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Domestic Relations—State Statute May Not Forbid a Putative Father from Suing for the Wrongful Death of His Illegitimate Child

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RECENT CASE

DOMESTIC RELATIONS—STATE STATUTE MAY NOT FORBID A PUTATIVE FATHER FROM SUING FOR THE WRONGFUL DEATH OF HIS ILLEGITIMATE CHILD.

Seventeen-year-old Terry Holden, an illegitimate child, died as the result of injuries sustained when the automobile in which she was a passenger left the highway and struck a tree. She left neither a will nor known surviving distributees. After her death, Earl Holden was appointed administrator of her estate with limited letters, and sought to maintain a wrongful death action against the operator (deceased) and the owner of the vehicle in which Miss Holden had been mortally injured. The defense asserted that only surviving distributees could maintain a suit for wrongful death under New York State law, and that Miss Holden was not so survived.[1] The term "distributee" is statutorily defined in the New York Estates, Powers, and Trusts Law (EPTL) to exclude putative fathers of illegitimates, unless a filiation order to establish paternity has been entered within two years of the child's birth.[2] While Earl Holden claimed to be the illegtimate's

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1. The New York wrongful death statute provides:

> The personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued. . . .

N.Y. EST. POWERS & TRUSTS LAW [hereinafter cited as EPTL] § 5-4.1 (McKinney 1967).

2. The EPTL defines "distributee" as "a person entitled to take or share in the property of a decedent under the statutes governing descent and distribution." *Id.* § 1-2.5. The statute also provides:

> (a) For the purposes of this article:
>
> (1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.
>
> (2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.
>
> (3) The existence of an agreement obligating the father to support the illegitimate child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made as prescribed by subparagraph (2).
>
> . . . .
>
> (b) If an illegitimate child dies, his surviving spouse, issue, mother, maternal kindred and father inherit and are entitled to letters of administra-

father, his paternity had never been established by an order of filiation, and no judicial proceeding had ever been instituted to establish a legal relationship between the putative father and illegitimate daughter. However, Earl Holden's name appeared on the illegitimate's birth and baptismal certificates. Miss Holden had lived with her putative father and his wife almost from birth, had been openly and completely acknowledged by him, and bore his name. Under these circumstances, plaintiff contended that the sections of the EPTL in question were unconstitutional, in that they denied equal protection of the law—they were arbitrary and set up an invidious discrimination. The New York State Supreme Court, at special term, granted a defense motion to dismiss the wrongful death action, concluding that the statute did not set forth an arbitrary classification. On appeal, the Appellate Division reversed. *Held:* Earl Holden should be treated as a distributee for the purpose of maintaining this suit for wrongful death. EPTL sections 4–1.2 (a)(2) and (b) are unconstitutional as applied under the facts of this case in that it creates an invidious discrimination between legitimates and illegitimates by requiring that an order of filiation be entered before a putative father or his illegitimate child may be treated as a distributee of the other. *Holden v. Alexander,* 39 App. Div. 2d 476, 336 N.Y.S. 2d 649 (2d Dep't 1972).

The right of action for wrongful death is constitutionally protected in New York, but the state constitution says nothing about who may bring the action or who may recover damages.[3] Under prior law, the right to sue for wrongful death was interwoven with the right of intestate succession by identical classification of the groups entitled to benefit in each case.[4] As the right of illegitimates to inherit was narrowly circumscribed, so also was their right to recover for wrongful death.

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tion as if the decedent were legitimate, provided that the father may inherit or obtain such letters only if an order of filiation has been made in accordance with the provisions of subparagraph (2).

Id. § 4-1.2.

3. N.Y. CONST. art. I, § 16 provides:

The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation.

4. Ch. 919 [1920] Laws of New York 2352, *as amended,* ch. 639 [1949] Laws of New York 1468, *construed in* Battalico v. Knickerbocker Fireproofing Co., 250 App. Div. 258, 294 N.Y.S. 481 (3d Dep't 1937); FOURTH REPORT OF THE TEMPORARY STATE COMMISSION ON LAW OF ESTATES, N.Y. LEG. DOC. No. 19, at 240 (1965) [hereinafter cited as FOURTH REPORT].

Anglo-American law historically distinguished between legitimate and illegitimate children.[5] At common law, illegitimates were defined as children born before celebration of a lawful marriage.[6] Such children were treated as *filius nullius,* the children of no one.[7] As illegitimates, they had few rights.[8] Specifically, they had no claim to inheritance from either parent.[9] In his classic treatise on the common law, Blackstone justified the existence of this scheme on the ground that it served the ends of "establishing the contract of marriage, taken in a civil light, . . . which has nothing to do with the legitimacy or illegitimacy of the children."[10] In essence, he argued that society and the state had an interest in marriage sufficiently strong to justify laws favoring the rights of legitimate children at the expense of the rights of illegitimate children. The causal connection between the harsh laws dealing with illegitimates and the state's interest in fostering the institution of marriage was apparently so clear to Blackstone that he merely asserted its existence without an examination of its validity.

