Louisiana Law Review

Volume 39 | Number 4
Summer 1979

Can Louisiana's Succession Laws Survive in Light of the Supreme Court's Recent Recognition of Illegitimates' Rights?

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CAN LOUISIANA'S SUCCESSION LAWS SURVIVE IN LIGHT OF THE SUPREME COURT'S RECENT RECOGNITION OF ILLEGITIMATES' RIGHTS?

As a result of several recent United States Supreme Court decisions,[1] the inferior status attributed to children born out of wedlock in many states has been seriously questioned. Constitutional attack has focused on distinctions between legitimate and illegitimate children in intestate inheritance rights; this focus is of particular concern to Louisiana since legitimacy distinctions are prominent in our intestacy laws.[2] What, if any, legal distinctions based on legitimacy may continue to exist under the federal equal protection clause and the Louisiana

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1. Lalli v. Lalli, 99 S. Ct. 518 (1978); Trimble v. Gordon, 430 U.S. 762 (1977); Labine v. Vincent, 401 U.S. 532 (1971).

2. For instance, Louisiana is the only state which does not permit illegitimate children to inherit automatically from the natural mother. Louisiana Civil Code article 918 excludes acknowledged illegitimate children from the mother's succession when she has legitimate descendants. The treatment of the illegitimate regarding intestate inheritance rights in Louisiana depends on his or her initial classification. The Civil Code categorizes children as either legitimate, illegitimate, or legitimated. LA. CIV. CODE art. 178. Legitimates are those children born during marriage. LA. CIV. CODE art. 179. Illegitimates are those born out of wedlock who have not been subsequently legitimated. LA. CIV. CODE art. 180. Legitimated children are those born out of marriage whose parents have later married and have also formally or informally acknowledged the children prior to or after marriage. LA. CIV. CODE art. 198. A child may also be legitimated by either parent by an authentic act declaring the intention to legitimate the child if there be no legal impediment to marriage either at the time of conception or legitimation and the parent has no legitimate descendants at the time of the notarial act. LA. CIV. CODE art. 200. Louisiana law also classifies illegitimates as those "born from two persons, who, at the moment when such children were conceived might have legally contracted marriage with each other; and those who are born from persons to whose marriage there existed at the time some legal impediment." LA. CIV. CODE art. 181. The latter are either adulterous or incestuous bastards. LA. CIV. CODE arts. 182, 183. A parent may elevate his illegitimate child's status above the level of bastard to the level of natural child without fully legitimating him, through the act of acknowledgment. This procedure entails the parent's execution of a declaration in an authentic act whenever there has not been such an acknowledgment in the registry of birth or baptism of the child. LA. CIV. CODE art. 203. The Code limits this device to parents who were capable of contracting marriage at the time of conception or to parents who later contract a legal marriage. LA. CIV. CODE arts. 198, 204. Louisiana judicial decisions have also recognized an informal acknowledgment when the parent treats the child as his own. See note 126, *infra*. *See also* Lorio, *Succession Rights of Illegitimates in Louisiana*, 24 LOY. L. REV. 1, 6-7 (1978).

constitution[3] is the subject of this comment. A determination of the validity of Louisiana's intestate inheritance laws with respect to illegitimates must be made in light of state and federal court decisions outlining the constitutional requirements for such validity.

United States Supreme Court Decisions

There have been three recent decisions by the United States Supreme Court on the validity of state intestate succession laws dealing with illegitimate children. Two of these decisions, *Labine v. Vincent*[4] and *Lalli v. Lalli*,[5] upheld the state laws involved; the remaining case, *Trimble v. Gordon*,[6] held the state law unconstitutional. *Labine*, the first case to reach the Supreme Court on this issue, determined the constitutionality of Louisiana Civil Code article 919, which excludes the acknowledged illegitimate child from the intestate succession of the father when the father has legitimate collateral relations.[7] Due to public acknowledgment by the father, plaintiff in that case was classified as a "natural child."[8] She argued that the Louisiana law violated the equal protection clause by barring an acknowledged illegitimate from sharing equally with legitimate children in the intestate estate of the father. If plaintiff had been legitimate she would have excluded the father's legitimate collateral relations;[9] even as an acknowledged illegitimate, she would be able to exclude the mother's collateral relations in her mother's estate.[10] Despite the strength of plaintiff's argument, the Court refused to strike down this statute, holding instead that "the power to make rules to establish,

3. LA. CONST. art. I, § 3 provides: "No person shall be denied the equal protection of the laws . . . . No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations . . . ."

4. 401 U.S. 532 (1971).

5. 99 S. Ct. 518 (1978).

6. 430 U.S. 762 (1977).

7. Louisiana Civil Code article 919 does allow the illegitimate child of the father alimony when he is excluded by other heirs.

8. See note 2, *supra*.

9. LA. CIV. CODE art. 902.

10. LA. CIV. CODE art. 918.

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 Constitution of the United States and the people of Louisiana to the legislature of that state."[11] In rebuttal the dissent quite correctly pointed out that the majority's analysis refused to consider whether there was any rational basis for the difference in treatment but focused instead on the state's power to pass inheritance laws, a power not questioned.[12]

Six years later in *Trimble v. Gordon,* the Supreme Court was confronted with an Illinois statute allowing the illegitimate child to inherit from the mother but not from the father unless the parents married and the father acknowledged the child.[13] Under this intestate statute plaintiff could not inherit from her father even though a paternity order recognizing the deceased as her father had been issued during his lifetime. Plaintiff attacked the statute as an unconstitutional discrimination against illegitimates. As in *Labine,* if plaintiff had been a legitimate child she would have inherited the entire estate of her father,[14] and even as an illegitimate, she could inherit the entire estate of her mother. Thus, in *Trimble* and *Labine* somewhat similar statutes were challenged with the same constitutional argument.[15] Nevertheless, in *Trimble* a different result followed, perhaps due to a change in constitutional analysis. Although the test used was not one of strict scrutiny, it was "not a toothless one" either; instead, it lay midway between strict

11. 401 U.S. at 538.

12. *Id.* at 548. The dissent concluded that only a moral prejudice prevalent in 1825 when the Louisiana statutes were adopted could support the discrimination found in the statute. *Id.* at 558.

13. ILL. REV. STAT. ch. 3, § 12 (1973). Section 12 has since been recodified, although the part of the section at issue in *Trimble* remained unchanged. ILL. REV. STAT. ch. 3, § 2-2 (1976).

14. ILL. REV. STAT. ch. 3, § 2-1(b) (1976).

15. The plaintiff in *Trimble* also argued that section 12 violated the equal protection clause of the fourteenth amendment by invidiously discriminating on the basis of sex. Because the Court concluded that the illegitimacy classification was unconstitutional, the Court did not reach this second contention. 430 U.S. at 766. A further argument used by the appellant below, abandoned in the Supreme Court, was that section 12 discriminated on the basis of race because of its alleged disproportionate impact on Negroes. *Id.* at 765 n.10.

scrutiny and rational basis analysis.[16]

Four justifications for the Illinois statute were offered by the state and rejected by the Court. The first of these, the promotion of legitimate family relationships, was discredited by the majority as an attempt to influence the actions of parents by imposing sanctions on their innocent children.[17] The absence of an insurmountable barrier justification, of constitutional significance in *Labine,* was characterized as nothing more than an analytical anomaly.[18] The argument that the

