—*Reversed and remanded*. Illegitimate children have a right equal with that of legitimate children to require support by their fathers and to deny the former such rights given to the latter is a denial of equal protection of the law as guaranteed by the Federal and State Constitutions.

Under the common law a father had no duty to support his illegitimate child.¹ This child was incapable of inheriting property or transmitting property except to or from his own children.² Statutory enactments in some states have given illegitimate children the right to receive support from their father,³ whereas Kansas has rejected the common law rule and enforced the right of the illegitimate child to receive support from his father without statutory enactment.⁴

In *Levy v. Louisiana*,⁵ the Supreme Court of the United States held that the discrimination between illegitimate children and legitimate children in allowing recovery for the wrongful death of their mother created an "invidious discrimination" and was a denial of equal protection under the 14th amendment. In the companion case of *Glonn v. American Guaranty and Liability Insurance Company*,⁶ the Supreme Court held that to deny recovery by the mother for the wrongful death

¹ *Beaver v. State*, 96 Tex. Crim. 179, 256 S.W. 929 (1923); *State ex rel. Canfield v. Porterfield*, 222 Mo. App. 553, 292 S.W. 85, 91 (1927); 30 A.L.R. 1069 (1924)—"Non-statutory duty of father to support illegitimate child"; Madden, *Persons and Domestic Relations* § 105, p. 348 (1931).

² *Pettus v. Dawson*, 82 Tex. 18, 17 S.W. 714 (1891); *James v. James*, 253 S.W. 1112 (Tex. Civ. App.—San Antonio 1923, writ ref'd).

³ Only two states, Texas and Idaho, provide no remedy, civil or criminal, to enforce the father to support his illegitimate child. Another provides for support only if the father has voluntarily recognized the child—VA. CODE ANN. § 20-61.1 (1958).

⁴ *Doughty v. Engler*, 112 Kan. 583, 211 P. 619 (1923).

⁵ 391 U.S. 68, 88 S. Ct. 1509, 20 L. Ed. 2d 436 (1968).

⁶ 391 U.S. 73, 88 S. Ct. 1515, 20 L. Ed. 2d 441 (1968).

of her illegitimate child was likewise in violation of the equal protection clause of the 14th amendment.⁷

Under the common law, the illegitimate child was *nullius filius*, incapable of inheritance⁸ or of other rights which legitimate children enjoyed.⁹ There was no action at common law to establish paternity, thus there was no method to determine who the father of the child might be, except by the father's own admission.¹⁰ Although the early common law did not recognize a right or obligation of support for the illegitimate child in either the mother or the father, the common law as applied in the United States evolved the doctrine that the mother had the right to custody of the illegitimate child,¹¹ and was held to a moral duty to support the child.¹² Because of the recognition of this mother-child relationship by the courts, statutes were enacted allowing the mother to inherit from her illegitimate child.¹³ At common law the father had no custodial rights or support obligations,¹⁴ while the father who had custody of the child gained certain rights and incurred certain obligations.¹⁵ While living with the father, the illegitimate child gained certain rights which the illegitimate child not living with the father did not enjoy.¹⁶

Before *Levy* and *Glon*a many states, which had originally adopted the common law treatment of the illegitimate child, had abrogated this harsh treatment by statutory enactment.¹⁷ Most states, however, continued to deny complete equality to the illegitimate child.¹⁸ Since *Levy*

⁷ U.S. CONST. amend. XIV, § 1. For a good discussion of what constitutes equal protection, see *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911).

⁸ *Berry v. Powell*, 105 S.W. 345 (Tex. Civ. App.—1907, no writ); *James v. James*, 253 S.W. 1112 (Tex. Civ. App.—San Antonio 1923, writ ref'd); *Savage v. Blanks*, 117 Ga. App. 316, 160 S.E.2d 461 (1968); *Hayworth v. Williams*, 102 Tex. 308, 116 S.W. 43, 45 (1909), no right of inheritance under common law from father.

⁹ *Pfeifer v. Wright*, 41 F.2d 464 (10th Cir. 1930), *cert. denied*, 282 U.S. 896, 51 S. Ct. 181, 75 L. Ed. 789 (1931). Right to the use of the father's name was denied the illegitimate. *Wasmund v. Wasmund*, 90 Wash. 274, 156 P. 3, 4 (1916).

