North Carolina Central Law Review

Volume 6
Number 2 *Volume 6, Number 2*

Article 6

4-1-1975

The Illegitimate Child v. The State of North Carolina: Is There a Justiciable Controversy under the New Constitutional Standards

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NOTES AND COMMENTS

The Illegitimate Child v. The State of North Carolina: Is There a Justiciable Controversy under the New Constitutional Standards?

> A bastard shall not enter into the congregation of the Lord; even to his tenth generation shall he not enter into the congregation of the Lord. DEUTERONOMY 23.2
>
> The bastard, like the prostitute, thief, and beggar, belongs to that motley crowd of disreputable social types which society has generally resented, always endured. He is a living symbol of social irregularity, and undeniable evidence of contramoral forces, in short, a problem—a problem as old and unsolved as human existance itself.[1]

That discrimination based on illegitimacy pervades American law is a universally known fact. This discrimination is derived from a tradition of prejudice which adversely affects a large and growing class of persons.[2] Until recently, however, discrimination based on status of birth largely escaped constitutional review.

THE U.S. CONSTITUTION AND THE ILLEGITIMATE CHILD

The cases of *Levy v. Louisiana*[3] and *Glona v. American Guarantee & Liability Insurance Co.*[4] have resulted in a re-examination of this discrimination; at least insofar as *laws* relating to status of birth are concerned. Both *Levy* and *Glona* were cases involving the right to recovery for wrongful death under Louisiana's wrongful death statute. In *Levy* the illegitimate child was attempting to recover for the death of its mother. In *Glona* the mother was attempting to recover for the death of her child. The Court held that the statute denied equal protection of the law to both illegitimate children, *Levy*, and the mother of illegitimate children, *Glona*. The opinions in these cases generally condemn classifications based on illegitimacy. The exact basis of the Court's decisions, however, is less clear. Mr. Justice Douglas, writing

1. Davis, *Illegitimacy and the Social Structure*, 45 AM. J. SOCIOLOGY 215 (1939) quoted in H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 1 (1971) [hereinafter cited as KRAUSE]. Note, however, that the classification "bastard," unlike the classifications "prostitute," "thief" and "beggar," is one completely void of volition.

2. In 1950, the rate of illegitimacy in the United States was approximately one out of every 25 births. By 1960, one in 19, by 1964, one in 15, and by 1967, one in 12. It is expected that the rate will reach ten per cent of all births before the end of this decade. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 48, 50 (1969). *See* KRAUSE, *supra* note 1 at 8.

3. 391 U.S. 68 (1968).

4. 391 U.S. 73 (1968).

for the majority, announced in the *Levy* opinion that "it is invidious to discriminate against illegitimate children when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother."[5] This statement incorporates language used by the Court in deciding cases on the basis of the "rational basis" test of the Equal Protection and Due Process Clauses and implicitly the "fundamental right" and "suspect classification" test of the Equal Protection Clause. Use of the due process theory which precludes a state from denying persons rights on the basis of a condition over which they have no control is also not precluded by the language used by Justice Douglas.[6] Earlier in the opinion a discussion of the historical application of the Equal Protection Clause to social and economic legislation coupled with the Court's recent sensitivity to areas touching basic civil rights leads one to conclude that the easier equal protection rational basis test was the vehicle upon which the case was decided. It seems to this writer, however, that under any test, the statute in question in *Levy* and *Glona* would have failed to meet the rational basis required by the Fourteenth Amendment. This is perhaps borne out by the Court's reply in *Glona* to the State's argument that the statutory scheme which discriminates against illegitimates is designed to discourage extra-marital sexual activity. "We see no possible rational basis for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death."[7]

The Court's broad approach in both *Levy* and *Glona* gave the cause for equality under the law for illegitimate children a tremendous boost. It has been argued by notable legal commentators in this area that these two decisions supplied the necessary power for the courts to strike down any legal distinctions which tended to discriminate between legitimate and illegitimate children and impetus to state legislatures to take heed with legislative change.[8]

Such hopes were dealt a severe blow, however, when in the 1971 case of *Labine v. Vincent*[9] the Court, in a five-to-four decision, refused to extend *Levy* to include Louisiana's intestate succession statutes which prohibited unacknowledged illegitimate children from taking under the statutes. The majority in a rather brief opinion (considering

5. Levy v. Louisiana, 391 U.S. at 72.
6. *See* Robinson v. California, 370 U.S. 660 (1962).
7. Glona v. American Guarantee & Liability Insurance Co., 391 U.S. at 75.
8. *See* Gray & Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co.*, 118 U. PA. L. REV. 1 (1969); KRAUSE at 59-84.
9. 401 U.S. 532 (1971).

the Court's decision in Levy), written by Mr. Justice Black, concluded that "the power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the U.S. Constitution and the people of that state to the legislature of that state."[10] The Court distinguishes *Levy* by characterizing the "burden" faced by the children there as insurmountable while in this case, the child could have inherited from her father either by will or intestate. (Louisiana's intestate succession laws provide that an unacknowledged illegitimate child would take before the property escheated to the state *i.e.*, if there were no surviving legitimate children, parents, or collaterals.) Mr. Justice Brennan writing for the four dissenters berated the majority, both for its failure to recognize that the Equal Protection Clause requires a justification for Louisiana's discrimination against illegitimate children and for what he considered its fallacious basis for distinguishing *Levy*. In an exhaustive analysis of every interest offered by Louisiana in the face of the Equal Protection Clause, he concluded that the statute fails to satisfy even the rational basis test.[11]

The decision in *Labine* left the constitutional rights of illegitimate children in a state of limbo. The Court in *Labine* did not overrule *Levy*, but the two decisions are hardly consistent. In 1972, the Court received another opportunity to consider the rights of illegitimate children, this time in a case involving Louisiana's workmen's compensation statutes.[12] The statute relegated unacknowledged illegitimate children of the deceased to a lesser status with respect to benefits than that occupied by legiimate children of the deceased. Mr. Justice Powell writing for seven justices, declared the law invalid under the Equal Protection Clause. He identified the essential inquiry in cases involving an equal protection challenge as a dual one. What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger? After carefully considering each of the proffered state interests (protecting legitimate family relationships; facilitating potentially difficult problems of proof; statutory distinctions reflect what might be presumed to have been the deceased's preference of beneficiaries), he rejected all, concluding that the "inferior classification of dependent unacknowledged illegitimates bears, in this instance, no significant relationship to those recognized purposes of recovery which workmen's compensation statutes commendably serve."[13] The Court, however, did not overrule its decision in *Labine*. Rather,