16. Although the fourteenth amendment mandates that no state deny a person equal protection, certain classifications by statutes may be valid if all persons similarly situated are treated similarly. To determine validity, various tests have been propounded by the Supreme Court. The "two tier approach" to equal protection is the traditional approach. The lower tier is one of rational basis analysis in which a statute is held invalid only if the classification bears no rational relationship to a legitimate state purpose. *See, e.g.,* Rinaldi v. Yeager, 384 U.S. 305 (1966); McLaughlin v. Florida, 379 U.S. 184 (1964). The higher tier of analysis is one of strict scrutiny in which the standard of review is so stringent that few statutes survive it. This test is whether the classification scheme is necessary to accomplish a compelling state purpose. Shapiro v. Thompson, 394 U.S. 618 (1969). However, this test is only applied if the classification is deemed "suspect" or the interest involved is "fundamental." Suspect classifications include race, nationality, and alienage. Graham v. Richardson, 403 U.S. 365 (1971); Loving v. Virginia, 388 U.S. 1 (1967); Bolling v. Sharpe, 347 U.S. 497 (1954); Hernandez v. Texas, 347 U.S. 475 (1954); Oyama v. California, 332 U.S. 633 (1948). Interests considered "fundamental" include the right to vote, to travel interstate, and to adequate judicial review. Shapiro v. Thompson, 394 U.S. 618 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963). A middle level approach has recently surfaced in which the Court focuses more on "means" and "ends." Concentration is upon the character of the classification, the importance of the governmental benefits that the class is deprived of, and the asserted state interest in support of the classification. Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting). Illegitimacy has not been labeled as a suspect classification nor have inheritance rights been deemed fundamental. Therefore, they are subject to this middle level of scrutiny. Concluding that classifications based on illegitimacy are not suspect, the Court decided that the strict scrutiny test would be inappropriate. However, citing *Matthews v. Lucas,* 427 U.S. 495 (1976), the Court held that the appropriate test was "not a toothless one" either. 430 U.S. at 766. Using a balancing approach as in *Trimble* the Supreme Court in *Lalli v. Lalli* clarified the equal protection analysis to be applied to illegitimates; statutes are invalid under the fourteenth amendment "if they are not substantially related to permissible state interests." 99 S. Ct. at 523. See note 34, *infra,* and accompanying text. *See also* Lorio, *supra* note 2, at 9-12.

17. The Court, citing *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 175 (1972), stated: "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." 430 U.S. at 769-70.

18. In *Labine,* the Court found no insurmountable barrier to inheritance since

statute mirrored the presumed intent of citizens of the state was dismissed since reflecting presumed intent was not a purpose in the enactment of the Illinois law.[19] Having completely rejected all but one ground of the *Labine* rationale, the Supreme Court recognized as valid the state interest in establishing an orderly and efficient method of property disposition, and acknowledged that the Illinois statute addresssed threats to this interest arising from the difficulty of proving paternity and the danger of spurious claims.[20] Deviating from its position in *Labine* of absolute deference to state power over property disposition,[21] the Court held that "[d]ifficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate."[22] The majority concluded that the Illinois law could not be squared with the equal protection clause of the fourteenth amendment because it was over-inclusive in encompassing all illegitimates, even those whose paternity could be ascertained without delaying or burdening the succession procedure.[23]

Although the Supreme Court in *Trimble* refrained from overruling *Labine* outright, it did overrule the *Labine* standard of scrutiny as applied to state intestacy laws.[24] The two cases may be reconciled due to the differences in the state statutes.

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the plaintiff's father could have provided for her by writing a will, legitimating her by authentic act, or by marrying her mother. 401 U.S. at 539. See note 2, *supra*. But the Court in *Trimble* found that "hard questions cannot be avoided by a hypothetical reshuffling of the facts." 430 U.S. at 774.

19. The Court said that the true purpose in the enactment of section 12 was to provide a system more just to illegitimate children than the prior law. 430 U.S. at 776.

20. *Id.* at 771.

21. *Id.* at 776 n.917.

22. *Id.* at 772. Whether the statute is carefully tuned to alternative considerations must be considered. For example, a statute could reasonably bar illegitimates from inheritance from the father if it also allowed for occasions where paternity could be proven in an accurate and reliable manner. The Illinois law provided no such alternative.

23. *Id.* at 771, 776. The Court carefully noted that the states are free to fashion their own requirements of proof, such as a prior adjudication or formal acknowledgment of paternity. "[W]e would have a different case if the state statute were carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity." *Id.* at 772 n.14.

24. "To the extent that our analysis in this case differs from that in *Labine* the more recent analysis controls." *Id.* at 776 n.17.

In Illinois, *every* illegitimate child was totally barred from inheriting from his father, though he would be treated equally with legitimate children in his mother's succession. In Louisiana, the acknowledged child born out of wedlock can inherit from the father in the absence of any other heirs; he can likewise inherit from the mother, though not on a par with legitimate children. In any event, the illegitimate is entitled to at least alimony.[25] Essentially, the Louisiana statute dictates an order of succession with which the Court would not interfere, while the Illinois law designates the specific persons who are entitled to inherit.

Despite the fact that the Illinois and Louisiana statutes can be distinguished on these narrow grounds, it is likely that *Labine* has been effectively overruled.[26] In *Labine,* the Court upheld article 919 which allows acknowledged illegitimate children to inherit from the father only if there are no other heirs. *Trimble,* however, seemed to require that once there is an adjudication or formal acknowledgement, the state must allow illegitimates to inherit from their fathers if legitimates have that right. By placing the acknowledged illegitimate at the end of the succession line to his father's property and allowing him to exclude only the state, this law treats illegitimates, who have proven their paternity in a manner recognized for inheritance, unequally with legitimate children.[27] Additionally, like the Illi-

25. LA. CIV. CODE arts. 918-20.

26. In fact, *Labine* was probably an anomaly long before *Trimble.* An Ohio court of appeal in *Green v. Woodward,* 40 Ohio App. 2d 101, 318 N.E.2d 397 (1974), struck down a statute whereby illegitimate children could inherit from the father only when the child was legitimated by adoption or acknowledgment. The court distinguished *Labine* by saying that in *Labine,* the discrimination was between illegitimates and legitimates, whereas in *Green,* the discrimination was within the class of illegitimates, *i.e.,* illegitimates inheriting from the mother as opposed to inheriting from the father. *Id.* at 113, 318 N.E.2d at 406. In *Eskra v. Morton,* 524 F.2d 9 (7th Cir. 1975), a federal statute incorporating Wisconsin inheritance law had, prior to its amendment in 1971, allowed legitimates and illegitimates to share equally in the estate of their mother but excluded the illegitimate completely from any share in the estate of any relative of the mother. The court held that *Labine* did not control since the fifth amendment prevents the federal government from discriminating. 524 F.2d at 15.

27. The discriminatory treatment in Civil Code article 919 does not relate to evidentiary standards, which *Trimble* found may be reasonable, but rather applies to the order of succession. As a result, acknowledged illegitimate children of intestate men will rarely be entitled to inherit since there will almost certainly be a relative, although distant, lurking in the background.

nois law, the treatment of acknowledged illegitimates in the succession of the father differs from that afforded illegitimates in the succession of the mother.[28]

After *Trimble* established the only remaining barrier to absolute equality for illegitimate children to be a proof of paternity, a predictable subsequent development was a decision dealing with the kind of proof that a state can constitutionally require as a prerequisite to inheritance. This step came at the end of 1978 with the decision in *Lalli v. Lalli*.[29] The New York statute at issue required illegitimate children who would inherit from their father through intestate succession to provide a particular form of proof of paternity—a judicial decree of filiation pronounced during the father's lifetime.[30] Plaintiff did not have such a judicial order but produced instead a notarized document in which the father, in consenting to plaintiff's marriage, referred to him as "my son," along with several affidavits by persons who stated that the father had acknowledged plaintiff openly and often.[31] Although plaintiff argued that the requirement of a specific form of proof of paternity denied him equal protection,[32] the Supreme Court upheld the state's constitutional right to mandate such exclusive proof.[33] Using the same type of balancing approach as it had in *Trimble*, the Court remarked that although "classifications based on illegitimacy are not subject to 'strict scrutiny,' they nevertheless are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests."[34]

The primary state goal acknowledged by the Court was

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28. See note 2 and text at note 7, *supra*.

