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## CONSTITUTIONAL LAW—EQUAL PROTECTION AND THE INHERITANCE RIGHTS OF ILLEGITIMATES UNDER INTESTATE SUCCESSION LAWS

*Trimble v. Gordon*<sup>1</sup>

Sherman Gordon lived with Jessie Trimble and their illegitimate daughter Deta until 1974 when he died intestate leaving an estate consisting of a 1974 Plymouth worth approximately \$2,500. Gordon had acknowledged openly that Deta was his child, and a paternity order had been entered finding him to be Deta's father. Notwithstanding this acknowledgment and order, an Illinois probate court decreed that Deta Trimble was not her father's heir. This decree was based on an Illinois intestate succession statute which provided that an illegitimate child could inherit only from his mother, and, by negative implication, not from his father.<sup>2</sup> Under Illinois law, a legitimate child could inherit from both his mother and his father.<sup>3</sup> The Illinois Supreme Court upheld the statute on the authority of *Labine v. Vincent*.<sup>4</sup> The United States Supreme Court reversed, holding that this statutory classification based on illegitimacy violated the equal protection clause of the fourteenth amendment.

Under English common law, an illegitimate child was considered *filius nullius*, incapable of inheriting from anyone except the heirs of his own body.<sup>5</sup> The trend in the United States has been toward fairer

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1. 430 U.S. 762 (1977).

2. ILL. REV. STAT. ch. 3, § 12 (1961). Section 12 has been replaced by ILL. REV. STAT. ch. 3, § 2-2 (Supp. 1976-1977) and provides in relevant part:

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

3. ILL. REV. STAT. ch. 3, § 2-2 (Supp. 1976-1977).

4. 401 U.S. 532 (1971). In *Labine* the Court upheld a Louisiana probate provision excluding unacknowledged illegitimate children from sharing in their father's estate. The Court found it within the power of the state to determine the disposition of property, and that there had been no insurmountable barrier to the child's inheriting as her father could have included her in a will or legitimated her.

5. See generally Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967); Comment, *Constitutional Law—Equal Protection—Denial of Illegitimate Child's Right of Inheritance From Father Who Had Acknowledged But Not Legitimated Heir Does Not Constitute a Violation of Child's Equal Protection Rights Under the Fourteenth Amendment*, 47 NOTRE DAME LAW. 392 (1972).

treatment of illegitimate children;<sup>6</sup> in most states there are statutes providing for inheritance from the mother.<sup>7</sup> In spite of this trend, there still remain many legal barriers to inheritance by illegitimates. Most constitutional challenges to statutory discrimination against illegitimates have been mounted under the equal protection clause of the fourteenth amendment.<sup>8</sup>

The Court traditionally has used two approaches in evaluating discriminatory legislation under the equal protection clause. If a suspect class or a fundamental right is involved, the Court has applied a strict scrutiny test, requiring a compelling state interest to uphold the statutory classification.<sup>9</sup> If the regulation concerns economic matters, the Court has applied a rational basis test and upheld legislation if lawmakers could have conceivably concluded that the adopted method was rationally related to the harm to be prevented.<sup>10</sup> In evaluating illegitimacy legislation, the Court has applied an intermediate standard of review.<sup>11</sup> This standard has two aspects: the purpose of the legislation

6. See, e.g., ARIZ. REV. STAT. § 14-206 (1956) (current version at ARIZ. REV. STAT. § 14-2611 (1975)); N.D. CENT. CODE § 56-01.05 (1969); OR. REV. STAT. § 109.060 (1957). Arizona, North Dakota, and Oregon have eliminated the concept of illegitimacy and UNIFORM PROBATE CODE § 2-109 gives illegitimate children the same rights as legitimate children.

