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The Rights of an Illegitimate Child Post - Gomez v. Perez: A Legitimate Situation.

Deborah J. Venezia

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THE RIGHTS OF AN ILLEGITIMATE CHILD POST—*Gomez v. Perez*: A LEGITIMATE SITUATION?

DEBORAH J. VENEZIA

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Throughout Texas history the legal status of illegitimacy has prevented an illegitimate child from enjoying the right of parental support guaranteed to a legitimate child.¹ The United States Supreme Court's decision in *Gomez v. Perez*² rendered unconstitutional the denial of an illegitimate child's right to parental support on the basis of his illegitimacy.³ In the wake of *Gomez* the Texas Legislature enacted section 13.01 of the Texas Family Code.⁴ Although sections 13.01 through 13.09 of the Texas Family

1. See *Lane v. Philips*, 69 Tex. 240, 242, 6 S.W. 610, 611 (1887); Texas Dep't of Human Resources v. Hernandez, 595 S.W.2d 189, 191 (Tex. Civ. App.—Corpus Christi 1980, no writ); Solender, *Family Law: Parent and Child*, 33 Sw. L.J. 155, 161 (1979).

2. 409 U.S. 535 (1973).

3. See *id.* at 538.

4. 1975 Tex. Gen. Laws, ch. 476, § 24, at 1261 (codified at TEX. FAM. CODE ANN. § 13.01 (Vernon Supp. 1980)). Section 13.01 provides that “[a] suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred.” TEX. FAM. CODE ANN. § 13.01 (Vernon Supp. 1980); see Texas Dep't of Human Resources v. Hernandez, 595 S.W.2d 186, 191 (Tex. Civ. App.—Corpus Christi 1980, no writ); Solender, *Family Law: Parent and Child*, 33 Sw. L.J. 155, 161 (1979). The Texas Legislature failed to adopt a comprehensive program that fully outlined the legal aspects of illegitimate children. See Smith, *Title 2. Parent and Child*, 5 TEX. TECH L. REV. 389, 418

Code provide the procedure for establishing paternity,⁵ the rights an illegitimate child gains by proving paternity remain unclear.⁶ This comment will discuss the uncertainties arising from section 13.01 and propose a clearer legislative solution to clarify the rights afforded an illegitimate child who establishes paternity.

I. BACKGROUND

Historically the legal status of the illegitimate child has depended upon the legal system applicable where he or she lived.⁷ Under English common law the obligation to support a child applied only to the parents of a legitimate or an adopted child.⁸ Furthermore, common law precluded an illegitimate child from inheriting through intestate succession.⁹ Compounding the illegitimate child's misfortune, common law failed to provide the illegitimate child with a procedure to establish paternity and concomitantly his or her legitimacy.¹⁰

(1974). Even earlier, in 1969, proposed legislation was rejected by the legislature which would have established procedures for the determination of paternity and provision of support for illegitimate children. *See* L.G. v. F.O.P., 466 S.W.2d 41, 41 n.1 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.).

5. *See* TEX. FAM. CODE ANN. §§ 13.01-.09 (Vernon Supp. 1980).

6. *Cf.* Henson v. Brown, 524 S.W.2d 412, 413-14 (Tex. Civ. App.—Austin 1975, no writ) (extends any protection accorded to legitimate children under section 12.04 of Family Code to illegitimate children). *But cf.* *In re R.V.M.*, 530 S.W.2d 921, 922-23 (Tex. Civ. App.—Waco 1975, no writ) (illegitimate child has right to support).

7. *See* Fritz, *Judging the Status of the Illegitimate Child in Various Western Legal Systems*, 23 *LOY. L. REV.* 1, 2 (1977). Under early Roman law an illegitimate child had no legal relation to either parent. Later this law was changed to allow an illegitimate child to share the same relationship to its mother as that enjoyed by a legitimate child. *See id.* at 6. Since the seventeenth century civil law has allowed the illegitimate child the same rights of support as the legitimate child, except the illegitimate child could exercise the right of support only after establishing a filiation link to the father. *See id.* at 19.

8. *See* State v. Clark, 275 A.2d 137, 143 (N.J. 1971); Baston v. Sears, 239 N.E.2d 62, 63 (Ohio 1968). An illegitimate child under common law had no right to paternal support. *See, e.g.*, Home of the Holy Infancy v. Kaska, 397 S.W.2d 208, 210 (Tex. 1965); Lane v. Philips, 69 Tex. 240, 242, 6 S.W. 610, 611 (1887); Timmins v. Lacy, 30 Tex. 116, 135 (1867).

