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IN THE SUPREME COURT OF FLORIDA

CASE NOS. 84,385 and 84,386
(Consolidated)

IN RE: THE ESTATE OF
CHARLES W. SMITH, Deceased

DHLE S. WILSON and HAROLD "BUDDY" JIMMISON, CO-PERSONAL REPRESENTATIVES, H.H. ADAMS, FLORA C. JONES, LOUISE G. SMITH, FRANK O. YOUNG, ALMA YOUNG, his wife, CLYDE S. HICKS and HAROLD "BUDDY" JIMMISON, Individually,	ON APPEAL FROM THE DISTRICT COURT OF APPEAL, FIRST' DISTRICT, STATE OF FLORIDA
	AND
Petitioners,	ON DISCRETIONARY REVIEW OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA
vs.	
SHIRLEY I. SCRUGGS,	DISTRICT CASE NO.: 93-731
Respondent.	

RESPONDENT'S ANSWER BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

While Petitioners'[1] Statement of the Case and of the Facts contain statements which may be argumentative and may lack objectivity, and thus be improper, Respondent Scruggs adopts same for the purposes of judicial economy, with the following specific exceptions.

In addition to Petitioners' statements that Scruggs' Petition for Revocation of Probate and Letters of Administration alleges Decedent lacked testamentary capacity to make his Will and that the Will was the product of undue influence, the Petition for Revocation of Probate and Letters of Administration contains detailed allegations of Lack of Formality of Execution **(R. 18-19)**[2], and detailed allegations of Fraud, Duresc and Mistake (R. 20); in addition, the allegations of Lack of Testamentary Capacity and of Undue Influence are detailed **(R. 19-20)**. Decedent executed his will at 80 years of age (R. 7), approximately three and one-half (3 1/2) months before his death (R. 4, 7), while Scruggs alleges decedent was suffering from Parkinson's Disease and senile

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[1] The designations of the parties used in Petitioners' Initial Brief will also be used in this Answer Brief, and are restated for convenience as follows:
"Petitioners" for all of the Petitioners herein
"Scruggs" for Respondent Shirley I. Scruggs

[2] The symbols for reference used in Scruggs' Answer Brief are as follows:
"PB" for Petitioners' Initial Brief filed herein
"R" for Record on Appeal
"SB" for Scruggs' Amended Initial Brief before the District Court of Appeal
"App" for Appendix to Scruggs' Answer Brief

dementia, was heavily medicated, partially bedridden, unable to care for himself, and dependent upon one or all of the beneficiaries, which beneficiaries occupied confidential relationships with decedent (R. 19-20). These allegations were of course denied by Petitioners.

Also, the record does not indicate as stated by Petitioner that Scruggs had never before alleged that she was the natural daughter of the Decedent, nor that during Decedent's lifetime, Scruggs never made any claim of paternity, nor that Decedent had not acknowledged that Scruggs was his natural daughter, all statements not cited to the Record and thus improper, but only that no **written** acknowledgment existed and that no **proceeding to establish paternity** had been brought prior to Petitioners' January **27,** 1992 Petition for Probate of Decedent's will (R. 8-10), which will was executed on September **30,** 1991 (R. **4),** the validity of which was contested by Scruggs' April 20, 1992 Petition for Revocation of Probate and Letters of Adminictration.

Scruggs initially relied upon her birth certificate as prima facie evidence of her standing to bring her Petition for Revocation of Probate by showing that she was an "interested person", and for this reason alone entitled to maintain her Petition for Revocation of Probate and Letters of Administration (R. **17;** R. **34-37).** After the trial court held that such showing tendered in her Petition was insufficient and that allegations sufficient under F.S.

§732.108(2)[3] were required (R. 38 - 39), Scruggs amended her Petition to so allege (R. 42). Subsequently, limited discovery in the nature of Interrogatories from Petitioners to Scruggs (R. 70) and Notice to Produce from Scruggs to all Petitioners herein (R. 122) were sent in the normal course of the proceedings, not as "permitted" by the trial court, the allegation by Petitioners.

Additionally, while not contained within Petitioners' Statement of Facts but within their Summary of Argument instead, Petitioners' assertion as fact that no child support was sought is not cited to the Record, is conclusionary, is objectionable and this Court is urged to ignore same as unfounded. The statement asserted as fact that decedent was "unaware of any paternity claims" is likewise not cited to the Record, is conclusionary, is objectionable, and should be ignored by this Court.

Finally, Scruggs suggests that Petitioners' statements contained in pages 7 and 8 of their brief are inaccurate. The portion of the District Court of Appeals' opinion quoted on page 7, termed a *sua sponte* examination by the District Court of Appeals, is argued in Scruggs' brief in the District Court of Appeal (SB 10-11; 14-16). The equal protection argument referenced on page 8 of Appellants' brief which is suggested to be dicta was argued by Scruggs at Point III of her brief before the District Court of Appeals (SB. 17 et. *seq.)*. These issues are more appropriately addressed in the Arguments, and not in the Statement of Facts.

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[3]Unless otherwise specifically set forth, all statutory references herein will be to Florida Statutes 1991.

SUMMARY OF ARGUMENT

This case arises from Scruggs' Petition to Revoke the Probate of the will of the decedent, which she alleges is invalid because it lacked requisite formality of execution, because the decedent lacked testamentary capacity , and because it was the product of undue influence, fraud, duress and mistake. It is thus a probate case, brought under the Probate Code. Petitioners seek to inject into the Probate Code a statute of limitations, F.S. § 95.11(3)(b), which applies to actions for proof of paternity in support matters, for the support of a child born out of wedlock. Petitioners unsuccessfully attempted to apply such statute to the Probate Code in order to bar Scruggs' right to maintain her Petition for Revocation of Probate and thereafter, if successful, her right to inherit.

The purpose of paternity actions, formerly called bastardy actions, is the enforcement of a father's duty to support his child, and thus they are designed to act during the years of required support - from birth to age of majority. The purpose of probate actions is to provide for inheritance of a decedent's property, and are therefore designed to act at death - generally many years after any duty to support has long since expired. One begins to act at birth, and the other at death.

Because of these vast differences, F.S. § 95.11(3)(b) was not drawn by the legislature to affect probate proceedings, was not intended by the legislature to affect them, and if applied to

Scruggs, results in obviously incorrect applications and is unconstitutional.

It is uncontroverted, not disputed by Petitioners, that a right to inherit vests at the death of decedent. It is also both statutory and case law that a statute of limitations does not begin to run until the cause of action accrues, when the last element in the cause of action occurs. F.S. § 95.031. F.S. § 95.11(3)(b), in effect at the time of this action, was enacted in 1986, and requires that a paternity action be brought within four years of an illegitimate child's attaining the age of majority; as to Scruggs, that date would be 1957, even though the statute which requires same was not enacted until 1986, 29 years after the event transpired. If applied to Scruggs, she could never prove paternity in the Smith Estate Probate Code proceeding. If applied to Scruggs, therefore, it would deny her the due process right to access to court, and would deny her equal protection of the law, for neither legitimates nor other illegitimates are so burdened: she is burdened with a task impossible to perform.

The fact that the statute does not apply to the Probate Code, and thus to matters such as the instant one, is therefore apparent: the statute contradicts itself by providing that an action has run before the cause of action itself accrues; the legislature could not intend such an impossible result, such an unconstitutional result. In addition, however, many other factors make it evident that F.S. § 95.11(3)(b) does not and was never intended to apply to Probate Code proceedings. F.S. § 95.011 states that Chapter 95

applies to civil actions unless a different time is prescribed elsewhere - and the Probate Code contains its own procedures for making and enforcing claims and for limitations on claims. It specifically provides in F.S. § 731.102 that it is a **"unified"** coverage. It specifically provides many limitations periods without once referring to Chapter 95 - except to specifically remove the personal representative from the limitations of Chapter 95 in F.S. § 733.104. It even provides for a limitation period against Scruggs in the instant case, the probate of Mr. Smith's will, in F.S. § 733.109; it is noted that Scruggs complied with the limitation provided therein, making Petitioners' appeal and protest without foundation.

