The Prodigal Father: Interstate Succession of Illegitimate Children in North Carolina under Section 29-19

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The Prodigal Father: Intestate Succession of Illegitimate Children in North Carolina Under Section 29-19

Section 29-19 of the North Carolina General Statutes establishes procedures for a father's legal recognition of his illegitimate child for the purpose of intestate succession.[1] In *In re Estate of Stern v. Stern*,[2] a case of first impression,[3] the North Carolina Court of Appeals held that section 29-19 can prevent the lineal and collateral kindred of an illegitimate child's father from inheriting from the child's intestate estate if the father failed to acknowledge his paternity by the statutorily prescribed method.[4] In its holding, the court relied on precedent from the United States Supreme Court and on North Carolina courts' interpretation of the statute's language and purpose. A dissent, however, contended that, based on the facts presented, the court's failure to recognize the father's constructive compliance with section 29-19 rendered the statute violative of the equal protection clause.[5] Whichever view is technically correct, the outcome of *Stern* raises doubts about the fairness of the legislative scheme and its interpretation by the courts. This Note examines the *Stern* decision and its implications, proposes changes in section 29-19, and suggests a change in the judiciary's construction of the statute to ensure that the legislation will better serve its stated purpose of equalizing the inheritance rights of legitimate and illegitimate children.

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1. The statute provides:

(a) For purposes of intestate succession, an illegitimate child shall be treated as if he were the legitimate child of his mother, so that he and his lineal descendants are entitled to take by, through and from his mother and his other maternal kindred, both descendants and collaterals, and they are entitled to take from him.

(b) For purposes of intestate succession, an illegitimate child shall be entitled to take by, through and from:

(1) Any person who has been finally adjudged to be the father of such child pursuant to the provisions of G.S. 49-1 through 49-9 or the provisions of G.S. 49-14 through 49-16;

(2) Any person who has acknowledged himself during his own lifetime and the child's lifetime to be the father of such child in a written instrument executed or acknowledged before a certifying officer named in G.S. 52-10(b) and filed during his own lifetime and the child's lifetime in the office of the clerk of superior court of the county where either he or the child resides.

Notwithstanding the above provisions, no person shall be entitled to take hereunder unless he has given written notice of the basis of his claim to the personal representative of the putative father within six months after the date of the first publication or posting of the general notice to creditors.

(c) Any person described under subdivision (b)(1) or (2) above and his lineal and collateral kin shall be entitled to inherit by, through and from the illegitimate child.

(d) Any person who acknowledges himself to be the father of an illegitimate child in his duly probated last will shall be deemed to have intended that such child be treated as expressly provided for in said will or, in the absence of any express provision, the same as a legitimate child.

N.C. GEN. STAT. § 29-19 (1984).

2. 66 N.C. App. 507, 311 S.E.2d 909, *aff'd per curiam*, 312 N.C. 486, 322 S.E.2d 771 (1984).

3. *Id.* at 515, 311 S.E.2d at 914 (Johnson, J., dissenting).

4. *Id.* at 512, 311 S.E.2d at 912.

5. *Id.* at 521-22, 311 S.E.2d at 917 (Johnson, J., dissenting). The equal protection clause states: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

Prior to the passage of section 29-19, illegitimate children had few inheritance rights. Originally, illegitimate children were seen as *filius nullius*—unable to inherit either intestate or through a will.[6] The North Carolina courts later recognized an illegitimate child as an heir of the mother, entitled to the same inheritance rights as her legitimate children.[7] The 1935 Intestate Succession Act went further and provided that collateral heirs of a mother could inherit from her illegitimate child.[8] When the Act was modified in 1959, however, the North Carolina General Assembly rejected a proposal that would have permitted intestate inheritance by an illegitimate child from the father if paternity was established in a court action for nonsupport.[9]

The current version of section 29-19 is a remedial statute intended to "mitigate the hardships" of the common law on inheritance by illegitimates[10] and achieve "insofar as practical" equal inheritance between legitimate and illegitimate children.[11] Statutory provisions requiring that the father legally recognize his illegitimate child before the child can inherit are intended to strike a balance between this remedial goal and the state's dual interests in orderly disposition of estates and prevention of fraudulent claims against the estates of putative fathers.[12] While a mother's illegitimate children are treated as legitimate for intestate succession purposes,[13] section 29-19(b) provides that they can "take by, through and from"[14] their father only if paternity is established in a criminal

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6. *See* Note, *Judicial Impairment of the Illegitimate's Paternal Inheritance Rights in North Carolina*—Mitchell v. Freuler, 16 WAKE FOREST L. REV. 205, 205 (1980). *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 768 (1977).