9. *See* James v. James, 253 S.W. 1112, 1115 (Tex. Civ. App.—San Antonio 1923, writ ref'd); Berry v. Powell, 105 S.W. 345, 346 (Tex. Civ. App. 1907, no writ); Fritz, *Judging the Status of the Illegitimate Child in Various Western Legal Systems*, 23 *LOY. L. REV.* 1, 25 (1977).

10. *See* L.G. v. F.O.P., 466 S.W.2d 41, 41-42 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.); 1 *ST. MARY'S L.J.* 146, 149-50 (1969). Under the common law the illegitimate child was *nullius filius*, the child of no one, and enjoyed no legal relationship to either of his parents. *See* Doughty v. Engler, 211 P. 619, 620 (Kan. 1923); Pettus v. Dawson, 82 Tex. 18, 18, 17 S.W. 714, 714 (1891); 1 S. SCHATKIN, *DISPUTED PATERNITY PROCEEDINGS* 1-25 (rev. ed. 1979); Krause, *Bringing the Bastard Into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 *TEXAS L. REV.* 829, 841 (1966).

Until 1840 Texas was subject to the civil law of Spain and Mexico under which an illegitimate child had the right to inherit, with restrictions, from either the mother or natural father.¹¹ In 1840 Texas adopted the common law of England¹² which precluded an illegitimate child from inheriting.¹³ Subsequently the Congress of the Republic of Texas enacted statutes permitting an illegitimate child to inherit from his mother and his maternal relations.¹⁴ Also enacted in 1840 was a provision for legitimation of an illegitimate child if the natural parents subsequently married.¹⁵ These departures from English common law diminished the harsh result of illegitimacy¹⁶ and were later codified by the Texas Legislature in section 42 of the Texas Probate Code.¹⁷

In 1973 the Supreme Court of the United States in *Gomez* held a state may not discriminate by denying an illegitimate child a right to support solely because of his illegitimate status.¹⁸ In response to *Gomez* the Texas Legislature enacted chapter 13 of the Family Code which provided for voluntary legitimation of an illegitimate child by the father, but failed to provide for an involuntary paternity suit by the illegitimate child against a father.¹⁹ This gap was filled when chapter 13 was amended to provide a statutory action and procedure whereby an illegitimate child could establish paternity.²⁰ Since the enactment of section 13.01 various courts of civil appeals have attempted to interpret the section in light of the right to support created in *Gomez*.²¹ The issues arising from but unanswered

11. *James v. James*, 253 S.W. 1112, 1115 (Tex. Civ. App.—San Antonio 1923, writ ref'd). Intestate succession was restricted to an illegitimate son to the amount of one-sixth of the father's estate. See 1 J. & H. SAYLES, EARLY LAWS OF TEXAS 1731-1845, art. 124, § 4, at 170 (1888). Illegitimate children could inherit from their mother, except in the case of offspring of an incestuous relationship such as children of clergy, friars, or nuns. *Id.*

12. 1840 Tex. Gen. Laws, ch. 2, § 1, at 1, 2 H. GAMMEL, LAWS OF TEXAS 177 (1898).

13. See *Pettus v. Dawson*, 82 Tex. 18, 21, 17 S.W. 714, 715 (1891); *James v. James*, 253 S.W. 1112, 1115 (Tex. Civ. App.—San Antonio 1923, writ ref'd).

14. 1840 Tex. Gen. Laws, ch. 2, § 16, at 135, 2 H. GAMMEL, LAWS OF TEXAS 309 (1898); see *Lee v. Frater*, 185 S.W. 325, 326 (Tex. Civ. App.—Texarkana 1916, no writ).

15. 1840 Tex. Gen. Laws, ch. 2, § 15, at 135, 2 H. GAMMEL, LAWS OF TEXAS 309 (1898); see *James v. James*, 253 S.W. 1112, 1115 (Tex. Civ. App.—San Antonio 1923, writ ref'd).

16. See *James v. James*, 253 S.W. 1112, 1116 (Tex. Civ. App.—San Antonio 1923, writ ref'd).

17. See 1955 Tex. Gen. Laws, ch. 55, § 42, at 102.

18. See *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

19. 1973 Tex. Gen. Laws, ch. 543, § 13.01, at 1421; see *Texas Dep't of Human Resources v. Hernandez*, 595 S.W.2d 186, 191 (Tex. Civ. App.—Corpus Christi 1980, no writ); Smith, *Title 2. Parent and Child*, 5 TEX. TECH L. REV. 389, 418 (1974).

20. 1975 Tex. Gen. Laws, ch. 476, § 24, at 1261; see *Texas Dep't of Human Resources v. Hernandez*, 595 S.W.2d 186, 191 (Tex. Civ. App.—Corpus Christi 1980, no writ).

