SUPREME COURT OF FLORIDA

TARA DANIEL,

Petitioner,

vs.

MICHAEL S. DANIEL,

Respondent.

Case No. **89,363**

Second DCA No. 95-04573

PETITIONER'S INITIAL BRIEF

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INTRODUCTORY STATEMENT

In this Brief, the Petitioner, TARA DANIEL. will be referred to as the Mother or the Petitioner. The Respondent, MICHAEL S. DANIEL, will be refereed to as Legal Father or the Respondent. Designations to the Record will be referred to as (R:) followed by the appropriate page number(s). Designations to the Appendix will be referred to as (A:) followed by the appropriate page number(s).

STATEMENT OF THE FACTS AND THE CASE

A final judgment was entered by the Circuit Court for Pinellas County on November 8, 1995, dissolving the parties marriage. A copy of the Final Judgment is attached to this Brief as Appendix pages 9-13. A timely notice of appeal was thereafter filed by the Respondent, appealing the Order of the trial Court requiring the Petitioner to support the minor child, CIARA DANIEL, who was born during the parties' marriage. (R: 143-148) The essential facts for purposes of this appeal are undisputed and are found in the findings of fact made by the trial Court in the Final Judgment:

> 3. The parties were married to each other on December 26, 1992. At the time of the parties' marriage, the Husband knew the Wife was pregnant with the child of another man. It was stipulated by the parties and the Court accepts the undisputed testimony and statements made to the Guardian Ad Litem that the Husband, herein, MICHAEL DANIEL, is not the natural father of the child. (A: 9).

The trial Court further found that after CIARA's birth in March of of 1993, the parties lived together until August of 1993, at which time they separated. The parties reconciled shortly thereafter and remained together until their final separation in November of 1993.

Guided by Department of Health and Rehabilitative Services v. Privette, 6 17 So.2d 305 (Fla. 1993), the trial Court appointed a Guardian Ad Litem to represent and protect the best interests of the minor child and to make a recommendation as to whether the child's best interests will be served by allowing the Respondent/Legal Father to present evidence to overcome the presumption of the child's legitimacy. (R: 58) The Guardian's full report is in evidence and a copy is also attached to this Brief as Appendix pages 1-8. The Guardian Ad Litem stated:

> "The issue is whether it is in the best interests of Ciara to allow Mike Daniel to present evidence to overcome the presumption that he is the legal father when he married Tara Daniel prior to Ciara's birth, was present at the

birth, signed the birth certificate, provided support for the child during the marriage, paid court ordered support during the separation and presents the impression that he is an honest, articulate, stable, hardworking, ambitious and from a good family and a putative father exists who has a criminal record and past drug problem. . . . It is also significant to me that there is a chance that the putative father may also not be the biological father, in which case, Ciara could possibly become illegitimized without a putative father.

Accordingly, it is my recommendation that it is in the best interest of Ciara to not allow Mr. Daniel to present evidence to overcome the presumption of her legitimacy," (A: 7-8)

Based on the Guardian Ad Litem's report, the trial Court found as follows:

This Court also accepts the findings of the Guardian Ad Litem that the Husband herein, MICHAEL DANIEL, is a responsible person and better able to provide for the support of CIARA DANIEL than the natural father and that it would not be in the best interest of the minor child to relieve MICHAEL DANIEL from his support obligation.

5. It is the specific finding of this Court that the Supreme Court case of Privette v. Privette, [sic] 617 So.2d 305, (S.C. 1993), changes the law in Florida that:

> "Only a natural or adoptive parent has a duty of support to a minor child, "

It is the Finding of this Court that the presumption of legitimacy imposed on a legal father (the husband of the child's mother at the time of the child's birth) also implies a duty of support even after the dissolution of the parties marriage. It is the belief of this Court that support follows legitimacy and to find otherwise would be to leave the mother in the lurch by having to make a decision of support versus legitimacy. (A: 10-11).

Thereafter the Court awarded the parties shared parental responsibility of CIARA and required the Respondent, MICHAEL DANIEL, to pay child support in the amount of $496.44 per month, (A: 12).

On appeal, the Second District relied on Albert v. Albert, 415 So.2d 818 (Fla. 2d DCA 1982), in holding that, "since the husband is neither the child's natural nor adopted father, and he has not contracted for her care and support, he has no duty to pay child support upon the dissolution of the marriage." (A: 16)

The Second District determined that Privette, *supra*, does not apply to this case. The court reasoned:

> The broad language of Privette has made it difficult for trial judges to know when to conduct a Privette hearing. Privette centered on litigation brought by HRS seeking to compel a putative father to pay child support Privette was a case of contested paternity involving blood tests. In Robinson v. Department of Revenue, 661 So.2d 363 (Fla. 1st DCA 1995), the First District found the scope of Privette to be limited to cases involving (a) children who face the threat of being declared illegitimate and (b) "legal fathers" who face the threat of losing parental rights. We concur with Robinson but also conclude Privette has an even narrower focus. We conclude Privette does not apply unless the criteria set forth in Robinson are present and the matter involves contested paternity with the request for blood tests or similar genetic testing.
>
> Because the above concerns are not present in this case, Privette does not apply. First, paternity was not contested. . . . Second, this case did not involve a legal father who faced the threat of losing parental rights without notice and opportunity to be heard. Third, the child's legitimacy was not at issue. . . . We conclude that despite this Court's holding that the legal father has no duty to pay child support, the child remains legitimate. (A: 16-17)

The Second District Court then certified the following question as being of great public importance:

> IS THE PRESUMPTION OF LEGITIMACY OVERCOME WHEN A MARRIED HUSBAND AND WIFE STIPULATE THAT THE CHILD'S FATHER IS NOT THE HUSBAND BUT DO NOT CHALLENGE THE CHILD'S LEGITIMACY, AND THE BIRTH CERTIFICATE REMAINS UNCHANGED? (A: 19)

giving rise to the present appeal to this Honorable Court.

SUMMARY OF ARGUMENT

The trial court should be cammended for protecting the best interests of the minor child in this case, as mandated by the law and policy of the State of Florida. The Petitioner herein, TARA DANIEL, contends that the trial court was correct in making that decision. In addition, the court was also correct in following the recommendation of the guardian ad litem by not relieving the Respondent/legal father, MICHAEL DANIEL, of his duty to support the minor child which was legitimate by virtue of being born during the parties marriage.

In overturning the decision of the trial court, the Second DCA was apparently persuaded by the Respondent's argument that because the parties stipulated that the Respondent was not the biological father, Dept. of Health and Rehab. Services v. Privette, 617 So.2d 305 (Fla. 1993), is not applicable and a guardian ad litem should not have been appointed. This argument, however, is without merit. Although it is true that the parties did stipulate that the Respondent was not the biological father, that fact is irrelevant in light of the this Court's unequivocal statement that, "there must be a clear and compelling reason based primarily on the child's best interests to overcome the presumption of legitimacy *even after* the legal father is proven not to be the biological father. " (emphasis supplied) Id. at 309. Based on that passage, the trial judge had no choice but to appoint a guardian ad litem whose duties are to determine whether there is a clear and compelling reason based primarily on the child's best interests to overcome the presumption of legitimacy.

The Second District was also persuaded by the Respondent's argument that since no blood test or similar genetic testing was requested, Privette does not apply. A closer reading of Privette reveals the flaw in that argument. The fact that blood tests were not at issue in the present case is irrelevant based on the holding in Privette. Under Privette, trial courts must determine that it is in the best interests of the child to be deemed

illegitimate before even allowing the presentation of evidence to overcome the presumption. This construction is consistent with the public policy of protecting the welfare of the child. Essentially, trial courts must follow the specific instructions in Privette any time the child's legitimacy is at stake. CIARA DANIEL'S legitimacy is unquestionably at stake in this case and the trial court was correct in appointing the guardian ad litem to protect her.

Based on their opinion in this case, the Second District would allow the presumption of a child's legitimacy to be rebutted by agreement of the parties, without even the slightest consideration of the child's best interests. This result runs in direct conflict with the policy behind the presumption, i.e., the policy of advancing the best interests of the child. Perhaps the flawed reasoning of the Second District in this case can be described by a passage from Sacks v. Sacks, 267 So.2d 73 (Fla. 1972), which reads: "[t]he District Court of Appeal, . . . allowed the question of legitimacy to obscure the true issue before the Court; that is, the child. The child's welfare is paramount. Too often this is forgotten." Id. at 75.

As this Court is aware, the law is well settled in this state that the obligation of support belongs to the child and not the parent. Therefore, parents may not contract away the child's right to receive support. Since the Second District in this case relieved the Respondent of any support obligation due to the stipulated fact that the Respondent is not the natural father (yet somehow determined that the child is still legitimate), the child's right to support was effectively contracted away by the stipulation of the parties. This result is a true miscarriage of justice and cannot be tolerated by this Court.

The Legislative intent, as expressed in 5409.2551 Fla. Stat. (1995), indicates that the policy of this State is for children to be maintained from the resources of responsible parents. The trial court and the guardian ad litem in this case followed that policy by not

allowing Respondent to present evidence to overcome the presumption, finding that it was in CIARA's best interest for Respondent not to be relieved of his duty of support.

Based on the foregoing, it is clear that the trial court correctly followed the laws and policies of the State of Florida by appointing a guardian ad litem to protect the best interests of the minor child, CTARA, and should not have been overturned by the district court.

IL SUPPORT MUST FOLLOW LEGITIMACY

The opinion of the district court in this case attempts to draw a distinction between legitimacy and support According to the Second DCA, support does not follow legitimacy. (A: 18). Simple logic leads to the conclusion that one of the reasons the presumption of legitimacy was created was to protect the child's right to support.

Not only is the DCA's decision illogical in light of relevant law and policy, but it is also impractical in that it leaves this child in a very precarious situation. It is undisputed that CIARA DANIEL is a legitimate child. She is presumed legitimate by virtue of her being born in lawful wedlock. As a legitimate child, the law recognizes her mother's husband as CIARA'S legal father. The Second District does not dispute the fact that she is legitimate and that MICHAEL DANIEL is her legal father, yet they somehow declare that CIARA is not entitled to any support from her legal father.

The body of the argument will demonstrate the very precarious position the DCA left this child in. As such, it is difficult to reconcile their decision with the well established policy of protecting the welfare of the child. It would seem that the DCA ignored the directive handed down by this Honorable Court that, "the policy of protecting the welfare of the child, i.e., the policy of advancing the best interests of the child is a guiding principle that must inform every action of the courts in this sensitive legal area." Privette, *supra,* at 307.

III. A BRIGHT LINE RULE IS NECESSARY: ASSUMPTION OF THE RISK

One can certainly argue that estoppel applies in situations involving a man agreeing to marry a woman whom he knows to be pregnant with a child not his own. The law should distinguish that situation from those where a man agrees to marry a woman whom he believes is not pregnant and the woman later becomes pregnant with the child of another man. A distinction also exists when a man opts to wed a woman whom he fully believes is not pregnant when she actually is pregnant with the another man's child. In the case at bar, there is absolutely no question that the Respondent, MICHAEL S. DANIEL, was fully aware that the Petitioner, TARA DANIEL, was pregnant with another man's child. (A: 9-10). Respondent nevertheless decided to marry Petitioner and care for her child as if it were his own.

These facts demonstrate the need for a bright line rule to distinguish this very unique situation in the eyes of the law. In order to clear up this unsettled area of the law, the best option for all concerned would be for this Honorable Court to correct the injustice done to the child by creating a bright line rule that: absent fraud or misrepresentation, *men who choose to marry a woman who they know to be pregnant with the child of another man are forever responsible for the support of that child, just as if he were the biological father.*

ARGUMENT

The Second District Court of Appeal in its order of October 18, 1996 (A:), certified the following question as being of great public importance:

> "IS THE PRESUMPTION OF LEGITIMACY OVERCOME WHEN A MARRIED HUSBAND AND WIFE STIPULATE THAT THE CHILD'S FATHER IS NOT THE HUSBAND BUT DO NOT CHALLENGE THE CHILD'S LEGITIMACY, AND THE BIRTH CERTIFICATE REMAINS UNCHANGED?"

The Petitioner herein, TARA DANIEL, believes that question does not adequately deal with the totality of the issues present in this case, and opts instead address the following question:

> "WHETHER THE PRIVETTE DECISION [617 So. 2d 305 (Fla. 1993)] MANDATES TRIAL COURTS TO APPOINT A GUARDIAN AD LITEM TO PROTECT THE WELFARE OF THE CHILD, AND ENGAGE IN A BEST INTEREST OF THE CHILD(REN) ANALYSIS BEFORE ALLOWING THE PRESUMPTION OF LEGITIMACY TO BE REBUTTED IN DISSOLUTION ACTIONS BASED ON THE PARTIES AGREEMENT, LEAVING THE CHILD ILLEGITIMATE AND WITHOUT A LEGAL FATHER?"

ARGUMENT

I. THE TRIAL COURT CORRECTLY FOLLOWED THE LAWS AND POLICIES OF THE STATE OF FLORIDA BY APPOINTING A GUARDIAN AD LITEM TO PROTECT THE BEST INTERESTS OF THE CHILD AND ITS JUDGMENT SHOULD NOT HAVE BEEN DISTURBED ON APPEAL.