29. 99 S. Ct. 518 (1978).

30. N.Y. EST., POWERS & TRUSTS LAW § 4-1.2 (McKinney 1964).

31. 99 S. Ct. at 522 n.3.

32. Plaintiff also claimed that the law unconstitutionally discriminated on the basis of sex, but the question was not considered as it was raised for the first time in the Supreme Court. *Id.* at 522 n.3.

33. Section 4-1.2 requires that the order of filiation be made not only during the life of the father, but that the proceeding be commenced during pregnancy or within two years from birth. The Court limited its decision by not passing on the constitutionality of the two year statute of limitations. *Id.* at 524 n.5.

34. *Id.* at 523. In its opinion, the Supreme Court firmly established the "substantial relation" test as the proper approach in analyzing illegitimacy classifications. *Id.* at 524, 527, 528.

that of providing for the just and orderly distribution of property at death.[35] The Court distinguished *Trimble* from *Lalli* on the basis that the Illinois statute's total bar to illegitimates excluded a significant category of such children who could present proof of their paternity,[36] while under the New York statute marital status of the illegitimates' parents was irrelevant and the single requirement for inheritance was evidentiary.[37] The majority commented that the strength of the statute in *Lalli* was that "the administration of an estate will be facilitated, and the possibility of delay and uncertainy minimized, where the entitlement of an illegitimate child to notice and participation is a matter of judicial record before the administration commences."[38]

Also using the analysis that the means of discrimination, to be valid, must be "substantially related to the legitimate interests that the statute purports to promote,"[39] the dissent observed that the interest served, *i.e.*, protection against fraudulent and belated claims, could be promoted by less drastic means, such as a formal acknowledgment of paternity, a short statute of limitations, and publication and notice.[40] An ironic consequence of New York's more restrictive approach was noted in the dissent's comment that it was difficult to imagine an instance in which an acknowledged and voluntarily supported illegitimate child would ever inherit intestate under the New York scheme, due to the apparent absence of a need to institute such a paternity proceeding and the fear of provoking

35. The statute was held not defensible as an incentive to enter legitimate family relationships. *Id.* at 523.

36. *Id.*

37. *Id.* at 524.

38. *Id.* at 526. The Court considered in depth the findings of the Bennett Commission, created in 1961 by the New York legislature, which concluded that a number of problems counsel against treating illegitimate children identically to other heirs. These problems include: How does one cite and serve an illegitimate (if he is a distributee unconditionally) of whose existence the family is unaware? How may finality of decree in any estate be achieved when there always exists the possibility, however remote, of a secret illegitimate's existence. Even if the illegitimate is known, problems of proof would make it difficult to expose spurious claims. *Id.* at 525-26.

39. *Id.* at 530 (Brennan, J., dissenting).

40. *Id.*

disharmony with a father who is already voluntarily supporting his child.[41]

At first glance, the decision in *Lalli* appears to be a retreat from the position taken by the Supreme Court in *Trimble*. *Trimble* could have been interpreted to mean that discrimination against illegitimates who have proven their parenthood would be prohibited, regardless of whether or not they met the statutory requirements of proof of paternity in that state.[42] However, given a more careful reading, *Trimble* seems only to establish the proposition that the requirements of a statute with regard to proof of paternity must merely be reasonable and not exclude a significant category of illegitimate children.[43] Even accepting this proposition, it would have been difficult to forecast the conclusion in *Lalli* which allowed a filiation order to be mandated as the exclusive method of proof.[44]

The Court in *Lalli* distinguished *Trimble* on two grounds, the first of which was that, in *Trimble,* there was a total statutory disinheritance of illegitimate children who were not legitimated. By insisting upon both acknowledgment and marriage of the parents, it excluded a significant category of illegitimate children of intestate men whose inheritance rights could actually be recognized without jeopardizing the orderly settlement of estates or the dependability of titles.[45] This combination of requirements eliminated the possibility of a middle ground between the extremes of complete exclusion and a case-by-case determination of paternity.[46] In contrast, the New York statute was found to provide such a middle ground since it did not inevitably disqualify the entire group of illegitimates.[47] The

41. *Id.* at 529-30 (Brennan, J., dissenting). The dissent concluded that the fear of unknown illegitimates hardly justified cutting off the rights of known illegitimates. *Id.*

42. "For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws. Because it excludes those categories of illegitimate children unnecessarily, § 12 is constitutionally flawed." 430 U.S. at 771.

43. See note 23, *supra,* and accompanying text.

44. See note 23, *supra.*

45. 99 S. Ct. at 523.

46. *Id.* at 524.

47. The Court recognized that the New York law ensured accurate resolutions

other basis used by the Court to distinguish the two decisions involved the state interests purportedly served by the statutes. The encouragement of legitimate family relationships was not argued as a justification for the New York law though such a policy had been urged in support of the Illinois law.[48]

Lalli and *Trimble* together seem to establish the proposition that state statutes must afford illegitimates the same rights accorded legitimate children with respect to intestate successions, qualified by the state's freedom to provide the manner by which parentage must be proven within reasonable limits which do not exclude a significant category of illegitimate children.[49] A puzzling problem which still remains after *Lalli* concerns the form of proof of paternity that will be considered reasonable as not excluding a significant group of illegitimate children. Some guidance is offered by the Uniform Probate Code which does much to equalize the status of all children by focusing on the biological relationship between parent and child as the primary qualification for intestate inheritance. It provides:

> [A] person born out of wedlock is to be treated for the purposes of intestate succession as a child of the mother, but such a child is also to be treated as a child of the father where the natural parents participate in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void, or where paternity is established by an adjudication before death of the father or is established thereafter by clear and convincing proof.[50]

This constitutionally permissible provision has already been adopted in several states.[51] Although it goes beyond what is

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of claims of paternity. Accuracy is enhanced by placing paternity disputes in a judicial forum during the lifetime of the father. The father's availability will contribute to the reliability of the fact-finding process and allow him to defend his reputation against unjust accusations. *Id.* at 526.

48. *Id.* at 524.

49. See text at notes 43 & 47, *supra*.

50. UNIFORM PROB. CODE § 2-109 (1969 version).

51. Ten states have adopted this Uniform Probate Code provision: ALASKA STAT. § 13.11.045 (1972); ARIZ. REV. STAT. ANN. § 14-2109 (1975); COLO. REV. STAT. § 15-11-109 (1973); DEL. CODE ANN. tit. 12, § 508 (1974); FLA. STAT. ANN. § 732.108 (West 1976);

required in *Lalli,* it may serve as a guide to states desirous of treating all children, proven to be such, equally.

Louisiana Decisions

A brief review of the Louisiana jurisprudence and its treatment of illegitimate children and their inheritance rights both before and after *Trimble* is essential before examining the Louisiana law on this subject. As will be indicated by the following synopsis, every decision rendered by Louisiana courts before *Trimble* upheld the succession scheme set forth in the Louisiana Civil Code.

In *Succession of Wesley,*[52] the constitutionality of article 921 was affirmed when the court stated that an illegitimate child could not inherit from other children of his mother or father born in lawful wedlock or from any legitimate relations of the father or mother. Sixteen years later, another Louisiana court faced the problem of illegitimates' rights in *Succession of Bush,*[53] when the validity of article 200 was questioned. Article 200 provides that only those natural children can be legitimated who are offspring of parents who, at the time of conception, could have contracted marriage. Plaintiff, decedent's illegitimate son, argued that an invalid act of adoption[54] should be considered an act of legitimation,[55] thereby allowing him to be an heir to his father's intestate succession. Since the alleged father was married at the time of plaintiff's conception, the court relied on article 200 to exclude him, refusing to hold that article unconstitutional.[56]

IDAHO CODE § 15-2-109 (1978); IND. CODE ANN. § 29-1-2-7 (Burns 1972); MONT. CODE ANN. § 72-2-213 (1978); N.D. CENT. CODE § 30.1-04-09 (1977); S.D. UNIFORM PROB. CODE § 2-109 (1974); UTAH CODE ANN. § 75-2-109 (1977).