7. See generally materials cited note 5 *supra*.

8. The Court has considered illegitimacy legislation twelve times since 1968. *Trimble v. Gordon*, 430 U.S. 762 (1977); *Mathews v. Lucas*, 427 U.S. 495 (1976); *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973); *Gomez v. Perez*, 409 U.S. 535 (1973); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Labine v. Vincent*, 401 U.S. 532 (1971); *Glonn v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73 (1968); *Levy v. Louisiana*, 391 U.S. 68 (1968); *Beatty v. Weinberger*, 478 F.2d 300 (5th Cir. 1973), *summarily aff'd*, 418 U.S. 901 (1974); *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md.), *summarily aff'd*, 409 U.S. 1069 (1972); *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn.), *aff'd*, 409 U.S. 1069 (1972).

9. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). Although illegitimacy is analogous to the characteristics of suspect classifications, the Court consistently has rejected the argument that illegitimacy is a suspect class. See *Mathews v. Lucas*, 427 U.S. 495, 505-06 (1976).

10. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. Legislatures are presumed to have acted constitutionally . . . and their statutory classifications will be set aside only if no grounds can be conceived to justify them.

*McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 809 (1969).

11. See cases cited note 8 *supra*. See also Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 19-22 (1972). Gunther characterized this middle level scrutiny as an invigorated rational basis test in which the Court assesses the means in terms of legislative purposes that have substantial basis in actuality rather than in conjecture. The old test, according to Gunther, reflected

must be a legitimate state interest, and the legislation itself must be rationally related to furthering that interest.<sup>12</sup> If the statutory classification does not substantially further a legitimate state interest, the statute is held to violate equal protection.<sup>13</sup>

Applying this standard of review, the Court has invalidated statutory provisions which, to promote the state's interest in discouraging illicit relationships, bar an illegitimate child from recovering for the wrongful death of his mother.<sup>14</sup> The Court has found no rational relationship between legitimacy and the right of a child to be compensated for maternal loss, since barring illegitimate children from exercising wrongful death claims would not discourage illicit relationships. The Court also has invalidated provisions in social security and workmen's compensation acts which, in order to discourage spurious claims and promote legitimate family relationships, conclusively bar certain classes of illegitimates from receiving benefits.<sup>15</sup> The Court has pointed out that the danger of spurious claims of dependency exists for all classes of beneficiaries, and that it is illogical to assume that people will conform their behavior to societal norms merely to assure their offspring statutory benefits.<sup>16</sup> Furthermore, the purpose of such acts, which is to replace support lost to the deceased or disabled wage earner's dependents, is not furthered by excluding dependent children because they are illegitimate.

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virtual judicial abdication because it was characterized by extreme judicial deference to any conceivable legislative purpose, and very few discriminatory classifications were held unconstitutional under this standard of review.

12. See Gunther, *supra* note 11.

13. See generally cases cited in notes 14-18 *infra*.

14. Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) (statute barred the mother from recovering for the wrongful death of her illegitimate child); Levy v. Louisiana, 391 U.S. 68 (1968).

15. Jimenez v. Weinberger, 417 U.S. 628 (1974); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Beatty v. Weinberger, 478 F.2d 300 (5th Cir. 1973), *summarily aff'd*, 418 U.S. 901 (1974); Griffin v. Richardson, 346 F. Supp. 1226 (D. Md.), *summarily aff'd*, 409 U.S. 1069 (1972); Davis v. Richardson, 346 F. Supp. 588 (D. Conn.), *aff'd*, 409 U.S. 1069 (1972). See also Maracle v. Richardson, 348 F. Supp. 234 (W.D.N.Y. 1972); Morris v. Richardson, 346 F. Supp. 494 (N.D. Ga. 1972); Watts v. Veneman, 334 F. Supp. 482 (D.D.C. 1971), *aff'd in part and rev'd in part*, 476 F.2d 529 (D.C. Cir. 1973); Gentry v. United States, 546 F.2d 343 (Ct. Cl. 1976).

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

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

The Court also has struck down statutes which arbitrarily exclude all illegitimate children from securing paternal support.<sup>17</sup> Although the state has an interest in avoiding the problems of proving paternity, that interest cannot justify exclusion of all illegitimates. Similarly, the Court has invalidated provisions in welfare programs which discriminate against families with illegitimate children.<sup>18</sup> The state interest in preserving and strengthening legitimate family life is not attained by excluding illegitimate children. In addition, penalizing families with illegitimate children bears no rational relationship to the statutory purpose of providing supplementary income to the working poor.