The trial court should be commended for protecting the best interests of the minor child in this case, as mandated by the law and policy of the State of Florida. The Petitioner herein, TARA DANIEL, contends that the trial court was correct in making that decision In addition, the court was also correct in following the recommendation of the guardian ad litem by not relieving the Respondent/legal father, MICHAEL DANIEL, of his duty to support the minor child which was legitimate by virtue of being born during the parties marriage.

In 1993, this Honorable Court handed down its decision in Department of Health and Rehabilitative Services v. Privette, 617 So.2d 305 (Fla. 1993). In that case the trial court ordered the putative father to submit to a human leukocyte antigen (HLA) test to determine paternity. The putative father then petitioned the Second District for common law writ of certiorari. The district court granted the petition, finding that the putative father's privacy rights and, more importantly, the best interests of the child should have been considered by the trial court, Id. at 307. Without hesitation, the Privette decision stated that:

> "We must start with from the premise that the presumption of legitimacy is based on the policy of protecting the welfare of the child, i.e., the policy of advancing the best interests of the child **This policy is a guiding principle that must inform every action of the courts in this sensitive legal area."** (emphasis supplied)(citation omitted). Id.

Although, Privette was a paternity action, the district court in Alchin v. Alchin, 667 So.2d 477 (Fla. 2d DCA 1996), held that the principles applied in Privette are equally applicable in dissolution of marriage cases. Alchin at 48Alchin c o u r t

determined that the trial court erred in neglecting to appoint a guardian ad litem to represent the best interests of the child, "as soon as the issue of paternity was raised." Id. at 479. In the case at bar, the trial court was correct in appointing the guardian because the question of paternity was at issue. Since support obligations are based on either parentage or contract, and there was no contract in the case at hand, the trial court necessarily ruled on the question of paternity or it could not have ordered the appellant to pay support. Albert v. Albert, 415 So.2d 818,819 (Fla, 2d DCA 1982).

In Conrad v. Conrad, 663 So.2d 662 (Fla. 2d DCA 1995), the Second District, interpreting the Privette decision, stated "[t]here is a strong presumption of a child's legitimacy based on the policy of protecting the welfare of the child. . . . The child's interests must be represented by a guardian ad litem when a party raises the issue of a child's legitimacy." Id. at 663. (citation omitted). It is clear in this case that the issue of CIARA DANIEL'S legitimacy was raised, therefore the guardian ad litem was properly appointed.

The presumption of legitimacy was created to protect the interest of children who are either born or conceived in wedlock. Sacks v. Sacks, 267 So.2d 73 (Fla. 1972) CIARA DANIEL was born during the marriage of the parties in this case and was, therefore, born a legitimate child. As noted in Privette, Article I, Section 9 of the Florida Constitution mandates that "[o]nce children are born legitimate, they have a right to maintain that status both factually and legally if doing so is in their best interests." Privette at 307. Accordingly, the Court declared that before blood tests can be ordered in cases of this type, the trial court must make a determination that "the child's best interests will be better served **even if the blood test later proves the child's factual illegitimacy."** Id.

The Court goes on to state that the party requesting the tests has the burden of proving that the child's best interests will be better *served* by *clear and convincing evidence.* Noting that this burden is substantially **greater** than those in other discovery

contexts, the Court determined that, "it is absolutely mandated by the presumption of legitimacy and the policies on which it rests. Court after court in the United States has held that the presumption and its related policies are so weighty that they can defeat even the claim of a man proven ***beyond all doubt*** to be the biological father." Id. at 308. (italics supplied).

The Second DCA was apparently persuaded by the Respondent's argument that because the parties stipulated that the Respondent was not the biological father, Privette is not applicable and a guardian ad litem should not have been appointed. This argument, however, is without merit, Although it is true that the parties did stipulate that the Respondent was not the biological father, that fact is irrelevant in light of the this Court's unequivocal statement that, "there must be a clear and compelling reason based primarily on the child's best interests to overcome the presumption of legitimacy even *after* the legal father is proven not to be the biological father. " (emphasis supplied) Id. at 309. Based on that passage, the trial judge had no choice but to appoint a guardian ad litem whose duties are to determine whether there is a clear and compelling reason based primarily on the child's best interests to overcome the presumption of legitimacy. The trial court did appoint a guardian who ultimately determined that it was in the best interests of CIARA DANIEL **not** to allow the Respondent to present evidence to overcome the presumption of legitimacy and relieve the Respondent of his support obligation. (A: 7).

The Second District was also persuaded by the Respondent's argument that since no blood test or similar genetic testing was requested, Privette does not apply. A closer reading of Privette reveals the flaw in that argument. The fact that blood tests were not at issue in the present case is irrelevant based on the holding in Privette. Depending upon the outcome, genetic testing is evidence which can be used to rebut the presumption by proving that the legal father is not the biological father. However, under Privette trial court's must find "that the child's best interests will be better served

even if the blood test later proves the child's factual illegitimacy." Privette at 308. (emphasis supplied). In other words, trial courts must determine that it is in the best interests of the child to be deemed illegitimate before even allowing the presentation of evidence to overcome the presumption. This construction is consistent with the public policy of protecting the welfare of the child. Essentially, trial courts must follow the specific instructions in Privette any time the child's legitimacy is at stake. CTARA DANIEL'S legitimacy is unquestionably at stake in this case and the trial court was correct in appointing the guardian ad litem to protect her.

Based on their opinion in this case, the Second District would allow the presumption of a child's legitimacy to be rebutted by agreement of the parties, without even the slightest consideration of the child's best interests. This result runs in direct conflict with the policy behind the presumption, i.e., the policy of advancing the best interests of the child. Perhaps the flawed reasoning of the Second District in this case can be described by a passage from Sacks v. Sacks, 267 So.2d 73 (Fla. 1972), which reads: "[t]he District Court of Appeal, . . . allowed the question of legitimacy to obscure the true issue before the Court; that is, **the child. The child's welfare is paramount. Too often this is forgotten."** Id. at 75. (emphasis supplied).

As this Court is aware, the law is well settled in this state that the obligation of support belongs to the child and not the parent. Department of Health and Rehabilitative Services v. Walker, 411 So.2d 347 (Fla. 2d DCA 1982). Therefore, parents may not contract away the child's right to receive support. Evans v. Evans, 595 So.2d 988 (Fla. 1 st DCA 1992). Since the Second District in this case relieved the Respondent of any support obligation due to the stipulated fact that the Respondent is not the natural father (yet somehow determined that the child is still legitimate), the child's right to support was effectively contracted away by the stipulation of the parties. This result is a true miscarriage of justice and cannot be tolerated by this Court.

In Ownbv v. Ownbv, 639 So.2d 135 (Fla. 5th DCA 1994), the court discussed a situation similar to the case at bar, stating that before finding that HLA testing is in the best interests of the child, thereby allowing evidence to be presented to overcome the presumption of legitimacy:

> the trial court must consider the ability and willingness of the putative father to assume parental responsibilities in the event he is found to be the biological father. Absent such consideration, we fail to see how permitting HLA testing could serve the child's best interests because, to permit such testing in a situation where the putative father were unwilling or unable to parent, would result, at best, in the husband having to support the child with a declaration of illegitimacy or, at worst, in the child not receiving support from either his legal or biological father. The reason that Florida's courts have recognized the strong presumption of legitimacy when the child is either born or conceived during wedlock is to protect the child's welfare **and** the child's right to receive support. Id. at 138. (footnote 3) (emphasis supplied).

The situation discussed above is factually analogous to the present case since the record indicates that the putative father is both unwilling and unable to parent. The Guardian Ad Litem's report discussed the putative father's criminal record and past drug problem. Nothing on the record indicated the putative father was willing to parent. Although the report noted that the putative father had "apparently turned over a new leaf," it also noted he is supporting not only his own young child, but his girlfriend's daughter as well, supporting the argument that even if willing, he is certainly not able to support this child. (A: 7). The Legislative intent, as expressed in §409.2551 Fla. Stat. (1995), indicates that the policy of this State is for children to be maintained from the resources of responsible parents. The trial court and the guardian ad litem in this case followed that policy by not allowing Respondent to present evidence to overcome the presumption, finding that it was in CIARA's best interest for Respondent not to be relieved of his duty of support.

Based on the foregoing, it is clear that the trial court correctly followed the laws and policies of the State of Florida by appointing a guardian ad litem to protect the best

interests of the minor child, CIARA, and should not have been overturned by the district court.

There is analogous case law that supports what the trial court did in this case. Grant v. Jones, 635 So.2d 47 (Fla. 1st DCA 1994), was a paternity case where a blood test had ***already*** been performed and established a high probability that the appellant was the biological father, The trial court adjudged the appellant to be the father and imposed an obligation of support. On appeal, the First District remanded to the trial court for a determination that it is in the child's best interest to allow the presumption to be overcome. The district court relied on the fact that, "there must be a clear and compelling reason based primarily on the child's best interests to overcome the presumption of legitimacy ***even after*** the legal father is proven not to be the biological father. . . ." Id. at 47-48 (citation omitted).

In Ownby, ***supra,*** the parties to a dissolution of marriage action entered into a stipulation requiring each to submit to an HLA test. The stipulation was reached during mediation and the husband later refused to comply with the stipulation. The trial court granted the wife's motion to compel the husband to undergo the test. The Fifth District then granted husband's petition for certiorari, reversed the trial court's order and remanded with instructions to appoint a guardian ad litem to represent the best interests of the child. Id. at 138. As argued above, the principle in Ownby applies equally herein despite the fact that genetic testing was not at issue.

In White v. White, 661 So.2d 940 (Fla. 5th DCA 1995), the parties to a dissolution proceeding stipulated to undergo a blood test to determine the issue of the child's paternity. The test showed that there was a zero percent probability that the husband/ legal father was the biological father. The court explained:

> Without appointing a guardian ad litem to represent and protect the child's best interests as mandated by *Privette*, the trial court ordered that Appellant would have to continue in the role of legal father "unless evidence can be produced indicating some other individual is in fact the child's father." The order was entered without prejudice to Appellant to raise the issue again

"should he develop evidence indicating that someone else is the natural father of the minor child. Id. (citation omitted).

The Fifth District then remanded the case and ordered a full evidentiary hearing on the issue of the child's best interests because the trial court failed to join an indispensable party, to wit: the child as represented by a guardian ad litem. "The trial court was not in a posture to make this decision in the absence of a guardian ad litem to properly place the issue of the child's best interests before it." Id.

Alchin v. Alchin, 667 So.2d 477 (Fla. 2d DCA 1996), was a dissolution of marriage action in which the wife filed a motion for paternity testing. The trial court determined that genetic testing would be detrimental to the child since he is presumed legitimate. Id. at 479. On appeal, the court declined to rule on the issues raised by the parties since, "the trial court erred in failing to appoint a guardian ad litem to represent the child's interests as soon as the issue of paternity was raised." Id. Although Alchin was a dissolution of marriage case, the appellate court held that the principles applied in Privette, a paternity action, are equally applicable to dissolution of marriage cases. Id. at 479-80.

It is interesting to note that in all cases of this type, regardless of the trial court's action - be it to the benefit or detriment of the child - the appellate courts consistently remand the case with instructions to appoint a guardian ad litem to represent the child. The rights of the child are the paramount consideration in all cases of this type. To allow any court, or even worse, to allow parties to a dissolution action to conclusively determine the rights of a minor child without requiring input from a guardian ad litem appointed to protect those rights, would be to undermine over fifty years of progress the law has made toward protecting minor children, arguably the most vulnerable segment of society.

II. SUPPORT MUST FOLLOW LEGITIMACY

The opinion of the district court in this case attempts to draw a distinction between legitimacy and support. According to the Second DCA, support does not

follow legitimacy. (A: 18). Simple logic leads to the conclusion that one of the reasons the presumption of legitimacy was created was to protect the child's right to support. "The reason that Florida's courts have recognized a strong presumption of legitimacy. . . is to protect the child's welfare and the child's right to receive support." (emphasis supplied) Ownby at 138, *citing* Gammon v. Cobb, 335 So.2d 261, 266-67 (Fla. 1976); Sacks, *supra,* at 75-76.

It is difficult to understand why the presumption of legitimacy is to be given so much weight if it is merely a label to be placed on a child with no corresponding rights accompanying it. If the Second District is correct in assuming that the right to support is not contained within the presumption of legitimacy, then why would children have a Constitutional right to maintain the status of legitimacy? Art. I, § 9, Fla. Const. If the Second District is correct, then why would the Supreme Court declare:

> "We must start from the premise that the presumption of legitimacy is based on the policy of protecting the welfare of the child, i.e., the policy of advancing the best interests of the child. (citation omitted). This policy is a guiding principle that must inform every action of the courts in this sensitive legal area." Privette at 307.