In this day, proof of paternity has advanced to a virtual scientific certainty. With DNA and HLA testing, no more can one take advantage by waiting until the **"most** important witness", the father, is dead to assert an inheritance claim, for DNA and HLA testify louder from the grave than any putative father ever could. The bones and teeth of a long-dead Czarist family, after burning and burial in mud for over seventy years, can be used to conclusively prove identity. Petitioners seek to incorrectly apply F.S. § 95.11(3)(b) solely for the purpose of avoiding Scruggs' Petition for Revocation of Probate. Certainly with Florida's large, aging population, the protection of the aged and infirm from the undue influence, fraud, duress and coercion alleged by Scruggs must be, and is, an important policy of the State of Florida. The First District's holding that F.S. § 95.11(3)(b) does not apply to

Probate Code proceedings, and if applied is unconstitutional, promotes such policy, without detriment to anyone save those who seek to exercise the undue influence, fraud, duress and coercion alleged to have been exercised upon this eighty year old man, suffering from Parkinson's disease, medicated, bedridden, and dependent upon those who abused him.

ARGUMENT

I. THE PATERNITY STATUTE OF LIMITATIONS, FLORIDA STATUTES § 95.11(3)(b), DOES NOT APPLY TO PROCEEDINGS TO DETERMINE HEIRSHIP FOR INHERITANCE PURPOSES UNDER THE PROBATE CODE.

Determinative of this entire appeal, free of the constitutional analysis to be argued hereafter, is the fact that F.S. § 95.11(3)(b) does not apply to, and was never intended to apply to, probate proceedings.

Throughout the analysis of these matters, the evolution of the statute of limitations which the First District properly found to be inapplicable to probate proceedings, F.S. § 95.11(3)(b), and the evolution of applicable section of the Probate Code, F.S. §732.108(2)(b), must be examined and compared.

PROBATE CODE - INHERITANCE

An illegitimate's right to inherit from the father first arose in Chapter 16103, Section 30, Acts of 1933, which provided that an child born out of wedlock could inherit from the father only if the father acknowledged paternity in writing in the presence of a competent witness. Until one year after her birth, then, Scruggs could not inherit from Mr. Smith at all. Thereafter, continuing until she attained the age of forty-three, she could only inherit if paternity was acknowledged in writing. This provision subsequently was numbered F.S. § 731.29, and remained in effect until it was amended with the passage of the new Probate Code, F.S.

§ 732.108(2), effective January 1, 1976. This new section allowed inheritance by a child born out of wedlock if (a) the natura1 parents married before or after the birth, or (b) paternity was established by an adjudication before or after the death of the father. Beginning in 1976, at age forty-three, Scruggs was first given the right under Florida statutory law to prove her right to inherit by an adjudication. In 1977, the law was again amended to add F.S. § 732.108(2)(c), which permitted inheritance if paternity was acknowledged in writing. It is also important to note that the former section 731.29, permitting inheritance **only** by written acknowledgment, was determined to be unconstitutional by this Court in In Re Estate of Burris, 361 S. 2d 152 (Fla. 1978).

STATUTE OF LIMITATIONS - PATERNITY

Caution is urged in examining the statute of limitations issue, in that the difference between establishment of paternity for bastardy and support purposes becomes injected into the analysis, whereas the issue before the court is inheritance under the Probate Code. Wall v. Johnson, 78 So. 2d 371 (Fla. 1955), the case which first applied the statute of limitations to bastardy proceedings, stated at 372 that although the main issue of bastardy proceedings is paternity, the **purpose** of bastardy statutes is the enforcement of the putative father's **duty to support his child.** The Bastardy Act of 1828[4] is now Chapter 742[5] (Wall at 371). Thus

[4] The Bastardy Act of 1828 will hereafter be referred to as the "Old Bastardy Act", the term assigned by Wall, supra.

it is clear that paternity actions are concerned with and are directed to the birth of a child out of wedlock and the subsequent support of that child. They contrast with inheritance actions, which generally occur many years later, at the opposite end of life's continuum, at death. Indeed, there is no right to inheritance until death, and a putative heir has no rights until that time[6]. Paternity statutes of limitations therefore focus upon birth through the age of majority, the years during which a putative father has a duty to support his child. They do not speak to the death of a father, and are unconcerned with death and inheritance, the proper domain of the Probate Code.

Given the above caveat, the statute of limitations first applied to the Old Bastardy Act by Wall, supra, was F.S. § 95.11(5)(a), which imposed a 3 year limitation, with the time presumably running from birth[7]. Although Scruggs had no right to inherit until the death of Mr. Smith in 1992, the right to claim her nonexistent right would have run under this statute in 1935, an application which would at best promote unnecessary litigation. Thereafter, in 1959, subsection (9) was added to F.S. § 95.11, which stated that a "bastardy proceeding" could be instituted at

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[5]Chapter 742 will hereafter be referred to as the "New Bastardy Act" the term likewise assigned by Wall, supra.

[6] F.S. § 732.101(2) provides that death is the event that vests the heirs right to intestate property. See also In Re Estate of Burris, 361 So. 2d 152, 156 (Fla. 1953).

[7]The time of birth was specifically held to be the correct commencement of the statute in Kieser v. Love, 98 So. 2d 381 (Fla. 1957).

any time within 4 years of the date of birth of the illegitimate. In **1959,** Scruggs was **27** years of age, and the newly enacted ctatute of limitation as applied to her nonexistent right to inherit ran in **1936,** twenty-three years before enactment of the statute. In **1975,** the ctatute was changed to create F.S. **§ 95.11(3)(b),** which ctated that an "action related to the determination of paternity" must be brought within 4 years. In **1975,** Scruggs was **43,** and again the newly enacted ctatute ran against her nonexistent right in **1936,** twenty-nine years before enactment of the statute. After State Department of Health and Rehabilitative Services v. West, **378** So. 2d 1220 (Fla. **1979)** held the statute to be unconstitutional, the statute was again amended in **1986** to its present form, which added the following language to the 4 year statute: "...with the time running from the date the child reaches the age of **majority."** In **1986,** Scruggs was **54;** the newly enacted ctatute ran on her nonexistent right in **1957,** again twenty-nine years before its enactment.

Within this statutory context, Scruggs argues as follows.

A. THE LIMITATIONS CHAPTER, FLORIDA STATUTES CHAPTER 95, DOES NOT APPLY TO PROBATE PROCEEDINGS

The fact that the limitations chapter, Florida Statutes Chapter **95,** does not apply to probate proceedings is apparent from an examination of F.S. **§ 95.011,** entitled **"Applicability",** which states that a civil action:

> "...shall be barred unlecc begun within the time

prescribed by this chapter **or, if a different time is prescribed elsewhere in these statutes, within the time prescribed elsewhere."** Emphasis added.

Analysis of the Probate Code shows that there are numerous statutes therein which provide the Probate Code's own limitations, free of the impositions of Chapter 95.

The Probate Code provides initially, in F.S. **§ 731.011,** that:

"...The **procedures** for the enforcement of substantive rights...shall be as provided in this Code."
Emphasis added.

The legislature thus specifically stated in this first provision thatproceduralmatters, which may be arguedto include limitations on the right to proceed with actions, are governed by the Probate Code, not Chapter 95. Thereafter, F.S. **§ 731.102** provides that:

"This Code is intended as **unified** coverage of its subject matter." Emphasis added.