Some of the harshness of the common law has been modified by statute in each of the United States, especially as these statutes deal with the relations between illegitimate children and their mothers.[11] However, significant disadvantages for illegitimates remain. This is particularly true in the area of reciprocal rights and obligations between putative fathers and their illegitimate children. Presumably this resulted because the very issue of paternity may be contested, and its proof is difficult.[12]

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5. H. CLARK, LAW OF DOMESTIC RELATIONS 155 (1968) explores some possible explanations for the early emphasis on the distinction, as well as its longevity.

6. 1 W. BLACKSTONE, COMMENTARIES *454.

7. *Id.* at *459; FOURTH REPORT, *supra* note 4, at 235.

8. H. CLARK, *supra* note 5, at 155, 178.

9. 1 W. BLACKSTONE, *supra* note 6, at *459.

10. *Id.* at *455.

11. H. CLARK, *supra* note 5, at 158-61. Most states now permit illegitimates to inherit from their mothers or through the maternal line. Krause, *Bringing the Bastard Into the Great Society—A Proposed Uniform Act on Legitimacy,* 44 TEXAS L. REV. 829 (1966).

12. Petrillo, *Labine v. Vincent: Illegitimates, Inheritance, and the Fourteenth Amendment,* 75 DICK. L. REV. 377, 378 (1971). The history of New York legislation concerning the claim of illegitimate children to support by their fathers is an excellent example of diminished but persistent discrimination in such cases. It is conveniently reviewed in "Storm" v. "None", 57 Misc. 2d 342, 343-46, 291 N.Y.S.2d 515, 517-19 (Fam. Ct. 1968). In this context, it is interesting to note that the Supreme Court has recently refused to rule on the constitutionality of a Texas statute which makes failure of a parent to support a legitimate child a misdemeanor but imposes no duty on the parent of an illegitimate child. In a 5-4 decision, the Court dismissed the complaint on

New York originally followed the common law rule that an illegitimate had no right to inherit from either parent.[13] The harshness of this rule was first modified in 1855 when illegitimate children were given the right to inherit from their mother, but only if she was not survived by a spouse, legitimate children, or descendants. Moreover, the illegitimate child was still not permitted to inherent from the mother's kindred.[14] If the illegitimate died leaving no issue or spouse, his mother might inherit from him.[15] The statute did not provide a right of intestate succession by an illegitimate from his putative father or by the father from his illegitimate child.[16]

In 1966, after lengthy study,[17] the New York Decedent Estate Law pertaining to illegitimate intestate succession and wrongful death actions was substantially revised, and the revisions were carried forward into the present EPTL. The statutory changes broadened the inheritance rights to and from illegitimate children. At the same time, they continued to define the class of persons permitted recovery in wrongful death actions as encompassing the entire class of those considered distributees for the purpose of inheritance. Suit for wrongful death may now be maintained by the duly appointed personal representative of a decedent when he is survived by distributees.[18] The connection to inheritance is provided by the definition of distributees as persons "entitled to take or share in the property of a decedent under the statutes governing descent and distribution."[19] A special provision deals with inheritance by and from illegitimates.[20] The child is deemed to

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the ground that the mother of an illegitimate had no standing to raise the issue. Linda R. S. v. Richard D., 41 U.S.L.W. 4371 (U.S. Mar. 6, 1973).

13. For a detailed discussion of the history of New York law on inheritance by the illegitimate child see Note, *Illegitimacy,* 26 BROOKLYN L. REV. 45 (1960) and FOURTH REPORT, *supra* note 4, at 239-40. New York law is compared to that of Wisconsin in Note, *Rights of a Putative Father in Relation to His Illegitimate Child: A Question of Equal Protection,* 22 SYRACUSE L. REV. 470 (1970).

14. FOURTH REPORT 243; ch. 547 [1855] Laws of New York 1046 *as amended* N.Y. EPTL § 4-1.2(a)(1) (McKinney 1967); *In re* Cady's Estate, 257 App. Div. 129, 12 N.Y.S.2d 750 (3d Dep't), *aff'd,* 281 N.Y. 688, 23 N.E.2d 18 (1939).

15. N.Y. Sess. Laws 1965, ch. 958, *as amended,* N.Y. EPTL § 4-1.2(a)(1) (McKinney 1967).

16. *See* "Saks" v. "Saks", 189 Misc. 667, 71 N.Y.S.2d 797 (Fam. Ct. 1947).