10. Labine v. Vincent, 401 U.S. at 535.
11. Labine v. Vincent, 401 U.S. at 551-58 (Brennan, J., dissenting).
12. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972).
13. Weber v. Aetna Casualty & Surety Co., 406 U.S. at 175.

that case was distinguished on the basis that the state's interest there was "substantial."[14]

Since *Weber*, the Supreme Court has not labored long in deciding those cases that have reached it in favor of equality for the illegitimate child. Noteworthy are *Gomez v. Perez*,[15] *New Jersey Welfare Rights Organization v. Cahill*,[16] *Davis v. Richardson*,[17] and *Griffin v. Richardson*.[18]

Gomez is a case involving support statutes in Texas which fail to recognize any enforceable duty on the part of the biological father to support his illegitimate children while providing that the natural father has a continuing and primary duty to support his legitimate children. The Court invalidated the statute following *Levy* and *Weber*, which cases the opinion declares to stand for the proposition that a state may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally.[19] *New Jersey Wel-*

14. ". . . That decision reflected, in major part, the traditional deference to a State's prerogative to regulate the disposition at death of property within its borders. The Court has long afforded broad scope to state discretion in this action. Yet the substantial state interest in providing for 'the stability of . . . land titles and in the prompt and definite determination of the valid ownership of property left by decedents,' Labine v. Vincent, 229 So. 2d 449 (La. App. 1969), is absent in the case at hand." Weber v. Aetna Casualty & Surety Co., 406 U.S. at 170. Query whether prospective application of a court decision or a statutory scheme which affirmatively fixes vested rights at a certain point in time might not satisfy the state's interest in these areas. *See* text at note 46, *infra*.

15. 409 U.S. 535 (1973).

16. 411 U.S. 535 (1973). New Jersey's Assistance to Families of the Working Poor program, under attack in this case, is wholly financed by the State of New Jersey. North Carolina has no comparable program. Its AFDC program is, of course, financed jointly by the State and Federal governments under the Social Security Act.

17. 423 F. Supp. 588 (D. Conn.), *aff'd*, 409 U.S. 1069 (1972).

18. 346 F. Supp. 1226 (D. Md.), *aff'd*, 409 U.S. 1069 (1972).

19. ". . . [O]nce a state posits a judicially enforceable right, on behalf of children, to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because her natural father has not married her mother. For a state to do so is 'illogical and unjust.' Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972)." Gomez v. Perez, 409 U.S. at 538. *But cf.* Linda R.S. v. Richard D., 411 U.S. 614 (1973), where a five-to-four majority of the court affirmed a three-judge district court decision to dismiss the action because the appellant lacked standing. In that case the appellant, the mother of an illegitimate child, sought to enjoin the local district attorney from refraining to prosecute the father of her child under Art. 602 of the Texas Penal Code, which article makes it a misdemeanor for a parent to fail to support his or her children. Through judicial construction this provision was only applied in cases where the child was the legitimate child of the father. The court held that the appellant had made no showing that her failure to secure support payments resulted from the nonenforcement, as to her child's father, of Art. 602. Whether basing its decision on "standing" amounted to an adjudication on the merits is a question beyond the scope of this comment. However, the court did point out that the decision in this case came close on the heels of the decision in *Gomez*, which decision would no doubt result in a restructuring of Texas' civil support statutes. Linda R.S. then would presumably be able to rely on civil remedies to secure support from her child's father.

fare Rights Organization v. Cahill involved a challenge to New Jersey's "Assistance to Families of the Working Poor" program, which was alleged to discriminate against illegitimate children by limiting benefits to only those otherwise qualified families "which consist of a household composed of two adults of the opposite sex ceremonially married to each other who have at least one minor child of both; the natural child of one and adopted by the other; or a child adopted by both." The court held that the limitation imposed by the definition of eligible families was unconstitutional because violative of the Equal Protection Clause. The Court was "compelled" to reach this decision by its decisions in *Levy*, *Weber*, and *Gomez*.

Finally in *Davis v. Richardson* and *Griffin v. Richardson*, the Court was faced with alleged discrimination against illegitimate children in the Social Security Act.[20] This act is, of course, a federal act and as such reliance on the Equal Protection Clause of the Fourteenth Amendment was impossible. The district court had little trouble finding an invidious discrimination against illegitimate children, however, and based its decision to enjoin enforcement of the questionable provision on cases holding that equal protection standards are "included" in the Due Process Clause of the Fifth Amendment.[21]

Again, the actual basis which the Court used is vague. It seems safe to say though, that federal laws which discriminate against illegitimate children will be struck down, at least where their enforcement is in apparent conflict with the purpose for which they were enacted.[22] As to state laws, the same conclusion cannot be reached! The Supreme Court has made significant progress in equating the rights of illegitimate children with their legitimate counterparts. Presumably this has been done by making legal classifications of children on the basis of legitimacy suspect, thus warranting special judicial consideration. *Labine v. Vincent*, however, shows that a "substantial" state interest may prove sufficient to satisfy this special scrutiny by the courts. For this and other reasons then, resort to the courts is an inadequate means for accomplishing the goal of securing equality for illegitimate children.

20. Social Security Act, 42 U.S.C. § 416(h)(3), includes within the class of eligible children those illegitimate children who are acknowledged or supported by the wage-earner. However, in effect 42 U.S.C. § 403(a) of the Act subject one sub-group of individuals who qualify as "children" under the Act (acknowledged and dependent illegitimate children) to total deprivation unless all others who "deserve" payment receive their full statutory share. And among the class of children who qualify under § 416(h)(3), critical differences in the amount of money received occur based on the fortuitous factor of the number of legitimate children the wage-earner had. *See* Davis v. Richardson, 342 F. Supp. at 591.

21. Richardson v. Becker, 404 U.S. 78 (1971); Bolling v. Sharpe, 347 U.S. 497 (1954).

22. *See e.g.*, Davis v. Richardson, 342 F. Supp. 588.

The ultimate solution, and probably the one most consistent with the historical and constitutional premise that the making and enforcing of state laws is a function of the state legislatures (with particular Congressional and court deference in the areas of economic and social policy), would be wholesale revision of state laws which presently discriminate against illegitimate children. This solution, of course, poses many extremely difficult problems. A method that would accomplish substantially the same results, with fewer legal and social obstacles, would be the adoption by each state of a Uniform Legitimacy Act. Such an act could provide for easy legitimation proceedings, which in most cases would not be proceedings at all, but would be the creation of rebuttable presumptions of legitimacy i.e., paternity. In the conclusion of this comment Professor Harry D. Krause's "discussion draft" of the Uniform Legitimacy Act submitted to the Committee on a Uniform Legitimacy Act of the National Conference of Commissioners in Uniform State Laws, will be briefly discussed. The following subsection, however, is concerned with the rights of the illegitimate child in North Carolina.