In deciding *Trimble v. Gordon*, the Supreme Court applied this middle level equal protection analysis. The Court rejected the argument that the discrimination advanced a state interest in promoting legitimate family relationships, noting that there was no rational relationship between the promotion of family life and the denial to illegitimates of the right to share in their fathers' estates because the denial of this right would not influence the behavior of men and women. Moreover, the Court concluded that penalizing children as a means of influencing the behavior of their parents was inconsistent with the desire of the Illinois legislature to improve the position of illegitimates under the intestacy laws.<sup>19</sup>

This analysis appears inconsistent with the Court's prior decision in *Labine v. Vincent*.<sup>20</sup> In *Labine* the Court held that Louisiana's interest in promoting legitimate family relationships justified exclusion of certain classes of illegitimates from inheriting under the intestacy laws. The court in *Trimble* attempted to explain this apparent inconsistency by distinguishing the two statutes involved.<sup>21</sup> Unlike the Illinois statute, the Louisiana probate code differentiated between bastard children (unacknowledged illegitimates) who were given no inheritance rights, natural children (acknowledged illegitimates) who were given limited inheritance rights, and legitimate children who were given full inheritance rights. The Court reasoned that these categories were consistent with a theory of social reproach to illicit relationships and were an attempt by the Louisiana legislature to deter such relationships. Also, the impact of the discrimination in *Labine* was less severe because all illegitimate children were entitled to some support from their fathers' estates.<sup>22</sup> However, the Court recognized that the Illinois statute was examined more closely

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17. *Gomez v. Perez*, 409 U.S. 535 (1973).

18. *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973). See also *Miller v. Laird*, 349 F. Supp. 1034 (D.D.C. 1972).

19. 430 U.S. at 767-68. See *In re Estate of Karas*, 61 Ill. 2d 40, 44-45, 329 N.E.2d 234, 236-37 (1975).

20. 401 U.S. 532 (1971).

21. 430 U.S. at 768-69 n.13.

22. *Id.* at 776 n.17.

than the Louisiana provision, and that to the extent the analysis differed, *Trimble* would control.<sup>23</sup>

The Court in *Trimble* reaffirmed the view, expressed in *Labine*, that judicial deference to the state scheme of inheritance is appropriate when the challenged intestacy provision involves the substantial state interest in providing for stability of land titles by a quick and conclusive determination of the ownership of intestate property.<sup>24</sup> However, while the problems of proving paternity may compromise an orderly system of inheritance, this concern cannot justify exclusion of all illegitimates. There are certain classes of illegitimate children, *e.g.*, those acknowledged by their fathers, whose inheritance claims would not disrupt the efficient disposition of intestate property.<sup>25</sup> Therefore, the Illinois statute could not be justified on this basis.

An important factor in the *Labine* decision was that the challenged statute did not present illegitimates with an insurmountable barrier to inheritance. Under Louisiana law,<sup>26</sup> illegitimate children could be legitimated by parents who later married, or by parents who could have married at the time of conception and had no legitimate ascendants or descendants. In addition, a formal acknowledgment of paternity by the father entitled an illegitimate child to be a limited beneficiary under his father's will, and also entitled him to claim monthly support from his father's estate, even though he had no legal right to share equally in the estate with any legitimate children. Because the father of the illegitimate child in *Labine* had formally acknowledged paternity, the child was not statutorily barred from sharing in her father's estate.<sup>27</sup> Consequently, the Court upheld the Louisiana statute.