7. Paul v. Willoughby, 204 N.C. 796, 798, 169 S.E. 226, 228 (1933). The limited nature of this modification of the common law is illustrated in Brown v. Holland, 221 N.C. 135, 136, 19 S.E.2d 255, 256 (1942), where the North Carolina Supreme Court held that the term "issue" in a mother's will only included her legitimate children. The modification also did not allow collateral heirs of the mother to inherit from the mother's illegitimate child. Carter v. Smith, 209 N.C. 788, 185 S.E. 15 (1936); Board of Educ. v. Johnston, 224 N.C. 86, 29 S.E.2d 126 (1944). In addition, an illegitimate child could not inherit any property from her mother which the mother had received from the father of the legitimate children. McCall, *North Carolina's New Intestate Succession Act*, 39 N.C.L. REV. 1, 13 (1960). *See also* Battle v. Shore, 197 N.C. 449, 449, 149 S.E. 590, 590 (1929) (mother's illegitimate children inherit as her heirs but father's do not).

8. Board of Educ. v. Johnston, 224 N.C. 86, 88, 29 S.E.2d 126, 127 (1944).

9. McCall, *supra* note 7, at 14. The general assembly provided full inheritance rights for legitimated and adopted children in 1955. Greenlee v. Quinn, 255 N.C. 601, 606, 122 S.E.2d 409, 413 (1961). *See also* Comment, *Illegitimacy in North Carolina*, 46 N.C.L. REV. 813, 825 (1968) (adoption laws intended to alleviate stigma of illegitimacy, but only through nonreference to child's parental status).

10. Mitchell v. Freuler, 297 N.C. 206, 216, 254 S.E.2d 762, 768 (1979); *Stern*, 66 N.C. App. at 511, 311 S.E.2d at 912 (quoting *Mitchell*).

11. Mitchell v. Freuler, 297 N.C. 206, 216, 254 S.E.2d 762, 768 (1979); *Stern*, 66 N.C. App. at 511, 311 S.E.2d at 912 (quoting *Mitchell*).

12. Mitchell v. Freuler, 297 N.C. 206, 216, 254 S.E.2d 762, 768 (1979); *Stern*, 66 N.C. App. at 511-12, 311 S.E.2d at 912. *See also* Note, *supra* note 6, at 205 (In dealing with unequal treatment of illegitimate persons, state legislatures must consider countervailing factors such as efficiency in administering estates and the policy of discouraging "spurious assertions of paternity."); Note, *Illegitimacy and Equal Protection*, 49 N.Y.U. L. REV. 479, 511 (1974) ("The state is properly concerned with minimizing administrative expense and inconvenience, as well as with preventing the successful assertion of fraudulent claims.").

13. N.C. GEN. STAT. § 29-19(a) (1984). For text of statute, see *supra* note 1.

14. N.C. GEN. STAT. § 29-19(b) (1984). For text of statute, see *supra* note 1. *See also* McCall, *supra* note 7, at 13-14 (discussion of "by, through and from" language).

action for nonsupport,[15] in a civil proceeding for support,[16] or by the father's ackowledgement of paternity "before a certifying officer . . . during his own lifetime and the child's lifetime."[17] The statute also provides that a duly adjudged or acknowledged father and his heirs may inherit from the illegitimate child's estate[18] and that a father's ackowledgement of his illegitimate child in a will may be treated as intent to have the illegitimate child inherit as though she were legitimate.[19]