It would seem that the presumption is much more significant than the Second District and the Respondent would have us believe,

Not only is the DCA's decision illogical in light of relevant law and policy, but it is also impractical in that it leaves this child in a very precarious situation. It is undisputed that CIARA DANIEL is a legitimate child. She is presumed legitimate by virtue of her being born in lawful wedlock. As a legitimate child, the law recognizes her mother's husband as CIARA'S legal father, The Second District does not dispute the fact that she is legitimate and that MICHAEL DANIEL is her legal father, yet they somehow declare that CIARA is not entitled to any support from her legal father.

The decision of the DCA raises leaves many unanswered questions regarding the rights of this child. Initially, where can this child go for support? As a legitimate child

she obviously should be entitled to support from her legally recognized father, however, the DCA completely blocked this avenue of support. Is she eligible for support from the putative father? As a legitimate child with a legally recognized father, this result would seem unlikely. Additionally, as noted in the Guardian Ad Litem's report, "there is a chance that the putative father may also not be the biological father, in which case, Ciara could possibly become illegitimized without a putative father." (A: 7) The only available option will then be the citizens of the State of Florida. This result runs in direct conflict with the policy that children, "be maintained from the resources of their natural parents so that the burden on the public welfare system, and thus the taxpayers, will be lessened." Department of Health and Rehabilitative Services v. West, 378 So.2d 1220, 1227 (Fla. 1979).

Another valid question raised by this case concerns the child's rights under Florida's laws governing intestate succession. Since the Second DCA declared that CIARA is owed no support from the Respondent? one can assume that she will be precluded from claiming any right of inheritance from him as well. In other words, based on the lower court's ruling she will not inherit from her legally recognized father. It is also difficult to envision a scenario where she will be permitted to inherit from the putative father when the law recognizes the Respondent as the child's legal father. Theoretically this child is only entitled to inherit from her mother. This Court faced a similar situation in In re Estate of Burris, 361 So.2d 152 (Fla. 1978), in which a statute requiring written acknowledgment of paternity by the father of an illegitimate child before that child could inherit from the father was declared unconstitutional as violative of the Equal Protection Clauses of the State and Federal Constitutions. Id. at 1227. [see also: Trimble v. Gordon, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977) (A: 20-34)].

Another difficult situation arises in the context of wrongful death actions. Legitimate children are entitled to pursue wrongful death actions against those responsible for the deaths of their parents. Similarly, parents are entitled to the same

rights against those responsible for the wrongful death of their child. In CIARA DANIEL'S case, where does she stand in the context of wrongful death? Between the legal father and the putative father, who has standing to pursue a wrongful death action if the child is the victim of a wrongful death? It is doubtful that the putative father would have standing since the law recognizes the Respondent as the legal father. The legal father may have standing, but that result would be a terrible injustice. A legal father with no corresponding duty to support his legitimate child should **not** then be permitted to benefit from that child's wrongful death. On the other hand, will this child have standing to sue upon the wrongful death of the legal father? The same question applies for the putative father. CIARA DANIEL is entitled to equal treatment under the law and the decision of the Second District places that constitutionally guaranteed right in jeopardy.

Based on the very precarious position the lower court placed this child in, it is difficult to reconcile their decision with the well established policy of protecting the welfare of the child. It would seem that the DCA ignored the directive handed down by this Honorable Court that, "the policy of protecting the welfare of the child, i.e., the policy of advancing the best interests of the child is a guiding principle that must inform every action of the courts in this sensitive legal area." Privette, *supra,* at 307.

III. A BRIGHT LINE RULE IS NECESSARY: ASSUMPTION OF THE RISK

One can certainly argue that estoppel applies in situations involving a man agreeing to marry a woman whom he knows to be pregnant with a child not his own. The law should distinguish that situation from those where a man agrees to marry a woman whom he believes is not pregnant and the woman later becomes pregnant with the child of another man. A distinction also exists when a man opts to wed a woman whom he fully believes is not pregnant when she actually is pregnant with the another man's child. In the case at bar, there is absolutely no question that the Respondent, MICHAEL S. DANIEL, was fully aware that the Petitioner, TARA DANIEL? was

pregnant with another man's child. (A: 9-10). Respondent nevertheless decided to marry Petitioner and care for her child as if it were his own. In such a case, the Respondent is "presumed to have known the legal consequences of his actions." Marshall v. Marshall, 386 So.2d 11, 12 (Fla. 5th DCA 1980). In other words, since he assumed the risk of being obligated to support a child he legitimized by virtue of his marriage to the Petitioner, he should not then be permitted to disavow his support obligation whenever he decides he no longer wants to care for the child and/or desires to move on to another woman.

Although it may be true that estoppel is one possible way to protect the child in these situations, it is certainly **not** the best. Estoppel is an affirmative defense and must be specifically pled. Pitcairn v. Vowell, 580 So.2d 219,222 (Fla. 1st DCA 1991). As such, the burden is on the mother to plead and prove a case for estoppel **in** order to prevail. This result is simply unjust. Moreover, it is detrimental to the child since the mother must carry such a difficult burden to prevail. The better result would be to place the burden of proof on the party who assumed the risk, i.e. the man.

The best option for all concerned would be for this Honorable Court to correct the injustice done to the child resulting from the misplaced burden of proof by creating a bright line rule that: absent fraud or misrepresentation, *men who choose to marry a woman who they know to be pregnant with the child of another man are forever responsible for the support of that child, just as if he were the biological father.* This would prevent the time consuming case by case analysis required in estoppel cases, and limit situations were *Privette* guardians will be necessary since legal fathers will be precluded from even raising the issue of the child's legitimacy absent a finding of fraud or misrepresentation by the mother. Should the husband present credible evidence that the mother misled or defrauded the husband either by maintaining that the husband is the father of the child or by failing to disclose her pregnancy, only then should he be permitted to raise the issue of the child's legitimacy. Once the child's legitimacy is raised, the trial court must appoint a *Privette* guardian to represent the best interests of the

child. Even though the mother may be guilty of fraud, the guardian must be appointed to protect the child since courts cannot punish a child for the actions of its parents.

Not only will a bright line rule be the best way to protect the child - which is the goal in cases involving minor children - it will also save judicial resources and prevent the often inconsistent and unpredictable results that generally follow estoppel cases. By simply declaring the aforementioned bright line rule to be the law of this State, this Court can effectively protect children who were born legitimate by virtue of their legal father marrying their mother with full knowledge that she is pregnant and that the child is not his own, while at the same time prevent the need for *Privette* guardians and the needless waste of judicial resources by limiting the cases where the legal father may even raise the presumption of legitimacy.

CONCLUSION

The trial court in this case was absolutely correct in applying the *Privette* decision and appointing a Guardian Ad Litem to protect the best interests of the minor child. Furthermore, the trial court was correct in following the recommendation of the Guardian Ad Litem and not allowing the Respondent to present evidence to overcome the presumption of CIARA DANIEL'S legitimacy. As such, the decision of the Second District should be reversed, and the portion of the Final Judgement of Dissolution of Marriage ordering the Respondent to support the child should be reinstated without delay.

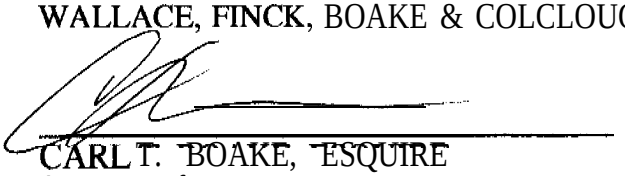
Respectfully Submitted,

CARL T. BOAKE, ESQUIRE
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via hand delivery to Peter N. Meros, Esquire, 1301 Fourth Street North, Post Office Box 27, St. Petersburg, Florida 33731 , this 20th day of December, 1996.

LAW OFFICES OF
WALLACE, FINCK, BOAKE & COLCLOUGH



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INDEX TO APPENDIX

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA.
CASE NO. 93-11818-FD-17

IN RE: THE MARRIAGE OF

MICHAEL S. DANIEL,
Petitioner,

v.

TARA DANIEL,
Respondent.

IN THE INTEREST OF:

CIARA ANN DANIEL,

A Minor Child. /

GUARDIAN AD LITEM REPORT TO THE COURT

Date: April 23, 1995

Pursuant to Court Order of June 22, 1994 the undersigned was appointed Guardian Ad Litem to represent the interests of the minor child, CIARA ANN DANIEL, in accordance with the Florida Supreme Court's ruling in Department of Health and Rehabilitative Services v. Privette, 617 So.2d 305 (FLW. 1993) to make a recommendation as to whether or not the child's best interests will be served by the allowing the Petitioner/Legal Father to present evidence to overcome the presumption of the child's legitimacy. In order to accomplish this, I undertook a number of steps. Initially, I met with the parties and their respective attorneys to obtain a factual framework. After the initial meeting, I found it necessary to meet with Mrs. Daniel's mother, PEGGY WILLMOT and Mr. Daniel's parents, Mr. and Mrs. JACK DANIEL. Mr. Meros provided me with information regarding the alleged putative father's (SCOTT STAGGERS) income and

4/26/95

I also took Mr. Stagger's deposition on April 20, 1995.

THE FACTS

The undisputed facts are as follows: Mr. and Mrs. Daniel were co-workers and became friends while working at Eckerds. Previous to and during the first part of their friendship, Mrs. Daniel was living with and involved with an individual named Scott Staggers, whom she had dated since she was 16. Mrs. Daniel was 19 at the time she met Mr. Daniel. Sometime in June 1992, Mrs. Daniel became pregnant, presumably by Mr. Staggers even though no paternity testing was ever done. On July 3, 1992, Mr. and Mrs. Daniel had their first date and commenced their dating relationship, all the while apparently breaking up with Mr. Staggers. At that time, Mr. Staggers had a drug problem which was causing the breakup.

Sometime in July or August 1992, Mrs. Daniel learned she was pregnant. Mr. Daniel was told of this sometime in August 1992. The parties stories somewhat conflict at this point in that Mrs. Daniel recounts a phone call to Mr. Daniel and Mr. Daniel recalls hearing about it from other co-workers and then confronting Mrs. Daniel. Mrs. Daniel further claims that Mr. Daniel was given the choice at that point to back out of the relationship and chose not to. Regardless, the parties continued to date and in fact, became engaged sometime in October, 1992. There is another conflict in testimony at this point in that Mrs. Daniel and her mother indicated that Mr. and Mrs. Daniel consulted attorney William Penrose as to Mr. Daniel's rights as a father, while Mr. Daniel recalls Mrs. Daniel and her mother consulting the attorney. In any event, the parties married on December 26, 1992.

The child was born on March 8, 1993. Mr. Daniel was present at the birth, signed the birth certificate and according to Mrs. Daniel and her mother, was the first person to hold the child. Also, Phyllis Daniel, Mr. Daniel's mother, video taped the birth. Subsequently, the parties separated on or about October 30, 1993 and this dissolution was filed by Mr. Daniel on December 19, 1993. In the pleadings, both parties have conceded that Mr. Daniel is not the biological father of the child. The parties have attempted to reconcile at various times between the date of filing and the present.

THE PARTIES' POSITIONS

Mr. Daniel indicates that he has had no significant visitation with the child since the date of separation. The child was approximately 8 months at that time and is now 2 years old. Mr. Daniel's perspective is that at no time did he consider himself to be the legal father of the child but was more of a stepfather. Ho feels that, upon separation, he was cut off from everything, including the child. In retrospect, he feels that he was somewhat pressured rushed into the marriage, especially by Mrs. Willmot and opines that he may have been maneuvered into the marriage due to his stability and potential as opposed to the alleged putative father, SCOTT STAGGERS.

According to Mr. Daniel, Mrs. Daniel always referred to the child as "my daughter" or "my child" as opposed "our child" or " our daughter". He relates an incident which occurred on September 17, 1994 in which he drove straight through from his parents vacation home in North Carolina to babysit the child so that Mrs. Daniel

would not miss class and when he arrived, found that Mrs. Daniel had found someone else to do it. There was another incident in which Mrs. Daniel and her mother were arguing to the extent that it was frightening the child and when Mr. Daniel attempted to extricate the child fron the situation, was told by **Mrs. Daniel** "don't touch my daughter". Finally, Mr. Daniel indicates that he will not exercise **any** visitation should he be found to be the legal father.

Naturally, Mrs. Daniel's perceptions and positions are markedly different than Mr. **Daniel's.** She feels that once the decision was made to continue with the relationship and later to marry, that Mr. Daniel unequivocally intended to establish a father-daughter relationship with Ciara in every sense. She indicates that he insisted on being on the birth certificate and the he exercised visitation whenever the parties reconciled. Mrs. Willmot recounts Mr. Daniel's emotional reaction to being the first to hold Ciara upon her birth. Mrs. Daniel had no objection with Mr. Daniel exercising visitation.