THE ILLEGITIMATE CHILD IN NORTH CAROLINA

Initially, it is important to note that North Carolina does not have an integrated body of law dealing with the legal problems of the illegitimate. Neither has the legislature devised a scheme whereby illegitimate children may be deemed "children" of their natural parents and thereby entitled to rights and benefits afforded children generally. Recently, however, there have been significant changes made in some of the more important areas[23] of the law that indicate to this writer that North Carolina may be in the forefront of states which have recognized that the illegitimate child needs legal help.[24] The actual motive for enactment of the new laws is, of course, subject to speculation. In some areas, the language of the statutes leads one to the inevitable conclusion that the interest that the state is trying to protect is its own pocketbook and that benefiting the child is ancillary. Legislative mo-

23. For example, recent statutes in the areas of intestate succession and workmen's compensation afford at least the acknowledged illegitimate with rights equal to his or her legitimate counterpart. These areas will be discussed in detail in the text *infra*.

24. Minnesota is often regarded as a front-runner in this area, primarily due to its statute conferring a duty on the commissioner of public welfare to take care that the interests of the child are safeguarded. MINN. STAT. ANN. § 257.33 (1959). However, North Carolina, which does not provide for the conference of such a general duty to its Social Services Commission (*See* N.C. GEN. STAT. §§ 143B-153 *et seq.* (Supp. 1974). *See also* N.C. GEN. STAT. §§ 108-1 *et seq.* (1966).), does have more liberal laws in the area of intestate succession. *Compare* MINN. STAT. ANN. § 525.172 (Supp. 1967), wherein it is said that the illegitimate child inherits from its mother (but not her kin) and its father (but not his kin), if the latter acknowledged the child in writing, *with* N.C. GEN. STAT. § 29-19 (Supp. 1974), which provides that an acknowledged illegitimate child may inherit *by, through and from* its mother and acknowledging father.

tives, however, are always a subject of controversy and, in the case of the illegitimate child who will benefit from the statutory changes, irrelevant. What is important is that progress is being made in this long overlooked area. In as much as the law in this country has become, in recent years, a vanguard of social welfare and historically has been a significant factor in shaping social policy,[25] a fair share of the responsibility for putting an end to the immoral practice of legally stigmatizing illegitimate children-the innocents of their parents' "wrong," must fall on our state legislature and to a lesser extent on the courts.

Common Law

North Carolina follows the very strong common law presumption that children born in wedlock are legitimate.[26] Now, after a long history of court decisions, this presumption provides the child born of a married woman an impressive arsenal of law to do battle with the social forces that would rob him or her of the legal benefits that legitimate children take for granted, albeit "unbeknownst" to them in most situations. No attempt will be made to trace the complete history of the common law in this area—a brief composite of some of the case holdings will suffice to show the scope of the remedies it provides.

It is not relevant to the issue of legitimacy that the child was conceived prior to the marriage of its parents. The child is, in law, legitimate if born within matrimony, though born a day after the marriage.[27]

25. *See e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954) (right to racially integrated education system); Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir.), *cert. denied* 384 U.S. 941 (1965) (right of private citizens to intervene in the federal agency decision-making process in order to better protect the environment). *See also* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 1971, 2000e-2000e-15 (outlawing racial discrimination in employment). Compare this phenomenon with that existing in the Scandinavian countries, which have long granted substantially equal rights to the illegitimate, principally because of the social practice of the people generally in those countries. *See generally*, Christensen, *Cultural Relativism and Premarital Sex Norms*, THE UNWED MOTHER 61-77 (R. Roberts ed. 1966), comparing norms in Utah, Indiana and Denmark.

26. The presumption that children born while their mother was living in lawful wedlock with her husband are legitimate is conclusive in the absence of proof of impotency of the husband, or evidence negativing the possibility or probability of access. State v. Pettaway, 10 N.C. 623 (1825). In this regard it is important to note what the courts will require as proof of marriage. In all civil cases except actions for criminal conversation, and, in all criminal cases except prosecutions for bigamy, evidence of reputation of marriage and cohabitation is sufficient to support a finding of the existence of a marriage. Jackson v. Rhem, 59 N.C. 141 (1860); Felts v. Foster, 1 N.C. 164 (1799). Although no case could be found to the contrary, this author has some doubt concerning the vitality of this principle, particularly with respect to persons married within the United States.

27. Rhyne v. Hoffman, 59 N.C. 335 (1862). Many of the old common law principles have now been codified in the statutory law of North Carolina. On the holding in Rhyne v. Hoffman, *supra, see* N.C. GEN. STAT. § 130-50(c) (1969), wherein it is said: "If the mother was married either at the time of conception or birth, the name

The presumption here is strong, but not conclusive.[28] To overcome the presumption it is necessary for one challenging the child's legitimacy to "plainly prove" the impossibility or improbability that the husband was the father.[29] Generally, as stated earlier, such proof must be of impotency or of non-access by the husband.

Conversely, the child is presumed the legitimate offspring of the husband of the mother when conception occurs during the marriage of the husband and mother, notwithstanding the fact that the child is born after termination of the marriage.[30] The same is true in cases where the husband of the mother dies before the birth of the child. And here, the law further presumes that any child born within ten lunar months after the death of the husband is the lawful offspring of the then deceased husband.[31] Furthermore, where conception occurs during the marriage of the mother, the courts will go out of their way to provide the law's protection to the child. For example, if it is shown that the husband was living in the same house with the mother during the period in which the child was conceived, the legitimacy of the child is conclusively presumed when the husband is not impotent.[32] Similarly, when there was in-fact access by the husband during the period when the child was begotten, the child is presumed legitimate, notwithstanding the fact that the mother was at the same time carrying on "criminal intimacy" with others.[33]

However, the common law imposed heavy burdens on the child born out of wedlock who could not call into play the above presumptions. For example, the child could not use the name of his or her father (a signficant factor in a system of laws which has a primogeniture basis) and, the child was not entitled to support from his or her father.[34] North Carolina has made significant "dents" in this wall to common law condemnation of the illegitimate child, however, in many areas the

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of the husband shall be entered on the [birth] certificate as the father of the child and the surname of the child shall be the same as that of the husband, unless paternity has been determined otherwise by a court of competent jurisdiction, in which case the name of the father as determined by the court shall be entered and the surname of the child shall be the same as that of the mother."