The *Stern* case arose in this statutory context. Decedent Gordon Stern was born to Hilda Weiss and Edward D. Stern in Saskatchewan, Canada, where laws forbidding intermarriage between Jews and Catholics prevented the couple from marrying. Decedent lived with his parents from birth and continued to live with his father after his mother's death. He adopted his father's surname to facilitate inheritance under his father's will and subsequently inherited $500,000 at his father's death. Although decedent's father had never sought judicial or other official recognition of his paternity, he had recognized decedent as a son in his will. Upon decedent's death intestate one year after his father's death, the heirs of decedent's father sued to share in the decedent's estate. The trial court ruled that only the mother's heirs were entitled to inherit and plaintiffs appealed.[20]

Stern presented the court of appeals with the novel issue of when the heirs of an illegitimate child's father are entitled to inherit from the illegitimate child by intestate succession. Plaintiffs first contended that Edward Stern had com-

15. N.C. GEN. STAT. § 29-19 (b)(1) (1984). For text of statute, see *supra* note 1. The criminal nonsupport provisions are found in N.C. GEN. STAT. §§ 49-1 to -9 (1984). Nonsupport of a child is a misdemeanor. *Id.* § 49-2. The trial court has the power to compel both defendant and child to submit to blood tests. *Id.* § 49-7. If defendant is convicted, the judge must fix a child support arrangement. *Id.*

16. N.C. GEN. STAT. § 29-19(b)(1) (1984). For text of statute, see *supra* note 1. The civil proceeding is a paternity action for support under N.C. GEN. STAT. §§ 49-14 to -16 (1984). *See* Mitchell v. Freuler, 297 N.C. 206, 221 n.2, 254 S.E.2d 762, 763 n.2. The action must be completed before the putative father's death. N.C. GEN. STAT. § 49-14(b) (1984).

In addition to blood tests, a broad range of evidence is allowed to prove or disprove paternity in a civil proceeding. *See* Wright v. Gann, 27 N.C. App. 45, 217 S.E.2d 761 (1975); Note, *The Use of Blood Tests in Actions to Determine Paternity*, 16 WAKE FOREST L. REV. 591 (1980). A mother's testimony about the period between sexual intercourse with defendant and the child's birth is admissible. County of Lenoir *ex rel.* Dudley v. Dawson, 60 N.C. App. 122, 298 S.E.2d 418 (1982); State v. Snyder, 3 N.C. App. 114, 164 S.E.2d 42 (1968). The child can be exhibited to show resemblance to the defendant. State v. Green, 55 N.C. App. 255, 284 S.E.2d 688 (1981). Defendant's out of court admission of paternity is relevant. State v. Bowman, 231 N.C. 51, 55 S.E.2d 789 (1949). Defendant's payments to child's mother are admissible evidence. State v. Garner, 34 N.C. App. 498, 238 S.E.2d 653 (1977). Evidence of a mother's sexual relations with other men near the time of conception can be offered. State v. Farmer, 63 N.C. App. 384, 304 S.E.2d 765 (1983). For a discussion of evidence used to prove paternity in intestate proceedings in other states, see *infra* notes 58-59, 61-63 and 68-70 and accompanying text.

17. N.C. GEN. STAT. § 29-19(b)(2) (1984). For text of statute, see *supra* note 1. The father may voluntarily acknowledge paternity before a certifying officer listed in N.C. GEN. STAT. § 52-10(b) (1984). The certifying officer "shall be a notary public, or a justice, judge, magistrate, clerk, assistant clerk or deputy clerk of the General Court of Justice, or the equivalent or corresponding officers of the state, territory or foreign country where the acknowledgment is made." *Id.*

18. N.C. GEN. STAT. § 29-19(c) (1984). For text of statute, see *supra* note 1.

19. N.C. GEN. STAT. § 29-19(d) (1984). For text of statute, see *supra* note 1.

20. *Stern*, 66 N.C. App. at 507-10, 311 S.E.2d at 909-11. At his death, decedent was a resident of North Carolina. His parents, however, had never resided in the state. *Id.* at 508, 311 S.E.2d at 910.