21. See, e.g., *Texas Dep't of Human Resources v. Hernandez*, 595 S.W.2d 186, 191-92 (Tex. Civ. App.—Corpus Christi 1980, no writ) (one year statute not tolled during minority); *Texas Dep't of Human Resources v. Delley*, 581 S.W.2d 519, 520 (Tex. Civ. App.—Dallas

by section 13.01 include retroactive application,²² applicability and tolling of the statute of limitations,²³ and the status and rights accorded to an illegitimate child by a successful section 13.01 suit.²⁴ Despite the efforts of the courts of civil appeals to resolve these issues, the Texas Supreme Court has yet to hear an appeal of a section 13.01 suit.

II. DEVELOPMENT OF THE CONSTITUTIONAL RIGHTS OF THE ILLEGITIMATE CHILD PRIOR TO *Gomez*

Equal protection and due process afforded an illegitimate child have been the focus of the United States Supreme Court in a number of cases.²⁵ In *Levy v. Louisiana*,²⁶ *Glonn v. American Guarantee & Liability Insurance Co.*,²⁷ and *Weber v. Aetna Casualty & Surety Co.*²⁸ the Supreme Court declared unconstitutional statutes denying recovery on the basis of a child's illegitimacy.²⁹ Applying the rational basis test for determining constitutionality, the *Weber* Court was unable to find a rational relationship between the discrimination and the goals sought by the state.³⁰ The enactment of such statutes evidenced the state's denial of the

1979, writ ref'd n.r.e.) (four year statute of limitations tolled); Texas Dep't of Human Resources v. Chapman, 570 S.W.2d 46, 50 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.) (time limitation in section 13.01 constitutional).

22. See *Alvarado v. Gonzales*, 552 S.W.2d 539, 543 (Tex. Civ. App.—Corpus Christi 1977, no writ).

23. See Texas Dep't of Human Resources v. Hernandez, 595 S.W.2d 186, 192-93 (Tex. Civ. App.—Corpus Christi 1980, no writ); Texas Dep't of Human Resources v. Delley, 581 S.W.2d 519, 520 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

24. See *Catchings v. Hamm*, 560 S.W.2d 194, 195-96 (Tex. Civ. App.—Waco 1977, no writ).

25. See, e.g., *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 172-75 (1972); *Glonn v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73, 74-76 (1968); *Levy v. Louisiana*, 391 U.S. 68, 70-72 (1968).

26. 391 U.S. 68 (1968).

27. 391 U.S. 73 (1968).

28. 406 U.S. 164 (1972).

29. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175-76 (1972); *Glonn v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73, 76 (1968); *Levy v. Louisiana*, 391 U.S. 68, 71 (1968). In *Levy* the illegitimate children brought suit to recover for the wrongful death of their mother and were denied recovery by the lower courts because "child" in the statute allowing for recovery was interpreted to mean legitimate not illegitimate child. *Levy v. Louisiana*, 391 U.S. 68, 70 (1968); see *Glonn v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73, 74-75 (1968). The appellant in *Glonn* was denied a right of action for the death of her son because he was illegitimate. *Glonn v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73, 74-75 (1968); see *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 167-68 (1972). In *Weber* the deceased's illegitimate children were denied workmen's compensation benefits because illegitimate children were not considered in the class of "children" under the statute. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 167-68 (1972).

30. See *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 173 (1972). The state's interest

same equal protection to an illegitimate child as that granted to other citizens regardless of their status.³¹ The Court in *Weber* further resolved that such discrimination ran counter to our system's concept that legal burdens bear a relation to individual wrongdoing.³² The same reasoning was applied by the United States district court in *Morris v. Richardson*,³³ when the court noted a denial of social security survivor benefits to illegitimate children would not serve the state's goal of deterring persons from entering into illicit relationships.³⁴

The holdings of *Levy*, *Glon*, and *Weber* were distinguished in *Labine v. Vincent*³⁵ when the Supreme Court upheld a state's right to discriminate against illegitimate children in its statutory laws of descent and distribution.³⁶ Distinguishing the holding in *Labine* from the earlier *Levy* decision, the Court noted the statute upheld in *Labine* did not totally bar the illegitimate child from inheriting as did the statute declared void in *Levy*.³⁷ The Court found that under the *Labine* statute the father could have acted before his death to circumvent the denial of inheritance rights to the child by having married the mother.³⁸

III. *Gomez v. Perez*

The United States Supreme Court's decision in *Gomez* represents a natural progression following several decisions in which the court broadened the rights of an illegitimate child.³⁹ Mrs. Gomez, a Texas resident, initiated proceedings for support of her illegitimate child against the al-

was in protecting "legitimate family relationships and the regulation and protection of the family unit." *Id.* at 173.

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

32. See *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175 (1972).

33. 346 F. Supp. 494 (N.D. Ga. 1972).

34. *Id.* at 499.

35. 401 U.S. 532 (1971).