The legislature did not intend that one look elsewhere but the Probate Code itself for the disposition of probate matters. The fact that the legislature viewed probate proceedings differently from **"civil** proceedings" is again strikingly illustrated by F.S. **§ 731.107,** which provides that the **Rules of Civil Procedure** shall be applied to probate proceedings. The legislature **did not** regard probate proceedings as civil proceedings, to which the Rules of Civil Procedure would automatically apply, thus found it necessary by virtue of its announced **"unified"** coverage of the subject matter to enact a separate statute making the Rules of Civil Procedure applicable to Probate Code proceedings. It is telling that the

legislature did **not** specifically make chapter **95,** limitations of actions in civil actions, applicable to probate proceedings by a similar statute, despite its "unified coverage" pronouncement; in fact the legislature provided its own numerous limitations for probate matters within the Probate Code, not within chapter **95.**

Specific removal of probate proceedings from the general limitations of Chapter **95** occurs in F.S. **§ 733.104,** by which the legislature removed the Personal Representative from the application of the general limitations of Chapter **95** by providing entirely separate limitations periods for a Personal Representative. In F.S. **§ 733.109,** the legislature provided a limitation period for bringing a petition for revocation of probate, again separate from Chapter **95.** Therein, and not in Chapter **95,** a period of **90** days is provided to assert a right if a will is probated and Notice of Administration is provided. If not provided, then a revocation proceeding cannot be brought after discharge of the personal representative. In the instant case, therefore, the legislature provided a perfectly effective limitation to Scruggs' claim of her right, and Petitioners are without argument that as to the facts of this case, there is no limitation provided. Thereafter, or initially if no revocation proceeding is brought, F.S. **§ 733.105** provides for the due and orderly bringing by the personal representative or a putative heir of a Petition for Determination of Beneficiaries, a procedure in which an illegitimate child would be required to prove heirship. Thereafter, F.S. **§ 733.212** provides for publication of notice of

administration, and provides in subsection (1)(a) thereof a limitation on claims separate from Chapter 95. It refers to F.S. § 733.702, "Limitations on Presentation of Claims", which bars claims if not made within certain times contained therein, not within Chapter 95. Further limitations within the Probate Code itself are contained within F.S. § 733.705, "Payment of and Objection to Claims", which provides limitations as to payment of and objection to claims separate from Chapter 95, and within F.S. § 733.710, "Limitation on Claims Against Estates", which provides its own limitations provisions for claims against estates separate form Chapter 95. All of such statutes create limitations periods completely separate from the genera1 provisions of Chapter 95.

Petitioners attempt to rely upon King v. Estate of Anderson, 519 So.2d 67 (Fla.5th DCA 1988) and Garris v. Cruce, 404 So.2d 785 (Fla.1st DCA 1981), *rev. denied*, 413 So.2d 876 (Fla.1982) as authority for the application of F.S.§ 95.11(3)(b) to probate proceedings. It is submitted that they are either inapplicable or insufficient, and in fact do not hold in the manner which Petitioners advance.

Garris, most importantly, is not a probate case, and is therefore inapplicable. In Garris, the decedent died intestate in 1963, leaving homestead real property, a wife, a legitimate child, and it is argued an illegitimate child, the Appellant therein. The homestead, of course, descended to the wife for life, with a vested remainder to the child or children. The wife died in 1979, and in 1980, the illegitimate filed a declaratory judgment action seeking

to establish that she was the illegitimate child of decedent. The case is thus clearly a homestead case, with rights vesting upon the death of the decedent, and even more clearly a declaratory judgment action, not a probate proceeding. The only importance of Garris is in support of Scruggs' position, as it supports the proposition, never disputed by Petitioners, that death vests rights as an heir:

> "We hold that appellant's rights, if any, as an heir of James H. Cruce vested at the time of his death in 1963. In Re Estate of Burris, 361 So. 2d 152, 156, n.5 (Fla 1973)" Id at 786

Garris thus supports Scruggs: her rights, if any, vested at Smith's death, not before. It is submitted that King should not be relied upon as authority because the opinion is a *per curiam* opinion without facts and without reasoning, and cites for authority Garris, which was shown above to be inapplicable to such proceedings and does not hold what the 5th District apparently thought that it held.

In addition to the insight that an analysis of the respective chapters provides as set forth above, a number of cases, both within Florida and without, hold emphatically that probate proceedings are entirely different and separate from paternity proceedings, and the statutes related to each are separate and distinct.

The First District in its opinion from which Petitioners appeal, In Re Estate of Smith v. Scruggs, 640 So. 2d 1152 (Fla. 1st DCA 1994), at 1154 cited with approval one of the very few Florida cases to directly confront this question, In re the Estate

of Odom v Odom, 397 So.2d 420 (Fla.2d DCA 1981). There, Odom compared at length the paternity statutes, Chapter 742, and the probate statutes. It pointed out at 422-423 that the statutes were separate and distinct, and the probate statutes alone controlled proof of heirship in probate proceedings.

Thereafter, Odom at 424 noted that Florida's statute regarding illegitimates, Section 732.108, is similar to and apparently patterned after the Uniform Probate Code, and thus interpretations in all states should be similar. It cited with approval from C.L.W. v. M.J., 254 N.W. 2d 446 (N.D. 1977), which when faced with the questions of application of the paternity statutes of limitations to probate court actions, determined that the statute did not apply. The North Dakota court found that determination of paternity for support is a separate remedy, for a separate purpose, from determination of paternity for inheritance purposes. The First District so held as well, by quoting the North Dakota Supreme Court at 450 as holding: "The two are separate remedies for separate purposes."

When one compares Odom, supra and C.L.W., supra, with In re: Estate of Greenwood, 402 Pa. Super. 536, 587 A. 2d 749 (Pa. 1991), the differentiation between paternity actions and probate actions is again stark. Greenwood realized they were separate, as did C.L.W. and Odom. Greenwood involved an illegitimate daughter of a decedent who sought her intestate share of her father's estate. Despite the fact that the Petitioner in that case (the illegitimate daughter) submitted a birth certificate as well as proof of the

decedent's oral acknowledgement of paternity, the Administratrix denied the Petitioner's status as an heir, and argued that her claim was barred by the statute of limitations which applied to, and was entitled, "Support Matters Generally." Pennsylvania's statute is similar in effect to Florida's in that it precluded paternity actions not broughtwithin eighteen (18) years after the birth of the illegitimate child (comparable to Florida's age of majority statute).

The Pennsylvania probate statute setting forth the ways in which an illegitimate child would be considered a child of the father for purposes of intestate succession included the following subsection :

> "If there is clear and convincing evidence that the man was the father of the child, which may include a prior court determination of paternity. Act 1978, November 26, P.L. 1269, No. 303, s 1." Id. at 541.

The illegitimate child therein sought to prove her paternity after the death of her father, similar to Appellant herein. The illegitimate child would have been barred from so doing if the paternity statute of limitations as to "Support Matters Generally" was applied to her by the trial court, also similar to Appellant's case herein. The Pennsylvania Appellate court ruled that the eighteen (18) year statute of limitations did not apply to the intestate succession statute. The Court refused to apply limitations provisions of "Support Matters Generally" to the establishment of paternity in an estate proceeding. The Court then stated:

> "Given the fact that the appellee sought to establish only heirship in a probate court, in contrast to establishing liability for expenses, support payments, or visitation rights of an unmarried parent, the intermingling of the support statute of limitations with the intestate succession law is unjustified. See Henry v. Johnson, 292 Ark. 446, 730 S.W.2d 495 (1987); See also Boatman v. Dawkins, 294 Ark. 421, 743 S.W.2d 800, 802 (1988). Id. at 547.