plied with the paternal acknowledgment requirements of section 29-19 when he recognized Gordon Stern as his son in his will, thus allowing the son, under section 29-19(d), to be treated as a legitimate child under the will.[21] Section 29-19(c) explicitly provides that the heirs of an illegitimate child's father are entitled to intestate inheritance from the child under the same circumstances that the child can inherit from the father—specifically, when the father has recognized the child under section 29-19(b).[22] Plaintiffs in *Stern* did not argue that Edward Stern had complied directly with section 29-19(b) in acknowledging Gordon Stern as his illegitimate son.[23] Instead, they contended that Edward Stern's statement of paternity in his will in compliance with section 29-19(d) constructively satisfied the requirements of section 29-19(b).[24] Under plaintiffs' interpretation, Edward Stern's indirect compliance with subsection (b) enabled them to recover under subsection (c). The *Stern* court rejected this construction, holding that section 29-19(d) only enables the illegitimate child to take under the will from the putative father; it does not allow the father's heirs to inherit from the child under intestacy.[25] The court found that Edward Stern had failed to comply with section 29-19(b) and that his heirs were not entitled to inherit from Gordon Stern under section 29-19(c).[26]

Plaintiffs also contended that failure to grant them inheritance rights would deny equal protection of the law to fathers of illegitimate children and heirs of such fathers.[27] The court in *Stern* relied on the denial of equal protection claims in prior cases to dispose of this argument even though the equal protection problem in *Stern* is distinguishable from earlier suits. In one case relied on by the court, *Mitchell v. Freuler*,[28] the class distinction complained of was between legitimate and illegitimate children. In contrast, plaintiffs in *Stern* alleged discrimination against the father's heirs in favor of the mother's.[29] The court of appeals, however, employed the same equal protection analysis in *Stern* as had

21. *Id.* at 510, 311 S.E.2d at 911. *See* N.C. GEN. STAT. § 29-19(d). For text of statute, see *supra* note 1.

22. N.C. GEN. STAT. § 29-19(c) (1984). For text of statute, see *supra* note 1.

23. *Stern*, 66 N.C. App. at 510, 311 S.E.2d at 911.

24. *Id.* In his dissent Judge Johnson contended that the presence of a provision for inheritance under a will in the intestate succession statute rendered its meaning ambiguous in relation to the other provisions of § 29-19. Therefore, to further the remedial purposes of the statute, Judge Johnson stated that compliance with § 29-19(d) should be interpreted to fulfill the paternal acknowledgement provisions of § 29-19(b). *Id.* at 519, 311 S.E.2d at 916 (Johnson, J., dissenting). *See infra* note 46 and accompanying text.

25. *Stern*, 66 N.C. App. at 510, 311 S.E.2d at 911. According to the majority, "G.S. 29-19(c) clearly and unambiguously provides that a putative father and his kindred are only entitled to inherit from an illegitimate child if paternity has been established by one of the methods prescribed in G.S. 29-19(b)." *Id.*

26. *Id.*

27. *Stern*, 66 N.C. App. at 511, 311 S.E.2d at 911.

28. 297 N.C. 206, 254 S.E.2d 762 (1979). In *Mitchell* an illegitimate child argued that § 29-19(b) violates the equal protection clause of the 14th amendment by placing the burden of showing paternal recognition on illegitimate children but not on legitimate children. *Id.* at 207, 254 S.E.2d at 763. *See also* Trimble v. Gordon, 430 U.S. 762, 763 (1977) (illegitimate children as plaintiffs); Lalli v. Lalli, 439 U.S. 259, 262 (1978) (illegitimate children as plaintiffs).

29. *Stern*, 66 N.C. App. at 510, 311 S.E.2d at 911. In *Stern*, plaintiffs contended that section 29-19(b) violates the equal protection rights of the illegitimate child's father and paternal heirs by requiring that paternity be acknowledged in the manner required by the statute before they can

been used in *Mitchell* because it found that the statute's purpose—to balance inheritance rights against the state's interests in preventing fraudulent claims upon estates—protected it against equal protection challenges whether the challenges were brought by a father's heirs or by an illegitimate child.[30]

Once the court of appeals determined that *Stern* presented the same equal protection problem as prior cases, United States Supreme Court and North Carolina Supreme Court precedent foreclosed plaintiff's contention that section 29-19(b) on its face violated equal protection. In *Trimble v. Gordon*[31] and *Lalli v. Lalli*[32] the United States Supreme Court established a framework for review of statutes affecting intestate succession by illegitimate children. The Court applied the intermediate scrutiny equal protection test and suggested that statutes which classify illegitimate children's inheritance rights differently from those of legitimate children may be unconstitutional even if they " 'bear some rational relationship to a legitimate state purpose.' "[33] Thus, a statute that imposes a substantially greater burden on illegitimate children cannot be written broadly to deprive illegitimate children of inheritance rights in situations that do not promote permissible state interests.[34] In *Trimble* the Court held that the state of Illinois' interest in preventing fraudulent claims against estates did not justify depriving all illegitimate children of the right to intestate succession.[35] In *Lalli*,