17. FOURTH REPORT, *supra* note 4.

18. N.Y. EPTL § 5-4.1 (McKinney 1967).

19. *Id.* § 1-2.5.

20. *Id.* § 4-1.2. It should be noted that while the rights of illegitimates to inherit have been expanded, the class of illegitimates who have benefited has been narrowing. Provisions in other statutes have operated to increase the number of circumstances in which a child may be deemed legitimate. *See, e.g.,* N.Y. DOM. REL. LAW § 24 (McKinney 1964).

be the legitimate child of his mother and so may inherit from her; the right is also extended to include inheritance from maternal kindred.[21] When an illegitimate child dies unmarried and without children, his mother or her kindred may inherit from such child.[22] On the other hand, an illegitimate child may only inherit from his father if a filiation order—a declaration of paternity issued by a court of competent jurisdiction—is filed during the father's life. The filiation proceedings must be instituted during the mother's pregnancy or within two years of the birth of the child.[23] Although the filiation order permits the putative father to inherit from his illegitimate child, the right of intestate succession still does not extend to or from the father's kindred.[24]

The strict requirement of a filiation order has been the subject of much dispute. The commission which recommended the 1966 changes in the Decedent Estate Law deemed it a necessary precaution to protect innocent men from the possibility of unjust paternity claims and to protect the inheritance of legitimate distributees.[25] The commission's report concluded that other suggested alternatives would afford "considerable opportunity for falsification of evidence and [would] invit[e] harassing litigation . . . ."[26] Informal acknowledgement by the putative father, which is acceptable in many jurisdictions,[27] was explicitly rejected as an alternative to the filiation order. Judicial orders of support were likewise deemed insufficient unless they specifically included a finding of paternity.[28] There have been recent attempts to modify the filiation order requirement. In January of 1972, a bill was introduced into the New York Legislature which would have added a properly executed, acknowledged and recorded affidavit of paternity as an alternative to the filiation order, but it failed to gain approval.[29]

While New York was reconsidering its wrongful death and in-

21. N.Y. EPTL § 4-1.2(a)(1) (McKinney 1967).
22. *Id.* § 4-1.2(b).
23. *Id.* § 4-1.2(a)(2).
24. *Id.* § 4-1.2(b).
25. FOURTH REPORT 266.
26. *Id.* at 267.
27. A convenient summary of the requirements of several states may be found *id.* at 260-62. Some states require clear assertions of paternity which must be witnessed or notarized. Others accept any writing by the father which manifests a clear acknowledgment of paternity.
28. *Id.* at 267.
29. A. 8788, 195th Sess. (1972).

testate succession statutes, cases involving restrictive Louisiana statutes on these subjects were making their way to the United States Supreme Court. The gravamen of the complaints in *Levy v. Louisiana*,[30] and its companion case, *Glona v. American Guarantee Co.*,[31] was that the Louisiana wrongful death statute discriminated against illegitimates and their parents, and thus deprived them of equal protection under the fourteenth amendment.[32] The Supreme Court held that wrongful death statutes which excluded illegitimates from the ambit of those who may recover for the death of their mother (*Levy*), or excluded mothers from recovery for the wrongful death of their illegitimate children (*Glona*), were violative of the constitutional mandates of equal protection. Although the holdings of *Levy* and *Glona* seem quite clear, the rationale employed does not. Thus, while both decisions have been hailed as harbingers of the end of all statutory discrimination against illegitimates and their parents, there has been a strong undercurrent of discontent that the results were marred by carelessly drawn opinions.[33]

Speaking for a six-man majority in *Levy*, Justice Douglas first outlined the classic principles of equal protection. A state has broad power to establish classifications, but "it may not draw a line which constitutes an invidious discrimination against" individuals or groups; the lines drawn must be rational, and there must be a justifiable connection between the state interest to be served and the classifications to be established.[34] Thus, the primary inquiry in *Levy* was an examination of the connection between Louisiana's wrongful death statute and its asserted purpose. Did excluding illegitimates from the class of those entitled to recover for wrongful death further the state's asserted purposes to foster marriage and discourage out-of-wedlock births? The Supreme Court concluded that it did not:

> Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. . . . It is invidious to

30. 391 U.S. 68 (1968).

31. 391 U.S. 73 (1968).

32. For an excellent analysis of the rationale and implications of these decisions see Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana—First Decisions on Equal Protection and Paternity*, 36 U. CHI. L. REV. 338 (1969).

33. *See, e.g.*, 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); Petrillo, *supra* note 12, at 380-83.

34. 391 U.S. at 71.