52. 224 La. 182, 69 So. 2d 8 (1953).

53. 222 So. 2d 642 (La. App. 4th Cir. 1969).

54. The act of adoption was an absolute nullity for lack of concurrence by decedent's wife. *Id.* at 644.

55. See note 2, *supra.* Legitimated children are treated as legitimate and obtain the same rights of inheritance. One Louisiana case that has extended inheritance rights to illegitimate children through the process of legitimation is *Succession of Mitchell,* 323 So. 2d 451 (La. 1975). In that case, the marriage of the children's biological parents subsequent to the children's birth legitimated them, despite circumstances indicating that the children may have been born of an adulterous connection.

56. The court was not disposed to extend the holding in *Levy v. Louisiana,* 391

In *Strahan v. Strahan*,[57] a federal district court in Louisiana upheld the right of legitimate relations of the decedent to prevent the father's alleged illegitimate son from inheriting intestate from him.[58] The court found the distinction between legitimate and illegitimate children in the Louisiana succession laws not to be arbitrary, focusing on the state's paramount interest in encouraging marriage and the vital necessity of promoting stability in land titles.[59] The court emphasized the devastating effect upon commercial land transactions which would have resulted had the lawmakers permitted illegitimates to share in a decedent's estate.[60]

One of the few cases prior to *Trimble* dealing with the validity of Louisiana laws regulating testate successions was *Succession of Captain*.[61] In that case, the testator left a will in which he bequeathed all of his property to his seven natural children.[62] He was also survived by his mother, two brothers, and a sister, who, relying on article 1486, which limits the right of natural children to receive property by donation from their natural father,[63] attacked the validity of the testator's bequests. Unpersuaded by the argument of the natural children that this article violated the equal protection clause, the court upheld article 1486 and limited the testator's donation to his natural children to one quarter of his property. Even though *Labine* was an intestate succession case, the court relied on it in stating that the "regulation of descent and distribution [is] peculiarly within the powers reserved for the states. These pro-

U.S. 68 (1968), to a different codal article and different factual situation. 222 So. 2d at 644. *Levy* held that illegitimates were included in the definition of "children" in the Louisiana wrongful death act.

57. 304 F. Supp. 40 (W.D. La. 1969).

58. LA. CIV. CODE art. 919. See text at note 7, *supra*.

59. 304 F. Supp. at 40-42.

60. *Id.* at 42-44. "Had the lawmakers permitted illegitimate children to share in a decedent's succession, no title to property would ever be secure and certain." *Id.* at 44.

61. 341 So. 2d 1291 (La. App. 3d Cir. 1977).

62. See note 2, *supra*.

63. Louisiana Civil Code article 1486 prohibits the natural father who has left no legitimate descendants from donating more than one fourth or one third of his estate to his acknowledged children, depending on which legitimate relations also survive him.

visions . . . serve the vital interests of the state by encouraging marriage, by discouraging illegitimacy, by promoting stronger family ties and by contributing to the stability of land titles."[64] A vigorous dissent pointed out, however, that there is little problem in establishing the validity of land titles in a testate succession.[65] Since the testator had expressly recognized and devised his property to his illegitimate children, there would be no occasion for problems involving fraudulent or belated claims.

Only after the opinion in *Trimble* was rendered, however, did a majority of the Louisiana Supreme Court recognize the insubstantial relationship between testate succession laws and the stability of land titles. The two most recent Louisiana Supreme Court cases in the testate succession area[66] provide a guide for judging the future validity of intestate succession laws that deal with illegitimate children and may also indicate the court's post-*Trimble* constitutional analysis of intestate inheritance laws.[67]

In *Succession of Robins,*[68] the testator willed his estate, composed entirely of separate property, to his two illegitimate sons who were conceived in adultery with a single woman. In order to invalidate those legacies, the surviving spouse interposed article 1488, which probibits a natural parent from giving or willing an illegitimate any substantial part of his estate if the child's conception resulted from the parent's adultery.[69] Careful to note that the court was not deciding whether illegiti-

64. 341 So. 2d at 1295.

65. *Id.* at 1296 (Watson, J., dissenting).

66. Succession of Thompson, 367 So. 2d 796 (La. 1979); Succession of Robins, 349 So. 2d 276 (La. 1977).

67. Procedural determinations in two post-*Trimble* cases prevented the effect of *Trimble* on our intestate inheritance laws from being scrutinized. Succession of Shaw, 360 So. 2d 530 (La. App. 2d Cir. 1978); Succession of Matte, 346 So. 2d 1345 (La. App. 3d Cir. 1977). In *Matte,* the court ruled that since the claimant could not prove she was decedent's child, she lacked standing to constitutionally attack articles 918 and 919 on the ground that they work an unconstitutional discrimination between the acknowledged illegitimate children of the mother and those of the father. 346 So. 2d at 1349.

68. 349 So. 2d 276 (La. 1977).

69. LA. CIV. CODE art. 1488 restricts such dispositions to the "mere amount of what is necessary to their sustenance, or to procure them an occupation or profession by which to support themselves."

mates could be treated differently from legitimates for purposes of intestate or testate succession,[70] but solely whether the law may reasonably discriminate against adulterous bastards within the class of illegitimates, the court held that article 1488 unreasonably discriminates against certain illegitimates because of their birth, thus violating the Louisiana constitution.[71] In analyzing the state purposes rationally served by distinctions between adulterous illegitimates and other illegitimates with respect to their capacity to receive legacies from their father, the court distinguished *Labine* as a case involving intestate succession wherein the facilitation of a prompt determination of title to the property left by an intestate decedent was a vital interest.[72] The relevance of another interest in *Labine,* the preservation of the sanctity of marriage, was discredited by the court since the sanction was not aimed at the adulterous parents, but rather at their children.[73] The court stated:

> However valid these may be as rational bases for differentiated treatment of legitimate or illegitimate children for purposes of intestate succession, these reasons do not afford any rational basis to deny completely by statute any right of an illegitimate child to receive a legacy given him by his father's will solely because the child's conception resulted from his father's admitted adultery—especially where, as here, the father could have willed his estate to non-adulterous illegitimates or to complete strangers.[74]

A vigorous dissent in *Robins* viewed article 1488 as an integral part of the Louisiana succession system and the decision striking it down as jeopardizing all other legislation affecting illegitimates.[75] It predicted an eventual effective invalida-

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70. 349 So. 2d at 277.

71. *Id.* at 280. See note 3, *supra.*

72. *Id.*

73. *Id.* at 279. The court emphasized the irrationality of a sanction which affected only certain children born of an adulterous act and not others. "In practical effect, the only adulterous children affected are those born of a married father and an unmarried mother—and then only if the father admits his parentage . . . ." *Id.*

74. *Id.* at 280.