The Greenwood case is analogous to the facts at bar in that both address a state statutory framework which provides for a statute of limitations in one chapter and a provision regarding intestate succession in another chapter. Under the rule that a uniform law should have a uniform application, Odom at 424, Greenwood serves as additional authority for a construction that it is not intended for F. S. Section 95.11(3)(b) to apply to probate proceedings. Further out-of-state authority distinguishing paternity matters from probate proceedings is Wood v Wingfield, 816 S.W. 2d 899 (Ky. 1991), which in a probate action to determine heirchip, states at 905:

> ". . .this is not a paternity action. The purpose of a paternity action is to establish the duty of support during a child's minority; it is not the vehicle by which heirs must establish or enforce their rights to intestacy."

In accord with these cases is that of Woods v Harris, 600 N.E. 2d 163 (5th CA Ind. 1992). In a case very similar to the instant case, an illegitimate brought an action to determine paternity in order to establish heirchip. As in the instant case, a defense of the statute of limitations was raised. The court held at 164 that such statute was inapplicable to probate proceedings. The court

held that the probate statute involved was distinct, and that only the statute itself controlled limitations for probate purposes. The Indiana statute differs form Florida's only in stating that a determination of paternity in probate proceeding must be brought during the father's lifetime or within 5 months after death. In the instant case, Scruggs was limited to 3 months by Petitioners' publication of Notice of Administration[8].

B. THE LEGISLATURE DID NOT INTEND FOR THE LIMITATIONS PROVISION OF F.S. § 95.11(3)(b) (1991) TO APPLY TO INHERITANCE PROCEEDINGS IN PROBATE

It is therefore argued that Chapter 95 on its face does not apply to the Probate Code, which provides a myriad of distinct procedural sections and limitations periods. While Petitioners argue the rule of statutory construction that a statute which is clear and unambiguous is not subject to interpretation, the arguments above, and those following, make it clear that F.S. § 95.11(3)(b) cannot be analyzed by itself, but must be analyzed within the context of the chapter from whence it is derived, and the chapter to which Petitioners seek its application. Taken within such broader context provides a more accurate analysis of the statute, and leads one to the conclusion that F.S. § 95.11(3)(b) itself is not so much construed to be inapplicable, but

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[8].F.S. § 733.109 provides a period of 90 days after service of Notice of Administration within which to bring a Petition for Revocation of Probate.

rather that the legislature did not intend Chapter 95 to apply to the Probate Code.

Important in evaluating legislative intent is F.S. § 732.101(2), which states that "The decedent's death is the event that vests the heirs' right to intestate property." In addition, F.S. § 732.514 provides similarly that death is the event that vests the rights of devisees of property. Thus under the Probate Code, there is no right upon which a statute of limitations can work until the death of the decedent. Since it is clear that a statute of limitations can only work upon rights which have vested, In Re Estate of Burris supra at 156, Garris v. Cruce, supra at 786, the statute of limitations for paternity actions contained within F.S. § 95.11(3)(b) cannot apply nor be intended to apply to probate proceedings, to rights which have not yet arisen. The Probate Code provides its own statutory framework for heirship of persons born out of wedlock in F.S. § 732.108(2), separate from the paternity chapter, Chapter 742. The Probate Code provides its own limitation on electing the elective share in F.S. § 732.212, separate from Chapter 95. The Probate Code provides in F.S. § 732.518 that an action to contest the validity of a will may not be commenced before the death of the testator, thus providing its own procedure regarding will contests. In the instant case, therefore, the question of Scruggs' heirship in the context of probate proceedings could not arise until the death of the Decedent.

Further evidence that Chapter 95 was never intended to apply to probate proceedings is derived from F.S. § 733.104, by which the

legislature **specifically** removed the Personal Representative from the application of the general limitations of Chapter 95 by providing entirely separate limitations periods. Also, F.S. § 733.105 provides for the **determination** of **beneficiaries**, not the "establishment of paternity" set forth in F.S. § 95.11(3)(b), and provides a framework for the accomplishment of such determination.

Yet further evidence of legislative intention is found in the history of F.S. § 95.11(3)(b). Prior to the 1986 amendment to the statute, F.S. §95.11(3)(b) set the statute of limitations for establishment of paternity at four (4) years, with the time interpreted to commence at the date of birth of the illegitimate child; it was held unconstitutional by the Florida Supreme Court in State Department of Health and Rehabilitative Services v. West, 378 So.2d 1220 (Fla. 1979). It is axiomatic that once a statute is declared unconstitutional, it is void ab *initio*. State ex. rel. Nuveen v. Green, 88 Fla. 249 (1924). Therefore, no paternity statute of limitations was in effect prior to the legislative enactment of the amendment to §95.11(3)(b) in 1986. In 1986, the legislature amended the unconstitutional statute. The 1986 Amendment to F.S. §95.11(3)(b), it is argued, was intended solely to provide a constitutionally permissible limit on the collection of child support, and was not intended to affect probate proceedings. A study of the reason for the amendment, as set forth in the House of Representatives Committee on Judiciary, Staff Analysis of the legislation, shows that the primary reason for the 1986 amendment

to Section 95.11(3)(b), which previously had set forth the statute of limitations in paternity actions as four (4) years from the date of birth, was to bring Florida law into line with the requirements of federal legislation regarding child support enforcement. App. at p. 8. There is no mention of, nor concern expressed for, application of the statute to probate proceedings. The sole concern of the legislature was enforcement and collection of child support obligations, because if certain federal standards alluded to in the commentary were not met, Florida would lose "about 32 million" dollars in federal aid. App. at p. 8.

Further proof of this is fact is apparent from a reading of the Senate Staff Analysis and Economic Impact Report. (App. at 11) Page 2 of the report, concerning the amendment to chapter 95, specifically refers to the holding of the Florida Supreme Court in State Department of Health and Rehabilitative Services v. West, supra, which declared Florida's former four (4) year statute of limitations for paternity actions unconstitutionaï.

The court in West held the statute unconstitutional as applied to the collection of child support. The Court properly focused upon the fact that a statute of limitations cannot run against a claim until the right to assert that claim has matured. The right to support being a continuing right, continuing until the minor attained the age of majority, the statute of limitations could not run on the right to support until the right itself vested:

> "The state's objective to avoid stale claims, however, is not valid justification for the discrimination it inflicts on illegitimate since their right to support is

> a continuing right renewing itself until the child becomes 18." Id. at 1227.

More evidence of the fact that a statute of limitations cannot run until a right is vested, or has accrued, appears in West at 1228, where the court states:

> "The only proper application of the statute of limitations to child support claims would be to those claims that have accrued in the past but which are not adjudicated. The state could properly say that a claim for child support not made within a certain time after it accrued is barred."

Florida's announced position is thus that a claim must have accrued before a statute of limitations can bar it. Any other position would be contrary to logic.

In the instant case, it is clear that the Petitioner's claim to her father's estate did not exist prior to his death. Section 732.101, Florida Statutes, specifically provides that the decedent's death is the event that vests an heir's right to intestate property. Petitioner's father died on January 18, 1992. Clearly, her interest as an heir vested on that day. Garris v. Cruce, ***supra,*** at 786; In Re: Estate of Burris, ***supra,*** at 156. Statutes of limitation presuppose substantive rights and forbid the exercise thereof if action is not taken to do so in accordance with the applicable statute. Puleston v. Alderman, 4 So.2d 704, 707 (Fla. 1950). Without substantive rights, there is nothing against which the statute can work.

The Trial Court's holding that any claim Petitioner may have to her father's estate is barred before her status as an heir and

her right to intestate property came into existence files in the face of common sense and the above cited legal principle announced by the Florida Supreme Court. Such a result cannot reasonably be the intent of the legislature.