> discriminate against them [the illegitimate children] when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done the mother.[35]

Thus, insofar as the Louisiana wrongful death statute prohibits suit by illegitimates for the death of their mothers, it sets up an unconstitutional invidious discrimination against these children and violates their right to equal protection.

In *Glona,* the Court examined the same statute, but this time focused on its exclusion of mothers of illegitimates from the class of those permitted to sue for the wrongful death of such children. Once again, the Court relied upon equal protection demanding an examination of the relation between the lines drawn in the statute and the state purpose that the statute was designed to serve. Here, as in *Levy,* the Court rejected Louisiana's arguments:

> [N]o possible rational basis [exists] 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.[36]

Thus, both *Levy* and *Glona* concluded that the state's purpose in encouraging marriage and discouraging illegitimate conception was not sufficient to justify the discrimination against illegitimates and their mothers found in Louisiana's wrongful death statute.

It is difficult to determine the full significance of *Levy* and *Glona.* Some of their language is very broad and appeared to warrant the conclusion reached by one study "that *Levy* and *Glona* provide a basis from which all the major legal disadvantages suffered by reason of illegitimacy can be challenged successfully."[37] Nevertheless, the implications of these two opinions are not at all clear. Neither opinion articulated the specific standard employed in reaching the conclusion that the Louisiana statutory classifications in question represented invidious discrimination. The *Levy* opinion notes that the Court "[has] been extremely sensitive when it comes to basic civil rights . . . ."[38] If this means that *Levy* involved protected civil rights, the Court never delineated what specific rights were involved. We are told that "[t]he

35. *Id.* at 72.
36. 391 U.S. at 75.
37. Gray & Rudovsky, *supra* note 33, at 2.
38. 391 U.S. at 71.

rights asserted here *involve* the intimate, familial relationship between a child and his own mother."[39] This may imply a right to privacy within the family unit, or perhaps a right to have children without suffering legal discrimination, or it may imply no more than the right to sue for wrongful death. Further, the Court did not make clear whether the *Levy-Glona* rationale should be extended to include putative fathers of illegitimate children. In *Glona,* Justice Douglas stressed that the biological relationship between child and mother was the significant connection. But we are not told whether this biological relationship test would apply also in the case of a putative father. Finally, the *Levy* and *Glona* opinions leave unclear whether their reasoning would be applicable to statutes dealing with intestate succession.

Notwithstanding the potential for reform in the area of illegitimates' rights that was opened by *Levy* and *Glona,* the Supreme Court itself stopped short and refused to extend the equal protection argument to the issue of inheritance. In *Labine v. Vincent,*[40] the Court upheld Louisiana's statutory scheme barring an illegitimate child from sharing in the estate of her deceased natural father. The majority and dissent both agreed that the Louisiana statute "discriminates" against illegitimates. However, the majority asserted that laws may often permissibly discriminate between groups. Referring to the result in *Levy,* the Court asserted that it "did not say and cannot fairly be read to say that a State can never treat an illegitimate child differently from legitimate off-spring."[41] Further, the Court felt that the issue in *Levy* was distinguishable from the problem in *Labine.* The latter case posed no absolute state bar to inheritance by the child such as existed in the case of wrongful death recovery. The father could have done any one of several things to assure his illegitimate child inheritance rights.[42] The major concern in *Levy* and *Glona*—that the child was barred from recovery due to actions of his parents which he was helpless to control —is not directly discussed. The four members of the Court dissenting from the *Labine* majority bitterly charged:

> The Court . . . resorts to the startling measure of simply excluding . . . illegitimate children from the protection of the [Equal Protection] Clause, in order to uphold the untenable and discredited moral preju-

39. *Id.* (emphasis added).
40. 401 U.S. 532 (1971).
41. *Id.* at 536.
42. *Id.* at 539.

> dice of bygone centuries which vindictively punished not only the illegitimates' parents, but also the hapless, and innocent, children. Based upon such a premise, today's decision cannot even pretend to be a principled decision.[43]

The Supreme Court was able to avoid extending the equal protection rationale to *Labine* by finding that the statute in question had a rational basis founded upon a valid state interest: promoting family life and directing the distribution of property within the state's borders. However, the Court had rejected the sufficiency of promoting marriage as a possible basis for wrongful death statutes operating unequally on legitimates and illegitimates. There is no reason given (and none is apparent) why this argument should succeed in an inheritance context any more than in a wrongful death situation. Likewise, the Court did not carefully examine the traditional notion that states have very strong interests in directing the distribution of property within their borders. The opinion merely asserts that permitting illegitimate inheritance through intestate succession would prejudice this state interest. In the final analysis, it is quite difficult to determine why an equal protection analysis applied in the case of wrongful death recovery and not in the case of inheritance.