The dissent in *Labine* attacked the majority's reasoning as implying that any discrimination short of a total bar would be permissible.<sup>28</sup> Such an implication, the dissent argued, was inconsistent with the Court's prior holding in *Levy v. Louisiana*.<sup>29</sup> The majority in *Labine* had distinguished *Levy* as involving an insurmountable barrier to inheritance by illegitimates. However, as the dissent pointed out, under the reasoning of the majority, the challenged statute in *Levy* did not constitute a complete bar because the illegitimate children would have recovered for the wrongful death of their mother if she had formally acknowledged them.

The Court in *Trimble* weakened *Labine* by rejecting the argument that statutory discrimination against illegitimates is permissible if there is

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23. *Id.*

24. *Id.* at 767-68 n.12.

25. *Id.* at 772.

26. LA. CIV. CODE ANN. arts. 198, 200 (1952).

27. 401 U.S. at 533, 539.

28. 401 U.S. at 550-51 (Brennan, J., dissenting).

29. 391 U.S. 68 (1968).

no insurmountable barrier to inheritance.<sup>30</sup> Such an analysis, the Court stated, is merely a hypothetical reshuffling of the facts to avoid the essential question of the constitutionality of discrimination against illegitimates in an intestate succession law. If the discrimination cannot withstand equal protection analysis, then it cannot be saved by the absence of an insurmountable barrier.<sup>31</sup>

*Mathews v. Lucas*<sup>32</sup> was cited by the Court in *Trimble* as an indication of the extent to which state legislatures can discriminate against illegitimate children and still remain within constitutional boundaries. In *Lucas* the Court upheld a statutory provision which conditioned entitlement to Social Security disability benefits for certain illegitimate children on proof of dependency at the time of the wage earner's death.<sup>33</sup> The purpose of the provision was to replace support actually lost to the child and not merely to provide support based on a legal obligation to support. The statute also provided that certain classes of illegitimates would be presumed dependent and would automatically qualify for statutory benefits.<sup>34</sup> However, all legitimate children were presumed dependent. This distinction, the Court reasoned, was not between legitimate and illegitimate children, but between children who were most likely to be dependent and those who were not.<sup>35</sup> The Court concluded that the distinction was justified because it avoided the administrative burden of case-by-case determinations of dependency.

The Court in *Lucas* recognized that the statutory classifications were over-inclusive because some children would be presumed dependent who were not. Nevertheless, the Court found the classifications permissible because they were reasonably related to the likelihood of dependency.<sup>36</sup> However, this conclusion is of questionable validity because the percentage of illegitimate children who do not receive support from absent fathers is not significantly greater than that of similarly situated

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30. 430 U.S. at 773-74.

31. *Id.*

32. 427 U.S. 495 (1976).

33. See also *Perry v. Richardson*, 440 F.2d 677 (6th Cir. 1971); *Norton v. Weinberger*, 364 F. Supp. 1117 (D. Md. 1973), *aff'd sub nom.* *Norton v. Matthews*, 427 U.S. 524 (1976); *Watts v. Veneman*, 334 F. Supp. 482 (D.D.C. 1971), *aff'd in part and rev'd in part*, 476 F.2d 529 (D.C. Cir. 1973); *Ingalls Shipbuilding Corp. v. Neuman*, 322 F. Supp. 1229 (S.D. Miss. 1970).

34. An illegitimate child was presumed dependent if: (1) he would be entitled to inherit from the insured parent under state law; (2) if the decedent had gone through a marriage ceremony with the other parent which would have been valid but for a nonobvious defect; (3) if the insured parent acknowledged in writing that the child was his; (4) if the insured parent had been decreed by a court to be the child's father; or (5) if the insured parent had been ordered by a court to support the child because the child was his. 427 U.S. at 498-99.

35. *But see* *Frontiero v. Richardson*, 411 U.S. 677 (1973).

36. 427 U.S. at 509.

legitimate children.<sup>37</sup> Therefore, it can be argued that such statutory presumptions impermissibly discriminate against illegitimate children. Legitimate children who are similarly situated do not have the burden of proving dependency, while illegitimate children do. For many illegitimates this is a difficult, if not impossible, burden to carry.