75. *Id.* at 281 (Summers, J., dissenting). The dissent noted that given the attention of the drafters of the Code to a "thorough legal system designed to sustain the

tion of all laws of this state in which distinctions are based upon illegitimate birth.[76]

True to this prediction, the Louisiana Supreme Court in *Succession of Thompson*[77] struck down article 1483 which prohibits an acknowledged illegitimate child from receiving a legacy from his mother if she is survived by legitimate children. In such an event, article 1483 would restrict the disposition to what is strictly necessary to procure the child sustenance or an occupation or profession to maintain him. The testator in *Thompson* willed all of her property to her legitimate daughter and her acknowledged natural son. The legitimate child contended that article 1483 prohibits such a disposition to the illegitimate, while the illegitimate child argued that the article violates the Louisiana Constitution of 1974, article 1, section 3, which prohibits arbitrary, capricious or unreasonable discrimination on the basis of birth.[78] Commenting that this constitutional provision refers to the entire range of discriminatory practices based on illegitimacy,[79] the court determined that the validity of these classifications depended on the existence of a rational basis for their enactment which is reasonably related to a valid governmental purpose.[80]

Using the analysis applied in *Robins,* the court questioned the valid state purpose served by a statute which prohibits an acknowledged illegitimate child from being a legatee merely because his parent has legitimate descendants. Three justifications for such discrimination, approved in *Labine,* were offered in support of article 1483, two of which were discredited in

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family unit, protect the rights of property and accord to illegitimate children some benefits of inheritance, it is inconceivable that these classifications were intended to be abolished by Article 1, Section 3, of the Constitution of 1974 . . . ." *Id.* at 283 (Summers, J., dissenting).

76. *Id.* at 285 (Summers, J., dissenting).

77. 367 So. 2d 796 (La. 1979).

78. *See* note 3, *supra.*

79. 367 So. 2d at 797. This statement addressed the legitimate child's arguments that "birth" may refer to national origin, and that the purpose of the provision was merely to abolish discrimination on the basis of birth with respect to state programs aiding dependent children. *Id.*

80. *Id.* at 798. This test was also used by the court in *Robins.* 349 So. 2d at 278. See note 16, *supra.*

Trimble.[81] Although *Labine* had recognized the goal of the promotion of family life, the court pointed out that *Trimble* found only an attenuated relationship between a statute discriminating against illegitimates and such a goal.[82] The court also noticed that the deterrent effect of such legislation is belied by the statistics of illegitimate births.[83] Furthermore, the court felt that it is anomalous for those wholly innocent as regards the condition of their birth to bear the full force of society's disapproval.[84] Again citing *Trimble,* the court rejected the argument that no insurmountable barrier restricted defendant from inheritance; such a theory cannot be used to eliminate constitutional infirmities.[85] Disposing of the third justification offered by the legitimate child, the court stated that "there is no connection between a prohibition against a donation mortis causa to an illegitimate child and land titles."[86] The court cited the dissent in *Captain* and stated that a specific parental bequest by will raises no problems with land titles.[87]

Since the *Captain* case is a state appellate court decision, its analysis is effectively displaced by the more recent and higher court's ruling in *Thompson;* in a challenge to article 1486 today, a finding of unconstitutionality could be fairly predicted. The majority in *Captain* relied on two justifications, the promotion of the family and the stability of land titles,[88] both of which were rejected by the *Thompson* court as having no relevancy to testate successions. The impact of these two Louisiana decisions, *Robins* and *Thompson,* on the future of other succession laws affecting illegitimates awaits further litigation. However, they are indicative of a more liberal trend

81. See text at notes 17, 18 & 20, *supra*.

82. 367 So. 2d at 798.

83. *Id.* at 799. The court stated that the theory is undermined by public health statistics which demonstrate that one out of every five children born in Louisiana is illegitimate. *Id.*

84. *Id.*

85. *Id.* at 800. This was in response to the legitimate child's argument that the testator could have made the bequest through the legitimation process in article 200.

86. *Id.* at 798.

87. *Id., citing* Succession of Captain, 341 So. 2d 1291, 1296 (La. App. 3d Cir. 1977), (Watson, J., dissenting).

88. See text at note 64, *supra*.

toward raising the status of illegitimates to a level commensurate with that enjoyed by legitimates.

Proposals for Reform

A constitutional analysis of the Louisiana codal articles relating to the rights of illegitimate children in the estates of their parents entails not only the equal protection clause of the fourteenth amendment to the United States Constitution,[89] but also, and perhaps more importantly, article 1, section 3 of the Louisiana constitution.[90] The protection afforded by the Louisiana constitution is at least as great, if not greater than, that of the federal Constitution. Birth is so important a classification that the drafters of the Louisiana constitution chose to specifically enumerate it. In fact, the Louisiana Supreme Court in both *Robins* and *Thompson* relied solely on the Louisiana constitution for the basis of their opinions, though influenced by the *Trimble* analysis.

Three main categories of Louisiana succession law are presented in determining the constitutional revision required of our Code. These are Louisiana testate succession laws, intestate succession laws, and the principle of forced heirship.

Testate Succession Laws: Articles 1483-88

The Louisiana Supreme Court has struck down both Civil Code articles 1488 and 1483 as violative of the Louisiana constitution.[91] These articles relate to testate successions and accordingly are not directly affected by the United States Supreme Court cases dealing with the intestate succession rights of illegitimate children. There are no Supreme Court cases dealing with the problems encountered by the Louisiana court in *Robins* and *Thompson,* probably due to the fact that few, if any, other states have such a comprehensive system to control the disposition of one's property at death.

89. The fourteenth amendment states that "[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, §1.

90. *See* note 3, *supra.*

91. Succession of Thompson, 367 So. 2d 796 (La. 1979); Succession of Robins, 349 So. 2d 276 (La. 1977).

By both federal and state constitutional analysis, articles 1483-88 of the Louisiana Civil Code appear to be clearly violative of equal protection. As previously noted, articles 1483 and 1488 have been successfully challenged.[92] Both of these provisions restrict the natural mother and father alike, and limit dispositions to their natural children to amounts necessary to maintain them in the event that the children were born of an adulterous or incestuous union or that the parents had legitimate descendants surviving them. Articles 1484 and 1485 affect the natural mother alone and allow her to dispose of her entire estate to her natural children when she has left no legitimate descendants. However, if she leaves such children only a part and disposes of the rest in favor of other persons, her natural children have an action against her heirs only for what is necessary for their support. Articles 1486 and 1487 apply solely to the natural father, permitting him to dispose of a limited portion of his estate in favor of his natural children only when he leaves no legitimate descendants and only if he bequeaths the rest of his property to his legitimate relatives or to public institutions.

In order for this difference in treatment of illegitimate and legitimate children to be valid, there must be a rational basis for the differentiation which is reasonably related to a valid governmental purpose.[93] It has been pronounced by the Louisiana Supreme Court that the interest of the state in the stability of land titles has no connection with the problem of a parent's decision to will property to his illegitimate child,[94] and the only other justification advanced for restricting such dispositions is the promotion of legitimate family ties. Although this was considered a permissible state interest in *Labine,* it was deemed in *Trimble* to have at most an attenuated relationship to the state statute.[95] Such an attenuated relationship does not satisfy the constitutional test requiring more than a minimum rational relationship between the state's interest and a statutory classification. Unless a valid reason for the discrimination

92. *Id.*

93. See note 80, *supra,* and accompanying text.

94. See text at notes 72 & 86, *supra.*

95. See text at notes 82, 83 & 84, *supra.* The majority in *Thompson* recognized that the *Trimble* analysis prevails over that of *Labine.*

is advanced, it appears that in the future there will be no limitations on the rights of parents to dispose of their property in favor of children born out of wedlock. Of course, this conclusion is modified by the qualification that no disposition may impinge on the inheritance of a forced heir.[96] Another factor not relevant to intestate successions weighs against the validity of these articles. The will of the testator is deemed paramount in testate successions and is to be given effect in strictest accordance with his testament unless clearly outweighed by countervailing interests. A countervailing interest of sufficient weight is forced heirship, which is considered to be so important in preventing disinherison that it is protected in our state constitution.[97] However, in balancing the importance of the testator's intent against the tenuous justification for restricting his dispositions to his natural children, the former clearly outweighs the latter and should prevail. Instead of inhibiting such dispositions, society should commend these parents for accepting their responsibilities to their children.