Since the specific standard used in *Levy* and *Glona* went undelineated, and the decision in *Labine* seemed to halt further extensions of the equal protection rationale in this area, the implications of the *Levy-Glona* opinions remain unclear. If these cases merely mean that any peculiar remnants of discrimination in the *maternal* relationship are now barred, they should have limited impact. Most states have already equalized the postion of legitimates and illegitimates, vis-à-vis the mother, for purposes of wrongful death recovery and intestate succession.[44] In New York, for example, statutory provisions already permit both wrongful death recovery and intestate succession by an illegitimate child from its mother and her kindred, and they permit the mother to similarly benefit if she survives her illegitimate child.[45] Both the *Levy* and *Glona* opinions, however, employ extraordinarily expansive language. Looking to this broad language, how far it may be extended is debatable.

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43. *Id.* at 541. For a fuller discussion and criticism of the *Labine* opinion see Petrillo, *supra* note 7.

44. H. CLARK, *supra* note 5, at 179; FOURTH REPORT *passim.*

45. N.Y. EPTL §§ 5-4.1, 1-2.5, 4-1.2(a)(1) (McKinney 1967).

Appellate courts outside New York State have now extended the equal protection doctrine to cover paternal relationships. On remand of *Levy*,[46] the Louisiana Supreme Court assumed that the United States Supreme Court's equal protection analysis applied to the relationships of both mothers and fathers with their illegitimate children. New Jersey's wrongful death statute, permitting recovery by an illegitimate child for the death of the mother, but not the father, was declared unconstitutional.[47] The New Jersey court reasoned that the underlying principle of *Levy* reached the father-illegitimate child relationships for purposes of wrongful death recovery. At the same time, several New York courts of primary jurisdiction have grappled with the problem of defining illegitimates' rights to inheritance and wrongful death recovery. In some wrongful death cases they have extended the *Levy-Glona* rationale to the paternal relationship.[48]

The instant case arose against this background. The *Holden* controversy was the first time in any context that the relevant provisions of the EPTL had been examined by an appellate court in light of the equal protection requirements of the fourteenth amendment.

The *Holden* opinion rests first upon the mandate of equal protection in the federal constitution and then upon the particular fact situation involved in the case itself. The court reviewed the facts and relevant statutes and then turned its attention to the recent Supreme Court decisions. Although *Levy* and *Glona* dealt with wrongful death statutes in the context of mother-illegitimate child rights, the decisions were viewed as "valuable guides" to reaching the determination here.[49] *Holden* carefully delineates the distinction between the situa-

46. 253 La. 73, 216 So. 2d 818 (1968).

47. Schmoll v. Creecy, 54 N.J. 194, 254 A.2d 525 (1969). *See also* R— v. R—, 431 S.W.2d 152 (Mo. 1968) which comes to the same conclusion in a case involving child support.

48. *In re* Estate of Perez, 69 Misc. 2d 538, 330 N.Y.S.2d 881 (Sur. Ct. 1972) (written acknowledgment sufficient to permit wrongful death recovery); *In re* Estate of Ross, 67 Misc. 2d 320, 323 N.Y.S.2d 770 (Sur. Ct. 1971) (mother and illegitimate daughter given letters of administration jointly); *In re* Estate of Ortiz, 60 Misc. 2d 756, 303 N.Y.S.2d 806 (Sur. Ct. 1969) (illegitimates permitted recovery in suit for wrongful death of their father). There are miscellaneous New York judicial decisions relying upon extensions of the *Levy-Glona* rationale in contexts other than wrongful death. *See, e.g.,* Prudential Ins. Co. v. Hernandez, 63 Misc. 2d 1058, 314 N.Y.S.2d 188 (Sup. Ct. 1970) (right to proceeds of an insurance policy); *In re* Anonymous, 60 Misc. 2d 163, 302 N.Y.S.2d 688 (Sur. Ct. 1969) (inheritance). Both of these latter cases were decided before *Labine*.