28. *See* N.C. GEN. STAT. § 130-50(c) (1969).

29. *See* Ewell v. Ewell, 163 N.C. 233, 79 S.E. 509 (1913).

30. N.C. GEN. STAT. § 50-11 (1966). *See also* N.C. GEN. STAT. § 130-50(c) (1969); State v. Bowman, 230 N.C. 203, 52 S.E.2d 345 (1949).

31. *See generally* Byerly v. Talbert, 250 N.C. 27, 108 S.E.2d 29 (1959).

32. Evidence tending only to show that sexual intercourse between husband and wife did not take place is insufficient for a finding that the husband was not the father of the child of the wife, if access was possible. State v. Green, 210 N.C. 162, 185 S.E. 670 (1936); *see also* State v. Hickman, 8 N.C. App. 583, 174 S.E.2d 609, *cert. denied*, 277 N.C. 115 (1970).

33. Ray v. Ray, 219 N.C. 217, 13 S.E.2d 224 (1941).

34. *See generally* Love v. Love, 179 N.C. 115, 101 S.E. 562 (1919) and cases cited therein.

spirit of the doctrine remains.[35]

Statutory Provisions Establishing Paternity

In the spirit of the common law presumptions of legitimacy discussed above, North Carolina has a number of statutory aids to the legally "malconceived" child. When the mother of a child born out of wedlock marries the putative father of that child, the child is legally deemed to be legitimate for all purposes under the law (including but not limited to entitlement to succession, inheritance, etc., by, through, and from his or her father).[36] Under this statute the ordinary procedure of establishing proof of paternity is dispensed with in that if the child is "regarded," "deemed," or "held in thought" by the parents themselves as their child, such child is legitimate.[37] If the marriage of the parents of a child is voidable or bigamous under North Carolina law, the child is deemed legitimate, notwithstanding the annulment of the marriage.[38] These statutes are simple curative remedies with respect to the legitimation of the child and represent to this author's mind the type of "presumptive" legislative action which most conforms with the intent of the proposed Uniform Act which will be discussed *infra.* Clearly the child benefits in that the stigma of bastardy is either removed or never attaches. However, like the provisions for legitimation by petition to the court by the putative father[39] and adoption by the putative father,[40] the provision for legitimation as the result of a subsequent marriage of the child's parents suffers the infirmity of requiring action by the parents of the child. Thus the child is powerless to avoid the social and legal consequences of illegitimacy when his or her parents refuse to act.

North Carolina does have one remedy for the illegitimate which does not necessarily rely on action by the parents. Under recently enacted Article 3 of Chapter 49 of the General Statutes,[41] the child may institute civil proceedings to establish paternity. Establishment of paternity results in the mother and the father each having the same rights and obligations concerning custody and support as though their child were

35. Birth certificates still evidence the child's status in that they do not show the father's name without his written consent under oath. N.C. GEN. STAT. § 130-54 (1974). Statutes still use language such as "next of kin," which by court decision, has been construed not to include illegitimate children. *See e.g.*, N.C. GEN. STAT. § 97-37 (1972), dealing with the distribution of workmen's compensation benefits in the event of the death of an employee.

36. N.C. GEN. STAT. § 49-12 (1966).

37. Carter v. Carter, 232 N.C. 614, 617, 61 S.E.2d 711, 713 (1956).

38. N.C. GEN. STAT. § 50-11.1 (1966).

39. N.C. GEN. STAT. § 49-10 (Supp. 1971).

40. N.C. GEN. STAT. § 48-23 (1966).

41. N.C. GEN. STAT. §§ 49-14-16 (Supp. 1974).

legitimate. More effective enforcement of the right to support can be expected under the statutes protecting legitimate children, which thus become applicable.[42] Proof of willful neglect or refusal to support a child are aided by presumptions.[43] Thus prosecution is less of a burden than under the bastardy section where proof of intent can be difficult.[44] This statutory scheme is no doubt designed to help relieve the financial burden that the state often is forced to assume with respect to illegitimate children and, as such it fails to remove the legal stigma of illegitimacy. Although, as will be shown *infra,* the fact of legitimacy is determinative of some benefits afforded children under North Carolina law, the number of such distinctions is dwindling, with more and more emphasis being placed on the question of paternity, regardless of the marital status of the parents.

Intestate Succession

The U.S. Supreme Court has, for the present, elected to defer to the state legislatures in the area of descent and distribution.[45] Presumably there is concern in this area about the stability of property and estate laws and the effect that a court decision might have on vested rights.[46]

Until recently and since 1959, the illegitimate child in North Carolina has been treated as though he or she were the legitimate child of his or her mother for intestate succession purposes.[47] The child could not inherit from its father or the father's relatives.[48] On the other hand, a legitimated child had the same rights to inherit by, through, and from

42. N.C. GEN. STAT. § 14-322 (1969) provides: ". . . [I]f any father or mother shall wilfully neglect or refuse to provide adequate support for his or her child or children, whether natural or adopted, . . . [he or she] shall be guilty of a misdemeanor." This section, however, has no application to illegitimate children. State v. Gardner, 219 N.C. 331, 13 S.E.2d 529 (1941). N.C. GEN. STAT. § 49-15 presumably overrules this court decision, in so far as the illegitimate child whose paternity is established pursuant to § 49-14.

43. N.C. GEN. STAT. § 14-323 (1966).

44. *See e.g.*, State v. Day, 232 N.C. 388, 61 S.E.2d 86 (1950).

45. *See* Labine v. Vincent, 401 U.S. 532.

46. Blackstone's view has it that the legal effect of a court decision which "makes new law" is that the "new law" is merely a clarification of, or correction of a prior application of "the" law, and as such all court decisions have retroactive effect. *See* 1 BLACKSTONE, COMMENTARIES 69 (2d ed. 1766). Retroactive application of a U.S. Supreme Court decision in the area of intestate succession would no doubt be the "proximate cause" of mass suicide by title insurance underwriters and estate planners everywhere. The notion that judges do not have the power to make their decisions prospective only, however, has been challenged by legal scholars and members of the judiciary so frequently that the question whether to make a decision prospective or retroactive has become one based on the policy factors to be weighed in each case. *See generally* Chaffee, *Do Judges Make or Discover Law?*, 91 PROC. AM. PHILOS. SOC'Y 405 (1947).