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inherit from the child without placing the same burden on the illegitimate child's mother and maternal heirs. *Id.*

30. *Stern*, 66 N.C. App. at 511-12, 311 S.E.2d at 911-12. In fact the court questioned whether a statute classifying the parents of an illegitimate should not be subject to a less stringent equal protection review. *Id.* at 511, 311 S.E.2d at 911.

31. 430 U.S. 762 (1977).

32. 439 U.S. 259 (1978).

33. *Trimble*, 430 U.S. at 766-67 (quoting Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172 (1972)). Statutes affecting illegitimate children are given an intermediate equal protection review. *See Stern*, 66 N.C. App. at 511, 311 S.E. 2d at 911; Note, *supra* note 6, at 207; Note, Trimble v. Gordon: *Expanding the Illegitimate's Right to Inherit*, 32 ARK. L. REV. 120, 121-22 (1979). A court may require a more careful balancing between the rights of a class entitled to intermediate review, such as illegitimate children, and permissible state interests than is required under the normal rational basis standard. *Id.* at 125-26; *see infra* note 34 and accompanying text. The Court in *Trimble* rejected the argument that illegitimate children are a suspect class entitled to the highest level of equal protection review. 430 U.S. at 767. *See Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1101-03, 1121-22 (1969).

The equal protection review for illegitimate children is not limited to intestate succession rights. *See, e.g.*, Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (discussing eligibility of illegitimate children to receive deceased parent's workers' compensation benefits).

34. *Trimble*, 430 U.S. at 772. The Court stated:

> We think . . . that the Illinois Supreme Court gave inadequate consideration to the relation between [the statute] 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 of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity.

Id. at 770-71. Both *Trimble* and *Lalli* quoted with approval the Court's statement in Matthew v. Lucas, 427 U.S. 495, 513 (1976), that the statute must not " 'broadly discriminate between legitimates and illegitimates without more, [and must be] carefully tuned to alternative considerations.' " *Trimble*, 430 U.S. at 772; *Lalli*, 439 U.S. at 266. Professor Loewy suggests that in order to sustain a statute affecting illegitimates, a state must show a "legitimate nondiscriminatory purpose sufficient to render it probable that the discrimination was merely an incidental adjunct to a legitimate purpose." Loewy, *A Different and More Viable Theory of Equal Protection*, 57 N.C.L. REV. 1, 22 (1978).

35. *Trimble*, 430 U.S. at 771-72. An illegitimate child in Illinois could only inherit if she was subsequently legitimated by the marriage of her parents. *Id.* The Court noted that the state interest

however, a New York statute allowing inheritance by illegitimate children from their fathers only after a judicial declaration of paternity was obtained was held to be sufficiently related to the state's proper interest in avoiding spurious claims against estates.[36]

In *Mitchell v. Frueler*[37] the North Carolina Supreme Court, relying on *Trimble* and *Lalli*, held that section 29-19 passed equal protection scrutiny.[38] Specifically, the court found section 29-19 constitutional because it had a legitimate purpose and provided more ways for an illegitimate child to establish paternity than the New York statute upheld in *Lalli*.[39]

The dissent did not quarrel with the majority's characterization of section 29-19 as constitutional on its face.[40] Instead, Judge Johnson noted the United States Supreme Court's partial reliance on the New York courts' liberal judicial construction of the New York statute in holding the statute constitutional.[41] He contrasted this treatment with the North Carolina Supreme Court's strict construction of section 29-19 in *Stern*[42] and suggested that section 29-19(b) be interpreted broadly to allow substantial compliance with its provisions. He concluded that the court's failure to do so violated the equal protection rights of Edward Stern's heirs.[43]

Judge Johnson argued further that even if the statute did not violate the equal protection clause, plaintiffs should have been allowed recovery based on decedent's father's constructive compliance with section 29-19.[44] He pointed to

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in legitimate family relations is not served by totally depriving illegitimate children of their inheritance rights because their parents failed to marry. *Id.* at 770. *See also* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1975).

