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Constitutional Law—EQUAL PROTECTION—STATUTE OF LIMITATIONS FOR PATERNITY SUITS DOES NOT DENY ILLEGITIMATE CHILDREN THE EQUAL PROTECTION OF THE LAWS—*State v. West*, No. 53,123, 23 FLA. L.W. 265 (Sup. Ct. June 7, 1979).

In *State v. West*[1] the Florida Supreme Court upheld the constitutionality of a four-year statute of limitations for paternity actions[2] against an equal protection challenge. In doing so the court applied the traditional "rational basis" standard of review, stating that the court's "job is to discern whether legitimate legislative purposes exist, and then to ask whether the challenged classifications bear some reasonable relation to the purposes."[3] Less than one year earlier, in *In re Estate of Burris*, the court had applied a stricter standard of review and actually analyzed the state's interest to determine whether it justified "the statutory differentiation on the basis of illegitimacy."[4]

Recent decisions of the United States Supreme Court in the area of illegitimacy, most of which are discussed in Justice Alderman's dissenting opinion in *West*,[5] reveal considerable confusion regarding the appropriate standard of scrutiny to apply.[6] While it may be difficult to determine exactly what standard the United States Supreme Court considers appropriate, it is clear that the Florida Supreme Court need not limit itself to the minimum guarantees of the Federal Constitution.[7] The Florida Constitution contains an express declaration of rights[8] which enhances and extends the individual rights guaranteed by the Federal Constitution.

Both *West* and *Burris* purport to be based on *Trimble v. Gordon* in which the Court struck an Illinois statute that discriminated against illegitimate children.[9] The *Trimble* Court stated that "classifications based on illegitimacy fall in a 'realm of less than strictest scrutiny,' . . . [but] the scrutiny 'is not a toothless one'

1. No. 53,123, 23 FLA. L.W. 265 (Sup. Ct. June 7, 1979).

2. FLA. STAT. § 95.11(3)(b) (1977) states in relevant part: "Actions other than for recovery of real property shall be commenced as follows: . . . (3) WITHIN FOUR YEARS. . . . (b) An action relating to the determination of paternity."

3. 23 FLA. L.W. at 266.

4. 361 So. 2d 152, 155 (Fla. 1978).

5. 23 FLA. L.W. at 267-68. *See also* Trimble v. Gordon, 430 U.S. 762, 766 n.11 (1977). The Supreme Court has never directly considered the constitutionality of a statute of limitations on paternity actions. The New York statute involved in Lalli v. Lalli, 99 S. Ct. 518 (1978) included a two-year statute of limitations, but that issue was not raised before the Supreme Court. *Id.* at 524 n.5.

6. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 781 (1977) (Rehnquist, J., dissenting).

7. Dore, *Of Rights Lost and Gained*, 6 FLA. ST. U.L. REV. 609, 612 (1978).

8. FLA. CONST. art. I.

9. 430 U.S. 762 (1977).

. . . ."[10] Subsequent Supreme Court decisions have been less than clear but have, at least in part, applied the *Trimble* "middle tier" standard of scrutiny.[11] The effect of this standard is to compel a state to closely articulate the specific concerns allegedly met by a statute, to go beyond "the mere incantation of a proper state purpose."[12]

While the court in *Burris* required the state to go that extra step, the *West* court, which did not cite *Burris*,[13] was content with finding that "the state has a legitimate interest in having paternity claims settled as early as possible after the event in question . . . ."[14] The court focused on language in *Trimble* which supports a minimal standard of review,[15] while ignoring the very next line of the *Trimble* opinion which observed that "the standard just stated is a minimum; the Court sometimes requires more."[16]

The facts in *West* are uncontested. The Department of Health and Rehabilitative Services brought suit against Ronald Jerome West to determine the paternity of a minor child receiving Aid to Families with Dependent Children (AFDC) through the Department.[17] The lower court specifically found that West was the natural father of the child but held that the suit was barred by the statute of limitations. West had on occasion bought clothing, shoes and food for the child, but had never made any cash payments for her sup-

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10. *Id.* at 767 (citing Mathews v. Lucas, 427 U.S. 495, 510 (1976)).

11. *See* Caban v. Mohammed, 99 S. Ct. 1760 (1979); Parham v. Hughes, 99 S. Ct. 1742 (1979); Lalli v. Lalli, 99 S. Ct. 518 (1978). *Caban* and *Parham* turn on the natural father's rights to establish his legal relation to his illegitimate child and thus do not directly bear upon this matter. For a discussion of the father's rights with respect to his illegitimate children *see* Note, *The Unwed Father: Conflict of Rights in Adoption Proceedings*, 7 FLA. ST. U.L. REV. 559 (1979).

12. 430 U.S. at 769.