47. N.C. GEN. STAT. § 29-19 (1966).

48. Jolly v. Queen, 264 N.C. 711, 142 S.E.2d 592 (1964).

its father and mother as if such child had been born in lawful wedlock.[49] The 1973 General Assembly, however, made a significant change in the law in this area. Any child born an illegitimate child who is legitimated in accordance with North Carolina law or in accordance with the applicable law of any other jurisdiction is still entitled, by succession, to property by, through, and from its father and mother the same as if born in lawful wedlock.[50] With respect to the child not formally legitimated, the 1973 amendment to the statutes permits the child to take not only by, through, and from its mother but also by, through, and from (1) any person who has been judicially determined to be the father of the child pursuant to *civil* proceedings to establish paternity;[51] (2) any person who has formally acknowledged himself during his own lifetime to be the father of such child.[52] This same statute also provides that any person who acknowledges himself to be the father of an illegitimate child in his duly probated last will shall be deemed to have intended that the child be treated as expressly provided for in the will or, in the absence of any express provision, the same as a legitimate child.[53]

This new statutory scheme is a vast improvement over that which previously existed with respect to the rights of children born out of wedlock. Legitimation is no longer required before the child can take from its father, and the child itself may now initiate a civil action to establsih paternity. In the latter situation, however, the burden still realistically lies on the parents of the child to establish its paternity because the action to establish paternity must be commenced within three years after the birth of the child or within three years after the date of the last payment by the putative father for support of the child.[54] And,

49. N.C. GEN. STAT. § 29-18 (1966). *See also* Greenlee v. Quinn, 255 N.C. 601, 122 S.E.2d 409 (1961). A child adopted in accordance with North Carolina law or the applicable law of any other jurisdiction is also entitled to inherit through and from its adoptive parents and their heirs the same as if it were the natural legitimate child of the adoptive parents. N.C. GEN. STAT. § 29-17 (1966).

50. *See* note 49 *supra.*

51. Discussed *supra* in text accompanying note 41.

52. N.C. GEN. STAT. § 29-19 (Supp. 1974). The acknowledgment required by this statute is a written instrument executed or acknowledged before a certifying officer (justice, judge, magistrate, clerk or assistant or deputy clerk of the court) and filed during the lifetime of the person making the acknowledgment in the office of the clerk of superior court.

53. N.C. GEN. STAT. § 29-19(d). Note also that the subsequent entitlement of an after-born illegitimate child to take as an heir pursuant to the provisions of § 29-19(b) does not revoke the will of a testator, but any so entitled illegitimate child shall have the right to share in the testator's estate to the same extent as an after-born or after-adopted child. N.C. GEN. STAT. § 31-5.5 (Supp. 1974).

54. *See* N.C. GEN. STAT. § 49-14(c) (Supp. 1974). The action may be brought by the director of public welfare when the child is likely to become a public charge. N.C. GEN. STAT. § 49-16(2) (Supp. 1974). This remedy may also prove illusory because in virtually all cases it depends on the mother of the child seeking public welfare within

as at common law, the unacknowledged and unlegitimated child takes nothing from its father under the laws of intestacy.

Wrongful Death

North Carolina has a wrongful death statute. It provides that when the death of a person is caused by a wrongful act. . . of another such as would, if the injured party had lived, have entitled him to an action for damages, therefor, the action may be brought by the personal representation of the decedent. The statute further provides that the amount recovered in such action shall be disposed of as provided in the Intestate Succession Act.[55]

With respect to an illegitimate child recovering for the death of its mother (*Levy v. Louisiana*) and a mother recovering for the death of her illegitimate child (*Glona v. American Guarantee & Liability Insurance Co.*), North Carolina's intestate succession laws comply with the equal protection mandate of the Constitution. The illegitimate child is treated as if it were the legitimate child of its mother,[56] and would thus stand in the same place legally as its legitimate counterpart. Distribution of the estate of an illegitimate intestate who dies leaves no surviving spouse and no surviving children generally follows maternal lines of kinship.[57] The mother of such a child, who would be otherwise eligible, would therefore take whether the intestate was legitimate or illegitimate.

To this author's mind, however, there is a serious question as to the constitutionality of this method of distribution with respect to the illegitimate child's right to receive wrongful death proceeds resulting from the death of the child's father. Many of the infirmities of the statutory method of distributing the proceeds have been cured by the 1973 amendment to the intestate succession laws discussed *supra*. But, what of the illegitimate child who has not been formally acknowledged and whose paternity has not been established before the untimely death of its father?[58] It doesn't take much imagination to conceive of the "test"

the time periods set out in § 49-14(c). And, although the statute provides that the director may bring the action, no statutory *duty* is actually proscribed.

55. N.C. GEN. STAT. § 28-173 (1966). "While any sum recovered is not a part of decedent's estate, such sum can only be recovered in the name of the personal representative, and must be distributed under laws of intestacy in this State." Harrison v. Carter, 226 N.C. 36, 36 S.E.2d 700 (1946) *citing* Neill v. Wilson, 146 N.C. 242, 59 S.E. 674 (1907). Note that N.C. GEN. STAT. § 28A-18-2, effective July 1, 1975, does not change the distributive aspects of the wrongful death statute.

56. N.C. GEN. STAT. § 29-19 (Supp. 1974).

57. N.C. GEN. STAT. §§ 29-20-22 (1966).

58. *See* N.C. GEN. STAT. § 49-14(c) wherein it is said: "Provided, that no such action [to establish paternity] shall be commenced nor judgment entered after the death of the putative father."

case. A man and woman living together, not married, give birth to a child acknowledged both privately and publicly by the man to be his child. Unless the father formally acknowledges the child, which, of course, presupposes his knowledge of the necessity of such action, the child would receive nothing from a distribution of wrongful death proceeds. The illegitimate child's legitimate counterpart, would take as much as all of the proceeds of the wrongful death action.[59]

North Carolina would be hard pressed to substantiate this distribution scheme in the face of the U.S. Supreme Court's decisions in *Levy* and *Weber*. Certainly, the purpose of the wrongful death statute is not promoted by this statutory classification, nor, to this author's mind, is there any rational relationship between allowing recovery for wrongful death and denying distribution to the formally unacknowledged illegitimate child.[60]

Workmen's Compensation

In case of death of an employee entitled to compensation under North Carolina's Workmen's Compensation Act,[61] there is basically a three-prong scheme for payment of the award:

(1) to persons wholly dependent for support upon the earnings of the deceased employee, to the exclusion of all others;

(2) if there is no person wholly dependent for support, to persons partially dependent;

(3) if there is no person partially dependent for support, to the employee's next of kin.[62]

The Act also provides that a widow, widower and all children of the deceased employee shall be conclusively presumed to be wholly dependent for support upon the deceased employee.[63]

59. *See* N.C. GEN. STAT. §§ 29-13-15 (1966). Distribution of wrongful death proceeds via North Carolina's intestate succession laws also raises equal protection questions with respect to the subgroups established therein. That is, different classes of illegitimate children receive different treatment under this method of distribution. Analysis of this problem adds nothing to the substance of this comment and will therefore not be made. The reform-minded legislator or the practicing attorney should be mindful, however, of this aspect of the illegitimate child problem. *See generally* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972). For an actual situation, *see* Byerly v. Tolbert, 250 N.C. 27, 108 S.E.2d 29 (1959), wherein the Supreme Court remanded the case to the trial court for a determination of the paternity of a child of a woman whose husband's death resulted in a wrongful death settlement. The child was born more than 280 days after the death of the husband of its mother and as such, had to overcome the presumption of illegitimacy before being entitled to a share of the settlement.