36. See *id.* at 535-37. In *Labine* the guardian of the decedent's illegitimate child brought an action to have the illegitimate child declared the deceased's sole heir for inheritance under the Louisiana intestate succession statutes. *Id.* at 533. The contested statutes denied unacknowledged illegitimate children the right to take property by intestate succession through their fathers. *Id.* at 537; see LA. REV. STAT. ANN. §§ 919, 920 (West 1973).

37. See *Labine v. Vincent*, 401 U.S. 532, 539 (1971).

38. See *id.* at 539. The decedent, Ezra Vincent, also could have willed property to the child or stated in his acknowledgement of paternity that he desired to legitimate the child. *Id.* at 539.

39. See *Gomez v. Perez*, 409 U.S. 535, 535 (1973) (illegitimate can recover paternal support); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 172 (1972) (illegitimate can recover under workmen's compensation); *Glon v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73, 76 (1968) (mother can recover for illegitimate child's death); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (illegitimate can recover for mother's wrongful death).

leged father.⁴⁰ The trial court found that although Mrs. Gomez's child required support, no legal obligation arose in the biological father because of the child's illegitimacy.⁴¹ Finding Texas did not provide statutorily enforceable support for an illegitimate child, the Supreme Court, in light of *Levy* and *Weber*, held that when a state creates a right of action for legitimate children there is no constitutionally sufficient justification for denying a similar right to children simply because their natural fathers have not married their mothers.⁴² The Court recognized that under the federal constitution an illegitimate child may not be denied a right accorded a legitimate child merely on the basis of illegitimacy.⁴³ Determining discrimination based on grounds of illegitimacy was "illogical and unjust,"⁴⁴ the Court declared unconstitutional the common law principle that an illegitimate child has no right to support from his biological father.⁴⁵ The Court in *Gomez* held an illegitimate child is entitled to support from his biological father; therefore, implicit in *Gomez* is the prerequisite that the illegitimate establish his or her paternity before support can be granted.⁴⁶

IV. TEXAS' REACTION TO *Gomez*: CHAPTER 13 OF THE TEXAS FAMILY CODE

Chapter 13 provides the procedure whereby a man who voluntarily chooses to acknowledge his paternity can legitimate his child.⁴⁷ Not until the enactment of amended section 13.01, however, did an illegitimate child whose natural father did not voluntarily acknowledge paternity have a procedure to establish the parent-child relationship.⁴⁸ Section

40. See *Gomez v. Perez*, 409 U.S. 535, 535-36 (1973).

41. See *id.* at 536-37.

42. *Id.* at 538.

43. See *id.* at 538. The Court acknowledged problems of proving paternity but also noted that such problems cannot be built into an impenetrable barrier to shield discrimination. See *id.* at 538.

44. *Id.* at 538 (citing *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 166 (1972)).

45. See *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

46. See *id.* at 538; Texas Dep't of Human Resources v. Hernandez, 595 S.W.2d 186, 191 (Tex. Civ. App.—Corpus Christi 1980, no writ); *Wynn v. Wynn*, 587 S.W.2d 790, 793 (Tex. Civ. App.—Corpus Christi 1979, no writ).

47. See TEX. FAM. CODE ANN. § 13.21 (Vernon Supp. 1980); Smith, *Title 2. Parent and Child*, 5 TEX. TECH L. REV. 389, 419 (1974).

48. TEX. FAM. CODE ANN. § 13.01 (Vernon Supp. 1980); see Texas Dep't of Human Resources v. Hernandez, 595 S.W.2d 186, 191 (Tex. Civ. App.—Corpus Christi 1980, no writ). The parent-child relationship is defined in section 11.01(4) as "the rights, privileges, duties, and powers existing between a parent and child as provided by section 12.04 of this code." TEX. FAM. CODE ANN. § 11.01(4) (Vernon 1975). Section 12.04(3) provides the duty of support includes clothing, food, shelter, medical care and education; section 12.04(9) delineates inheritance rights. See *id.* § 12.04(3), (9) (Vernon Supp. 1980). Texas was the last jurisdiction to provide an illegitimate child with a procedure for an involuntary paternity suit. J.