The third party to this controversy is Scott Staggers, the alleged putative father. I took Mr. Stagger's deposition on April 20, 1995. He presented an interesting appearance in that he had about one eighth of an inch of hair on his head along with copious tattoos and earrings. Mr. Staggers apparently lived with Mrs. Daniel for a time period ending about September 1992. Prior to their breakup, Mrs. Daniel informed him of the pregnancy but had not kept him updated as to the child's progress. He is currently on probation for a variety of offenses including, possession of

marijuana and hashish, DUI, burglary and petty theft. However, he indicates that he has been a law abiding citizen since September of 1993 and that he no longer does drugs. In fact, he volunteered that he takes monthly drug screenings under the terms of his probation. He is currently employed at Country Kitchen in Brooksville as a head cook/kitchen supervisor making $7.25 an hour, He started there in September 1993 at a salary of $5.25 an hour.

Mr. Staggers currently has a 4 month old daughter with his current girlfriend and also supports his girlfriend's child by a previous marriage. They live in a single wide trailer on an acre of land. His girlfriend works part-time. He acknowledges that the child, Ciara, might be his but also indicated that at or near the time of conception, Mrs. Daniel was in the habit of regularly staying out past 2 a.m. and that he was suspicious of her seeing other men. He understands his obligation to pay child support -in the event that Ciara is found to be his. It is interesting to note that Mrs. Willmot called the undersigned in somewhat of a state of panic indicating that Mr. Staggers had called her after receiving his subpoena and informed her, among other things, that if he were found to be Ciara's father, that he would seek custody. Mr. Staggers admitted to the conversation but denied that he had told Mrs. Willmot that he would seek custody and in fact, indicated that he wanted no part of visitation or being a part of the child's life.

ANALYSIS AND CONCLUSION

My impression of both parties is that both were candid with me and were relating the facts as they perceived them. However, I

tend to agree partially with Mr. Daniel in his retrospective analysis of the situation in that he was pressured into a hasty marriage so as to be a father to Ciara. That is not to say that Mrs. Daniel in any way engineered the marriage for any improper purpose or that she did want to marry Mr. Daniel for the reasons most people get married. I believe that Mrs. Daniel recognized Mr. Daniel for the decent, honest, hardworking and caring individual that he appears to be. Mr. Daniel did what he felt to be the right thing at the time and now he feels he is the one suffering. Unfortunately for Mr. Daniel's position in this matter, I cannot consider the equities of the situation as they relate to the parents, legal or otherwise. My role is to recommend what is in Ciara's best interest.

Privette tells us that "we must start from the premise that the presumption of legitimacy is based on the policy of protecting the welfare of the child, i.e., the policy advancing the best interests of the child." Privette at 307 citing Sacks v. Sacks 267 So.2d 73 (1972). Once children are born legitimate, they have a right to maintain that status both factually and legally if doing so is in their best interest-k. Art. I, Sec. 9, Fla. Const. Privette goes on to state that before a blood test can be required for a case such as the instant case, the court is required to determine that the complaint is apparently accurate factually, is brought in good faith, and is likely to be supported by reliable evidence, and to find that the child's best interests will be better served even if the blood test later proves the child's factual illegitimacy. The one seeking the test bears the burden of

proving these element by clear and convincing evidence.

There has been **no** evidence presented to the guardian as to how it would be in Ciara's best interest to allow Mr. Daniel to overcome the presumption of legitimacy. There has been evidence that the putative father, Scott Staggers, would be in the position to provide support, were he shown to be the father and **in fact, if** the issue were purely monetary, i.e. the amount of child support to be paid, then we would not need Privette and would simply do the math. See exhibit **"A"** for a child support guideline calculation for the putative **father.**

The issue is whether it- is in the best interest of Ciara to allow Mike Daniel to present evidence to overcome the presumption that he is the **legal** father when he married Tara Daniel prior to Ciara's birth, **was** present at the birth, signed the birth certificate, provided support for the child during the marriage, paid court ordered support during the separation and presents the impression that he is honest, articulate, stable, hardworking, ambitious and from a good family and a putative father exists who has a criminal record and past drug problem but who has apparently turned over a new leaf to the extent of being employed since September 1993 at the same job and is supporting not only his own 4 month old child but his girlfriend's daughter also. It is also significant to me that there is a chance that the putative father may also not be the biological father, in which case, Ciara could possibly become illegitimized without a putative father.

Accordingly, it is my recommendation that it is in the best interest of Ciara to not allow Mr. Daniel to present evidence **to**

overcome the presumption of her legitimacy.

Respectfully submitted,

SCOTT T. ORSINI, ESQUIRE
Orsini & Rose, P.A.
1822 Drew Street, Ste. 4
Clearwater, Florida 34625
(813) 442-1933
FL Bar No. 855855
SPN No. 01173224
Guardian Ad Litem

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Guardian Ad Litem Report was furnished by facsimile transmission and regular U.S. Mail, postage prepaid, to Honorable Phillip A. Federico, Pinellas County Courthouse, 545 First Avenue North, St. Petersburg, FL 33701, Peter N. Meros, Esq., P.O. Box 27, St. Petersburg, FL 33731 and Carl T. Boake, Esq., P.O. Box 60, St. Petersburg, FL 33731 on this 24 day of April, 1995.

SCOTT T. ORSINI, ESQUIRE

IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA

CIRCUIT CIVIL NO. 93-11818-FD-17

IN RE: THE MARRIAGE OF:

MICHAEL S. DANIEL,

Husband/Petitioner,

and

TARA DANIEL,

Wife/Respondent.

_____/

FINAL JUDGMENT OF DISSOLUTION OF MARRIAGE

This matter came on to be heard for final hearing on October 17, 1995. Both parties appeared in Court with counsel. Testimony was taken and documents received into evidence including the Guardian Ad Litem's Report which was received by Stipulation. Argument was heard by counsel. Based on the foregoing, this Court finds as follows:

1. That the Petitioner has been a resident of the State of Florida for at least six months next prior to the filing of the Petition for Dissolution of Marriage and this court has jurisdiction over the parties and subject matter hereto.

2. The marriage between the parties is irretrievably broken.

3. The parties were married to each other on December 26, 1992. At the time of the parties' marriage, the Husband knew that the Wife was pregnant with the child of another man. It was stipulated by the parties and the Court accepts the undisputed testimony and statements made to the Guardian Ad Litem that the

Husband herein, MICHAEL DANIEL, is not the natural father of the child. It was the Wife's statement to the Guardian Ad Litem and it is undisputed before this Caurt that the natural father of the minor child is SCOTT STAGGERS. He was joined as a party to this matter, but has failed to appear before this Court and has not participated in the litigation. This Court accepts the findings of the Guardian Ad Litem, SCOTT ORSINI. His repot is a part of the record in this matter.

4. The Husband herein, MICHAEL DANIEL, did not agree to adopt CIARA DANIEL; did not agree to support her after the parties herein were divorced; did not contract for her support nor do any facts exist herein which would require him to pay support under the Doctrine of Equitable Estoppel. He did, however, bond with the child, love her and supported her voluntarily during the time that the parties were together. After the birth of the child in March of 1993, the parties lived together until August of 1993 at which time they were separated. They got back together briefly thereafter and their final separation was in November of 1993. MICHAEL DANIEL testified that the primary reason he married his wife was because he loved her, but that a part of the reason for the marriage was to protect CIARA from her natural father, a man of marginal character.

This Court accepts the findings of the Guardian Ad Litem that SCOTT STAGGERS was employed and living with his girlfriend in Brooksville, Florida, and supporting her child from a prior marriage. This Court also accepts the finding of the Guardian Ad Litem that the Husband herein, MICHAEL DANIEL, is a responsible

person and better able to provide for the support of CIARA DANIEL than the natural father and that it would not be in the best interest of the minor child to relieve MICHAEL DANIEL from his support obligation.

5. It is the specific finding of this Court that the Supreme Court case of Privette v. Privette, 617 So.2d. 305,(S.C. 1993), changes the law in Florida that:

> "Only a natural or adoptive parent has a duty of support to a minor child."

It is the finding of this Court that the presumption of legitimacy imposed upon a legal father (the husband of the child's mother at the time of the child's birth) also implies a duty of support even after a dissolution of the parties' marriage. It is the belief of this Court that support follows legitimacy and to find otherwise would be to leave the mother in the lurch by having to make a decision of support versus legitimacy.

6. This Court accepts the agreement between the parties that the marital home located at 11336 62nd Avenue North, Seminole, Florida, will remain on the market for sale and that the net proceeds will be equally divided by the parties after the Husband receives credit for principal reduction, taxes, insurance, and repairs made during the course of his exclusive occupancy. The Court will retain jurisdiction over this issue to resolve any outstanding matters concerning the sale or if the parties are unable to sell the home.

7. This Court further accepts the stipulation of the parties that all of their personal property including their automobiles

have been previously divided and that there is no marital debt.

8. Based on the financial statement of the parties, the Husband's net income is $1,529. The Wife's net income is $864.00. The child care costs are $70.00 per week and the health insurance cost is $64.50. Based on these figures, the Husband's child support obligation under the Guidelines is $522.50. It is agreed that the Wife will continue to provide medical insurance for the child and this Court finds that any uncovered health care expenses should be equally divided between the parties. This Court exercises its discretion in reducing the child support obligation by five (5%) percent as allowed by law.

9. This Court finds that the parties should have shared parental responsibility of the minor child. The primary physical residence shall be with the mother with liberal. access by the father for the purpose of visitation.

10. Jurisdiction should be retained to deal with the claims of either party for attorney's fees and costs,

Based on the foregoing it is

ORDERED AND ADJUDGED as follows:

1. That the marriage between the parties is dissolved because it is irretrievably broken.

2. The agreement between the parties with regard to the marital home is accepted and the parties are ordered to comply with it. Jurisdiction is retained for the purpose of dealing with any other issues that may arise concerning that home. This resolves all issues concerning equitable distribution.

3. That the parties shall have shared parental responsibility of the minor child, CIARA DANIEL, born March 8, 1993. Based on the findings of this Court with regard to the duty of a legal father to provide support the Husband herein, MICHAEL DANIEL, shall pay to the Wife the sum of $496.44 as child support until such time as the minor child reaches the age of 18, or until she would graduate from high school as long as it is reasonably anticipated that she will graduate prior to her 19th birthday, dies, marries, or becomes self-supporting. The Wife shall provide medical insurance for the benefit of the child and the parties shall equally divide any uncovered health care expenses. The support shall be paid by Income Deduction Orderthroughthe Central Governmental Depository. The Husband shall have liberal access for the purpose of visitation with the minor child.

4. Jurisdiction is retained to enforce the executory provisions of this Final Judgment and to enter such further Orders at may be necessary with regard to the minor child and the marital home as well as for the claims of either parfy with regard to attorney's fees and costs.

DONE AND ORDERED in Chambers at St. Petersburg, Pinellas County, Florida, this _____ day of ~~October~~ November, 1995.

CIRCUIT JUDGE

Original Signed

NOV - 8 1995

PHILIP J. FEDERICO
Circuit Judge

COPIES TO:
PETER N. MEROS
CARL T. BOAKE

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

MICHAEL S. DANIEL,

Appellant,

v.

TARA DANIEL,

Appellee.

CASE NO. 95-04573

Opinion filed October 18, 1996.

Appeal from the Circuit Court for Pinellas County; Philip Federico, Judge.

Peter N. Meros, St. Petersburg, for Appellant.

Carl T. Boake and James A. Obeso, St. Petersburg, for Appellee.

WHATLEY, Judge.

The husband, Michael S. Daniel, challenges that part of the final judgment of dissolution of marriage awarding the wife, Tara Daniel, child support for a child who is not biologically his, but who was born during the course of the marriage. At the time of the parties' marriage, the husband knew the wife was pregnant with the child of another man. In the dissolution proceeding, the parties stipulated that the husband was not the

biological father of the child. The parties separated after eleven months of marriage.

Pursuant to Department of Rehabilitative Servi v. Privette, 617 So. 2d 305 (Fla. 1993), the trial court appointed a guardian ad litem to represent the interests of the child and made the biological father a party to the proceedings.[1] In the final judgment of dissolution, the trial court determined that the husband had not contracted for the child's support and that equitable estoppel did not apply so as to compel him to pay child support. Consistent with the guardian ad litem's report, the trial court found that although both the husband and the biological father had the ability to pay child support, the husband was "better able" to provide such support and the "best interest" of the child was served by ordering the husband to pay child support.

The husband contends that Privette does not control these facts and that the applicable rule of law is stated in Albert v. Albert, 415 So. 2d 818 (Fla. 2d DCA 1982), review denied, 424 So. 2d 760 (Fla. 1983). We agree. In Albert, this court announced, "We hold that a person has no legal duty to provide support for a minor child who is neither his natural nor his adopted child and for whose care and support he has not contracted." 415 so. 2d at 820. See also Portuondo v.

[1] The biological father only participated to the extent that his deposition was taken by the guardian ad litem.

Portuondo, 570 SO. 2d 1338 (Fla. 3d DCA 1990), review denied, 581 so. 2d 166 (Fla. 1991); Swain v, Swain, 567 So. 2d 1058 (Fla. 5th DCA 1990); Bostwick v. Eostwick, 346 So. 2d 150 (Fla. 1st DCA 1977); Tavlor v. Taylor, 279 So. 2d 364 (Fla. 4th DCA 1973). Here, since the husband is neither the child's natural nor adopted father, and he has not contracted for her care and support, he has no duty to pay child support upon the dissolution of the marriage.