C. ANY SUCH INTENDED APPLICATION OF SECTION 95.11(3)(B), FLORIDA STATUTES (1991) WOULD BE UNCONSTITUTIONAL, A CONSTRUCTION WHICH SHOULD BE AVOIDED IF POSSIBLE

It will be seen from the following sections that if applied in the instant case, F.S. § 95.11(3)(b) would be unconstitutional. Under the legislative interpretation rule that a statute should be construed in a manner so as to promote its constitutionality, the statute should not be applied to probate proceedings. In Re Seven Barrels Of Wine, 83 So. 627, 632 (Fla. 1920), stated the rule as:

> "A statute must be so construed, if fairly possible, as to avoid, not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

Likewise, Durring v. Reynolds, Smith & Hills, 471 So. 2d 603 (Fla. 1st DCA 1985) states at 605 that where a statute is fairly susceptible to two interpretations, one of which would render the statute unconstitutional, the courts should avoid the unconstitutional interpretation and adopt a construction that leaves the statute valid.

II. THE FIRST DISTRICT CORRECTLY FOUND THAT THE PATERNITY STATUTE OF LIMITATIONS, SECTION 95.11(3)(b), FLORIDA STATUTES (1991) IS NOT APPLICABLE TO PROCEEDINGS UNDER THE PROBATE CODE

In large part, the arguments advanced as to Point I above are applicable to and adequately answer the challenges mounted by Petitioners in this Point, and will not be repeated.

Several misconstructions asserted by Petitioners, however, must be addressed. At page **20** of Petitioners' Initial Brief, it is stated that Chapter **95** applies to **"any"** civil action or proceeding, a statement which is inaccurate: F.S. **§ 95.011** specifically states that Chapter 95 applies only to civil proceedings where a different time is not prescribed elsewhere. The Probate Code states in F.S. **§ 731.102** that it is a **"unified"** coverage of its subject matter, and in fact provides a multitude of limitations, including limitations which have been shown to apply perfectly well to Scruggs' case, and to bar Scruggs' action if not commenced within certain periods. Petitioners then state at page **22** of their Initial Brief that a general statute of limitations on paternity claims (presumably F.S. **§ 95.11(3)** (b)) existed and was applicable, without authority for such statements. Scruggs has shown in Point I that F.S. **§ 95.11(3)** (b) is not a statute of limitations as to Probate Code inheritance claims, and that it does not apply - the legislature is much more likely to have known these facts than Petitioners' allegations, as the legislature wrote the "unified" Probate Code.

Petitioners do note one of the arguments in support of the above Point not heretofore advanced by Scruggs at their Initial Brief, pages **21** and **22**, by stating that the right to adjudicate paternity in probate was not recognized until January 1, **1976**

(incorrectly noted as 1974 in Petitioner's Initial Brief), thus the legislature could not have possibly intended F.S. § 95.11 to apply to probate heirship proceedings - such proceedings did not exist at the time. It is difficult to refute the logic of the First District, and it is suggested that Petitioners' argument does not succeed in doing so. Petitioners argue in contradiction thereto that the legislature is presumed to know that a general statute of limitations on paternity claims existed and was applicable. Such reasoning is circular and presumptive - there is no authority that the statute of limitations was applicable, and much authority, as is noted in Scruggs' Point I ***supra,*** that the statute of limitations was *not* applicable, and that the legislature was in fact aware of its inapplicability to probate proceedings. Indeed, at the time of passage of F.S. § 732.108(2) in 1974 (effective in 1976), the statute of limitations, F.S. § 95.11(9) (1974) still referred to limitations in "Bastardy Proceedings", not to adjudications of paternity for inheritance purposes. It is submitted that the legislature knew well that Chapter 95's Bastardy limitation did not apply to Probate Code heirship proceedings.

Petitioners then cite King v. Estate of Anderson, ***supra*** and Garris v. Cruce ***supra,*** which were adequately addressed in Point I. In addition, Petitioners appear to suggest to this Court that Rogers v. Runnels, 448 So.2d 530 (Fla.5th DCA 1984) supports the proposition that F.S. § 95.11(3) (b) applies to probate proceedings. Rogers, however, is clearly inapplicable, and does not stand for such a conclusion. Rogers is a declaratory judgment action brought

pursuant to Chapter 742, the civil paternity chapter; it has no nexus with the instant case.

Similarly, J.E.W. v. Estate of Doe, 481 So.2d 921 (Fla.1st DCA 1984), cited by Petitioners, is inapplicable. That, too, is a declaratory judgment action, a "pure paternity action", and is unconnected with the Probate Code. The facts of J.E.W., however, are worthy of note. Although the J.E.W. at 481 So. 2d 921 is a per *curiam* opinion without facts, J.E.W. appearedpreviously at 443 So. 2d 249 (Fla. 1st DCA 1983). Therein, a probate action under F.S. § 732.302 to establish J.E.W. as a pretermitted child, as well as a Chapter 742 action for paternity, was filed. The court rejected a commendably creative argument by J.E.W., and held that J.E.W. was not a pretermitted child. Thereafter, at 250, the court suggested that a declaratory judgment action, not a F.S. § 732.302 action, may be the proper vehicle to achieve a number of benefits, e.g. social security payments, which would be due J.E.W. if he were established as a child of decedent. The 481 So. 2d action, therefore, can reasonably be surmised to be such action, distinct from a Probate Code action; all parties and all counsel are the same. While a party to the action was the Estate of Doe, it was not a probate action, and while Petitioners appears to implicate probate by quoting from the opinion at 921 that "The appellant cannot seek support from the estate of his deceased father", the reasoning of the court is based upon the long accepted law that a duty of support dies with the obligor, and the estate is not liable for support on a continuing basis. Flaqler v. Flaqler, 94 So. 2d

592 (Fla. 1957).

J.E.W. is important for one aspect, however. It refutes Petitioners' doomsday argument that if the First District's decision is allowed to stand, no one will ever be able to create a testamentary plan in safety again, for one would never know whether an alleged child will appear, after the putative father's death, snare a part of the estate, and destroy the testamentary plan at a time when the decedent cannot defend himself. The fact is that one can create a testamentary plan omitting a child from a will, whether the child is legitimate or illegitimate. It has been shown that F.S. § 733.109 provides limitations for will contests, regardless of legitimacy. If no revocation action is brought within the times provided, the testamentary plan is protected. That is the point in the case at bar - it is alleged that the Decedent's purported will is not valid - this is not his testamentary plan.

It therefore appears that Petitioners cannot argue there is no limitations period effective as to Scruggs herein - there is. Petitioners argument is therefore relegated to the outmoded Rule Against Perpetuities "possibility" analysis - is there any case which may be devised as to which a limitation under the Probate Code does not exist? It is respectfully suggested that the remedy for such a case is legislative refinement to the Probate Code.

III. SECTION 95.11(3)(b), FLORIDA STATUTES (1991), IS UNCONSTITUTIONAL IN ITS APPLICATION TO RESPONDENT

Scruggs finds it possible to conditionally agree with Petitioners as to this one Point - the First District unnecessarily reaches the issue of constitutionality - because F.S. § 95.11(3)(b) does not apply to Probate proceedings. Because the statute does not apply to probate proceedings, the constitutional issues need not be considered. In the event that this Court considers the constitutional issues, however, they will be argued hereafter.

A. THE FIRST DISTRICT PROPERLY CONSIDERED THE CONSTITUTIONALITY OF SECTION 95.11(3)(B), FLORIDA STATUTES (1991)

In the First District, Scruggs strenuously argued that the application of F.S. § 95.11(3)(b) to her by the trial court constituted a retroactive application thereof, and was thus unconstitutional. SB. 6-8. The First District correctly held that such application to Scruggs was a retroactive application, and therefore invalid. While the grounds argued were due process, access to courts is a portion of one's due process rights, and therefore the First District's decision is a refinement of the arguments made by Scruggs and responded to by Petitioners.