13.01 further provides such actions must be commenced within one year of the illegitimate child's birth.⁴⁹

Since the adoption of section 13.01 several Texas courts of civil appeals have interpreted section 13.01 in line with the constitutional mandate in *Gomez*.⁵⁰ In *Texas Department of Human Resources v. Delley*⁵¹ the general four year statute of limitations was held applicable to paternity actions of illegitimate children born prior to the effective date of section 13.01 since the one year time limitation in section 13.01 was held not retroactive.⁵² The court in *Delley* further held the four year statute of limitations would be tolled during the child's minority,⁵³ noting that as a matter of public policy a time limitation should not work to free a father of his obligation to pay child support.⁵⁴

In *Catchings v. Hamm*⁵⁵ the constitutionality of the one year time limitation of section 13.01 was contested by the appellant, but the court did not decide whether the limitation was a denial of equal protection and due process.⁵⁶ The Dallas Court of Civil Appeals in *Texas Department of Human Resources v. Chapman*⁵⁷ held the one year limitation was not an unconstitutional denial of equal protection and due process to illegitimate

LEDBETTER, TEXAS FAMILY LAW 73 (5th ed. 1978). Important provisions of the amended chapter 13 are the sections authorizing and directing the procedure for blood tests. See TEX. FAM. CODE ANN. §§ 13.02-.06 (Vernon Supp. 1980); Smith, *Title 2. Parent and Child*, 8 TEX. TECH L. REV. 19, 58 (1976). Blood tests provide an accurate means of establishing paternity and preventing invalid claims of parentage. See *In re B.M.N.*, 570 S.W.2d 493, 502 (Tex. Civ. App.—Texarkana 1978, no writ). If blood tests show by clear and convincing evidence that the putative father is not the biological father, the court shall dismiss the suit. See *id.* at 502; TEX. FAM. CODE ANN. § 13.05 (Vernon Supp. 1980).

49. See TEX. FAM. CODE ANN. § 13.01 (Vernon Supp. 1980); *cf.* Texas Dep't of Human Resources v. Hernandez, 595 S.W.2d 186, 191 (Tex. Civ. App.—Corpus Christi 1980, no writ) (one year statute not tolled during minority); Texas Dep't of Human Resources v. Delley, 581 S.W.2d 519, 520 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (four year statute of limitations tolled during minority); Texas Dep't of Human Resources v. Chapman, 570 S.W.2d 46, 49-50 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.) (time limit in section 13.01 constitutional).

50. See Texas Dep't of Human Resources v. Hernandez, 595 S.W.2d 186, 191-92 (Tex. Civ. App.—Corpus Christi 1980, no writ); Texas Dep't of Human Resources v. Delley, 581 S.W.2d 519, 521 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.); Texas Dep't of Human Resources v. Chapman, 570 S.W.2d 46, 50 (Tex. Civ. App.—Dallas 1978, no writ).

51. 581 S.W.2d 519 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

52. See *id.* at 521; Alvarado v. Gonzales, 552 S.W.2d 539, 543 (Tex. Civ. App.—Corpus Christi 1977, no writ).

53. See Texas Dep't of Human Resources v. Delley, 581 S.W.2d 519, 522 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

54. *Id.* at 522.

55. 560 S.W.2d 194 (Tex. Civ. App.—Waco 1977, no writ).

56. See generally *id.* at 195.

57. 570 S.W.2d 46 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.).

children.⁵⁸ The court in *Chapman* found the statute did not create an "impenetrable barrier" by denying a paternity suit completely, rather section 13.01 prescribes a limitation within which such a suit must be brought.⁵⁹ More importantly, the court discerned a rational basis for the one-year limit; it was reasonably related to the legitimate state interest of preventing stale or fraudulent claims.⁶⁰ The Corpus Christi Court of Civil Appeals in the companion cases of *Texas Department of Human Resources v. Hernandez*⁶¹ and *In re A.B.D.*,⁶² held the one year time limitation constitutional.⁶³ The court did not, however, follow the holding in *Delley* that the statute is not tolled during the illegitimate child's minority.⁶⁴ Allowing the statute to toll until majority, the court reasoned, would be to allow an adult to bring suit for child support.⁶⁵

V. UNANSWERED ISSUES RAISED BY SECTION 13.01

Despite the decisions by various Texas courts of appeals, questions created by section 13.01 and the *Gomez* mandate remain unanswered. If *Gomez* is interpreted narrowly, the illegitimate child who establishes paternity under section 13.01 would be entitled only to the right of paternal support.⁶⁶ In the event *Gomez* is broadly construed to provide all statutory rights afforded a legitimate child in section 12.04,⁶⁷ the illegitimate child would be entitled to the rights to support, care, control, protection, moral and religious training, and inheritance.⁶⁸ Yet, section 13.01 is not

58. *Id.* at 50.

59. *See id.* at 49-50.

60. *See id.* at 50. The due process arguments of the appellant were quieted when the court balanced the illegitimate child's right to support, jeopardized by the mother's failure to bring suit, against the harm to the putative father and decided the legislature could have felt the latter was greater. *See id.* at 50.

61. 595 S.W.2d 186 (Tex. Civ. App.—Corpus Christi 1980, no writ).