We conclude that Privette is not applicable to the present case. The broad language of Privette has made it difficult for trial judges to know when to conduct a Privette hearing. Privette centered on litigation brought by HRS seeking to compel a putative father to pay child support. Privette was a case of contested paternity involving blood tests. In Robinson v. Department of Revenue, 661 So. 2d 363 (Fla. 1st DCA 1995), the First District found the scope of Privette limited to cases involving (a) children who face the threat of being declared illegitimate and (b) "legal fathers" who face the threat of losing parental rights.[2] We concur with Robinson but also conclude Privette has an even narrower focus.[3] we conclude

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[2] Department of Rehabilitative Services v. Privette, 617 So. 2d 305, 308 (Fla. 1993) held that legal fathers should not lose their parental rights without notice and opportunity to be heard.

[3] Kimberly G. Montanari, Does the Presumption of Legitimacy Actually Protect the Best Interests of the Child?, 24 Stetson L. Rev. 809 (Summer 1995).

Privette does not apply unless the criteria set forth in Robinson are present and the matter[4] involves contested paternity with the request for blood tests or similar genetic testing.

Because the above concerns are not present in this case, Privette does not apply. First, paternity was not contested. The parties stipulated that the husband was not the biological father. Second, this case did not involve a legal father who faced the threat of losing parental rights without notice and opportunity to be heard. Third, the child's legitimacy was not at issue. See Robinson. In Matter of Adoption of Baby James Doe, 572 So. 2d 986, 988 (Fla. 1st DCA 1990), the First District states the well-settled rule that: "A child born or conceived during a lawful marriage is a legitimate child." Because the child in this case was born during the lawful marriage of the husband and the wife, the child was thus born legitimate. In addition, no party to the dissolution of marriage action raised the issue of legitimacy or challenged the child's status as being legitimate. The husband affirmatively acknowledges this matter. Further, the child's birth certificate remains unchallenged and unchanged. In Florida, a birth certificate can be changed only pursuant to a court order. See

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[4] Alchin v. Alchin, 667 So. 2d 477 (Fla. 2d DCA 1996), states that even though Department of Health and Rehabilitative Services v. Privette, 617 So. 2d 305 (Fla. 1993), was a paternity action, its principles apply equally in dissolution of marriage proceedings.

Fla. Admin. Code R. 10D-49.017; Jones v. State, Dep't of Health and Rehabilitative Services, 409 So. 2d 1120 (Fla. 1st DCA 1982). We conclude that despite this court's holding that the legal father has no duty to pay child support, the child remains legitimate.

We believe confusion has arisen in the law because of a failure to distinguish between paternity and legitimacy. The presumption of legitimacy is one of the strongest rebuttable presumptions known in the law. See Albert; Matter of Adoption of Baby James Doe. In dicta, Albert addressed this presumption of legitimacy and stated: "However, when all parties to the action agreed upon the identity of the natural father and that the appellant was not the natural father, this presumption was overcome." 415 so: 2d at 820. The presumption that was overcome in Albert was not the presumption of legitimacy, but the presumption of paternity. See Prater v. Prater, 491 So. 2d 1280 (Fla. 5th DCA 1986).

The American Heritage College Dictionary 1001 (3d ed. 1993), defines paternity as "the state of being a father: fatherhood. . . . a woman attempting to establish that a particular man is the father of her child . . . ." Only one person can be the biological father of a child. The American Heritage College Dictionary 775 (3d ed. 19931, defines legitimate as "being in compliance with the law; lawful. . . . Born to

legally married parents." Paternity and legitimacy are related concepts, but nonetheless separate and distinct concepts.

Based on the foregoing, we certify the following question as being of great public importance:

> "IS THE PRESUMPTION OF LEGITIMACY OVERCOME WHEN A MARRIED HUSBAND AND WIFE STIPULATE THAT THE CHILD'S FATHER IS NOT THE HUSBAND BUT DO NOT CHALLENGE THE CHILD'S LEGITIMACY, AND THE BIRTH. CERTIFICATE REMAINS UNCHANGED?"

Accordingly, we reverse and remand to the trial court for proceedings consistent with this opinion.

"Reversed and remanded; question certified.

SCHOONOVER, A.C.J., and PARKER, J., Concur.

at 1452 n. 30. This "explanation" simply assumes the conclusion that the majority is attempting to justify: What the parties to these cases are arguing about is whether for § 801 purposes reserves are invariably attributable to the company holding them rather than to the company bearing the risks that the reserves were set up to cover. Mandatory attribution to the risk bearer under § 801 is just as consistent with the inapplicability of the § 820 option as is mandatory attribution to the holder of those reserves, and is more consistent with the attribution rule prescribed by the Regulations for life insurance reserves. See *supra*, at 1457. Moreover, the definition of nonlife reserves under § 801(c)(2) and (3) is explicitly made applicable only "[f]or purposes of [the] subsection [801](a)" reserve-ratio test. The attribution rule at issue in these cases thus does not apply to the § 820 rules for taxing the income of life insurance companies from modified coinsurance contracts (or to the taxation of any other insurance income). In short, the majority's conclusion that § 820 "affords an unmistakable indication" of congressional intent with respect to attribution of reserves under § 801, ante, at 1453, is refuted by the language of the Code itself.[6]

For the reasons stated, I respectfully dissent.

6. The majority attempts to find support for its position in a Revenue Ruling requested hy the parties to a modified coinsurance contract under § 820(b). Rev.Rul. 70 508, 1970 2 Cum. Bull. 136. As permitted by § 820(a), the parties chose to attribute to the reinsured company the reserves on the portion of the risks reinsured with the other company. The reinsured company was assumed to be a life insurance company for purposes of § 801; the question was how its reserves should be calculated for purposes of the tax on life insurance companies imposed under § 802. See Rev.Rul. 70 508, *supra*. Because the definition of life insurance company reserves in § 801(b) is used to define "life insurance company taxable income" under § 802, see §§ 802(b), 804(a)(1), 805(a) and (c), the Commissioner had to decide whether the reserves in question were within the § 801(b) definition for *purposes* of calculating the tax imposed under § 802. In ruling that the reserves did come within this definition, the Commissioner did not decide how reserves should be attributed for companies Seeking to qualify for life insurance company status. That issue was not before him, because the companies had already qualified.

430 U.S. 762, 52 L.Ed.2d 31

Deta Mona TRIMBLE and Jessie Trimble, Appellants,

v.

Joseph Roosevelt GORDON et al.

No. 755952.

Argued Dec. 7, 1976.

Decided April 26, 1977.

Mother of child born out of wedlock, and the child, appealed from orders of the Circuit Court, Cook County, which determined heirship upon death of the father. After notice of appeal was filed, the Illinois Supreme Court allowed direct appeal and affirmed and mother and daughter appealed. The Supreme Court, Mr. Justice Powell, held that provision of the Illinois Probate Act which allowed children born out of wedlock to inherit by intestate succession only from their mothers, whereas children born in wedlock may inherit by intestate succession from both their mothers and their fathers, denied equal protection; that classification based on illegitimacy was required to bear a rational relationship to a legitimate state purpose; that the provision could not be justified on the ground that it promoted legitimate family relationship; that difficulties in proving paternity in some situations did not justify total statutory disinheritance of children born out of wedlock; and that fact that the father could have provided for the child by making a will did not save the provision from invalidity.

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Reversed and remanded.

Mr. Chief Justice Burger, Mr. Justice Stewart, Mr. Justice Blackmun, and Mr. Justice Rehnquist filed a dissenting statement.

Mr. Justice Rehnquist dissented and filed an opinion.

1. Constitutional Law ⇐208(3)

Classification based on illegitimacy is not suspect so as to require that it survive strict scrutiny but it must, at a minimum, bear some rational relationship to a legitimate state purpose. U.S.C.A.Const. Amend. 14,

2. Bastards ⇐97

Constitutional Law ⇐225.5

Provision of the Illinois Probate Act allowing children born **out** of wedlock to inherit by intestate succession only from their mothers whereas children born in wedlock may inherit by intestate succession from both mothers and fathers could not be justified, as against equal protection challenge, on the ground that it promotes a legitimate family relationship, as a state may not attempt to influence the actions of men and women **by** imposing sanctions on the children born out of their illegitimate relationships. Ill.Rev.Stat.1961, ch. 3, § 12; S.H.A.Ill. ch. 3, § 2-2; U.S.C.A.Const. Amend. 14.

3. Bastards ⇐97

Difficulties of proving paternity in some situations did not justify total **statuto**ry disinheritance of children born out of wedlock whose fathers die intestate. Ill. Rev.Stat.1961, ch. 3, § 12; S.H.A.Ill. ch. 3, § 2-2; U.S.C.A.Const. Amend. 14.

4. Federal Courts ⇐432

In exercising its responsibility for structuring a legal framework for the orderly disposition of property at death, state must enact laws governing both the procedure and substance of intestate succession and, absent infringement of a constitutional right, the federal courts have no role and, even when constitutional violations are alleged, federal courts should accord substantial deference to a state statutory scheme of inheritance.

5. Bastards ⇐101

State court adjudication ordering father to contribute to support of his child born out of wedlock should be sufficient to establish that child's right to claim a child's share of his estate as the state's interest in accurate and efficient disposition of property at death would not be compromised in any way by allowing the claim in such circumstances.

6. Bastards ⇐97

Constitutional Law ⇐225.5

Fact that father of child born out of wedlock could have provided for the child by making a will did not save provision of the Illinois Probate Act which allows children born **out** of wedlock to inherit by intestate succession only from their mothers, whereas children born in wedlock may inherit by intestate succession from both mothers and fathers, from invalidity under the equal protection clause. Ill.Rev.Stat. 1961, ch. 3, § 12; S.H.A.Ill. ch. 3, § 2-2; U.S.C.A.Const. Amend. 14.

7. Bastards ⇐97

Constitutional Law ~225.5

Since there was no indication of legislative intent, in adopting provision of Illinois probate code permitting children born out of wedlock to inherit by intestate succession only from their mothers, to attempt to mirror the intent of Illinois decedents, the provision, when attacked on equal protection grounds, could not be sustained on the theory that it represented such an intent on the part of the legislature. Ill.Rev.Stat.1961, ch. 3, § 12; S.H.A.Ill. ch. 3, § 2-2; U.S.C.A. Const. Amend. 14.

8. Bastards ⇐97

Constitutiotial Law ⇐225.5

Provision of the Illinois Probate Act which allows children born out of wedlock to inherit by intestate succession only from their mothers, although children born in wedlock may inherit by intestate succession

from both their mothers and their fathers, denies equal protection to children born out of wedlock. Ill.Rev.Stat.1961, ch. 3, § 12; S.H.A.Ill. ch. 3, § 2-2; U.S.C.A.Const. Amend. 14.

Syllabus *

Section 12 of the Illinois Probate Act, which allows illegitimate children to inherit by intestate succession only from their mothers (though under Illinois law legitimate children may inherit by intestate succession from both their mothers and their fathers), held to violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 1463-1468.

(a) A classification based on illegitimacy such as that challenged here is not "suspect" so as to require that it survive "strict scrutiny," Mathews *v. Lucas, 427* U.S. 495, 506, 96 S.Ct. 2755, 2763, 49 L.Ed.2d 651. Nevertheless, this Court requires, "at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose," *Weber* v. *Aetna Casualty & Surety Co., 406* U.S. 164, 172, 92 S.Ct. 1400, 1405, 31 L.Ed.2d 768, and the Court's previous decisions in this area show that the standard is "not a toothless one." *Mathews v. Lucas, supra, 427* U.S., at 510, 96 S.Ct., at 2764. P. 1463.

(b) Section 12 cannot be justified on the ground that it promotes legitimate family relationships. A State may not attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships. Pp. 1464-1465.

(c) Difficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate. Section 12 is not "carefully tuned to alternative considerations," *Mathews* v. *Lucas,* supra, 427 U.S., at 513, 96 S.Ct., at 2766, as is illustrated by the fact that in the instant case the decedent had been determined to be the appellant child's father in a state-court paternity action. Pp. 14651466.

(d) The fact that appellant's father could have provided for her by making a will does not save § 12 from invalidity under the Equal Protection Clause. Pp. 1466-1467.

(e) Though appellees contend that § 12 should be sustained on the theory that it represents the legislature's attempt to mirror the intent of Illinois decedents, the Illinois Supreme Court in construing the law did not rely upon a theory of presumed intent, and this Court's own examination of the statutory provision discloses no such legislative intent; rather, as the State Supreme Court indicated, § 12's primary purpose was to provide a system of intestate succession more just to illegitimate children than the previous law, tempered by the secondary interest in protecting against spurious paternity claims. Pp. 1467-1468. 1763

Reversed and remanded.

James D. Weill, Chicago, Ill., for appellants.

Miles N. Reermann, Chicago, Ill., for appellees.

Mr. Justice POWELL delivered the opinion of the Court.