49. Holden v. Alexander, 39 App. Div. 2d 476, 478, 336 N.Y.S.2d 649, 652 [hereinafter cited as instant case].

tion of the mother and the father of an illegitimate child. At the same time, it quotes with favor the *Levy* conclusion that "[l]egitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother."[50] The court also looked to the *Glona* stricture that a

> law which creates an open season on illegitimates in the area of automobile accidents gives a windfall to tortfeasors . . . . To say that the test of equal protection should be "legal" rather than the biological relationship is to avoid the issue.[51]

The *Holden* court concluded that a state might constitutionally discriminate between legitimates and illegitimates when dealing with intestate succession, but it may not discriminate when dealing with wrongful death actions, at least between mother and child.[52]

The court then determined that anaylsis of other decisions[53] and examination of the facts in the case at bar sufficiently supported the extension of the *Levy-Glona* doctrine to the father-child relationship here. That relationship was very different from the usual case where the putative father rarely sees the child he has sired and may, at most, merely furnish some financial support. The relationship between Mr. Holden and his daughter was "that of parent and child, and the bond between them could not have been made any stronger by an order of filiation."[54] Mr. Holden openly acknowledged his paternity. The court specifically found that "although no order of filiation was entered, still, under these facts and in accordance with the modern trend in the law 'to abolish the unchosen birth-given shackles of illegitimacy and to confer filial equality wherever possible,' "[55] Mr. Holden should be permitted to maintain a suit for wrongful death. In support of this conclusion, the court declared sections 4–1.2 (a)(2) and (b) of the EPTL unconstitutional as applied and limited to the facts of the *Holden* case. Following the mandate of *Labine,* the constitutionality of the application of these sections to questions of intestate succession was specifically upheld. In the final analysis, any contrary holding

> would seem not only to create a windfall for tort-feasors who happen to be fortunate enough to have committed their tortious acts

50. *Id., citing Levy,* 391 U.S. at 72.
51. Instant case at 479, 336 N.Y.S.2d at 652, *citing Glona,* 391 U.S. at 75-76.
52. Instant case at 479, 336 N.Y.S.2d at 652.
53. *See* note 48 *supra.*
54. Instant case at 478, 336 N.Y.S.2d at 654.
55. *Id.*

> against illegitimates . . . , but also to render a gross injustice to this particular plaintiff, who would have suffered a wrong without being provided any remedy.[56]

Law and equity, therefore, were deemed to favor permitting the suit for wrongful death by the putative father.

The *Holden* decision's declaration that EPTL section 4–1.2 (b) was unconstitutional under the facts of this case amounted to legislating away the requirement of a filiation order. Yet, the court had other alternatives open to it. For example, it might have considered the two-year limit as in the nature of a statute of limitations for the protection of the putative father. Since Mr. Holden did not assert it, the time requirement was of no import. Or, it might have argued that since the filiation order was merely a procedural requirement designed to protect other distributees, it had no effect in a case where there were no other distributees and where paternity was so clearly established. Certainly, it was not intended to be asserted as a defense by a possible tortfeasor who was clearly not included within the group the statutory safeguard was designed to protect.

However, the court chose not to dispose of the case without consideration of the issues raised in light of the equal protection clause. It read the Supreme Court decisions in *Levy* and *Glona* as requiring substantive review of statutory schemes for wrongful death recovery. Following the equal protection approach of these two cases, the first step for the *Holden* court should have been a clear determination of the precise classifications created by the statute. Only then could the court decide whether the establishment of these classes set up an invidious discrimination in favor of one group at the expense of another. The court examined the classes of legitimates and illegitimates and found that the statute discriminated against the latter group.[57] However, the classifications set forth in the opinion are themselves open to criticism.

Some illegitimates, whose paternity has been established by an order of filiation within two years of their birth, are not excluded from the definition of distributees under the statute. Alternatively, if in fact a filiation order is obtained within the time set forth, a wrongful death action could be maintained by a putative father for the death

56. *Id.* at 482, 336 N.Y.S.2d at 655. This argument may have limited effect in states with compulsory insurance laws.

57. *Id.* at 481, 336 N.Y.S.2d at 655.

of his illegitimate child. Thus, New York law does raise an absolute bar against putative fathers or their offspring. Further, the court might have found that the discrimination took place in the different treatment given to illegitimates and their fathers where a filiation order existed as opposed to treatment received by illegitimates and their putative fathers where no judicial order of filiation has been secured. In fact, despite the broad assertion that the New York statute set up an invidious distinction between legitimates and illegitimates, the thrust of the *Holden* opinion compared father-illegitimate child relations with mother-illegitimate child relationships. The conclusion reached was that rights granted by statute to the latter relationship, in the case of wrongful death recovery, must also be granted to the former. For this one purpose it was found that the equal protection analysis of *Levy* and *Glona* must be extended to cover the paternal relationship in *Holden*.