This Court stated in Bystrom v. Diaz, 514 So. 2d 1072, 1075 (Fla. 1987) that, "Due process requires that a taxpayer be given a meaningful opportunity to be heard." Both this Court and the United States Supreme Court have held that such due process right includes access to courts. This Court recognized the due process/access to courts duality in In Re Advisory Opinion To The

Governor, 509 So. 2d 292 (Fla. 1987), which at 296 quotes from the Governor's request the following language regarding the due process challenge to Florida's former sales tax on services:

> "(1) Due process - Whether a general tax on the sale or use of services consumed or enjoyed in this state, including legal services, impermissibly burdens the right to legal counsel **and access to the courts in violation of the due process clauses** of Article 1, Section 9 of the Florida Constitution and the 14th Amendment to the U.S. Constitution." Emphasis added.

Access to courts is regarded as being a portion of the due process guarantee provided by the due process clauses of Article 1, Section 9 of the Florida Constitution and the 14th Amendment to the U.S. Constitution. In Newton v. McCotter Motors, Inc., 475 So. 2d 230, 231 (Fla. 1985), this Court upheld a decision of the First District regarding due process and access to courts by stating:

> "The First District reversed and upheld the constitutionality of Section 440.16 against challenges that it denied **due process** of **law, to wit: access to courts, ...**We agree." Emphasis added.

Similarly in the later case of Smith v. Dept. of Health & Rehabilitative Services., 573 So. 2d 320, 323 (Fla. 1991), this Court stated:

> "The United States Supreme Court held that Boddie had been **denied access to courts as an element of due process. . ."** Emphasis added.

While the First District's sagacity as to constitutional issues well exceeds that of counsel, thus its use of access to courts rather than due process, the essential argument was specifically made by Scruggs in the trial court (R. 87-88), specifically made by

Scruggs at the First District (SB. 6-8), and specifically responded to by Petitioners (PB 3-5). It was thereafter specifically accepted by the First District at 1155-56, and termed access to courts, a portion of Scruggs' due process rights. It is therefore incorrect that the issue was never raised, briefed or argued by Petitioner and Scruggs.

Likewise, the issue of equal protection was raised by Scruggs in the trial court, albeit as Petitioners correctly point out as it relates to the issuance of Scruggs' birth certificate. It is argued that the general concept of denial of equal protection was raised below on numerous occasions, although not stated with the precision of an appellate brief. The holding of the First District in Smith at 1156 that the application of § 95.11(3)(b) would impose upon illegitimates a burden not imposed upon legitimates is substantially similar to Scruggs' arguments as to denial of due process and equal protection at the trial court and at the First District. While no Florida case on point has been found, Scruggs suggests that Clark v. State, 572 So. 2d 1387 (Fla. 1991) may be examined for guidance. Therein, it is noted at Footnote 1 that an issue was raised in general terms upon appeal, as opposed to the specific terms of the instant case, and the District Court considered same.

Notwithstanding the fact that the issue was raised in general terms, even if these issues had not been raised, they would constitute fundamental error, thus allowing their consideration initially in the appellate court. Sanford v. Rubin, 237 So. 2d 134

(Fla. 1970), cited by Petitioners in support of the proposition that absent fundamental error, an appellate court cannot consider for the first time on appeal constitutional issues (a proposition which will be considered in more detail below), contains a definition of "fundamental error" often cited. It holds at 1046 that:

> ""Fundamental error," which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action."

In Sanford, the error raised for the first time was raised on oral arguments, not by briefs as in the instant case. In Sanford, the error asserted was the constitutionality of a statute because its title did not mention the right to award attorney's fees, clearly not a fundamental error. In the instant case, the error, it is asserted, does go to the foundation of the case, that is Scruggs' denial of her right to prove her paternity, the merits, the very heart, of her cause of action. It may therefore be raised for the first time on appeal.

Further, notwithstanding the characterization of the error as fundamental, an appellate courtmay consider, sua sponte, any error which it finds obvious on the face of the record. Dovle v. State, 19 FLW D2478 (Fla. 3rd DCA 1994). In Gordon v. Omni Equities, Inc., 605 So. 2d 538 (Fla. 1st DCA 1992), the court raised an issue sua sponte during oral arguments. It thereafter invited supplemental briefs, and ruled upon the issue so raised.

In addition to all of the above, these issues may be

considered by this Court in its discretion, as once considered by the appellate court, issues may then rightly be considered by this Court. Savoie v. State, 422 So. 2d 308 (Fla. 1982); Cantor v. Davis, 489 So. 2d 18 (Fla. 1986). Indeed, the sentence following Petitioner's quotation from Cantor, supra on page 26 of their Initial Brief is as follows:

> "...deemed waived. Once this Court has jurisdiction, however, it may, at its discretion, consider any issue affecting the case." Id at 19.

B. SECTION 95.11(3)(B), FLORIDA STATUTES (1991), AS APPLIED HERE, VIOLATES SCRUGGS' RIGHT TO DUE PROCESS OF LAW UNDER ARTICLE I, SECTION 9, FLORIDA CONSTITUTION AND THEREUNDER HER RIGHT OF ACCESS TO THE COURTS UNDER ARTICLE I, SECTION 21, FLORIDA CONSTITUTION, AND UNDER THE FOURTEENTH AMENDMENT, U.S. CONSTITUTION

It is clear and indisputable that Scruggs had no right to inherit until Mr. Smith's death in 1992. This fact is correctly recognized by the First District at 1155, wherein it cites F.S. § 732.101(2) and Garris v. Cruce, supra, as uncontroverted authority. The First District also correctly recognized at that page the "well established" rule that a statute of limitations will not begin to run until the occurrence of the last event which gives rise to the cause of action, and cited as authority, among many such authorities, Keller v. Reed, 603 So. 2d 717 (Fla. 2d DCA 1992) and Hynd v. Ireland, 582 So. 2d 772 (Fla. 4th DCA 1991). As stated by Petitioners, the legislature must be presumed to be aware of its own statutes, thus it was aware of this fact and enacted F.S. §95.031, which specifically provides such law:

> "95.031. Except...the time within which an action shall be begun **under any statute of limitations** runs **from the time the cause of action accrues.**
> **(1)** A cause of action accrues when **the last element** constituting the cause of action **occurs..."**
> Emphasis added.

Given these indisputable facts, and applying the paternity statute of limitations to the Probate Code, the statute of limitations on Scruggs' cause of action ran in **1957,** thirty-five **(35)** years before the cause of action arose. If F.S. **§ 95.11(3)** (b) is applied to Scruggs, not only would it result in irreconcilable statutory conflict, but also in unconstitutionality of the statute itself. Scruggs in the case at bar reached her majority in **1953.** In order for her to **"comply"** within F.S. **§95.11(3)** (b), she would have had to bring an action in 1957, twenty-nine **(29)** years prior to the enactment of the statute, and thirty-five **(35)** years before she had a cause of action. Clearly, this retroactive application of F.S. **§95.11(3)** (b) to Scruggs is invalid in that it imposed an obligation upon her which was impossible for her to meet - the subsequent limitation completely prevented Scruggs from pursuing an action. It deprived her of two substantial rights: first, the right to prove that Mr. Smith's will is invalid, and second, the right to prove that she is the daughter of Mr. Smith, and to thereby claim an intestate share of her father's estate. It is well established that retroactive legislation is invalid if it adversely affects vested rights, imposes a new duty or obligation, or creates additional disability. McCord v. Smith, **43** So.2d **704** (Fla. **1950).** It is for such reasons that, as the First District

held at 1155:

> "Absent clear legislative intent to the contrary, the presumption is against retroactive application of a statute of limitations. Durring v. Reynolds, Smith & Hills, 471 So. 2d 603 (Fla. 1st DCA 1985).