¹⁰ *Pfeifer v. Wright*, 41 F.2d 464 (10th Cir. 1930), *cert. denied*, 282 U.S. 896, 51 S. Ct. 181, 75 L. Ed. 789 (1931); *Allison v. Bryan*, 21 Okla. 557, 97 P. 282, 284 (1908).

¹¹ *Blue v. Holman*, 245 S.W. 722 (Tex. Civ. App.—Texarkana 1922, writ dismissed); *Binion v. Mathis*, 171 S.W.2d 512 (Tex. Civ. App.—Amarillo 1923, no writ); 98 A.L.R.2d 417 (1964)—“Right of mother to custody of illegitimate child.”

¹² *Friesner v. Symonds*, 46 N.J. Eq. 521, 20 A. 257 (1890); *Easley v. Gordon*, 51 Mo. App. 637 (1892); *State v. White*, 363 Mo. 83, 248 S.W.2d 841, 843 (1952).

¹³ KY. REV. STAT. ANN. § 391.090 (1963); MO. REV. STAT. ANN. § 474.060 (1955); TEX. PROB. CODE ANN. § 42 (1956).

¹⁴ *Timmons v. Lacy*, 30 Tex. 116 (1867); *Lane v. Phillips*, 69 Tex. 240, 6 S.W. 610 (1887); *Home of Holy Infancy v. Kaska*, 397 S.W.2d 208, 210 (Tex. Sup. 1965).

¹⁵ *Lane v. Phillips*, 69 Tex. 240, 6 S.W. 610 (1887), homestead rights; *State v. White*, 363 Mo. 83, 248 S.W.2d 841 (1952).

¹⁶ *Maxey v. Franklin Life Ins. Co.*, 164 S.W. 438, 439 (Tex. Civ. App.—Fort Worth 1914, writ ref'd).

¹⁷ *Breslin, Liability of Possible Fathers: A Support Remedy for Illegitimate Children*, 18 STAN. L. REV. 859, 860 (1960).

¹⁸ *Armijo v. Wesselius*, 440 P.2d 471 (1968)—holding use of word “child” in wrongful death act included illegitimate children as well as legitimate children basing their decision on statutory interpretation not on equal protection (rendered before *Levy* and *Glon*a); *Krause, Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967).

and *Glon*, the courts of the various states have taken the position that legitimate children and illegitimate children should have equal rights¹⁹ and have interpreted their statutes to reflect this attitude.

Federal statutes, such as the Social Security Act,²⁰ the Veteran's Administration Act,²¹ and certain Compensation Acts²² have recognized the right of the illegitimate child to benefits if paternity has been established by voluntary action on the part of the alleged father or by court action.²³ A recent decision interprets this federal tenor.²⁴

The Texas Constitution prohibits any special or general law of legitimation.²⁵ The application and interpretation of the Probate Code provisions have denied the illegitimate child inheritance rights afforded to the legitimate child.²⁶ The definition of "child" as used in the Probate Code means legitimate child,²⁷ unless the procedure provided in the Probate Code for the legitimation of the illegitimate child is followed.²⁸

The illegitimate child in Texas has been denied equal rights under the Texas Workmen's Compensation Act,²⁹ under the Wrongful Death Act,³⁰ under the Probate statutes determining intestate succession,³¹ and under the penal statutes providing for the enforcement of a child's support by his father.³² The basis of this denial is that "child" as used in the legislative enactments of this State is descriptive of a legitimate child and is not inclusive of those children born out of wedlock who have not been subsequently legitimized.

¹⁹ *In re Estate of Jensen*, 162 N.W.2d 861 (1968)—right of illegitimate to inherit from the legitimate children of a common mother.

²⁰ 42 U.S.C. § 416(h)(3) (1965).

²¹ 38 U.S.C. § 101 (1959).

²² Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 902(14) (1927).

²³ For the rights of illegitimate children under Federal statutes, *See* 76 HARV. L. REV. 337 (1962).

²⁴ *Haley v. Metropolitan Life Ins. Co.*, 434 S.W.2d 7 (Mo. Civ. App. 1968)—dealing with the Federal Employees Group Life Ins. Act.

²⁵ TEX. CONST. art. III, § 56.

²⁶ TEX. PROB. CODE ANN. § 42 (1956). Other states also interpret intestate distribution statutes not to include illegitimate children unless the statutes specifically provide that the word "child" is so inclusive. *See* 10 AM. JUR. 2d *Bastards* § 149 ftnt. 19, at p. 950.