62. No. 1547 (Tex. Civ. App.—Corpus Christi, Jan. 31, 1980) (not yet reported).

63. *See In re A.B.D.*, No. 1547, slip op. at 3 (Tex. Civ. App.—Corpus Christi, Jan. 31, 1980) (not yet reported); *Texas Dep't. of Human Resources v. Hernandez*, 595 S.W.2d 186, 192-93 (Tex. Civ. App.—Corpus Christi 1980, no writ).

64. *See Texas Dep't of Human Resources v. Hernandez*, 595 S.W.2d 186, 192-93 (Tex. Civ. App.—Corpus Christi 1980, no writ).

65. *See id.* at 192. The court noted "[t]he purpose of [the] lawsuit [was] to establish the duty of the biological father to support a child fathered by him and born out of wedlock. Tolling the statute of limitations would simply allow the child to bring suit for child support once he is no longer a child." *Id.* at 192.

66. *Cf. In re R.V.M.*, 530 S.W.2d 921, 922-23 (Tex. Civ. App.—Waco 1975, no writ) (right to paternal support).

67. *See Rhode Island Hosp. Trust Co. v. Hopkins*, 172 A.2d 345, 351 (R.I. 1961); *Home of the Holy Infancy v. Kaska*, 397 S.W.2d 208, 210 (Tex. 1965).

68. *See Henson v. Brown*, 524 S.W.2d 412, 412-13 (Tex. Civ. App.—Austin 1975, no writ) (same protection afforded legitimate children must be extended to illegitimate chil-

explicit in its provisions; it is explicit only in providing the procedure for establishing the parent-child relationship and the statute of limitation for bringing such a suit.⁶⁹ Section 13.01 further fails to indicate whether its time limitation is applicable to the illegitimate child and whether it is tolled during his minority.⁷⁰ If section 13.01 is tolled during minority, the section lacks a limitation on the father's liability for support in the years prior to the establishment of his paternity.⁷¹

VI. AN OVERVIEW OF PATERNITY LEGISLATION IN OTHER JURISDICTIONS

Texas is not alone in its failure to provide more comprehensive paternity legislation. Most states have only scattered provisions providing for methods of legitimation, support, and succession.⁷² The judgment in most paternity suits establishes the man as the natural father of the illegitimate child and orders him to support and maintain the child.⁷³ Alaska, unlike most jurisdictions, allows the child to be legitimated in a paternity action.⁷⁴ Most states, including Texas, provide legitimation under voluntary rather than involuntary circumstances, as in the father's acknowledgment of the child as his own⁷⁵ or by the subsequent marriage of the parents.⁷⁶

dren as per *Gomez* and section 12.04).

69. See *Texas Dep't of Human Resources v. Hernandez*, 595 S.W.2d 186, 191 (Tex. Civ. App.—Corpus Christi 1980, no writ); *Wynn v. Wynn*, 587 S.W.2d 790, 792 (Tex. Civ. App.—Corpus Christi 1979, no writ); TEX. FAM. CODE ANN. §§ 13.01-.09 (Vernon Supp. 1980).

70. Compare *Texas Dep't of Human Resources v. Delley*, 581 S.W.2d 519, 522 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.) (statute tolled during minority) with *Texas Dep't of Human Resources v. Hernandez*, 595 S.W.2d 186, 191-93 (Tex. Civ. App.—Corpus Christi 1980, no writ) (section 13.01 is not tolled during minority).

71. Other states have avoided this by providing a statutory limitation on past child support. See, e.g., ME. REV. STAT. ANN. tit. 19, § 273 (Supp. 1979-1980); MISS. CODE ANN. § 93-9-11 (1972); UTAH CODE ANN. § 78-45a-3 (1977).

72. See, e.g., ALA. CODE tit. 26, §§ 11-1 (legitimation), 12-9 (appeal) (1977); *id.* tit. 43, §§ 3-7 (intestate succession), 3-8 (inheritance from child); CONN. GEN. STAT. ANN. §§ 46b-160 to -171, 45-274 (West Supp. 1980) (paternity matters and distribution of inheritance to illegitimate child); OKLA. STAT. ANN. tit. 10, §§ 55 (legitimation), 83 (support) (West 1966); *id.* tit. 84, § 215 (West Supp. 1979-1980) (inheritance by and through the illegitimate child). See generally Krause, *Bringing the Bastard Into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEXAS L. REV. 829, 831 (1966).

73. See Krause, *Bringing the Bastard Into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEXAS L. REV. 829, 850 (1966).

74. See ALASKA STAT. § 25.20.050 (1977); Krause, *Bringing the Bastard Into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEXAS L. REV. 829, 850 (1966).

75. See, e.g., N.D. CENT. CODE § 14-15-20 (1971); OKLA. STAT. ANN. tit. 10, § 55 (West 1966); TEX. FAM. CODE ANN. § 13.21 (Vernon Supp. 1980).