A saving feature of the statutory scheme in *Lucas* was a provision allowing benefits to all illegitimate children who could prove actual dependency. The Court in *Trimble* indicated that the Illinois probate provision may have been upheld if it had allowed all illegitimate children who could prove paternity to inherit from their fathers as well as their mothers.<sup>38</sup> However, the Court did not go so far as to say that the Constitution requires that state intestacy laws provide all illegitimates the opportunity to prove paternity. The Court indicated that certain classes of illegitimate children could permissibly be denied the opportunity of proving paternity, but failed to draw any clear lines as to which classes could be so denied. *Trimble* suggests the possibility of a middle ground between the extremes of a case-by-case determination of paternity and the complete exclusion of illegitimates.<sup>39</sup> The Court noted that evidence of paternity can take a variety of forms, and that states are free to fashion their own requirements of proof tailored to meet the problems of inaccuracy and inefficiency.<sup>40</sup> This freedom is limited, however, to the extent that a state cannot refuse to recognize forms of proof that do not compromise important state interests. Such formal proof might include adjudication or formal acknowledgment of paternity.<sup>41</sup>

In 1971, the Supreme Court dismissed appeals from two Minnesota Supreme Court rulings that upheld a statute which prohibited an illegitimate child from inheriting intestate property from his father, unless he could produce an attested, written declaration of paternity.<sup>42</sup> The language in *Trimble* suggests that similar statutes will be upheld in the

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37. Eighty-two percent of legitimate children do not receive support from absent fathers compared with ninety percent of illegitimate children. See *Beaty v. Weinberger*, 478 F.2d 300, 306 n.9 (5th Cir. 1973), *aff'd*, 418 U.S. 901 (1974).

38. 430 U.S. at 772 n.14.

39. "For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized. . . . [B]ecause it excludes those categories of illegitimate children unnecessarily, § 12 is constitutionally flawed." *Trimble v. Gordon*, 430 U.S. 762, 771 (1977).

40. *Id.*

41. *Id.* at 772 n.14.

42. *In re Estate of Breole*, 287 Minn. 556, 178 N.W. 896 (1970), *appeal dismissed sub nom.* *Kastano v. Northern City Nat'l Bank*, 402 U.S. 902 (1971); *In re Estate of Pakarinen*, 287 Minn. 330, 178 N.W.2d 714 (1970), *appeal dismissed sub nom.* *Hietala v. Heir of Pakarinen*, 402 U.S. 903 (1971). See also *Easley v. John Hancock Mut. Life Ins. Co.*, 70 Mich. App. 451, 245 N.W.2d 785 (1976); *In re Johnsons Estate*, 560 P.2d 962 (Okla. 1977). See generally *Tenopir v. Boles Estate*, 342 So. 2d 130 (Fla. Dist. Ct. App. 1977).



future,<sup>43</sup> even though such provisions form an impenetrable barrier for many illegitimates because inheritance rights are dependent solely upon a formal act of the deceased father.<sup>44</sup>

There is little case law in Missouri concerning the right of illegitimate children to inherit from their fathers. The leading case is *R. v. R.*,<sup>45</sup> decided by the Missouri Supreme Court in 1968. On the basis of *Levy v. Louisiana*, the court summarily held that the state could not preclude illegitimate children from securing paternal support.<sup>46</sup> Because *Levy* involved the right of an illegitimate child to inherit from the estate of his mother, the Missouri decision to extend the principle to the right of paternal support may suggest a willingness on the part of the Missouri Supreme Court to invalidate legislation which discriminates against illegitimates.<sup>47</sup>

In the wake of *R. v. R.* and *Trimble*, two Missouri inheritance statutes are vulnerable to constitutional attack. Section 474.060, RSMo 1969,<sup>48</sup> like the challenged intestacy provision in *Trimble*, allows illegitimate children to inherit only from their mothers, and, by negative implication, not from their fathers. This provision is clearly unconstitutional.

The Missouri pretermitted heir statute, section 474.240, RSMo 1969,<sup>49</sup> also is subject to challenge on equal protection grounds to the

43. 430 U.S. at 772 n.14.