60. Nor is there the type of special "property-type" considerations in the wrongful death situation which caused the U.S. Supreme Court to pause momentarily in *Labine* in its movement to judicially eradicate the legal stigma of illegitimacy.

61. N.C. GEN. STAT. § 97-1 *et seq.* (1972).

62. N.C. GEN. STAT. § 97-38 (1972). *See also* N.C. GEN. STAT. § 97-37 (1972).

63. N.C. GEN. STAT. § 97-39 (1972).

The courts of North Carolina have construed these statutes to stand for the proposition that dependency will be conclusively presumed where the law imposes a duty of support.[64] Early in the case law development in this area, informally acknowledged illegitimate children were included in the statutory definition of "child" and, as such were conclusively presumed to be wholly dependent for support upon the deceased employee, notwithstanding the fact that the "duty" of support in such situations then could be more correctly characterized as a "moral" one rather than one imposed by law.[65] In 1955 in the case of *Wilson v. Utah Construction Co.*,[66] the court had the opportunity to provide illegitimate children generally with the same rights as legitimate children under the Act. It declined to do so, however, citing "acknowledgment" as the key to entitlement and holding that without sufficient evidence tending to show that the child was acknowledged it was not entitled to compensation.

The U.S. Supreme Court decision in *Weber v. Aetna Casualty & Surety Co.*, at first blush, would seem to vitiate the North Carolina position in this area as expressed in *Wilson*. However, factually *Weber* and *Wilson* are distinguishable. In *Weber*, the unacknowledged illegitimate child denied compensation by the Louisiana workmen's compensation laws was shown to be *actually dependent* on the deceased employee. Since the purpose of death benefits in workmen's compensation awards is to provide support for the dependents of the deceased employee, the court had no trouble finding that Louisiana's denial of benefits to the dependent unacknowledged illegitimate child bore no rational relationship to the purpose of the workmen's compensation act. Since those conclusively presumed to be dependent on the deceased employee prior to his death (a classification which under *Wilson* does not include the unacknowledged illegitimate), do *not* take exclusive of other persons wholly dependent on the deceased employee,[67] the North Carolina courts could arguably comply with the literal holding of *Weber* in a case where the unacknowledged illegitimate was shown to be

64. *See* Wilson v. Utah Construction Co., 243 N.C. 96, 89 S.E.2d 864 (1955).

65. *See* Lippard v. Southeastern Express Co., 207 N.C. 507, 177 S.E. 801 (1935). The deceased supported a housekeeper who bore him a posthumous illegitimate child. The Industrial Commission found as a fact that the deceased had made it known that he was the father of the child. The Supreme Court reversed the Commission's decision that the child was not a dependent. It stated that the "dependency which the statute recognizes as a basis of the right of the child to compensation grows out of the relationship which in itself imposes upon the father the duty to support the child, and confers upon the child the right to support by its father. The status of the child, social or legal, is immaterial." *See also* N.C. GEN. STAT. § 97-2(12) (1972). "Child . . . shall include . . . [an] acknowledged illegitimate child dependent upon the deceased."

66. 243 N.C. 96, 89 S.E.2d 864 (1955).

67. *See* Shealy v. Associated Transport Co., 252 N.C. 738, 114 S.E.2d 702 (1960). *See also* N.C. GEN. STAT. § 97-39 (1972).

actually dependent on the deceased employee.[68]

What of the unacknowledged illegitimate child born after the death of the entitled employee or "unknown" to the employee before his death? Is he or she to be denied benefits—even though it could be argued that the employee would have supported the child, indeed been legally compelled to do so, had it been born before the employee's death or had its existence become known to the employee before his death?

The test used in *Weber* is certainly broad enough to include all illegitimate children of the deceased employee within the definition of "child" in North Carolina's workmen's compensation statutes. It is this author's view that *Weber* mandates such a result with the only issue left to the Industrial Commission and the courts that of establishing paternity.

Support-Private and Public

Both parents have a statutory duty in North Carolina to support their illegitimate children.[69] The mother's duty to support the child may be enforced at any time before the child reaches the age of eighteen. Except where paternity is established by civil action,[70] however, in most cases the father must be prosecuted for non-support within three years of birth of the child.[71]

With one notable exception,[72] the Bastardy Support Statutes provide the only means by which the illegitimate child can secure support from

68. *But cf.* Fields v. Hollowell, 238 N.C. 614, 78 S.E.2d 740 (1953). The court refused to allow benefits to a woman who had been "cohabiting" with the deceased before his death, although it conceded that she had been wholly dependent on him.

69. *See* N.C. GEN. STAT. § 49-2 (1966). *See also* Dellinger v. Bollinger, 242 N.C. 696, 89 S.E.2d 592 (1955), wherein the court states that this statute recognizes that the putative father of an illegitimate child is now deemed to be the father thereof within the eyes of the law.

70. The effect and mechanics of establishing paternity by civil action are set out in the text corresponding to note 41 *supra*, and will not be commented on here except to again note that this remedy provides substantial protection for the illegitimate child able to take advantage of it.

71. N.C. GEN. STAT. § 49-4 (1966). A three-prong time period is established for prosecution of the putative father:

(1) within three years next after the birth of the child or;

(2) where the paternity of the child has been judicially determined within three years after its birth, at any time before the child attains the age of eighteen years or;

(3) where the reputed father has acknowledged paternity of the child by payments for the support thereof within three years next after the birth of such child, three years from the date of the last payment whether such last payment was made within three years of the birth of such child or thereafter. Provided, the action is instituted before the child attains the age of eighteen years.