Intestate Succession Law: Articles 917-921

As yet, no decision of the Louisiana Supreme Court has held unconstitutional the Louisiana intestate succession scheme's treatment of illegitimates. Therefore, the analysis of Louisiana intestate laws must be made in light of *Labine, Trimble* and *Lalli* with an eye to Louisiana Supreme Court pronouncements in the realm of testate successions. Clearly, the only justification which can be suggested in support of constitutionality is the state interest in the orderly and efficient disposition of property at death.[98] In *Lalli,* the constitutional test was unequivocally held to be one in which the demands visited on the illegitimates must "bear an evident and substantial relation to the particular state interest the statute is designed to serve."[99] Therefore, attention is focused on

96. LA. CIV. CODE art. 1493.

97. LA. CONST. art. 12, § 5. See text at note 118, *infra*.

98. The court in both *Thompson* and *Robins* discredited any connection between succession laws and the protection of the legitimate family. See text at notes 73, 82, 83 & 84, *supra*.

99. 99 S. Ct. at 524.

whether the following classifications are substantially related to the concern over the stability of land titles.

Within the class of acknowledged illegitimate children,[100] the order of intestate succession differs depending on whether the child is to inherit from the mother or from the father. An acknowledged illegitimate child inherits from the mother to the exclusion of other kindred according to article 918, unless she has also left legitimate children or other descendants. Under article 919 an acknowledged illegitimate inherits from the father only to the exclusion of the state. In the event the acknowledged illegitimate is excluded in either of the above situations, the child's rights will be reduced to a moderate alimony. Adulterous and incestuous bastards do not inherit in any event, but are restricted to a mere alimony by article 920. Finally, article 921 restricts the right of natural children to inherit from the legitimate relations of their parents.

Article 918 places the illegitimate child in a relatively high position with respect to the estate of his mother. However, it should be pointed out that Louisiana is the only state that distinguishes between legitimates and illegitimates as to intestate inheritance rights from the mother.[101] Constitutional analysis of this article requires an inquiry into the state purposes served by a statute which prohibits an acknowledged illegitimate child from being an heir of his mother merely because she has legitimate descendants. The recurring justifications for such restrictions are the fostering of stability of land titles and the promotion of the legitimate family. Just as there is no connection between the former interest and testate successions,[102] there is likewise no connection between this interest and the intestate succession of the mother. The relative ease of proving maternity dissipates any problems of fraudulent and belated claims to the mother's estate.[103] The latter interest has been discredited in *Trimble, Robins* and *Thompson* as a device

100. See note 2, *supra*.

101. *See* Hallisey, *Illegitimates and Equal Protection*, 10 U. MICH. J.L. REF. 543 (1977); Lorio, *supra* note 2, at 4.

102. See text at notes 72 & 86, *supra*.

103. In *Lalli*, the Court noted that establishing maternity is seldom difficult since the child's birth is usually a recorded event taking place in the presence of others. 99 S. Ct. at 525.

which visits the sins of the parents on the heads of their innocent children. Article 918 thus bears no relationship to a legitimate state objective.

Whether article 919 bears a substantial relationship to permissible state purposes must be examined against the background of *Labine*. *Labine* upheld article 919 and allowed the legitimate collateral relations of the father to exclude his acknowledged illegitimate child, using a minimal rationality approach.[104] Reexamining this article in terms of the constitutional test provided in *Trimble,* the primary and probably only legitimate justification for differentiation today is the state interest in the accurate and efficient disposition of a decedent's property at death.[105] Inquiry should then focus on whether this state interest in protecting the estate from the disruptive intrusion of lost or hidden heirs is furthered by or substantially related to a legislative classification that places acknowledged illegitimates behind all other related takers of the estate. Reading *Trimble* in light of *Lalli*, a discrimination against illegitimate children is prohibited once parentage is proven in accordance with a statute providing for the requisite kind of evidence.[106] It is difficult to imagine how the state interest justifies placing illegitimates who are acknowledged, and have thus proven parentage, at a point in the succession order where they will rarely be entitled to inherit. If the acknowledged illegitimate child of the father were totally excluded rather than placed at a lower level in the order of succession, it cannot be doubted that an unreasonable discrimination would exist.[107] How then can the state be allowed to indirectly accomplish (at least substantially) what it could not do directly?

If the illegitimate may inherit, why then may he not inherit equally? The only possible relationship this writer can discover between the low priority in the succession order given illegitimates in their father's succession and the interest in land titles, is that the worrisome possibility of fraudulent and

104. See text at note 12, *supra*.

105. See text at note 20, *supra*.

106. See text at note 49, *supra*.

107. This is the exact reason why the Illinois statute was struck down in *Trimble*. See text at note 23, *supra*.

belated claims will arise infrequently. Since the illegitimate can take only when there are no other legitimate relations, the state would be the only one affected by any spurious claims. However, if this slight benefit were considered a sufficient rationale for article 919, it is easy to perceive that other states could rewrite their laws to technically comply with constitutional mandates by simply placing the illegitimate at the end of the succession line. It is extremely doubtful that the courts will allow a state legislature to avoid granting equality by using what could be termed a "loophole."[108]

While not clearly unconstitutional, article 919 certainly is questionable and it is therefore suggested that the article be repealed. The possibility of receiving alimony even if the illegitimate child is excluded under articles 918 and 919[109] is not sufficient to justify the classifications, since the right to alimony and the right to inheritance are two entirely different concepts. Alimony should not be permitted to substitute for the child's right to an inheritance. The acknowledged illegitimate child of the father should be allowed to inherit equally with legitimate children, to the exclusion of other potential heirs.

Article 920 is analogous to the repealed article 1488 in restricting the rights of an adulterous or incestuous child to mere alimony. Discrimination within the class of illegitimates, based solely on the child's conception resulting from the parent's adultery, was prohibited in *Robins*.[110] Therefore, at a minimum, the bastard child who has proven paternity must be allowed the rights given other illegitimate children in articles 918 and 919 as they now stand. Furthermore, if articles 918 and 919 are found unconstitutional, then the adulterous or inces-

108. If constitutional mandates could be successfully met by permitting the illegitimate child to inherit, but only after all other relatives, then the *Trimble* decision would be senseless. Certainly, a significant category of illegitimate children would thereby be excluded from the father's succession, a result prohibited by *Trimble*. See text at note 43, *supra*.

109. See text at note 100, *supra*.

110. See text at note 71, *supra*. Although the opinion in *Robins* dealt only with adulterous illegitimate children, there is no reason why the same rationale may not be extended to the incestuous illegitimate child. There is no rational relationship between (1) a classification which treats incestuous illegitimate children differently from other illegitimates and (2) the state concern over the stability of land titles.

tuous illegitimate who proves paternity must be treated equally with the legitimate child. Although article 204, which governs the acknowledgment procedure, precludes the acknowledgment of these children,[111] this article is also constitutionally weak after *Robins,* since there is no rational basis for the discrimination.[112]

Whether an illegitimate who proves paternity is constitutionally entitled to inherit from the legitimate relations of the parents whenever a legitimate child would have such a right,[113] is an issue which has not yet arisen in the Louisiana or United States Supreme Court. Many states allow the illegitimate to inherit equally with legitimates in the estates of the mother's relatives, while restricting the illegitimate's inheritance from the father's relations, usually in accordance with paternity proof.[114] There do not appear to be any additional justifications for discrimination merely because the decedent is a more distant relation, and it follows that the analysis discussed previously will control in these situations also. Thus, if the child has met the burden of proving parentage, he should possess the same rights that a legitimate child possesses.[115]

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111. LA. CIV. CODE art. 204 provides: "Such acknowledgment shall not be made in favor of children whose parents were incapable of contracting marriage at the time of conception; however, such acknowledgment may be made if the parents should contract a legal marriage with each other."