The First District reached the only conclusion which it could reach at 1155-56 in holding that an application of F.S. § 95.11(3)(b) to Scruggs would constitute an impermissible retroactive application, a denial of access to courts, and concomitantly a denial of due process.

Rather than analyzing the Probate Code, Petitioners incorrectly focus this Court's attention upon paternity proceedings for support under the Old and the New Bastardy Acts. Scruggs had no right to prove her heirship for inheritance purposes under Florida statutory law until the January 1, 1976 effective date of F.S. § 732.108(2)(b), which for the first time allowed her to inherit if her paternity were adjudicated. Petitioners' emphasis upon Scruggs' right to bring a paternity action against Smith at page 27 of Petitioners Initial Brief is incorrect, as under the Old Bastardy Act, the right was the mother's right, not the child's, and Scruggs had no such right until F.S. § 734.011 of the New Bastardy Act was amended effective October 1, 1986, to provide that "...any child may bring proceedings...". Scruggs **herself** thus never had the right to bring a paternity action against Smith, because once again, applying the paternity statute of limitations against Scruggs, her right to bring a paternity action ran in 1957, yet did not arise until 1986. Scruggs **herself** was therefore never

given the due process right to be heard, to have access to court. Petitioners' reasoning also leads to an incorrect conclusion: a prior adjudication of paternity would have effectively given her the right to inherit. Since she had no right to inherit through adjudication prior to 1976, no prior adjudication of paternity would have been effective as to her right to inherit. Under Florida law, she was beyond the time by which she could prove her paternity and beyond the time by which she could prove her heirship for inheritance purposes at each amendment of each statute. This is therefore not a situation in which a time is curtailed, as Petitioners suggest, and Cates v. Graham, 451 So. 2d 475 (Fla. 1985) is not applicable. She was thus clearly denied access to courts, due process, and equal protection of the laws.

Petitioners' argument at their Initial Brief, page 28, that in any event, Scruggs had other means to prove paternity, and simply could not do so, is also invalid. This Court in Burris, supra, held at 155 that the former statute, which only provided for proof of paternity by written acknowledgment, was unconstitutional. The statute, F.S. § 732.108(2)(b) was made constitutional by the legislature's adding the right to adjudicate paternity, the importance of which Petitioners attempt to dismiss with such argument.

Similarly invalid is Petitioner's argument that the change in F.S. §95.11(3)(b) was simply a codification of a long standing rule relating to statutes of limitation not running against a minor. Florida's statute of limitations applicable to the within action is

tolled statutorily by F.S. Sec. 95.051. Other than the statutory tolling provisions, statutes of limitations are not tolled, thus authority for Appellee's statement that the statute of limitations does not run during minority must be found within the cited statute. There is no provision therein for tolling of the statutes of limitations because of minority, except subsection (h) thereof, which provides:

> (h) The minority... of the person entitled to sue during any period of time in which a parent...does not exist..."

There is no evidence in the record that this provision applies, and no argument has been advanced by Petitioners, either in their Initia1 Brief herein or their Answer Brief below, that this state existed. Minority therefore did not toll the statute of limitations as applied to her. Velazquez v. Metropolitan Dade County, 442 So. 2d. 1036 (Fla. 3rd DCA 1983), cert. den. 449 So. 2d. 265, supports this clear interpretation of the statute.

Appellees cite Commercial Building Company v. Parslow, 93 Fla. 143, 112 So. 378 (1927) in support of their contention. Commercial, however, was a quiet title suit, not controlled by the statute of limitations applicable to the instant case. The title of F. S. Section 95.11 is:

> "Limitations of Actions Other Than for Recovery of Real Property."

The statute from which such cases descended did in fact have its own tolling provision regarding infancy, but were specifically applicable to real property actions, not others, such as the case at bar. Slaughter v. Tyler, 126 Fla. 515, 171 So. 320 (Fla. 1936)

quotes the statute applicable at the time of the Commercial case at 126 Fla 520, 171 So. 322:

> Sec. 9. If a person entitled to commence any **action for the recovery of real property,** or to make an entry or defense founded on the title to real property, or to the rents or services out of the same, be, at the time such title shall first descend or accrue, either: First, **within the age of twenty-one years...the time during which such disability shall continue shall not be deemed any portion of the time in this chapter limited for the commencement of such action..."**

In addition to the Velazauez case cited above, Gasparro v. Horner, et. al., 245 So. 2d 901 (Fla. 4th DCA 1971) puts this question into historica1 perspective. Therein at pages 904-905, the specific question of whether the 4 year statute of limitations was tolled because of minority when applied to negligence actions. The court answered this question in the negative, as there was no statutory exception to the statute. Gasparro at 905. A dissenting opinion was written for the announced purpose of suggesting to the legislature that the statute be amended to address those harsh cases in which a minor has no parent or guardian to sue on the minor's behalf, and the statute was subsequently amended to its present state.

While the statute was thereafter amended to provide that the statute is tolled if the minor has no parent or guardian, there is no other exception. Additional proof of this fact comes from State Department of Health and Rehabilitative Services v. West, supra. The Court will recall that this case is cited by both Petitioner and Scruggs, as it held the 4 year statute of limitations to prove paternity was unconstitutional as applied to an illegitimate minor.

If the statute had been tolled during minority, the ruling that the 4 year statute was unconstitutional would be moot, as the statute would have been tolled regardless.

In accord with Gasparro, supra, is White v. Padgett, 475 F. 2d 79 (USCA 5th Cir. 1973). Therein, the question of tolling of Florida's statute of limitations was considered, and Gasparro was cited with approval. In addition, White also pointed out the distinction between tolling of **real property** actions under F.S. Section 95.20, and the fact that no other actions were similarly tolled. White at 83.

Finally, Petitioners advance a theory of **"trumping"** and reviving statutes at pages 30 - 32 of their Initial Brief. Adopting Petitioners' terminology, Scurggs urges to this Court that it is dealt herein a **"no** trump" hand, logic being the suit. The statutes are separate, thus a first statute in time doesn't **"control"** another, and Scruggs had no right, thus nothing is **"revived"** by a statutory amendment.

Returning this Court to the issue of this Point On Appeal, in summation Scurggs directs this Court's attention to the closely parallel Texas Supreme Court case of Dickson v. Simpson, 807 S.W. 2d 726 (Texas 1991). The facts thereof are similar to the instant case, even to the extent that the illegitimate child, a daughter, was born out of wedlock the same year as Scruggs. Similarly, the parents never married, and the father never acknowledged paternity in writing. There, as here, the illegitimate daughter had to prove paternity through an adjudication. There, as here, the statute of

limitations which was sought to be applied was amended several times, and each time, the illegitimate was already beyond the age by which a petition was required to be brought. The Texas Supreme Court held at 727 and 728 that the illegitimate child was effectively never given the opportunity to prove her heirship, and therefore was denied equal protection of the laws. It is argued that such denial of equal protection is also a denial of due process and access to courts, as Scruggs will never effectively be given the opportunity to prove her heirship in court if the paternity statute of limitation is incorrectly applied to her.