72. N.C. GEN. STAT. § 14-326 (1969). "If any *mother* shall willfully abandon her child or children, whether legitimate or illegitimate, and under sixteen years of age, she shall be guilty of a misdemeanor." (Emphasis added.)

its parents.[73] The legitimate child, on the other hand, may rely on the common law duty of support imposed on its parents, and the criminal law statutes under which proof of neglect is aided by presumptions.[74] This "package" of inequities imposed on the illegitimate child is compounded by the following: the bastardy nonsupport statute is criminal in nature and therefore the burden of proof is "beyond a reasonable doubt;"[75] *willful* neglect or *willful* failure to support the child must be shown;[76] and blood-group tests which are admissible if they tend to exclude the possibility of paternity, are inadmissible to show the possibility or probability of paternity.[77]

Clearly, the burden imposed on the legitimate child's enforcing its right to support is a "featherweight" when compared with the burden imposed on the illegitimate child. North Carolina does provide for support of illegitimate children and therefore would not be controlled by the *holding* of the U.S. Supreme Court in *Gomez v. Perez.* Texas law made *no* provision for support of the child by the natural father of the child. However the policy set down by the court language in that case indicates a broader application and it would seem to this writer that North Carolina law in this area, although arguably not in derelegation of the Supreme Court, does not comply with the spirit of the new standard.[78]

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73. N.C. GEN. STAT. § 14-322 (1969), provides that "if any father or mother shall willfully neglect or refuse to provide adequate support for his or her child or children, whether natural or adopted . . . , he or she shall be guilty of a misdemeanor." This statute, however, has been held to have no application to illegitimate children. State v. Gardner, 219 N.C. 331, 13 S.E.2d 529 (1941). N.C. GEN. STAT. § 14-325 (1969), provides that "if any husband, while living with his wife, shall willfully neglect to provide adequate support of such wife or the children which he has begotten upon her . . ., he shall be guilty of a misdemeanor." This statute, by definition, does not apply to illegitimate children.

74. N.C. GEN. STAT. § 14-323 (1969).

75. State v. Moore, 238 N.C. 743, 78 S.E.2d 914 (1953).

76. *See* State v. McDay, 232 N.C. 388, 61 S.E.2d 86 (1950).

77. Wright v. Wright, 281 N.C. 159, 188 S.E.2d 317 (1972). *See* N.C. GEN. STAT. § 49-7 (1966). *See also* N.C. GEN. STAT. § 8-50.1 (1969).

78. The policy, as set out by the court in *Gomez*, is essentially that once a State posits a judicially enforceable right, on behalf of children, to needed support from their natural fathers, there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. To do so is an invidious discrimination. The State, of course, does have a compelling duty to protect the rights of the man alleged to be the father of the child. His property and liberty may be at stake. However, establishment of paternity does not necessarily mean establishment of willful neglect and it is only proof of the latter fact which can result in a loss of liberty. Since in civil actions generally, property rights are every day determined on the basis of a preponderance of the evidence or clear and convincing proof, the question raised here is why must *paternity* be proved beyond a reasonable doubt? Further, why are blood tests not admissible to show probability of paternity? Further still, why are the civil and criminal actions to establish paternity so severely limited in time? *See* N.C. GEN. STAT. §§ 49-4, 14-16 (Supp. 1974). Is reform not needed?

The support statutes just discussed help serve another purpose though in that in addition to providing criminal sanctions against the non-supporting parent, they also serve to establish, judicially, the paternity of the child.[79] This has particular significance in the area of public support, embodied in North Carolina's Aid to Families with Dependent Children program.[80]

Where paternity is established, illegitimate children are eligible for AFDC on an equal footing with legitimate children.[81] In some cases, the non-marriage of the parents of the child is a "benefit" to the child in the sense that deprivation of parental support and care (thus eligibility for AFDC) is conclusively presumed when the child's parents are not married to each other and paternity has not been judicially established.[82] It is interesting to note that when this situation arises, the county social services department is impressed by regulation, with a duty for establishing paternity for the child.[83]

There is one hypothetical case, however, where equivalent benefits will not accrue to the illegitimate where they would accrue to his or her legitimate counterpart. If the mother is the "absent" parent and the putative father lives with the child, the child may be denied eligibility if the child was born illegitimate; paternity has never been established by the courts; the father has never legitimated the child by

79. State v. Collins, 85 N.C. 511 (1881).

80. *See* N.C. GEN. STAT. § 108-23-39.1 (Supp. 1974).

81. N.C. GEN. STAT. § 108-38(a) (Supp. 1974). "Assistance shall be granted to any dependent child who:

. . . .

(2) Has been deprived of parental support or care by reason of a parent's death, physical or mental incapacity, or continued absence from the home of one or both parents." Although the language of the statute makes no mention of legitimacy of the child, the North Carolina Department of Human Resources AFDC manual provides that only those persons with a legal duty of support are to be considered in determining the eligibility of the child. These persons are:

1. the natural mother, and
2. the natural father, if
   a. married to the mother, or
   b. paternity was established through the courts, or
   c. the man legitimated the child by petition to the court or subsequent marriage to the mother; or
3. adoptive parents after the final order of adoption is issued.

See N.C. DEP'T OF HUMAN RESOURCES, DIV. OF SOCIAL SERVICES, AFDC MANUAL § 2330-I (Rev. 1974) [hereinafter cited as AFDC MANUAL]. Keying deprivation of parental support or care to persons with a *legal* duty of support is a relatively recent innovation. Before King v. Smith, 392 U.S. 309 (1968), children otherwise eligible for AFDC benefits were denied assistance in many states (including North Carolina) if their mother maintained a continuing sexual relationship with a man. This "substitute father" or "man in the house" rule was struck down by the U.S. Supreme Court as being inconsistent with the Social Security Act. *See generally* Note, 47 N.C.L. REV. 228 (1968).

82. AFDC MANUAL § 2330-II,C,7.

83. *Id.*

petition to the court or subsequent marriage to the mother; or, the father has not adopted the child.[84] This hypothetical situation is, no doubt, rarely encountered by the county social service departments and may be cured by the institution of a paternity action by the department. It is presumed that the intention here is to force the putatitive father to legally establish his duty to support the child and to the extent this result is accomplished, the child will benefit. However, the child would be eligible for benefits even though the father did not have a legal duty because of the absence of its mother. The proceedings necessary to establish paternity could still be brought by the department, if the father was not willing to take the necessary steps himself, and the child would, in the meantime, receive benefits according to the very purpose of the AFDC program.