13. The only mention of *Burris* is a "see also" reference in the dissent. 23 FLA. L.W. at 268.

14. *Id.* at 266.

15. The *West* decision noted that the United States Supreme Court has "reiterated its previous declarations that legitimacy distinctions will not be sustained unless the particular statutory classification bears 'some rational relationship to a legitimate state purpose.'" *Id.* (quoting *Trimble*, 430 U.S. at 766-67).

16. 430 U.S. at 767.

17. FLA. STAT. § 409.2561 (1977) provides:

> (3) By accepting public assistance for, or on behalf of, a dependent child, the recipient is deemed to have made an assignment to the department of any right, title, and interest in any child support obligation owed to or for said child up to the amount of public assistance money paid for, or on behalf of, the dependent child. The recipient is also deemed to have appointed the department as his [*sic.*] attorney in fact to act in his [*sic.*] name, place, and stead to perform specific acts relating to child support, including but not limited to:
>
> . . . .
>
> (d) Executing verified complaints for the purpose of instituting an action for the determination of paternity of a child born, or to be born, out of wedlock.

port. The court held that the term "voluntary payments" in the statute[18] means monetary payments, and thus the running of the statute of limitations had not been tolled.[19]

The supreme court affirmed stating that the "statute is designed to foster the state's reasonable concern for discouraging fraudulent claims and for promoting the fair administration of justice by ensuring that law suits will be instituted while proof is still available and memories are still fresh."[20] The opinion contains no analysis of how these goals are fostered by this statute. Nor is there any comparison between the state's interests and the "rights of illegitimate children to protection of the laws equal to that afforded to other natural but legitimate children."[21]

Traditionally statutes of repose are based on a public policy of preventing stale claims—the theory being that if a claim is valid the right to have it enforced will be exercised promptly.[22] While this theory may be justified as applied to limitations of actions in general, it does not address the reality of the singular situation involved in paternity suits. There are many reasons why a paternity action might not be brought promptly. The father of the child might still be present and might even be assisting on occasion (as did Mr. West in the instant case). The mother's short-term interests might conflict with the child's long-term rights. There could also be an element of threat or duress involved, or simply lack of knowledge about the proper procedures for establishing paternity of an illegitimate child.

When any but the most "toothless" scrutiny is applied, the "rational basis" of the Florida statute simply disappears. The alleged goal of the statute is to discourage fraudulent paternity claims. The United States Supreme Court has repeatedly recognized "the lurking problems with respect to proof of paternity," but it has declared that problems of proof cannot "be made into an impenetrable barrier."[23] Rather, a statutory classification must be "carefully tuned to alternative considerations."[24] The Florida statute fails to comport with this directive, as the means selected to achieve the statutory goal is an arbitrary determination that paternity can only be proved within four years of a child's birth. This

18. FLA. STAT. § 95.051(1)(e) (1977) states: "The running of the time under any statute of limitations . . . is tolled by . . . [v]oluntary payments by the alleged father of the child in paternity actions during the time of the payments."

19. 23 FLA. L.W. at 265.

20. *Id.* at 266.

21. *Burris*, 361 So. 2d at 154-55.

22. 21 FLA. JUR. *Limitation of Actions* § 3 (1958).

23. Gomez v. Perez, 409 U.S. 535, 538 (1973).

24. Mathews v. Lucas, 427 U.S. 495, 513 (1976).

creates an impenetrable barrier of time without considering any alternatives.

A recent decision of the District of Columbia Superior Court recognized that a statute of limitations on paternity actions is not rationally related to the legitimate state concern with fraudulent claims.[25] That court noted that "[t]he mere passage of a certain amount of time . . . has no logical connection with whether the noncustodial putative parent is or is not the actual parent."[26] The focus should rather be on "reliable methods of proof [which are] far more directly related to establishing proof of parentage than . . . arbitrary time limitations . . . ."[27] This is precisely the approach of the United States Supreme Court in *Lalli v. Lalli,* which focused on the actual availability of evidence of paternity.[28]

In *West* the lower court found, after hearing the available evidence, that Mr. West was in fact the father of the child.[29] Yet that evidence was rendered totally irrelevant because the paternity action was not commenced within four years. Accordingly, the child is forever barred from seeking a judicial determination of paternity. As noted by the Court in *Weber v. Aetna Casualty & Surety Co.,* it is "illogical and unjust" to visit such condemnation on the innocent child as "legal burdens should bear some relationship to individual responsibility or wrongdoing."[30] The Florida Supreme Court has itself recognized that a mother cannot contract away a child's right to support,[31] yet this statute allows her to totally foreclose her child's rights through inaction. The court should not be willing to condone such an unnecessary deprivation of individual rights when feasible alternatives are readily available.