112. It should be noted that as Louisiana'a articles now read, acknowledgment is the kind of evidence necessary for inheritance. LA. CIV. CODE arts. 917-21.

113. LA. CIV. CODE art. 921.

114. A statute that precluded intestate inheritance by paternal kindred from an illegitimate child was upheld by a New York court in a case where there had been no order of filiation. Estate of Fay, 404 N.Y.S.2d 554, 375 N.E.2d 735 (N.Y. App. 1978). The validity of this statute with its limitation imposed would concur with *Lalli,* but there remains the question of the effect of such a statute where there is an order of filiation. It may be argued that it is unconstitutional to prevent an illegitimate, who could inherit intestate from his father, from inheriting from his father's kindred under the same circumstances. The paternity issue aside, such a determination would depend on whether the state had any valid interests in treating illegitimate children unequally with respect to the father's kindred as opposed to a clear right to inheritance from the mother's kindred. Perhaps such an argument could be found in the presumed intent of paternal relations, but it is doubtful. See note 19, *supra,* and accompanying text.

115. One such right is found in article 1705 of the Louisiana Civil Code, in which the birth of a legitimate child or the adoption or legitimation of a child subsequent to the making of a testament, revokes the testament. Whether the posterior birth of an

Forced Heirship

Illegitimates are not considered to be forced heirs in Louisiana and can thus be freely disinherited by their parents,[116] although their legitimate counterparts may only be disinherited for reasons narrowly defined in the Civil Code.[117] Forced heirship involves the same considerations discussed in the intestate succession area, since both concern rights to inheritance not granted by a will. Therefore, the primary state interest advanced to justify the exclusion of the illegitimate child is likely to be the stability of land titles. The protection of an estate from the possibility of belated or fraudulent claims is arguably not furthered by permitting a parent to disinherit his *acknowledged* illegitimate child when he cannot disinherit a legitimate child. If forced heirship is to continue in favor of the

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illegitimate child should revoke a will could depend on whether such child would be entitled to inherit intestate. If so, then his birth should revoke a prior will. This is illustrated in a New Jersey case, in which a statute identical to that in *Trimble,* requiring in addition to marriage, that the father treat and recognize the child as his own, was struck down. *In re* Estate of Sharp, 151 N.J. Super. 579, 377 A.2d 730 (N.J. 1977). Venturing that based on *Trimble, Labine* could be treated as overruled, and holding that the intestate statute in question was invalid, the New Jersey court found that an afterborn illegitimate child would render null the father's will executed before the child's birth. *Id.* at 585, 377 A.2d at 732. The court held that if the child could not be a beneficiary of his father's estate, then his birth would not render the will null. *Id.*

Another problem arises as to the interpretation of the word "children" as designated by a testator in his will. Again, it is arguable that this word should include illegitimate children who could otherwise inherit intestate. However, the testator's reference to "my children" or "our children" could be crucial. If he refers to "our children" then it very well may be that his illegitimate children were not intended to be included.

Following *Trimble,* many courts faced the question of whether the word "children" in a trust or will includes illegitimates. A New York court held that the inclusion of illegitimates would be determined by the facts in each case, since the intent of the testator controls and is to be construed in light of the statutes and decisions applicable at the time of execution of the will. Estate of Leventritt, 400 N.Y.S.2d 298, 92 Misc. 2d 598 (N.Y. Surr. 1977). In an Alabama case, the state supreme court held that a question of fact arises when a testator, who had allegedly recognized and supported an illegitimate child, referred to "my children" in his will. Walton v. Lindsey, 349 So. 2d 41 (Ala. 1977).

116. LA. CIV. CODE art. 1493 provides: "Donations *inter vivos* and *mortis causa* can not exceed two-thirds of the property of the disposer, if he leaves, at his decease, a legitimate child; one-half, if he leaves two children; and one-third, if he leaves three or a greater number."

117. There are ten just causes for the disinherison of legitimate children recognized by law. LA. CIV. CODE art 1621.

legitimate child, then it should also exist in favor of the illegitimate child along with the corresponding rights to demand reduction and collation. The Louisiana constitution provides that "no law shall abolish forced heirship. The determination of forced heirs, the amount of the forced portion, and the grounds for disinherison shall be provided by law."[118] Therefore, it would be consistent with the constitution to allow the illegitimate the rights of forced heirship equivalent to those a legitimate possesses.

The suggestion has been made that in the case of forced heirship and intestate succession, the illegitimate should receive his portion in the form of a credit against the estate rather than a fractional interest in the succession.[119] It is argued that this would reduce potential problems with the stability of commercial transactions. Since such a procedure would further this vital interest, it would almost certainly withstand any constitutional challenges based on equal protection.[120] It is not discrimination as such which is prohibited by the constitution, but *unreasonable* discimination. This device, along with others such as shortening the statute of limitations in which to assert claims to the estate, would be substantially related to legitimate state objectives.[121]

Proof of Paternity

After *Trimble* and *Lalli,* the only remaining barrier to absolute equality for illegitimate children is proof of parentage.[122] Since this prerequisite to inheritance is based on the state's interest in the stability of land titles, standards of proof should be fashioned so as to maximize the rights of illegitimates while at the same time guarding the estate from belated and fraudulent claims. How such a compromise should be structured is

118. LA. CONST. art. 12, § 5.

119. This plan has been suggested by Professor Robert Pascal. *See* Pascal, *Louisiana Succession and Related Laws and the Illegitimate: Thoughts Prompted by Labine v. Vincent,* 46 TUL. L. REV. 167, 181-82 (1972).

120. See text at note 49, *supra.*

121. Even the dissent in *Lalli* approves less drastic means than the sole criterion of a filiation order to assure the protection of the estate from belated claims. These include publication notice and a short statute of limitations period. 99 S. Ct. at 530.

122. *See* LA. CIV. CODE arts. 208-12 (methods of proving paternity).

probably the most pervasive and puzzling aspect of the provisions affected by these Supreme Court decisions.

With respect to inheritance from the mother the relative ease with which maternity is proved will mean that proof of parentage probably should impose no additional burden on the illegitimate child. Since there are usually witnesses to most births and since some sort of record is almost always kept,[123] it is suggested that the illegitimate be treated equally with legitimate children with respect to inheritance from the mother.

Proof of paternity procedure is quite a different matter. Under the succession articles as they now read, illegitimates may inherit once they are acknowledged.[124] As already indicated, the acknowledgment laws should conform to constitutional mandates so as to allow the acknowledgment of *all* illegitimates, regardless of how they are conceived.[125] Acknowledgment in Louisiana may be by formal means or by an informal act of the parent indicating parentage.[126] Although informal acknowledgment would provide sufficient accuracy and reliability in proof of maternity, the possibility of requiring more formal proof of paternity as a prerequisite to intestate inheritance should be considered. Rather than acknowledgment, stricter standards of paternity proof could be incorporated into the succession articles.[127]

If the goal of the state is to ensure the efficient and orderly distribution of property passing from decedents, it is necessary

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123. See note 103, *supra*.

124. However, the acknowledged illegitimate is treated differently from legitimates.

125. See text at notes 111-12, *supra*.

126. Acknowledgment may be formal, *see* LA. CIV. CODE art. 203, or informal. Professor Pascal states that "[i]nformal acknowledgment results from any act of the parent expressing or implying parentage of the child, and decisions have given it the same effect as formal acknowledgment for all purposes in favor of the child, but never in favor of the parent." Pascal, *supra* note 119, at 169.