76. See, e.g., FLA. STAT. ANN. § 742.091 (West Supp. 1979); IOWA CODE ANN. § 595.18 (West Supp. 1979-1980); TEX. FAM. CODE ANN. § 12.02 (Vernon Supp. 1980).

The Uniform Act on Paternity⁷⁷ is itself a disappointment as it fails to address the subject of illegitimacy broadly; instead, the Act is confined to the typical paternity-type statute for determination of fatherhood and the imposition of the duty to support.⁷⁸ The Uniform Act on Paternity is valuable, however, for it states unequivocally the liability of the father whose paternity has been established.⁷⁹ Such liabilities include reasonable expenses of the mother's pregnancy and confinement, in addition to education, necessary support, and expenses of the child.⁸⁰ The support lends relief to the mother, state agencies, and others, and, therefore, justifies the imposition of such obligation upon the father.⁸¹ A duty of support has not been based upon the child's status as legitimate or illegitimate but rather upon the status of the putative father as the natural father.⁸² For example, Arizona's statute provides the status of illegitimacy has no impact on the child's rights once he establishes parentage.⁸³

The scope of the father's support obligation has been statutorily limited in a number of states; time limitations have been established for liability prior to the paternity suit⁸⁴; and for bringing a paternity suit.⁸⁵ Time limitations in which a suit must be brought have been determined unconstitutional⁸⁶ as well as applicable only to the mother and the child.⁸⁷ Arizona allows a paternity suit any time during the pregnancy of the mother or after the birth of the child.⁸⁸ An Arizona appellate court held a limitation of action is inapplicable due to the continuing nature of the obligation to support an illegitimate child.⁸⁹ In states that have imposed a statute of limitations on the bringing of a paternity suit, statutes

77. 9A U.L.A. MATRIMONIAL, FAMILY AND HEALTH LAWS, UNIFORM ACT ON PATERNITY 623-41 (1979).

78. Krause, *Bringing the Bastard Into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEXAS L. REV. 829, 831 (1966).

79. See 9A U.L.A. MATRIMONIAL, FAMILY AND HEALTH LAWS, UNIFORM ACT ON PATERNITY § 1, at 629 (1979).

80. *Id.* § 1, at 626.

81. See *Dunn v. Grisham*, 157 So. 2d 766, 769 (Miss. 1963).

82. See *Shinall v. Pergeorelis*, 325 So. 2d 431, 434 (Fla. Dist. Ct. App. 1975).

83. See *In re Cook's Estate*, 159 P.2d 797, 800 (Ariz. 1945); ARIZ. REV. STAT. ANN. § 8-601 (Supp. 1979-1980); S. SCHATKIN, *DISPUTED PATERNITY PROCEEDINGS* 1-53 (rev. ed. 1979).

84. See ME. REV. STAT. ANN. tit. 19, § 273 (Supp. 1979-1980); MISS. CODE ANN. § 93-9-11 (1972); UTAH CODE ANN. § 78-45a-3 (1977).

85. See, e.g., *State v. Maddox*, 358 So. 2d 461, 463 (Ala. Civ. App. 1978); *Jensen v. Voshell*, 193 N.W.2d 86, 89-90 (Iowa 1971); *Stringer v. Dudoich*, 583 P.2d 462, 463 (N.M. 1978).

86. See *Stringer v. Dudoich*, 583 P.2d 462, 464 (N.M. 1978).

87. See *Huss v. DeMott*, 524 P.2d 743, 744 (Kan. 1974); *Palmer v. Mangum*, 338 So. 2d 1002, 1003 (Miss. 1976).

88. See ARIZ. REV. STAT. ANN. § 12-844 (Supp. 1957-1979).

89. See *State v. Christensen*, 508 P.2d 366, 368 (Ariz. Ct. App. 1973).

are tolled under certain circumstances, such as the defendant's absence from the jurisdiction⁹⁰ or some implied or express acknowledgment of paternity on the part of the putative father.⁹¹ Some jurisdictions, however, would follow the reasoning in *Delley* by tolling the statute under a general tolling statute.⁹²

VII. PROPOSAL FOR MORE COMPLETE PATERNITY LEGISLATION IN TEXAS

Texas paternity legislation should secure equal treatment for both legitimate and illegitimate children. Equal treatment would be achieved by allowing an illegitimate child who establishes paternity all the statutory rights accorded a legitimate child by section 12.04 of the Texas Family Code.⁹³ This result was discussed in *Henson v. Brown*⁹⁴ and supported by the broad language of the United States Supreme Court in *Gomez*.⁹⁵ Except for its denial of the illegitimate child's right to inherit from his father by intestate succession, the Uniform Parentage Act of 1973⁹⁶ provides the illegitimate child with equal treatment.⁹⁷ The Uniform Act reflects concern for the illegitimate child's substantive right to a legal relation to his father by tolling the three year statute of limitations for bringing a paternity suit and permitting retroactive application of the Act.⁹⁸ Section 15 of the Act provides for the determination of the support

90. See, e.g., *Lindsay v. District of Columbia*, 298 A.2d 211, 211-12 (D.C. 1972); *District of Columbia v. Franklin*, 154 A.2d 550, 551 (D.C. 1959); *Hull v. Jackson*, 121 So. 2d 4, 7 (Miss. 1960).