C. SECTION 95.11(3)(B), FLORIDA STATUTES (1991) VIOLATES THE EQUAL PROTECTION CLAUSE OF ARTICLE I, SECTION 2 OF THE FLORIDA CONSTITUTION AND ARTICLE 14 OF THE U.S. CONSTITUTION

Most illustrative of the fact that Scruggs has in fact been denied equal protection of the laws is the analysis applied to the argument in III B. above, and the analogous case of Dickson v. Simpson, supra. The disparity of treatment between legitimates and illegitimates in this case, without any substantial relation to a legitimate state interest or to the goal sought to be achieved, is evident: while legitimates automatically can inherit, Scruggs is not even allowed to prove her paternity by an adjudication. In addition, as the First District stated at 1156, there is denial of equal protection of the laws even as between illegitimates:

"...for the child whose father dies during the child's

> minority, the right to seek inheritance is always preserved; for the child who is twenty-two or older at her father's death, the right would never be preserved."
> In Re Estate of Smith v. Scruggs, supra, at 1156.

It is axiomatic that as state cannot enforce legislation which unreasonably deprives a person of equal protection under the laws. Gammon v. Cobb, 335 So.2d 261 (Fla. 1976); Wilcox v. Jones, 346 So. 2d 1037 (Fla. 4th DCA 1977); Williams v. Estate of Long, 338 So.2d 563 (Fla. 1st DCA 1976). It is equally well established that a state may not impose legislation which unreasonably discriminates against illegitimate children. Trimble v. Gordon, 430 U.S. 762 (1977); In Re: Estate of Burris, supra.

The test adopted by the Florida Supreme Court to determine the constitutionality of classification based on illegitimacy was set forth in West, supra at 1226, as follows:

> "That test, although it falls in the 'realm of less than strictest scrutiny,' requires more than a determination that there is a rational basis for the classification. The classification must also bear a substantial relationship to the state's interest asserted as the basis for the statute."

Although Appellant has found no Florida case directly addressing the factual context of the case on appeal, the case of Alexander v. Alexander, 42 Ohio Misc.2d 30, 537 N.E.2d 1210 (Ohio 1988) is strikingly similar. Alexander involved an appeal from an order which overruled motions to dismiss an application for disinterment made by an illegitimate child of a deceased putative father so that DNA testing could be conducted to prove paternity. In its analysis of the issue of equal protection as it related to

illegitimate children, the Ohio Probate court discussed several United States Supreme Court decisions, including Levy v. Louisiana, 391 U.S. 68 (1968); Weber v. Aetna Casualty and Surety Co., 406 U.S., 164 (1972); Trimble v. Gordon, supra. and Lalli v. Lalli, 439 U.S. 259 (1978). It is submitted that the Alexander court's discussion of the Lalli holding is particularly relevant to the case at bar.

Lalli involved a New York statute which provided that an illegitimate child could become a legitimate child of the father if an adjudication of paternity was established during the lifetime of the father, or made in a proceeding instituted during the pregnancy, or within two years after the child's birth. Lalli, supra at 439. The U.S. Supreme Court held that statute did not violate the equal protection clause and was not unconstitutional. Whilethe statute did discriminate between classes, the statute was saved from violation of equal protection because of the state's interest in ensuring adequate evidence is available at the time of bringing of a petition. What is crucial to note, however, and as the Alexander court points out, is that the Lalli decision was rendered fifteen (15) years ago, and that the Court based its decision in large part on the particular problems of proof in establishing paternity. Alexander concluded:

> "Thus, once again, the Supreme Court recognized the evidentiary problem is the basis for denying an illegitimate child equal inheritance rights with his counter part, the legitimate child." Id. at 1314.

The Alexander court thereafter took judicial notice of the accuracy

of DNA testing and recognized that:

> " . . . the problems of proof inherent to an action in which paternity is alleged should no longer deprive an illegitimate child of proving his paternity."
> Id. at 1311.

In so doing, Alexander held that denying an illegitimate the right to prove paternity in this day, with enormous strides in science not available at the time of Lalli, would deny the illegitimate equal protection of the law.

Illustrative of such scientific advancement is Florida's statute relating to blood testing in proof of paternity, F.S. S742.12, enacted in 1989. Such statute states that a 95% probability of paternity is prima facie proof of paternity. We are simply in a different age from Lalli. It is respectfully submitted that the Alexander case is analogous to the instant case, and that the Ohio Probate Court's holding and reasoning should be adopted by this Court. While justification for discriminating against illegitimates was held to exist years ago, it no longer exists, and by reason thereof, Appellant is denied equal protection of the laws.

It is urged that a further violation of equal protection occurred, and was recognized by the First District at page 1156, when the trial Court failed to honor the Petitioner's birth certificate, which was duly issued by the State of Florida. To find that there is a rational ground for discriminating between the birth certificates of legitimates, who can inherit by virtue thereof, and illegitimates, whom the Court in essence ruled cannot

inherit notwithstanding same, would deny Appellant the same right to the weight of her birth certificate as enjoyed by legitimates. Such discrimination violates equal protection in the absence of a legitimate state interest, which it is respectfully submitted, does not exist. In Lalli, the legitimate state interest applied to uphold discrimination between legitimates and illegitimates was that of the "evidentiary problem". When a birth certificate, duly issued by the State and establishing the identity of the father is possessed, there is no evidentiary problem.

It is argued that where birth certificates have been issued to both legitiamates and illegitimates, the time at which a state can legitimately discriminate between legitiamates and illegitimates is at birth, prior to issuing the birth certificate. Thereafter, there is no rational state interest to be served, as the state itself has itself has investigated and endorsed the paternity by issuing a birth certificate so stating. Section 382.20, Florida Statutes, states:

> "Certificates filed and accepted under this section. . . shall be admissible in evidence as prima facie evidence of the facts recited therein. . . "

By statute, therefore, the law as applied to birth certificates is as follows:

1. The birth certificate is admissible into evidence.
2. The birth certificate is prima facie proof.
3. All facts recited therein are prima facie proved, including the father's identity.

The reasoning behind acceptance of birth certificates and other official state records is illustrated by Smith v. Mott, 100 So.2d 173 (Fla. 1957). Therein, the admissibility of a death certificate as prima facie proof of the facts recited therein was at issue. In holding the contest thereof admissible as prima facie proof of what the certificate purported to show, the Court stated:

> "One of the basic reasons for holding it admissible as evidence and accepting it as such is the high probability of its truthfulness and verity." I.d. at 176.

Those who make out birth records are public officials or at least ad hoc public officials, recognized as such by Hinson v. Hinson, 356 So.2d 372, 374 (Fla. 4th DCA 1978), carrying out an official duty, and they are to be believed. Indeed, F.S. §382.39 makes it a criminal offense to falsify a birth record.

It is important to examine Hinson for another reason: that case was a wrongful death case, in which an illegitimate claimant, on the one hand, and an administratrix on the other, both sued for damages. A sum was paid into the registry of the Court by the tortfeasor, and the illegitimate claimant and administratrix then litigated the right to the proceeds. That case thus compares with our own; an illegitimate and the personal representatives litigating the question of which has the right to certain assets. In Hinson, the court held that birth certificate was prima facie evidence of heirship (although it was not admitted based upon lack of proper foundation at trial). Similarly, the birth certificate, made at the insistence of the state, under the regulations of the

state, by a state official or ad hoc official, is admissible as prima facie proof of what it purports to be - that Petitioner is the child of the decedent. To require any more proof of paternity what the birth record issued by the state would be to deny the Appellant equal protection of the law, as there is no substantial state interest present to justify the discrimination.

CONCLUSION

For the reasons set forth herein, a dilemma is presented: either F.S. §95.11(3)(b), the statute of limitations applicable to the New Bastardy Act and support obligations, is not applicable to the Probate Code, or it is unconstitutional. While it is submitted that either would be a correct holding, it is urged that the proof is overwhelming that the legislature never intended for F.S. §95.11(3)(b), the statute of limitations applicable to the New Bastardy Act and support obligations, to apply to the Unified Probate Code.

Respectfully Submitted,

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