If the state's purpose is to reduce spurious paternity claims, that goal can most effectively be reached by focusing on the available evidence, not by imposing an arbitrary time limit. Indeed, if scientific evidence can establish that a man is or is not the biological father of a child, he will be no more or less so in one day or in twenty years. In the past blood test results were admissible only as defendant's evidence of nonpaternity, since the probability of paternity indicated by the available blood tests was not considered sufficient to allow their use as plaintiff's proof.[32] However, the development

25. J.L.P. v. C.L.B., 107 DAILY WASHINGTON L. REP. 401 (D.C. Super. Ct. Jan. 30, 1979).
26. *Id.* at 406.
27. *Id.* at 407.
28. 99 S. Ct. 518, 524 (1979).
29. 23 FLA. L.W. at 265.
30. 406 U.S. 164, 175 (1972).
31. Gammon v. Cobb, 335 So. 2d 261, 266-67 (1976).
32. Terasaki, *Resolution by HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing,* 16 J. FAM. L. 543, 543 (1977-78).

of a new system, Human Leukocyte Antigen (HLA) testing, should drastically change the scope of paternity actions as this system provides an extremely high probability of paternity—usually over 90%.[33]

Before a new scientific technique can be utilized as evidence, it must be generally recognized in the scientific community as accurate and reliable. The joint AMA-ABA guidelines for serologic testing in paternity cases recommend HLA as "the single most potent method for exclusion."[34] A recent California case has gone so far as to hold that it was reversible error for the lower court to exclude HLA evidence as proof of paternity.[35]

The holding in *West* that only monetary payments toll the running of the limitation period is equally disturbing for its refusal to recognize the great variety of ways in which paternity can be acknowledged. Since the court felt compelled to uphold the validity of the statute of limitations, it is unfortunate that it found it necessary to so technically construe the tolling provision. The court has previously stated that it does not have to deliberate in a vacuum but can consider society as it is.[36] The *West* court observed that there is no need for a mother to bring suit to establish paternity if she is receiving *monetary* payments for the child's support.[37] What the court failed to recognize is that there is also no need to institute such proceedings if she is receiving other forms of support for the child. As noted in the dissenting opinion, although there was no verifiable exchange of cash in this case, "West was delivering the *equivalent of money*" to discharge his support obligation.[38]

The court in *West* noted that it is within the power of the legislature to establish classifications to meet legitimate goals. Perhaps it would be more desirable to address this issue to the legislature. This overlooks, however, that one of the arguments for applying *strict* scrutiny to a legislative classification is that it affects a politically impotent minority. There is no powerful lobby for illegitimate children, nor verbal proponents of their rights. The legislature might, of course, recognize that the statute of limitations conflicts with the

33. *Id. But see* Jaffee, *Comment on the Judicial Use of HLA Paternity Test Results and Other Statistical Evidence: A Response to Terasaki,* 17 J. FAM. L. 457 (1979).

HLA testing is available at the Blood Bank and Histocompatability Laboratory of the Shands Teaching Hospital at the University of Florida.

34. *Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage,* 10 FAM. L.Q. 247, 274 (1976). *See also* Malvasi v. Malvasi, 167 N.J. Super. 513 (Super. Ct. Ch. Div. 1979).

35. County of Fresno v. Superior Ct., 92 Cal. App. 3d 133 (5th Ct. App. 1979). *See also* Cramer v. Morrison, 153 Cal. Rptr. 865 (4th Ct. App. 1979).

36. Gammon v. Cobb, 335 So. 2d 261, 265 (1976).

37. 23 FLA. L.W. at 265.

38. *Id.* at 267 (emphasis added).

express legislative intent of Florida's child support enforcement statute.[39] While it may be unfortunate for change to be motivated by concerns of fiscal integrity rather than individual rights, the result would be the same. If the legislature is aware of the potential threat to the state's finances, and if the courts are willing to accept scientific evidence such as HLA, the statute could be repealed. At the very least the legislature should revise the tolling provisions to take into account factors other than monetary payments.

The legitimate interest of the state in avoiding spurious paternity claims can be served by carefully drafted statutes which focus on the actual availability of evidence. An arbitrary time limit does not significantly further the desired goal, especially in light of the fact that it unnecessarily cuts off the rights of illegitimate children. If the court is unwilling to find that such a classification "invidiously and unreasonably discriminates against illegitimate children,"[40] it is to be hoped that the legislature will.

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39. FLA. STAT. § 409.2551 (1977) provides in part:
It is declared to be the public policy of this state that this act be construed and administered to the end that children shall be maintained from the resources of responsible parents, thereby relieving, at least in part, the burden presently borne by the general citizenry through public assistance programs.

40. 23 FLA. L.W. at 266.