127. However, with respect to standards of proof it is clear that a statute permitting an illegitimate to inherit intestate from the father only if he marries the mother is unconstitutional. *Trimble* so held. See text at note 45, *supra*. *See* Murray v. Murray, 564 S.W.2d 5 (Ky. 1978); Pendleton v. Pendleton, 560 S.W.2d 538 (Ky. 1978); Rudolph v. Rudolph, 556 S.W.2d 152 (Ky. App. 1977). One case relied expressly on *Trimble*, while the other, relying on Kentucky's state constitution, remarked that the problem of proof of paternity seemed more reasonably to address itself to evidentiary standards than to the outright barring of claims. 556 S.W.2d at 155.

to determine what kinds of evidence will further this goal. These could include proof by filiation order, formal acknowledgment, or any other means of formal proof.[128] An alternative might be not to require a specific kind of evidence to the exclusion of all others, but rather to impose a higher standard of proof, such as proof by clear and convincing evidence.[129] Possibly, the Uniform Probate Code could be used as a guide where the primary qualification for inheritance focuses on the biological relationship between parent and child.[130] A child would thus

128. Although the *Lalli* type statute mandating a filiation order as the exclusive means of proof was upheld in New York, the same statute was found unconstitutional in Tennessee in *Allen v. Harvey*, 568 S.W.2d 829 (Tenn. 1978). However, one may question whether the Tennessee Supreme Court misinterpreted what *Trimble* purportedly required. Although the court conceded that an illegitimate had to meet a stricter standard of proof of paternity, it held that the denial of inheritance to a child whose father openly and consistently acknowledged, lived with, and supported him, would deprive the child of his inheritance unnecessarily as forbidden in *Trimble*. *Id.* at 835. In essence, the court asserted that the method of proof chosen had to include all children whose paternity determination would not interfere with the succession procedure. The majority in *Lalli*, however, took a negative approach to *Trimble* in finding a statute valid as long as it did not exclude a *great number* of illegitimates, even if it excluded *some* unnecessarily. *Lalli* recognized the lack of formal proof as a reasonable exclusion, not applicable to an excessively large number of illegitimate children. See note 47, *supra*, and accompanying text.

129. With respect to proof requirements, the Florida Supreme Court held unconstitutional a statute that allowed illegitimate children to inherit from their father only if the father acknowledged them in writing in the presence of a competent witness. *In re* Estate of Burris, 361 So. 2d 152 (Fla. 1978). While the Florida court recognized that the state could be justified in imposing a high degree of proof of paternity in order to prevent spurious claims, it found that this statute did not address the "standard of proof" but merely set forth the kind of evidence required to prove the fact of paternity to the exclusion of all other kinds of evidence. *Id.* at 155. The court found it significant that not even proof beyond a reasonable doubt would be sufficient. It thus interpreted *Trimble* to require that the requisite standard include *all* illegitimate children whose paternity ascertainment will not interrupt the orderly and accurate settlement of estates. This decision was clearly contrary to *Lalli*, which specifically permitted a state to require an exclusive method of proof of paternity. However, does *Lalli* require that there be a filiation order before inheritance is allowed, or is any evidentiary criteria sufficient? In a footnote, the *Lalli* majority noted that they were not restricting "a state's freedom to require proof of paternity by means other than a judicial decree." 99 S. Ct. at 5260 n.8. If under the Florida statute, the child had a paternity order but lacked the requisite acknowledgment, could the state permissibly eliminate him from inheritance? It would seem logical that if the lesser is sufficient proof, then surely the greater should not be considered inadequate. Perhaps the statute would be thus interpreted, but the problem remains as to whether *Lalli* mandates this result.

130. See text at note 50, *supra*.

be treated as a child of the father if the natural parents participate in a marriage ceremony, if paternity is established by adjudication before the death of the father, or if paternity is established thereafter by clear and convincing proof. Use of an elevated standard of proof of paternity would pose some problems as to the line of inquiry the procedure should encompass.[131] It is suggested that the use of scientific evidence, blood testing, and perhaps lie detector tests should be permissible.[132] In fact, *any* evidence which will assure accuracy should be allowed.

Once the kind of evidence required is established, an even more difficult problem for resolution arises—the timing of such proof. In *Lalli,* the Court upheld the New York statute requiring a filiation order during the father's lifetime, but it specifically avoided addressing the limitation that the order issue within two years of the birth of the child.[133] Presumably, such a short statute of limitations would be constitutionally impermissible since it would allow the illegitimate child himself no opportunity to assert his parentage. At a minimum, a statute must allow proof of paternity any time before the father's death, but it seems to this writer that the opportunity must extend even beyond the father's death. A particular example of the necessity of this extension is demonstrated in the case of posthumous illegitimate children.[134] Since the father has

131. The constitutionality of the presumption of legitimacy when a child is born in wedlock may raise problems once an illegitimate is entitled to inherit from the natural parent. LA. CIV. CODE art. 184. An Arkansas statute creating such a presumption was upheld, based on policy considerations. Brown v. Danley, 263 Ark. 480, 566 S.W.2d 385 (1978). This decision may be consistent with *Lalli* since it involved no discrimination between illegitimates and legitimates; the claimant was legitimate and could inherit from the legitimate father. However, the validity of a presumption that ignores the true biological realtionship between the parties is questionable.

132. See Lorio, *supra* note 2, at 24-27 for recommended revisions of Louisiana Civil Code articles providing for proof of paternity.

133. See note 33, *supra.*

134. In two Wisconsin Supreme Court decisions, a statute that provided for an illegitimate to inherit intestate from the father only if paternity was adjudicated during the father's life, admitted in open court, or acknowledged in a signed writing was upheld with respect to posthumous children. Robinson v. Kolstad, 84 Wisc. 2d 579, 267 N.W.2d 886 (1978); Estate of Blumreich, 84 Wisc. 2d 545, 267 N.W.2d 870 (1978). However, there was a vigorous dissent in *Robinson* as to the constitutionality of this statute as applied to an illegitimate child whose father died less than forty-eight hours

died before the child is even born, it is arguable that a statute restricting proof to a period prior to the date of death would virtually disinherit an entire class of illegitimate children, prohibited in *Trimble* and *Lalli*. The unlikelihood that a father will ever acknowledge his paternity or the mother institute a paternity action before the child's birth is obvious.

Perhaps the better solution would be the imposition of a short limitations period in which claims against the estate could be filed. This would serve the asserted state interest by eliminating belated claims which are the ones more likely to be fraudulent, while at the same time allowing the illegitimate child a reasonable period of time after the father's death in which to prove paternity and assert his rights to the estate. Publication notice should also be considered since it would aid justification of a short limitations period and afford the child notice of his right.

Although the above suggestions with respect to proof of paternity may meet with constitutional challenges, such attacks will almost certainly be unsuccessful since this difference in treatment appears clearly justified and constitutionally reasonable. *Trimble* and *Lalli* recognized the essential state interest in the just and orderly disposition of a decedent's property at death. Both decisions also noted the paramount interest of the illegitimate in the succession of his parents. The safeguards suggested may accomplish the delicate compromise needed between these two competing interests. The attitude of the Louisiana Supreme Court in *Robins* and *Thompson* is indicative of a desire to achieve this balance and overturn the one-sided approach of the Civil Code. It is hoped that procedural safeguards will be utilized in the future to grant to the illegitimate the full enjoyment of his constitutional rights.

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after he learned of the pregnancy. For any posthumous child, the statute's requirements are nearly impossible to meet. "A prenatal paternity proceeding is as unlikely as the written acknowledgment of a fetus." 84 Wisc. 2d at 586, 267 N.W.2d at 889 (Day, J., dissenting). Indeed, even the majority recognized that "[i]f it could be said that the legislative enactment categorically disinherited posthumous illegitimate children, the argument of denial of equal protection . . . would rise to a different dimension." *Id.* at 585, 267 N.W.2d at 888. For all practical purposes this is what the legislature has done by restricting proof to a period prior to the date of death.