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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. Perez2 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

3. See id. at 538.
Code provide the procedure for establishing paternity, the rights an illegitimate child gains by proving paternity remain unclear. 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. Under English common law the obligation to support a child applied only to the parents of a legitimate or an adopted child. Furthermore, common law precluded an illegitimate child from inheriting through intestate succession. 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.

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.
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. In 1840 Texas adopted the common law of England which precluded an illegitimate child from inheriting. Subsequently the Congress of the Republic of Texas enacted statutes permitting an illegitimate child to inherit from his mother and his maternal relations. Also enacted in 1840 was a provision for legitimation of an illegitimate child if the natural parents subsequently married. These departures from English common law diminished the harsh result of illegitimacy and were later codified by the Texas Legislature in section 42 of the Texas Probate Code.

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. 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. This gap was filled when chapter 13 was amended to provide a statutory action and procedure whereby an illegitimate child could establish paternity. 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*. 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.*


by section 13.01 include retroactive application, applicability and tolling of the statute of limitations, and the status and rights accorded to an illegitimate child by a successful section 13.01 suit. 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. In Levy v. Louisiana, Glona v. American Guarantee & Liability Insurance Co., and Weber v. Aetna Casualty & Surety Co., the Supreme Court declared unconstitutional statutes denying recovery on the basis of a child's illegitimacy. 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. 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).


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.).


same equal protection to an illegitimate child as that granted to other citizens regardless of their status. 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. The same reasoning was applied by the United States district court in Morris v. Richardson, 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.

The holdings of Levy, Glona, and Weber were distinguished in Labine v. Vincent when the Supreme Court upheld a state's right to discriminate against illegitimate children in its statutory laws of descent and distribution. 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. 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.

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. Mrs. Gomez, a Texas resident, initiated proceedings for support of her illegitimate child against the al-

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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).
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.
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. 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. 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. Determining discrimination based on grounds of illegitimacy was "illogical and unjust," the Court declared unconstitutional the common law principle that an illegitimate child has no right to support from his biological father. 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.

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. 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.
13.01 further provides such actions must be commenced within one year of the illegitimate child's birth.\(^9\)

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
children. 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. 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. The Corpus Christi Court of Civil Appeals in the companion cases of Texas Department of Human Resources v. Hernandez and In re A.B.D. held the one year time limitation constitutional. The court did not, however, follow the holding in Delley that the statute is not tolled during the illegitimate child's minority. Allowing the statute to toll until majority, the court reasoned, would be to allow an adult to bring suit for child support.

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. In the event Gomez is broadly construed to provide all statutory rights afforded a legitimate child in section 12.04, the illegitimate child would be entitled to the rights to support, care, control, protection, moral and religious training, and inheritance. 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.
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.
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-
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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. 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. 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.

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. 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. Alaska, unlike most jurisdictions, allows the child to be legitimated in a paternity action. Most states, including Texas, provide legitimation under voluntary rather than involuntary circumstances, as in the father's acknowledgment of the child as his own or by the subsequent marriage of the parents.

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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).


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


The Uniform Act on Paternity 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. The Uniform Act on Paternity is valuable, however, for it states unequivocally the liability of the father whose paternity has been established. Such liabilities include reasonable expenses of the mother's pregnancy and confinement, in addition to education, necessary support, and expenses of the child. The support lends relief to the mother, state agencies, and others, and, therefore, justifies the imposition of such obligation upon the father. 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. For example, Arizona's statute provides the status of illegitimacy has no impact on the child's rights once he establishes parentage.

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 suit and for bringing a paternity suit. Time limitations in which a suit must be brought have been determined unconstitutional as well as applicable only to the mother and the child. Arizona allows a paternity suit any time during the pregnancy of the mother or after the birth of the child. An Arizona appellate court held a limitation of action is inapplicable due to the continuing nature of the obligation to support an illegitimate child. In states that have imposed a statute of limitations on the bringing of a paternity suit, statutes

80. Id. § 1, at 626.
81. See Dunn v. Grisham, 157 So. 2d 766, 769 (Miss. 1963).
are tolled under certain circumstances, such as the defendant’s absence from the jurisdiction\(^9\) or some implied or express acknowledgment of paternity on the part of the putative father.\(^8\) Some jurisdictions, however, would follow the reasoning in *Delley* by tolling the statute under a general tolling statute.\(^9\)

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.\(^9\) This result was discussed in *Henson v. Brown*\(^9\) and supported by the broad language of the United States Supreme Court in *Gomez*.\(^8\) Except for its denial of the illegitimate child’s right to inherit from his father by intestate succession, the Uniform Parentage Act of 1973\(^8\) provides the illegitimate child with equal treatment.\(^7\) 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.\(^8\) Section 15 of the Act provides for the determination of the support

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

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.