²⁷ TEX. PROB. CODE ANN. § 3(b) (1956).

²⁸ TEX. PROB. CODE ANN. § 42 (1956).

. . . Where a man, having by a woman a child or children shall afterwards intermarry with such woman, such child or children shall thereby be legitimated and made capable of inheriting his estate. . . .

²⁹ TEX. REV. CIV. STAT. ANN. art. 8306 § a (1923); *Texas Indemnity Ins. Co. v. Hubbard*, 138 S.W.2d 626 (Tex. Civ. App.—Waco 1940, writ *dism'd jdgmt cor.*); *Hargrove v. Lloyd's Casualty Co. of New York*, 66 S.W.2d 466 (Tex. Civ. App.—Galveston 1933, writ *ref'd*); *Commercial Ins. Co. v. Austin*, 128 S.W.2d 836 (Tex. Civ. App.—Beaumont 1939, writ *dism'd jdgmt cor.*).

³⁰ *Jones v. S.S. Jesse Lykes*, 253 F. Supp. 368 (D.C. Texas 1966); TEX. REV. CIV. STAT. ANN. arts. 4671, 4675.

³¹ TEX. PROB. CODE ANN. § 42 (1956) does not abrogate the common law rule as to the father; *Berry v. Powell*, 105 S.W. 345 (Tex. Civ. App.—1907, no writ); *Lee v. Bolden*, 85 S.W. 1027 (Tex. Civ. App.—1905, no writ).

³² TEX. PENAL CODE ANN. arts. 602, 604; *Beaver v. State*, 96 Tex. Crim. 179, 256 S.W. 929 (1923).

The Supreme Court of Missouri in the instant case held that in light of *Levy and Glona*, the court must interpret their statutes relating to obligations and right of parents as applicable to both the legitimate child and the illegitimate child.³³

As stated previously, the Texas Constitution contains a provision which states that no general or special law which deals with legitimation shall be passed by the Legislature.³⁴ This Constitutional provision is to prevent a "blanket" law which would effectuate mass legitimation of all illegitimate children. To enact such a law would be to deny one class certain guaranteed rights while seeking to secure equal protection rights for the child. By the failure to provide a judicial proceeding for the establishment of paternity, the alleged father would be denied due process under the 14th amendment.

The provision of the Probate Code³⁵ which denies the illegitimate child the right to inherit from his alleged father is not a denial of equal protection of the laws. To allow an illegitimate child to inherit from his alleged father would be to establish paternity without a judicial proceeding or voluntary declaration on the part of the father. This would be a denial of the father's due process rights under the 14th amendment. If paternity is established by a judicial proceeding or by voluntary declaration, it would be a denial of equal protection of the law if the present provisions of the Probate Code, denying the illegitimate child the right to inherit from his father, continued to exist.

Precluding the illegitimate child from recovery under the Workmen's Compensation Act and the Wrongful Death Act is not a denial of equal protection of the law. Under the common law application in Texas, the illegitimate child is recognized as the child of his mother. Both of the aforementioned acts have allowed the illegitimate child to recover for the death or injury of his mother.³⁶ If Texas provided for a method to adjudicate paternity, and the paternity of the father had been established, to continue to deny the illegitimate child the right of recovery would be in derogation of the equal protection clause.

The legitimate child is afforded a judicial remedy to enforce support upon the divorce of his parents³⁷ or upon abandonment of the child by the father.³⁸ To deny the illegitimate child the right to establish who his father is, is to deny him this right of support. Such denial is repugnant to the equal protection clause of the 14th amendment.

The Texas Constitution and the Texas Statutes nowhere provide

³³ MO. REV. STAT. ANN. § 452.150, and § 452.160 (1959); MO. REV. STAT. ANN. § 559.353 (1967).

³⁴ TEX. CONST. art. III, § 56.

³⁵ TEX. PROB. CODE ANN. § 42 (1956).

³⁶ H. & S.A. Ry. Co. v. Walker, 106 S.W. 705 (Tex. Civ. App.—1907 writ ref'd); American General Ins. Co. v. Alexander, 216 S.W.2d 997 (Tex. Civ. App.—Beaumont 1958, writ ref'd).

³⁷ TEX. REV. CIV. STAT. ANN. art. 4639b.

³⁸ TEX. PENAL CODE ANN. arts. 602, 604.