CONCLUSION

The law cannot remove the social prejudice against the illegitimate child. However, a comprehensive legislative plan which would remove the legal prejudice is within the power of the state legislature. Removing the legal stigma could very well be the beginning of a relaxation of the social stigma. It would also, of course, result in benefits flowing to the child which we all have come to expect as citizens of this country. To this writer's mind, the constitutional mandate of equality for the illegitimate child has not been met.[85] Although some progress has been made by the General Assembly, its task is not complete. Reform is essential and the concentration of legislative effort should come in the public law.

It is proposed that North Carolina proceed with a three-prong attack to establish equality.

First, an "equality" statute should be enacted which would declare the State's policy. An excellent example enacted by North Dakota, in the wake of *Levy v. Louisiana,* is:

> Every child is hereby declared to be the legitimate child of its natural parents, and is entitled to support and education, to the same extent as if he [or she] had been born in lawful wedlock. He [or she] shall inherit from his [or her] natural parents, and from their kindred heir, lineal and collateral.[86]

84. Interview with Elaine Jenkins, caseworker, Durham County Department of Social Services, in Durham, N.C., Feb. 1, 1975. This result seems, to this writer, completely contrary to the regulations promulgated by the Department of Human Resources in its AFDC manual. Clearly the child is deprived of parental support and care due to the continued absence from the home of *both* parents in that deprivation of support is based on a *legal* duty, which is not imposed on the hypothetical putative father set out in the text.

85. See particularly the discussion of workmen's compensation and wrongful death.

86. N.D. CENT. CODE § 56-01-05 (Supp. 1969), cited in KRAUSE at 235.

Second, a statute establishing a duty on the part of county social service directors to take care that the interests of the illegitimate child are safeguarded.[87] It is also imperative that this duty be legally enforceable and enforced! Minnesota has such a statute which could serve as a model. It reads as follows:

> It shall be the duty of the commissioner of public welfare when notified of a woman who is delivered of an illegitimate child, or pregnant with child likely to be illegitimate when born, to take care that the interests of the child are safeguarded, that appropriate steps are taken to establish his [or her] paternity, and that there is secured for him [or her] the nearest possible approximation to the care, support, and education that he [or her] would be entitled to if born of lawful marriage. For the better accomplishment of these purposes the commissioner of public welfare may initiate such legal or other action as is deemed necessary; may make such provision for the care, maintenance, and education of the child as the best interests of the child may from time to time require, and may offer his aid and protection in such ways as are found wise and expedient to the unmarried woman approaching motherhood.[88]

Third, affirmative action is needed to establish the parents of the child, for it is by, through and from them that all private and many public benefits flow to the child. It is proposed that this be accomplished through the enactment of a statute establishing the relationship of the child to its mother by its birth to her and establishing the relationship of the child to its father by a number of means, all of which would be aided by presumptions. These presumptions would be disputable only by a presumed father or the mother of the child or the child itself, and only if they act without delay. The burden of overcoming the presumptions, would fall on the person disputing paternity.[89]

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87. North Carolina presently has an assortment of statutory provisions which, through the establishment of paternity, aid the illegitimate child. They are, it seems to this writer, insufficient to safeguard the child's interests. Clearly, the civil action to establish paternity under G.S. § 49-14-16, almost always requires action by the parents, whose interests are often in conflict with the child. Even permitting the director of public welfare to bring the action, as the statute does, is insufficient because the director's standing is limited to cases where the child is likely to become a public charge. *See* N.C. GEN. STAT. § 49-16(2). This grant of standing to the director is based on the interest of the welfare department, not the interests of the child. In addition, there is a statutory provision which permits the county director of social services to petition the court for judicial protection for the illegitimate child under the general juvenile jurisdiction of the courts. However, before the county director of social services is even notified of potential problems, the mother must have given birth to two previous illegitimate children, which information filters "down" to the social services director through a myriad of red tape. *See* N.C. GEN. STAT. § 130-58.1 (1974).

88. MINN. STAT. ANN. § 257.33 (1959).

89. This statute could be patterned after Professor Harry D. Krause's Discussion Draft of the UNIFORM LEGITIMACY ACT § 3. *See* KRAUSE at 241-42. The man would be presumed to be the father of the child,

All of the above proposals are contained, in somewhat different form, in Professor Krause's proposed Uniform Legitimacy Act.[90] Finally then, this author would advocate the adoption of such an act by the North Carolina General Assembly, when approved by the National Conference of Commissioners on Uniform State Laws.

GEOFFREY E. GLEDHILL

Taylor v. Hill—AFDC Benefits for Unborn Children

"TWO WOMEN DEMAND AID FOR UNBORN" was a May 24, 1974 headline in the *Charlotte Observer*.[1] Two Charlotte, North Carolina, women filed suit in the U. S. District Court for the Western District of North Carolina, demanding financial aid for their unborn children. This headline and the ultimate granting of a preliminary injunction by Judge McMillan in *Taylor v. Hill*,[2] prompted an investigation into the basis upon which these and other claims throughout the United States have been brought.

In *Taylor*, the pregnant mothers' action challenged the North Caro-

1. if he and the child's mother are or have been married and the child is born during the marriage, or within 300 days after the termination of marital cohabitation by reason of death, annulment, divorce, or separation ordered by a court; or

2. if, prior to the child's birth, he and the child's mother have attempted to marry, and some form of marriage ceremony has been performed in apparent compliance with law, though such attempted marriage is or might be declared void for any reason, and the child is born during such attempted marriage or within 300 days after the termination of marital cohabitation by reason of death, annulment, divorce, or separation ordered by the court; or

3. if, after the child's birth, he and the child's mother marry or attempt to marry, and some form of marriage ceremony has been performed in apparent compliance with law, though such attempted marriage is or might be declared void for any reason, and (a) he has publicly acknowledged the child as his in writing filed with the clerk of court in the county wherein the child resides, or (b) he is listed as the child's father on the child's birth certificate, or (c) he has previously become obligated to support the child under the law of this State or under the laws of another jurisdiction; or

4. if he receives the child into his home and it lives with him and he publicly recognizes the child as his, with the acquiescence of his wife if he is married, for a period of [one year] without objection disputing his paternity filed [within three years] with the clerk of court in the county wherein the child resides by the child's mother or another man claiming to be the child's father or the county director of social services, or

5. upon an order of the court in an action which establishes him as the father of the child.

90. *See* KRAUSE at 241-56.

1. The Charlotte Observer, May 24, 1974, § C, at 1, col. 4.

2. 377 F. Supp. 495 (W.D.N.C. 1974) (case noted in newspaper article).