At issue in this case is the constitutionality of § 12 of the Illinois Probate Act [1] which allows illegitimate children to inherit by

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions For the convenience of the reader. See United *States v. Detroit Timber & Lumber Co., 200 U.S. 32* 1, 337, 26 S.Ct. 282. 287, 50 L.Ed. 499.

1. Ill.Rev.Stat. c. 3, § 12 (1973). Effective January 1, 1976, § 12 and the rest of the Probate Act of which it was a part were repealed and replaced by the Probate Act of 1975, Public Act 79-328. Section 12 has been replaced by Ill. Rev.Stat. c. 3, § 2 2 (1976). Although § 2-2 of the Probate Act of 1975 differs in some respects from the old § 12, that pan of § 12 that is at issue here was recodified without material change in § 2 2. As the opinions below and the briefs refer to the disputed statutory provision as § 12, we will continue to refer to it that way.

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intestate succession only from their mothers. Under Illinois law, legitimate children are allowed to inherit by intestate succession from both their mothers and their fathers.[2]

I

Appellant Deta Mona Trimble is the illegitimate daughter of appellant Jessie Trimble [3] and Sherman Gordon, Trimble and Gordon lived in Chicago with Deta Mona from 1970 until Gordon died in 1974, the victim of a homicide. On January 2, 1973, the Circuit Court of Cook County, Ill., had entered a paternity order finding Gordon to be the father of Deta Mona and ordering him to pay $15 per week for her support.[4] Gordon thereafter supported Deta Mona in accordance with the paternity order and openly acknowledged her as his child. He died intestate at the age of 28, leaving an estate consisting only of a 1974 Plymouth automobile worth approximately

Shortly after Gordon's death, Trimble, as the mother and next friend of Deta Mona, filed a petition for letters of administration, determination of heirship, and declaratory relief in the Probate Division of the Circuit Court of Cook County, Ill. That court entered an order determining heirship, identifying as the only heirs of Gordon his father, Joseph Gordon, his mother, Ethel King, and his brother, two sisters, and a half brother.[5] All of these individuals are appellees in this appeal, but only appellee King has filed a brief.

The Circuit Court excluded Deta Mona on the authority of the negative implications of § 12 of the Illinois Probate Act, which provides in relevant part:

> "An illegitimate child is heir of his mother and of any maternal ancestor, and of any person from whom his mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if living. A child who was illegitimate whose parents inter-marry and who is acknowledged by the father as the father's child is legitimate." [6]

If Deta Mona had been a legitimate child, she would have inherited her father's entire estate under Illinois law.[7] In rejecting Deta Mona's claim of heirship, the court sustained the constitutionality of § 12.

After a notice of appeal was filed, the Illinois Supreme Court entered an order allowing direct appeal of the decision of the Circuit Court, bypassing the Illinois Appellate Court. Appellants were granted leave to file an amicus brief in two pending consolidated appeals which presented similar challenges to the constitutionality of § 12. On June 2, 1975, the Illinois Supreme Court handed down its opinion in *In re Estate of Karas,* 61 Ill.2d 40, 329 N.E.2d 234 (1975), sustaining § 12 against all constitutional challenges, including those presented in appellants' amicus brief.[8] On September 24, 1975, oral argument was held in the instant case. Chief Justice Underwood orally delivered the opinion of the court from the bench, affirming the decision of the Circuit Court on the authority of *Karas.* A final judgment was entered on October 15, 1975.[9]

We noted probable jurisdiction to consider the arguments that § 12 violates the

2. Ill.Rev.Stat. c. 3. § 2-1(b) (1976).

3. There is some dispute over the status of Jessie Trimble in this litigation. It has been argued that she is in the case only as the next friend of her daughter. As the question is relevant only to the claim of sex discrimination against the mothers of illegitimate children, an issue we do not reach, we need not resolve the dispute.

4. App. 8.

5. Id., at 14.

6. *See* n. *1, supra.*

7. See n. 2, *supra.*

8. For purposes of its decision, the court assumed that the children had been acknowledged. There is no mention of a prior adjudication of paternity.

9. App. 54 56.

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Equal Protection Clause of the Fourteenth Amendment by invidiously discriminating on the basis of illegitimacy and sex.[10] 424 U.S. 964, 96 S.Ct. 1457, 47 L.Ed.2d 731 [766] (1976). We now reverse, As we conclude that the statutory -discrimination against illegitimate children is unconstitutional, we do not reach the sex discrimination argument.

II

In *Karas,* the Illinois Supreme Court rejected the equal protection challenge to the discrimination against illegitimate children on the explicit authority of *Labine v.* Vin*cent, 401* U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971). The court found that § 12 is supported by the state interests in encouraging family relationships and in establishing an accurate and efficient method of disposing of property at death. The court also found the Illinois law unobjectionable because no "insurmountable barrier" prevented illegitimate children from sharing in the estates of their fathers. By leaving a will, Sherman Gordon could have assured Deta Mona a share of his estate.

Appellees endorse the reasoning of the Illinois Supreme Court and suggest additional justifications for the statute. In weighing the constitutional sufficiency of these justifications, we are guided by our previous decisions involving equal protection challenges to laws discriminating on the basis of illegitimacy." "[T]his Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose." *Weber* v. *Aetna [Casualty &* Surety Co., 406 U.S. [767] 164, 172, 92 S.Ct. 1400, 1405, 31 L.Ed.2d 768 (1972). In this context, the standard just stated is a minimum; the Court sometimes requires more. "Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny . . . ." *Ibid.*

[1] Appellants urge us to hold that classifications hascd on illegitimacy are "suspect," so that any justifications must survive "strict scrutiny." We considered and rejected a similar argument last Term in ***Mathews v. Lucas, 427*** U.S. 495, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976). As we recognized in ***Lucas,*** illegitimacy is analogous in many respects to the personal characteristics that have been held to he suspect when used as the basis of statutory differentiations. Id., at 505, 96 S.Ct., at 2762. We nevertheless concluded that the analogy was not sufficient to require "our most exacting scrutiny." ***Id.,*** at 506, 96 S.Ct., at 2763. Despite the conclusion that classifications based on illegitimacy fall in a "realm of less than strictest scrutiny," ***Lucas*** also establishes that the scrutiny "is not a toothless one," id., at 510, 96 S.Ct., at 2764, a proposition clearly demonstrated by our previous decisions in this area.[12]

10. Not presented here is the appellants' contention below that § 12 discriminates on the basis of race because of its alleged disproportionate impact on Negroes.

11. This case represents the 12th .time since 1968 that we have considered the constitutionality of alleged discrimination on the basis of illegitimacy. The previous decisions are as follows: Mathews v. Lucas, 427 U.S. 495, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976); *Beaty v. Weinberger,* 478 F.2d 300 (CA5 1973). summarily aff'd, 418 U.S. 901, 94 S.Ct. 3190, 41 L.Ed.2d 1150 (1974); *Jimenez v. Weinberger, 417* U.S. 628, 94 S.Ct. 2496, 41 L.Ed.2d 363 (1974); New ***Jersey Welfare Rights Organization*** v. ***Cahill,*** 411 U.S. 619, 93 S.Ct. 1700, 36 L.Ed.2d 543 ***(1973); Griffin*** v. ***Richardson. 346*** F.Supp. ***1226*** (Md.), summarily aff'd, 409 U.S. 1069, 93 S.Ct. 689, 34 L.Ed.2d 660 (1972); Davis v. ***Richardson,*** 342 F.Supp. 588 (Conn.). summarily affd. 409 U.S. 1069, 93 S.Ct. 678, 34 L.Ed.2d 659 (1972); Gomez v. ***Perez, 409 U.S. 535, 93*** S.Ct. 872, 35 L.Ed.2d ***56 (1973); Weber v. Aetna Casualty & Surety*** Co., 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d ***768 (1972); Labine v. Vincent,*** 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 ***(197*** 1); *Glona* ***v. American Guarantee & Liability*** *Ins. Co.,* 391 U.S. 73, 88 S.Ct. 1515. 20 L.Ed.2d 441 (1968); Levy v. ***Louisiana,*** 391 U.S. 68. 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968).

12. See cases cited n. Il. ***supra. Labine v. Vincent,*** *supra,* is difficult to place in the pattern of this Court's equal protection decisions, and subsequent cases have limited its force as a precedent. In ***Weber v. Aetna Casualty &***

III

The Illinois Supreme Court prefaced its discussion of the state interests served by [1768] § 12 with a general discussion of the purpose of the statute. Quoting from its earlier opinions, the court concluded that the statute was enacted to ameliorate the harsh common-law rule under which an illegitimate child was *filius nullius* and incapable of inheriting from anyone. 61 Ill.2d, at 44–45, 329 N.E.2d, at 236–237. Although § 12 did not bring illegitimate children into parity with legitimate children, it did improve their position, thus partially achieving the asserted objective. The sufficiency of the justifications advanced for the remaining discrimination against illegitimate children must be considered in light of this motivating purpose.

A

[2] The Illinois Supreme Court relied in part on the State's purported interest in "the promotion of [legitimate] family relationships." 61 Ill.2d, at 48, 329 N.E.2d, at 238. Although the court noted that this justification had been accepted in Labine, the opinion contains only the most perfunctory analysis. This inattention may not have been an oversight, for § 12 bears only the most attenuated relationship to the asserted goal.[13]

[1769] In a case like this, the Equal Protection Clause requires more than the mere incantation of a proper state purpose. No one disputes the appropriateness of Illinois' concern with the family unit, perhaps the most fundamental social institution of our society. The flaw in the analysis lies elsewhere. As we said in *Lucas*, the constitutionality of this law "depends upon the character of the discrimination and its relation to legitimate legislative aims." *427* U.S., at 504, 96 S.Ct., at 2761. The court below did not address the relation between § 12 and the promotion of legitimate family relationships, thus leaving the constitutional analysis incomplete. The same observation can be made [1770] about this Court's decision in Labine, but that case does not stand alone. In subsequent decisions, we have expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships.

In *Wcbcr* we examined a Louisiana workmen's compensation law which discriminated against one class of illegitimate children. Without questioning Louisiana's interest in protecting legitimate family relationships, WC rejected the argument that "persons will shun illicit relations because the offencing their parents seems inconsistent with the desire of the Illinois Legislature to make the intestate succession Law more just to illegitimate children. Moreover, the difference in the rights of illegitimate children in the estates of their mothers and their fathers appears to be unrelated to the purpose of promoting family relationships. In this respect the Louisiana laws at issue in *Labine* were quite different. Those laws differentiated on the basis of the character of the child's illegitimacy. "Bastard children" were given no inheritance rights. "Natural children," who could be and were acknowledged under state law. were given limited inheritance rights, but still less than those of legitimate children. 401 US., at 537, and n. 13, 91 S.Ct., at 2763. The Louisiana categories are consistent with a theory of social opprobrium regarding the parents' relationships and with a measured, if misguided, attempt to deter illegitimate relationships.

Surety Co.. *supra*, we found in Labine a recognition that judicial deference is appropriate when the challenged statute involves the "substantial state interest in providing for 'the stability of. land titles and in the prompt and definitive determination of the valid ownership of property left by decedents' ." 406 U.S., at 170, 92 S.Ct., at 1404, quoting; *Labine v. Vincent,* 229 So.2d 449, 452 (La.App. 1969). We reaffirm that view, but there is a point beyond which such deference cannot justify discrimination. Although the proposition is self-evident, *Reed v. Reed, 404 U.S.* 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), demonstrates that state statutes involving the disposition of property at death are not immunized from equal protection scrutiny. See also *Eskra v. Morton, 524* F.2d 9. 13 (CA7 1975) (Stevens, J.). The more specific analysis of *Labine* is discussed throughout the remainder of this opinion.

13. This purpose is not apparent from the statute. Penalizing children as a means of influ-

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spring may not one day reap the benefits of workmen's compensation." 406 U.S., at 173, 92 S.Ct., at 1405. Although *Weber* distinguished *Labine* on other grounds, the reasons for rejecting this justification are equally applicable here:

> "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility *or* wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual-as well as an unjust-way of deterring the parent." 406 U.S., at 175, 92 S.Ct., at 1406 (footnote omitted).

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The parents have the ability to conform their conduct to societal norms, but their illegitimate children can affect neither their parents' conduct nor their own status.

B

[3] The Illinois Supreme Court relied on *Labine* for another and more substantial justification: the State's interest in "establish[ing] a method of property disposition." 61 Ill.2d, at 48, 329 N.E.2d, at 238. Here the court's analysis is more complete. Focusing specifically on the difficulty of proving paternity and the related danger of spurious claims, the court concluded that this interest explained and justified the asymmetrical statutory discrimination against the illegitimate children of intestate men. The more favorable treatment of illegitimate children claiming from their mothers' estates was justified because "proof of a lineal relationship is more readily ascertainable when dealing with maternal ancestors." Id., at 52,329 N.E.2d, at 240. Alluding to the possibilities of abuse, the court rejected a case-by-case approach to claims based on alleged paternity. *Id.*, at *52-53*, 329 N.E.2d, at 240–241.