Two recent Supreme Court decisions, although not dealing with wrongful death statutes, have interpreted *Levy* to extend to paternal relationships with illegitimate children. At the same time, they imply that the limit to equal protection found in *Labine* will not have bearing in contexts other than inheritance. *Stanley v. Illinois*[58] involved the claim by a father of illegitimates that he was entitled to the same custody hearing provided for mothers of illegitimates before his children could become state wards. In holding for the father, the Court primarily relied upon a due process analysis, but it also looked to the *Levy* and *Glona* opinions. It reasoned that illegitimacy does not necessarily determine the strength of familial bonds, and that the biological relationship is central to determination in such cases. As the Court noted, "[t]hese authorities make it clear that, at the least, Stanley's interest in retaining custody of his children is cognizable and substantial."[59] In *Weber v. Aetna Casualty & Surety Co.*,[60] the Supreme Court held that, under the Louisiana workmen's compensation law, the state's denial of equal recovery rights to dependent unacknowledged illegitimate children violated equal protection. The State had argued that *Weber* should be distinguished from *Levy* on two grounds. First, *Levy* involved a statute absolutely barring recovery by illegitimates while the workmen's compensation law merely put illegitimates in a less

58. 405 U.S. 645 (1972).
59. *Id.* at 651.
60. 406 U.S. 165 (1972).

favorable position than legitimates. Second, *Weber* was not a tort action in which a possible tortfeasor would go free if recovery were denied. The Supreme Court had no difficulty dismissing these arguments:

> We do not think *Levy* can be disposed of by such finely carved distinctions. The Court in *Levy* was not so much concerned with the tortfeasor going free as with the equality of treatment under the statutory recovery scheme. Here, as in *Levy*, there is impermissible discrimination.[61]

Thus, although the precise holdings in *Stanley* and *Weber* were relatively narrow, the reasoning employed in each case would seem to support the *Holden* court's extension of the *Levy-Glona* rationale.

Once the classifications are recognized and delineated, the equal protection approach requires an examination of the state purpose offered in justification of the statutory discrimination. In essence, *Levy* and *Glona* raise the question of state interest on the issue of illegitimacy and wrongful death recovery to a constitutional level. The commission which framed the statutory provisions currently found in section 4–1.2 of the EPTL specifically stated the purpose of the legislation. It was intended "to grant to illegitimates, in so far as practicable, rights of inheritance on a par with those enjoyed by legitimate children while protecting innocent adults and those rightfully interested in their estates from fraudulent claims of heirship" and the lengthy litigation such claims would entail.[62] It may also be argued that the present statute serves the purpose of preventing fraudulent claims at the death of illegitimate children by wrongful means. The significant question now is whether these ends are reasonably served by the means chosen in the statute. The generally ignored closing paragraph of the *Glona* decision is instructive here. Addressing itself specifically to suits for the wrongful death of illegitimate children brought by their mothers, the Court stated:

> Opening the courts to suits of this kind may conceivably be a temptation to some to assert motherhood [fatherhood] fraudulently. That problem, however, concerns burden of proof. Where the claimant is plainly the mother [father], the State denies equal protection of the laws to withhold relief merely because the child, wrongfully killed, was born to her [him] out of wedlock.[63]

61. *Id.* at 169.
62. FOURTH REPORT 265.
63. 391 U.S. at 76.

A careful reading of this conclusion would seem to indicate that, once parenthood has in fact been established, there is *no* state purpose which could legitimately be used to justify discriminations against illegitimates and their parents in cases of wrongful death.

The equal protection analysis assumes that the putative father is, in fact, the natural father of an illegitimate. A somewhat different problem arises when a state statute attempts to set up a strict standard for proof of paternity as New York has done by the filiation order requirement. The order requirement can be deemed no more than a procedural safeguard against unjust claims and costly litigation. Because there is action a putative father can take to obtain an adjudication of paternity, the filiation order requirement is not an absolute bar to his recovery. However, *Weber* easily dismissed this kind of superficial analysis.[64] Further, from the point of view of the illegitimate child, the filiation order places it at the mercy of its parents. If its mother or father does not secure a filiation order within two years of its birth, there is nothing the child can do to remedy the situation. Thus, the child will be denied equal protection because legitimates may sue without having to overcome a lack of action on the part of a third-party before the child was old enough to act for itself. This is essentially the reasoning pursued in the *Levy* opinion. Just as *Glona* mandated an extension of *Levy* to the parent, so too the conclusion that the statutory requirement is unconstitutional ought to be extended to include the father.

There are many avenues for legislative revision open to the New York Legislature. The first step is the redefinition of "distributees" in the EPTL so that one class may sue for wrongful death and another may claim intestate succession. The State Legislature has absolute discretion to prescribe that there be one class of beneficiaries to inherit and another to benefit from suits for wrongful death. It has been said that the fact that the legislature decided to include the same people in each class "has no significance."[65] Actually, this may be very significant. On the one hand, the 1966 statutory changes broadened inheritance rights by and from illegitimates. On the other hand, by again subjecting the right to wrongful death recovery to the strict standard for putative fathers, the statute incorporated safeguards de-

64. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 165, 169 (1972).