44. The strongest justification for discriminating against illegitimates is the difficulty of proving paternity and the related danger of spurious claims. The Court conceded that the serious problems of proving paternity might justify "a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally." *Id.* at 770.

45. 431 S.W.2d 152 (Mo. 1968).

46. *Id.* See also *In re L—*, 499 S.W.2d 490 (Mo. En Banc 1973); *S—v. W—*, 514 S.W.2d 848 (Mo. App., D.K.C. 1974); *State v. Tschirner*, 504 S.W.2d 302 (Mo. App., D.K.C. 1973); *State v. Summers*, 489 S.W.2d (Mo. App., D. St. L. 1972).

47. For the standard of proof of paternity in Missouri, see generally *T.A.L.S. v. R.D.B.*, 539 S.W.2d 737 (Mo. App., D. St. L. 1976); *Corzine v. Stoff*, 505 S.W.2d 162 (Mo. App., D. St. L. 1973); *S—J—B— v. S—F—S—*, 504 S.W. 2d 233 (Mo. App., D.K.C. 1973); *L—D— v. J—D—*, 481 S.W.2d 17 (Mo. App., D. Spr. 1972).

48. Section 474.060, RSMo 1969 provides: "Illegitimate children are capable of inheriting and transmitting inheritance on the part of their mother, and a mother may inherit from her illegitimate children, in like manner as if they had been lawfully begotten of her."

49. Section 474.240, RSMo 1969 provides:

1. When a testator fails in his will to mention or provide for any of his children born or adopted after the making of his last will, such child, whether born before or after the testator's death, shall receive a share in the estate of the testator equal in value to that which he would have received if the testator had died intestate, unless it appears from the will that such omission was intentional, or unless when the will was executed the testator had one or more children

extent that illegitimate children are excluded from sharing property under their fathers' wills. The Missouri Supreme Court decided the issue of the applicability of the pretermitted heir statute to illegitimates in *Martin v. Claxton*,<sup>50</sup> which involved the omission of an illegitimate child from his mother's will. The court held that the statute allowing an illegitimate child to inherit the *intestate* property of his mother conferred all rights of inheritance from the mother. Therefore, an illegitimate child could not be excluded under the pretermitted heir statute and could inherit an intestate share of his mother's property when not mentioned in her will. In view of *R. v. R.* and *Trimble*, it is not unlikely that the reasoning in *Martin* will be extended to the illegitimate child's inheritance rights in his father's estate.<sup>51</sup>

In the past nine years, the United States Supreme Court slowly has eliminated certain types of discrimination against illegitimate children. However, none of the cases can be interpreted as holding that state legislatures cannot treat illegitimate children differently than legitimate children. Instead, the Court has provided legislatures with guidelines of how to accomplish indirectly that which they are forbidden to do directly. The states cannot arbitrarily prohibit all illegitimate children from inheriting their fathers' intestate property, but they are free to devise requirements of proof of paternity so strict that the net result would be the same as almost complete exclusion. The administrative convenience of the state may be served by avoiding case-by-case determinations of paternity, but the concepts of fairness and justice should not be relegated to a lower priority merely to serve administrative convenience.

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known to him to be living and devised substantially all his estate to his surviving spouse.

2. If, at the time of the making of his will, the testator believes that any of his children are dead, and fails to provide for such child in his will, the child shall receive a share in the estate of the testator equal in value to that which he would have received if the testator had died intestate, unless it appears from the will or from other evidence that the testator would not have devised anything to such child had he known that the child was alive.

50. 308 Mo. 314, 274 S.W. 77 (1925).

51. It should be noted that different issues are raised in the case of a will than in the case of intestate succession. Because a will is a written expression of the *testator's* intent, excluded illegitimates are not as justified in complaining as when the *state* bars inheritance under intestate succession laws. These differences were recognized by the Massachusetts Supreme Court in *Hanson v. Markam*, 356 N.E.2d 702 (Mass. 1976).