The more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers' estates than that required either for illegitimate children claiming under their mothers' estates or for legitimate children generally. We think, however, that the Illinois Supreme Court gave inadequate consideration to the relation between § 12 and the State's proper objective of assuring accuracy and efficiency in the disposition of property at death. The court failed to consider the possibility 1771
of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws. Because it excludes those categories of illegitimate children unnecessarily, § 12 is constitutionally flawed.

[4] The orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual States. In exercising this responsibility, a State necessarily must enact laws governing both the procedure and substance of intestate succession. Absent infringement of a constitutional right, the federal courts have no role here, and, even when constitutional violations are alleged, those courts should accord substantial deference to a State's statutory scheme of inheritance.

The judicial task here is the difficult one of vindicating constitutional rights without interfering unduly with the State's primary responsibility in this area. Our previous decisions demonstrate a sensitivity to "the lurking problems with respect to proof of paternity," *Gomez v. Perez*, *409* U.S. 535, 538, 93 S.Ct. 872, 875, 35 L.Ed.2d 56 (1973), and the need for the States to draw "arbitrary lines . . . to facilitate potentially difficult problems of proof," *Weber*, 406 U.S., at 174, 92 S.Ct., at 1406. "Those prob-

lems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination." *Gomez, supra,* at 538, 93 S.Ct., at 875. Our decision last Term in *Mathews v. Lucas, supra,* provides especially helpful guidance.

In *Lucas* we sustained provisions of the Social Security Act governing the eligibility for surviving children's insurance benefits. One of the statutory conditions of eligibility was dependency on the deceased wage earner. 427 U.S., at 498, and n. 1, 96 S.Ct., at 2758. Although the Act presumed dependency for a number of categories of children, including some categories of illegitimate children, it required that the remaining illegitimate children prove actual dependency. The Court upheld the statutory classifications, finding them "reasonably related to the likelihood of dependency at death." Id., at 509, 96 S.Ct., at 2764. Central to this decision was the finding that the "statute does not broadly discriminate between legitimates and illegitimates without more, but is carefully tuned to alternative considerations." *Id.,* at 513, 96 S.Ct., at 2766.

[5] Although the present case arises in a context different from that in *Lucas,* the question whether the statute "is carefully tuned to alternative considerations" is equally applicable here. We conclude that § 12 does not meet this standard. Difficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate. The facts of this case graphically illustrate the constitutional defect of § 12. Sherman Gordon was found to be the father of Deta Mona in a state-court paternity action prior to his death. On the strength of that finding, he was ordered to contribute to the support of his child. That adjudication should be equally sufficient to establish Deta Mona's right to claim a child's share of Gordon's estate, for the State's interest in the accurate and efficient disposition of property at death would not be compromised in any way by allowing her claim in these circumstances." The reach of the statute extends well beyond the asserted purposes. *See Jimenez v. Weinberger,* 41'7 U.S. 628, 637, 94 S.Ct. 2496, 2502, 41 L.Ed.2d 363 (1974).

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C

[6] The Illinois Supreme Court also noted that the decedents whose estates were involved in the consolidated appeals could have left substantial parts of their estates to their illegitimate children by writing a will. The court cited *Labine* as authority for the proposition that such a possibility is constitutionally significant. 61 Ill.2d, at 52, 329 N.E.2d, at 240. The penultimate paragraph of the opinion in *Labine* distinguishes that case from Levy *v. Louisiana,* 391 US. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968),[15] because no insurmountable barrier prevented the illegitimate child from sharing in her father's estate. "There is not the slightest suggestion in this case that Louisiana has barred this illegitimate from inheriting from her father." 401 U.S., at 539, 91 S.Ct., at 1021. The Court then listed three different steps that would have resulted in some recovery by Labine's illegitimate daughter. Labine could have left a will; he could have legitimated the daughter by marrying her mother; and he could have given the daughter the status of a legitimate child by stating in his acknowledgment of paternity his desire to legitimate her. *Ibid.* In *Web-*

14. Evidence of paternity may take a variety of forms, some creating more significant problems of inaccuracy and inefficiency than others. The States, of course, are free to recognize these differences in fashioning their requirements of proof. Our holding today goes only to those forms of proof which do not compromise the States' interests. This clearly would be the case, for example, where there is a prior adjudication or formal acknowledgment of paternity. Thus, we would have a different case if the state statute were carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity.

15. In Levy the Court struck down a Louisiana wrongful-death statute that gave legitimate, but not illegitimate, children a cause of action for the wrongful death of their parents.

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er our distinction of *Labine was* based in part on the fact that no such alternatives existed, as state law prevented the acknowledgment of the children involved. 406 U.S., at 170–171, 92 S.Ct., at 1404-1405.

Despite its appearance in two of our opinions, the focus on the presence or absence of an insurmountable barrier is somewhat of an analytical anomaly. Here, as in *Labine,* the question is the constitutionality of a state intestate succession law that treats illegitimate children differently from legitimate children. Traditional equal protection
1774 analysis asks whether this statutory differentiation on the basis of illegitimacy is justified by the promotion of recognized state objectives. If the law cannot be sustained on this analysis, it is not clear how it can be saved by the absence of an insurmountable barrier to inheritance under other and hypothetical circumstances. .

By focusing on the steps that an intestate might have taken to assure some inheritance for his illegitimate children, the analysis loses sight of the essential question: the constitutionality of discrimination against illegitimates in a state intestate succession law. If the decedent had written a will devising property to his illegitimate child, the case no longer would involve intestate succession law at all. Similarly, if the decedent had legitimated the child by marrying the child's mother or by complying with the requirements of some other method of legitimation, the case no longer would involve discrimination against illegitimates. Hard questions cannot be avoided by a hypothetical reshuffling of the facts. If Sherman Gordon had devised his estate to Deta Mona this case would not be here. Similarly, in *Reed v. Reed, 404* U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), if the decedent had left a will naming an executor, the problem of the statutory preference for male administrators of estates of intestates would not have been presented. The opinion in *Reed* gives no indication that this available alternative had any constitutional significance. We think it has none in this case.

D

[7] Finally, appeileea urge us to affirm the decision below on the theory that the Illinois Probate Act, including § 12, mirrors the presumed intentions of the citizens of the State regarding the disposition of their property at death. Individualizing this theory, appellees argue that we must assume that Sherman Gordon knew the disposition of his estate under the Illinois Probate Act and that his failure to make a will shows his approval of that disposition. We need not
1775 resolve the question whether presumed intent alone can ever justify discrimination against illegitimates,[16] for we do not think that § 12 was enacted for this purpose. The theory of presumed intent is not relied upon in the careful opinion of the Illinois Supreme Court examining both the history and the text of § 12. This omission is not without significance, as one would expect a

16. Appellees characterize the Illinois intestate succession law as a "statutory will." Because intent is a central ingredient in the disposition of property by will, the theory that intestate succession laws are "statutory wills" based on the "presumed intent" of the citizens of the State may have some superficial appeal. The theory proceeds from the initial premise that an individual could, if he wished, disinherit his illegitimate children in his will, Because the statute merely reflects the intent of those citizens who failed to make a will, discrimination against illegitimate children in intestate succession laws is said to be equally permissible. The term "statutory will," however, cannot blind us to the fact that intestate succession laws are acts of States, not of individuals. Under the Fourteenth Amendment this is a fundamental difference.

Even if one assumed that a majority of the citizens of the State preferred to discriminate against their illegitimate children, the sentiment hardly would be unanimous. With respect to any individual. the argument of knowledge and approval of the state law is sheer fiction. The issue therefore becomes where the burden of inertia in writing a will is to fall. At least when the disadvantaged group has been a frequent target of discrimination, as illegitimates have, we doubt that a State constitutionally may place the burden on that group by invoking the theory of "presumed intent." See *Eskra v. Morton, 524* F.2d, at 12-14 (Stevens, J.).

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state supreme court to identify the state interests served by a statute of its state legislature. Our own examination of § 12 convinces us that the statutory provisions at issue were shaped by forces other than the desire of the legislature to mirror the intentions of the citizens of the State with respect to their illegitimate children.

To the extent that other policies are not considered more important, legislators enacting state intestate succession laws probably are influenced by the desire to reflect the natural affinities of decedents in the
776 allocation of estates among the categories of heirs. See *Mathews v. Lucas, 427* U.S., at 514-515, 96 S.Ct., at 27662767. A pattern of distribution favoring brothers and sisters over cousins is, for example, best explained on this basis. The difference in § 12 between the rights of illegitimate children in the estates of thoir fathers and mothers, however, is more convincingly explained by the other factors mentioned by the court below. Accepting in this respect the views of the Illinois Supreme Court, we find in § 12 a primary purpose to provide a system of intestate succession more just to illegitimate children than the prior law, a purpose tempered by a secondary interest in protecting against spurious claims of paternity. In the absence of a more convincing demonstration, we will not hypothesize an additional state purpose that has been ignored by the Illinois Supreme Court.

IV

[S] For the reasons stated above, we conclude that § 12 of the Illinois Probate Act [17] cannot be squared with the command of the Equal Protection Clause of the Fourteenth Amendment. Accordingly, we reverse the judgment of the Illinois Supreme Court and remand the case for further proceedings not inconsistent with this opinion.

so *ordered.*

THE CHIEF JUSTICE, Mr. Justice STEWART, Mr. Justice BLACKMUN, and Mr. Justice REHNQUIST dissent. Like the
777 Supreme Court of Illinois, they find this case constitutionally indistinguishable from *Labine v. Vincent,* 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971). They would, therefore, affirm the judgment.

Mr. Justice REHNQUIST, dissenting.

The Fourteenth Amendment's prohibition against "any State . . dcny[ing] to any person the equal protection of the laws" is undoubtedly one of the majestic generalities of the Constitution. If, during the period of more than a century since its adoption, this Court had developed a consistent body of doctrine which could reasonably be said to expound the intent of those who drafted and adopted that Clause of the Amendment, there would be no cause for judicial complaint, however unwise or incapable of effective administration one might find those intentions. If, on the other hand, recognizing that those who drafted and adopted this language had rather imprecise notions about what it meant, the Court had evolved a body of doctrine which both was consistent and served some arguably useful purpose, there would likewise be little cause for great dissatisfaction with the existing state of the law.

Unfortunately, more than a century of decisions under this Clause of the Fourteenth Amendment have produced neither of these results. They have instead produced a syndrome wherein this Court seems to regard the Equal Protection Clause as a cat-o'-nine-tails to bc kept in the judicial

17. The Illinois statute can be distinguished in several respects from the Louisiana statute in Labine. The discrimination in *Labine* took a different form, suggesting different legislative objectives. See, e. g., n. 13, *supra.* In its impact on the illegitimate children excluded from their parents' estates, the statute was significantly different. Under Louisiana law, all illegitimate children, "natural" and "bastard," were entitled to support from the estate of the deceased parent. 401 U.S., at 534, n. 2, 91 S.Ct., at 1018. Despite these differences, it is apparent that we have examined the Illinois statute more critically than the Court examined the Louisiana statute in *Labine.* To the extent that our analysis in this case differs from that in Labine the more recent analysis controls.

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closet as a threat to legislatures which may, in the view of the judiciary, get out of hand and pass "arbitrary," "illogical," or "unreasonable" laws. Except in the area of the law in which the Framers obviously meant it to apply-classifications based on race or on national origin, the first cousin of race—the Court's decisions can fairly be described as an endless tinkering with legislative judgments, a series of conclusions unsupported by any central guiding principle

It is too well known to warrant more than brief mention that the Framers of the [778] Constitution adopted a system of checks and balances conveniently lumped under the descriptive head of "federalism," whereby all power was originally presumed to reside in the people of the States who adopted the Constitution. The Constitution delegated some authority to the federal executive, some to the federal legislature, some to the federal judiciary, and reserved the remaining authority normally associated with sovereignty to the States and to the people in the States. In reaching the results that it did, the Constitutional Convention in 178'7 rejected the idea that members of the federal judiciary should sit on a council of revision and veto laws which it considered unwise; the Convention also rejected a proposal which would have empowered Congress to nullify laws enacted by any of the several States.

Following the Civil War, Congress propounded and the States ratified the so-called "Civil War Amendments"-the Thirteenth, Fourteenth, and Fifteenth Amendments, which, together with post-Civil War legislation, sharply altered the balance of power between the Federal and State Governments. See *Mitchum v. Foster*, 407 U.S. 225, 238-242, 92 S.Ct. 2151, 2159-2162, 32 L.Ed.2d 705 (1972). But they were not designed to accomplish this purpose in some vague, ill-defined way which was ultimately to be discovered by this Court more than a century after their enactment. Their language contained the mechanisms by which their purpose was to be accomplished. Congress might affirmatively legislate under § 5 of the Fourteenth Amendment to carry out the purposes of that Amendment; and the courts could strike down state laws found directly to violate the dictates of any of the Amendments.

This was strong medicine, and intended to be such. Rut it cannot be read apart from the original understanding at Philadelphia: The Civil War Amendments did not make this Court into a council of revision, and they did not confer upon this Court any authority to nullify state laws which were merely felt to be inimical to the Court's notion of the public interest.