65. *In re* Estate of Ortiz, 60 Misc. 2d 756, 757, 303 N.Y.S.2d 806, 808 (Sur. Ct. 1969).

signed for the problem of inheritance. Recovery for wrongful death in New York is subject to proof of actual pecuniary loss.[66] Therefore, it is possible to argue that the necessity for a strict proof requirement of biological relationship may be less than in the case of contested inheritance.[67] Furthermore, at least in theory, the recovery of one party for wrongful death does not necessarily restrict the recovery of any other wronged party.[68] Redefinition of distributees in the EPTL would not be necessary if the legislature were willing to have no requirement in the law for proof of paternity. But in view of the legislature's hesitancy to broaden the present definition this seems unlikely. Further, in some earlier cases, courts declared EPTL section 5–4.1 unconstitutional as applied to particular fact situations.[69] *Holden* struck down section 4–1.2 of the EPTL as applied. Should the legislature now reconsider the definition of distributees, the issue of which section of the EPTL is unconstitutional could be resolved.

The question of substantive amendment is much harder than these preliminary problems. *Glona's* use of the phrase "burden of proof" in its closing paragraph[70] may imply that the Supreme Court will accept a standard somewhat stricter than that suggested by the common "more probable than not" formulation. It is reasonable to concede that determination of paternity is often difficult. The state may have some interest in preventing endless litigation, as well as in protecting men from unjust paternity claims. Some minimum proof standard for ascertaining paternity might be acceptable. But, how far the legislature may go without violating the equal protection doctrine is not clear.[71]

66. N.Y. EPTL § 5-4.3 (McKinney 1967).

67. Often in determining recovery, the relationship to the decedent is one of the elements to be considered. This is particularly true when dealing with speculative damages such as loss of support. *See* Linseed King, 48 F.2d 311 (S.D.N.Y. 1930), *aff'd sub nom. In re* Spencer Kellogg & Sons, Inc., 52 F.2d 129 (2d Cir. 1931), *rev'd on other grounds,* 285 U.S. 502 (1932); Meekin v. Brooklyn Heights Ry., 164 N.Y. 145, 58 N.E. 50 (1900). The same may be said of loss of inheritance. *See, In re* Estate of Ortiz, 60 Misc. 2d 756, 762, 303 N.Y.S.2d 806, 812 (Sur. Ct. 1969); Speiser, *Loss of Inheritance in Wrongful Death Cases,* 38 N.Y.S.B.J. 265 (1966).

68. The *Holden* court used this argument. However, it is possible that the amount of insurance available to pay any recovery awarded could be insufficient to cover the amount of the award.

69. *See* note 48 *supra.*

70. 391 U.S. at 76.

71. It must be noted that the dissent in *Labine,* written by Justice Brennan and joined by Justices Douglas, White and Marshall, specifically referred to the present New York statute. While the implication is not clear, the dissent appears to distinguish New York's statute from Louisiana's, since it does not completely deny illegitimates the rights of inheritance from their mothers that it grants to legitimates. The dissenters in *Labine*

Certainly anything that acts as a complete bar to illegitimate children could not stand. On the other hand, it is conceivable that the Supreme Court might accept an informal acknowledgment requirement which, if not executed or displayed, would serve to bar later actions by the putative father. Illegitimate children would have to be granted time to take some action on their own behalves to determine their paternity before reaching twenty-one or some other appropriate age. New York might also be well-advised to consider a statute requiring that a public official attempt to determine paternity whenever an illegitimate child is born.[72] This kind of statute might have a significant salutary effect upon the illegitimate's rights in wrongful death actions, and in areas such as support or adoption as well.

In the meantime, it is clear that there is a trend in the case law at both the state and federal levels to provide some measure of equal status for the illegitimate and its natural parents. The concept of the bastard as the child of no one is a relic of the past. An enlightened society should not long countenance second-class treatment for the innocent child born out of wedlock. And it should likewise not penalize the parents. The *Holden* decision is thus clearly in the mainstream of modern efforts to place the illegitimate child in the same, or similar, position before the law as his legitimate brother. The equal protection clause of the fourteenth amendment would seem to require no less.

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were members of the majority in *Levy* and *Glona*. It seems unlikely that these four Justices would uphold New York's filiation requirement for establishing paternity on the basis of an "absolute bar" analysis, although they used this approach in discussing the mother relationship. 401 U.S. at 557 n.26 (1971) (Brennan, J., dissenting).

72. *Cf.* MINN. STAT. ANN. § 257.33 (1959), which provides:

> 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 paternity . . . .

See also Krause, *supra* note 32, at 350.