91. See, e.g., *Lindsay v. District of Columbia*, 298 A.2d 211, 211-12 (D.C. 1972); *Goodman v. State*, 203 A.2d 695, 696 (Md. 1964); *Smith v. Gabrietti*, 395 P.2d 325, 327-28 (Nev. 1964).

92. See *Perez v. Singh*, 97 Cal. Rptr. 920, 921 (Ct. App. 1971); *Palmer v. Mangum*, 338 So. 2d 1002, 1003 (Miss. 1976).

93. See TEX. FAM. CODE ANN. § 12.04 (Vernon Supp. 1980).

94. 524 S.W.2d 412, 413-14 (Tex. Civ. App.—Austin 1975, no writ).

95. See *Gomez v. Perez*, 409 U.S. 535, 538 (1973). The Court stated a state cannot "invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." *Id.* at 538.

96. 9A U.L.A. MATRIMONIAL, FAMILY AND HEALTH LAWS, UNIFORM PARENTAGE ACT 579-622 (1979). To date seven states have enacted the Uniform Parentage Act entirely or with revisions. See CAL. CIV. CODE §§ 7000-7021 (Deering Supp. 1980); COLO. REV. STAT. §§ 19-6-101 to 19-6-129 (1978); HAWAII REV. STAT. §§ 584-1 to 584-26 (1976); MONT. REV. CODES ANN. §§ 61-301 to 61-334 (Supp. 1977); N.D. CENT. CODE §§ 14-17-01 to 14-17-26 (Supp. 1977); WASH. REV. CODE ANN. §§ 26.26.010 to .26.905 (Supp. 1978); WYO. STAT. §§ 14-7-101 to 14-7-126 (1977).

97. See 9A U.L.A. MATRIMONIAL, FAMILY AND HEALTH LAWS, UNIFORM PARENTAGE ACT, Commissioners' Prefatory Note at 581 (1979). "[R]egardless of the marital status of the parents, all children and all parents have equal rights with respect to each other." *Id.* Commissioners' Comment at 588 (1979).

98. See *In re W.M.V.*, 268 N.W.2d 781, 787 (N.D. 1978); 9A U.L.A. MATRIMONIAL, FAM-

obligation upon the adjudged father, but limits past support owed.⁹⁹ Adoption of the Uniform Parentage Act in Texas would alleviate the problems arising from section 13.01 since tolling the statute of limitations, in addition to equal treatment of legitimate and illegitimate children, are provided for in the Act.

The right of an illegitimate child to inherit through his father also needs statutory clarification in Texas. Uncertainty arises from the amended section 42 of the Probate Code which fails to state the effect of involuntary legitimation on the illegitimate child's right to inherit through his natural father.¹⁰⁰ To alleviate this doubt, proposed legislation should state an illegitimate child who has established paternity shall inherit from his natural father as if a legitimate child.¹⁰¹

VIII. CONCLUSION

The rights of the illegitimate child have broadened since the harsh common law proscription denying the illegitimate child a legal relation to either parent. Although the illegitimate child in Texas now has a right to establish parentage, the significance of that accomplishment remains unclear. To dispel the uncertainty and provide equality for both legitimate and illegitimate children, Texas must adopt more comprehensive paternity legislation.

ILY AND HEALTH LAW, UNIFORM PARENTAGE ACT § 7, at 596 (1979). It is not reasonable to bar the illegitimate child's right to bring suit because of the failure of another to do so. See Rodgers, *Equal Protection for the Illegitimate Child: Uniform Parentage Act of 1977*, 6 COLO. LAW. 1299, 1304 (1977).

99. 9A U.L.A. MATRIMONIAL, FAMILY AND HEALTH LAWS, UNIFORM PARENTAGE ACT § 15(d), (e), at 608 (1979).

100. See TEX. PROB. CODE ANN. § 42 (Vernon Supp. 1980); Solender, *Family Law: Parent and Child*, 32 Sw. L.J. 141, 145 (1978).

101. See, e.g., ARIZ. REV. STAT. ANN. § 14.2109 (1956); IND. CODE ANN. § 29-1-2-7 (Burns 1972); IOWA CODE ANN. § 633.222 (West 1964).