That much is common ground at least at [779] the conscious level. But in providing the Court with the duty of enforcing such generalities as the Equal Protection Clause, the Framers of the Civil War Amendments placed it in the position of Adam in the Garden of Eden. As members of a tripartite institution of government which is responsible to no constituency, and which is held back only by its own sense of self-restraint, see *United States v. Butler*, 297 U.S. 1, '79, 56 S.Ct. 312, 325, 80 L.Ed. 477 (1936) (Stone, J., dissenting), we are constantly subjected to the human temptation to hold that any law containing a number of imperfections denies equal protection simply because those who drafted it could have made it a fairer or a better law. The Court's opinion in the instant case is no better and no worse than the long series of cases in this line, a line which unfortunately proclaims that the Court has indeed succumbed to the temptation implicit in the Amendment.

The Equal Protection Clause is itself a classic paradox, and makes sense only in the context of a recently fought Civil War. It creates a requirement of equal treatment to be applied to the process of legislation-legislation whose very purpose is to draw lines in such a way that different people are treated differently. The problem presented is one of sorting the legislative distinctions which are acceptable from those which involve invidiously unequal treatment.

All constitutional provisions for protection of individuals involve difficult questions of line drawing. But most others have implicit within them an understandable value judgment that certain types of conduct have a favored place and are to be protected to a greater or lesser degree. Obvious examples are free speech, freedom from unreasonable search and seizure, and the right to a fair trial. The remaining judicial task in applying those guarantees is to determine whether, on given facts, the constitutional value judgment embodied in such a provision has been offended in a particular case.

In the case of equality and equal protection, the constitutional principle-the thing 1780 to be protected to a greater or lesser degree-is not even identifiable from within the four corners of the Constitution. For equal protection does not mean that all persons must be treated alike. Rather, its general principle is that persons similarly situated should be treated similarly. But that statement of the rule does little to determine whether *or* not a question of equality is even involved in a given case. For the crux of the problem is whether *persans* are similarly *situated* for purposes of the state action in issue. Nothing in the words of the Fourteenth Amendment specifically addresses this question in any way.

The essential problem of the Equal Protection Clause is therefore the one of determining where the courts arc to look for guidance in defining "equal" as that word is used in the Fourteenth Amendment. Since the Amendment grew out of the Civil War and the freeing of the slaves, the core prohibition was early held to be aimed at the protection of blacks. See *Strauder v. West* Virginia, 100 U.S. 303, 25 L.Ed. 664 (1880); Bickel, The Original Understanding and the Segregation Decision, 69 Harv.L.Rev. 1 (1955). If race was an invalid sorting tool where blacks were concerned, it followed logically that it should not be valid where other races were concerned either. See *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). A logical, though not inexorable, next step, was the extension of the protection to prohibit classifications resting on national origin. See Oyama *v. California, 332* U.S. 633, 68 S.Ct. 269, 92 L.Ed. 249 (1948).

The presumptive invalidity of all of these classifications has made decisions involving them, for the most part, relatively easy. But when the Court has been required to adjudicate equal protection claims not based on race or national origin, it has faced a much more difficult task. In cases involving alienage, for example, it has concluded that such classifications are "suspect" because, though not necessarily involving race or national origin, they are enough like the latter to warrant similar treatment. *See Graham v. Richardson,* 403 1781 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); *Sugarman v. Dougall,* 413 U.S. 634, 93 S.Ct. 2342, 37 L.Ed.2d 853 (1973); In re *Griffiths,* 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973). While there may be individual disagreement as to how such classes are to be singled out and as to whether specific classes are sufficiently close to the core area of race and national origin to warrant such treatment, one cannot say that the inquiry is not germane to the meaning of the Clause.

Illegitimacy, which is involved in this case, has never been held by the Court to be a "suspect classification." Nonetheless, in several opinions of the Court, statements are found which suggest that although illegitimates are not members of a "suspect class," laws which treat them differently from those born in wedlock will receive a more far-reaching scrutiny under the Equal Protection Clause than will other laws regulating economic and social conditions. Levy *v. Louisiana,* 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d *436* (1968); *Glona v. American Guarantee & Liability Ins.* Co., 391 U.S. 73, 88 S.Ct. 1515, 20 L.Ed.2d 441 (1968); *Labine v. Vincent,* 401 U.S. 532, 91 S.Ct. 1017, 28 L.Ed.2d 288 (1971); *Weber v. Aetna* Casualty & Surety Co., 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972); *Gomez v. Perez, 409* U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56 (1973);

New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619, 93 S.Ct. 1700, 36 L.Ed.2d 543 (1973); *Jimenez v. Weinberger,* 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed.2d 363 (1974). But see *Mathews v.* Lucas, 427 U.S. 495, 96 S.Ct. 2755, 49 L.Ed.2d 651 (1976). The Court's opinion today contains language to that effect. *Ante, at* 1463. In one sense this language is a source of consolation, since it suggests that parts of the Court's analysis used in this case will not be carried over to traditional "rational basis" or "minimum scrutiny" cases. At the same time, though, it is a source of confusion, since the unanswered question remains as to the precise sort of scrutiny to which classifications based on illegitimacy will be subject.

The appropriate "scrutiny," in the eyes of the Court, appears to involve some analysis of the relation of the "purpose" of the legislature to the "means'.' by which it chooses to carry out that purpose. The Court's opinion abounds in language of this sort. We are told that "the sufficiency of
1782 the justifications advanced for the remaining discrimination against illegitimate children must be considered in light of this motivating purpose [discussed by the Supreme Court of Illinois]." *Ante,* at 1464. The Court comments that while "[t]he Illinois Supreme Court relied in part on the State's purported interest in 'the promotion of [legitimate] family relationships,' " the statute, in the opinion of this Court., "bears only the most attenuated relationship to the asserted goal." *Ibid.* We are further told that "the court below did not address the relation between § 12 and the promotion of legitimate family relationships, thus leaving the constitutional analysis incomplete." *Ante,* at 1464. But large parts of the Court's opinion are devoted to its assessment of whether § 12 of the Illinois Probate Act did or did not "advance" the "purpose" which the Illinois Legislature had in mind when it passed that section. The crowning irony of the opinion is its assertion that "the judicial task here is the difficult one of vindicating constitutional rights without interfering unduly with the State's primary responsibility in this area." *Ante,* at 1465.

The "difficulty" of the "judicial task" is, I suggest, a self-imposed one, stemming not from the Equal Protection Clause but from the Court's insistence on reading so much into it. I do not see how it can be doubted that the purpose (in the ordinary sense of that word) of the Illinois Legislature in enacting § 12 of the Illinois Probate Act was to make the language contained in that section a part of the Illinois law. I presume even the Court will concede that this purpose was accomplished. It was this particular language which the Illinois Legislature, by the required vote of both of its houses and the signature of the Governor, enacted into law. The use of the word "purpose" in today's opinion actually expands the normal meaning of the word into something more like motive. Indeed, the Court says that the law "must be considered in light of this motivating purpose." *Ante,* at 1464. The question of what "motivated" the various individual legislators to vote for this particular section of the Probate Act, and the Governor of Illinois to sign it, is an extremely complex and difficult one to answer even if it were relevant to the constitutional question: 1783

> "Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts 'refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality." *Arlington Heights v. Metropolitan Housing Dev. Corp., 429* U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977) (footnote omitted).

What the Court in this case is apparently trying to ascertain is what the legislature had in mind or was trying to accomplish by enacting § 12. And, of course, this is actually an inquiry into motive: Why did the legislature pass this particular law?

If the great difficulties, described in *Arlington Heights, supra*, of ascertaining what various individual legislators "had in mind" when they voted to enact § 12 of the Illinois Probate Act are surmounted, this Court then takes it upon itself to inquire into whether the Act in question accomplished the "purpose" which the Court first determines the legislature had in mind. It should be apparent that litigants who wish to succeed in invalidating a law under the Equal Protection Clause must have a certain schizophrenia if they are to be successful in their advocacy: They must first convince this Court that the legislature had a particular purpose in mind in enacting the law, and then convince it that the law was not at all suited to the accomplishment of that purpose.

But a graver defect than this in the Court's analysis is that it also requires a conscious second-guessing of legislative judgment in an area where this Court has
[784] no special expertise whatever. Even assuming that a court has properly accomplished the difficult task of identifying the "purpose" which a statute seeks to serve, it then sits in judgment to consider the so-called "fit" between that "purpose" and the statutory means adopted to achieve it. In most cases, and all but invariably if the Court insists on singling out a unitary "purpose," the "fit" will involve a greater or lesser degree of imperfection. Then the Court asks itself: How much "imperfection" between means and ends is permissible? In making this judgment it must throw into the judicial hopper the whole range of factors which were first thrown into the legislative hopper. What alternatives were reasonably available? What reasons are there for the legislature to accomplish this "purpose" in the way it did? What obstacles stood in the way of other solutions?

The fundamental flaw, to me, in this approach is that there is absolutely nothing to be inferred from the fact that we hold judicial commissions that would enable us to answer any one of these questions better than the legislators to whose initial decision they were committed. Without any antecedent constitutional mandate, we have created on the premises of the Equal Protection Clause a school for legislators, whereby opinions of this Court are written to instruct them in a better understanding of how to accomplish their ordinary legislative tasks.

I would by no means suggest that this case is the first, and I fear it will not be the last, to import this sort of analysis into the Equal Protection Clause. As long ago as *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920), the Court declared that a classification to be valid under the Equal Protection Clause "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . ." Mr. Justice Pitney wrote the opinion of the Court in that case, and Mr. Justice Brandeis, joined by Mr. Justice Holmes, dissented. While the quotation in context is far [785] less objectionable than the just-quoted excerpt, it seems to me that there is little doubt that this case would be decided differently today.

The familiar quotation from *Royster* Guano comes from a time when the Court was giving a broad reading to both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment to invalidate legislation in a way which, it is hoped, would not recur today. See, e. g., *Concordia Ins. Co. v. Illinois, 292* U.S. 535, 54 S.Ct. 830, 78 L.Ed. 1411 (1934); *Hartford* Co. v. Harrison, 301 U.S. 459, 57 S.Ct. 838, 81 L.Ed. 1223 (1937). Every law enacted, unless it applies to all persons at all times and in all places, inevitably imposes sanctions upon some and declines to impose the same sanctions on others. But these inevitable concomitants of legislation have little or nothing to do with the Equal Protection Clause of the Fourteenth Amendment, unless they employ means of sorting people which the draftsmen of the Amendment sought to prohibit. I had thought that cases like McGowan *v. Maryland, 366* U.S. 420, 426, 81 S.Ct. 1101, 1105, 6 L.Ed.2d 393

(1961), in which the Court, speaking through Mr. Chief Justice Warren, said that "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it," and McDonald v. *Board of Election, 394* U.S. 802, 809, 89 S.Ct. 1404, 1408, 22 L.Ed.2d 739 (1969), in which the Court, again speaking through Mr. Chief Justice Warren, said that "[l]egislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them," would have put to rest the expansive notions of judicial review suggested in the above-quoted excerpt *from* Royster *Guano.*

Here the Illinois Legislature was dealing with a problem of intestate succession of illegitimates from their fathers, which, as the Court concedes, frequently presents difficult problems of proof. The provisions of Illinois Probate Act § 12, as most recently amended, alleviate some of the difficulties
1786 which previously stood in the way of such succession. The fact that the Act in question does not alleviate all of the difficulties, or that it might have gone further than it did, is to me wholly irrelevant under the Equal Protection Clause. The circumstances which justify the distinction between illegitimates and legitimates contained in § 12 are apparent with no great exercise of imagination; they are stated in the opinion of the Court, though they are there rejected as constitutionally insufficient. Since Illinois' distinction is not mindless and patently irrational, I would affirm the judgment of the Supreme Court of Illinois.

430 U.S. 787, 52 L.Ed.2d 50

Ramon Martin FIALLO, etc., et al., Appellants,

v.

Griffin B. BELL, Individually and as Attorney General of the United States, et al.

No. 75-6297.

Argued Dec. 7, 1976.

Decided April 26, 1977.

Three sets of unwed natural fathers and their illegitimate offspring brought action to permanently enjoin enforcement of those sections of Immigration and Nationality Act which have the effect of excluding the relationship between an illegitimate child and his natural father, as opposed to his natural mother, from the special preference immigration status accorded a "child" *or* "parent" of a United States citizen or lawful permanent resident. The three-judge District Court for the Eastern District of New York, Moore, Circuit Judge, 406 F.Supp. 162, rendered judgment for the Government, and plaintiffs appealed. The Supreme Court, Mr. Justice Powell, held that Congress' power to expel or exclude aliens is largely immune from judicial control, that no factors in the instant case warranted a more searching judicial scrutiny than is generally applied in immigration cases, that whether Congress' determination that preferential status is not warranted for illegitimate children and their natural fathers results from a perceived absence in most cases of close family ties or a concern with serious problems of proof that usually lurk in paternity determinations, it was not for the court to probe and test the justifications for the legislative decision and that the challenge provisions are constitutional.

Affirmed.

Mr. Justice White filed a dissenting statement.