36. *Lalli*, 439 U.S. at 275. According to one commentator, *Trimble*

> reflects the philosophy that a limited amount of discrimination against illegitimates is allowable in the formulation of state laws regarding the orderly disposition of property upon death, but laws which make it virtually impossible for an illegitimate child to be made legitimate, and thereby eligible to inherit from his biological father, are an unconstitutional denial of equal protection of the laws under the fourteenth amendment.

Note, Davis v. Jones: *A Case for Equitable Legitimation*, 23 S. TEX. L.J. 250, 252-53 (1982).

37. 297 N.C. 206, 254 S.E.2d 762 (1979).

38. *Mitchell*, 297 N.C. at 216, 254 S.E.2d at 762. *See* 3 R. LEE, NORTH CAROLINA FAMILY LAW § 252, at 361 (4th ed. 1981).

39. *Mitchell*, 297 N.C. at 216, 254 S.E.2d at762.

40. *Stern*, 66 N.C. App. at 512, 311 S.E.2d at 911-12 (Johnson, J., dissenting).

41. *Id.* at 520-21, 311 S.E.2d at 916-17 (Johnson, J., dissenting). The New York court's liberal construction of the statute advanced the statute's remedial goal of equalizing inheritance rights for illegitimate children. *Id.*

42. *Id.* (Johnson, J., dissenting).

43. *Id.* at 521-22, 311 S.E.2d at 917 (Johnson, J., dissenting).

44. The doctrine of constructive compliance allows a party who acts consistently with the purposes of a statute, but fails to comply with a technical requirement, to benefit from the protection of the statute. *See* Note, *supra* note 6, at 216. The North Carolina courts have accepted the rule that statutes serving a remedial purpose are to be construed liberally to achieve their objectives. *See* Joyner v. Lucas, 42 N.C. App. 541, 546, 257 S.E.2d 105, 108 (1979) (civil paternity action under N.C. GEN. STAT. § 49-14). In contrast to other states, *see, e.g.*, Weber v. Anderson, 269 N.W.2d 892, 894-95 (Minn. 1978), North Carolina courts have not applied this principle to § 29-19. *See Stern*, 66 N.C. App. at 510-11, 311 S.E.2d at 911 (§ 29-19 language is unambiguous).

In the absence of legislative history, one can only wonder whether the general assembly expected the requirements of § 29-19 to be strictly construed. The statute's provision for voluntary acknowledgement of paternity, however, *see supra* note 17 and accompanying text, suggests that the

the trial court's findings of fact to show that there was little chance that the *Stern* plaintiffs' claim was spurious. First, Edward Stern was clearly the biological father. Second, the decedent and his father lived together for the first eighteen years of decedent's life and always treated each other as father and son. Third, decedent adopted his father's surname and was closer to his father's relatives than to his mother's. Last, most of the disputed estate was inherited by the decedent from his father's estate one year before the lawsuit was commenced.[45] Judge Johnson stated that the majority should have addressed

> the issue of statutory construction . . . whether a father's acknowledgement of paternity in his duly probated last will is the substantial equivalent of an *inter vivos* acknowledgement of paternity in a written instrument executed or acknowledged [in compliance with section 29-19(b)(2)].[46]

Although the outcome advocated by Judge Johnson is appealing, his equal protection reasoning is not entirely sound. Consideration of New York's "liberal" statutory construction in *Lalli*[47] does not necessarily lead to the conclusion that section 29-19(b) as applied in *Stern* is insufficiently related to the state interest of preventing fraud upon estates so as to deny equal protection to the paternal heirs of an illegitimate child.[48] The father's recognition of his child in his duly probated last will is more remote from statutory requirements than the exceptions made by the New York courts for technical noncompliance with New York's statutory provisions.[49] For example, a New York trial court recognized as proof of paternity a judicial support order that did not specifically mention paternity[50] and allowed a paternity proceeding that was commenced, but not terminated, before the father's death to constitute compliance with the statute's requirement that paternity be established during the father's lifetime.[51] Further, the Court in *Lalli* was aware that statutory procedures intended to promote the state's interest in disposition of estates would cause some inequitable results:

> We do not question that there will be some illegitimate children who would be able to establish their relationship to their deceased father without serious disruption of the administration of estates and that, as applied to such individuals [the statute] appears to operate unfairly. . . . Our inquiry under the Equal Protection Clause does not focus on the abstract "fairness" of a state law, but on whether the statute's relation to the state interest it is intended to promote is so tenu-

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general assembly expected the standard to cover even the estates of putative fathers who appeared to have lived with or supported their children. *Stern*, 66 N.C. App. at 513, 311 S.E.2d at 912 (Johnson, J., dissenting).

45. *Stern*, 66 N.C. App. at 513-14, 311 S.E.2d at 912-13 (Johnson, J., dissenting).

46. *Id.* at 515, 311 S.E.2d at 913-14 (Johnson, J., dissenting). Although a will does not technically meet the requirements of subsection (b) as a written, signed, and acknowledged recognition of paternity, it certainly falls within the spirit of subsection (b). *See supra* note 1.

47. *See supra* note 41 and accompanying text.

48. *See supra* note 33.

49. *Lalli*, 439 U.S. at 273-74.

50. *Id.* at 274. *See In re* Kennedy, 89 Misc. 2d 551, 392 N.Y.S.2d 365 (1977).

51. *Lalli*, 439 U.S. at 274. *See In re* Niles, 53 A.D.2d 983, 385 N.Y.S.2d 876 (1976), *appeal denied sub nom.* Niles v. Beninati, 40 N.Y.2d 809, 360 N.E.2d 1109, 392 N.Y.S.2d 1027 (1977).

> ous that it lacks the rationality contemplated by the fourteenth amendment.[52]

Thus, it appears that even without the liberal construction of Judge Johnson section 29-19(b) as construed by the majority does not run afoul of the equal protection clause.

Judge Johnson's second contention, that constructive compliance with section 29-19(b) was present in *Stern*, is a more promising argument for plaintiffs. The court of appeals held in *Herndon v. Robinson*[53] that an illegitimate child's proof that his father had paid for his birth, had taken out insurance policies on him, and had listed him as a son on an employment application did not "rise to the dignity of constructive compliance" with section 29-19(b).[54] That constructive compliance was even recognized, however, suggests that the doctrine would be accepted under the right facts.[55] The *Herndon* court's conclusion that the father's acknowledgment of paternity did not show intent to allow the child to inherit was crucial to its analysis.

> The formalities [of section 29-19(b)] . . . assure that the decedent intended the illegitimate child to share in the estate, much in the same way a father intentionally excludes legitimate children as beneficiaries under his will. But, just as the father must act to *exclude* a legitimate child from sharing in his estate, he must also act to *include* an illegitimate child.[56]

In *Stern*, however, Edward Stern had acted to include his son in the will. Plaintiffs had both the father's acknowledgment of paternity in the will and a direct bequest of his entire estate to his son. Thus, a finding of constructive compliance on the facts in *Stern* would have been consistent with the purpose of section 29-19(b) as expressed in *Herndon*.

Judge Johnson suggested that the North Carolina courts recognize inheritance rights under section 29-19 whenever achievement of the remedial purposes of the statute could be enhanced without undermining the state's interest in preventing fraudulent claims.[57] While this solution would erode the predictability of the statute, it would lead to fairer results. The harsh result in *Stern* and, more disturbingly, in cases such as *Herndon* in which an illegitimate child is deprived of his share in his father's estate suggests that section 29-19 as currently interpreted fails to achieve its egalitarian goals. An approach to intestate succession that balances the interests of illegitimate children and the state would reduce the instances in which illegitimate children are unjustly deprived of their inheritance and would not unduly burden estates with fraudulent claims.

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52. *Lalli*, 439 U.S. at 272-73.

53. 57 N.C. App. 318, 291 S.E.2d 305, *cert. denied*, 306 N.C. 557, 294 S.E.2d 223 (1982).

54. *Id.* at 321, 291 S.E.2d at 307.

55. *Stern*, 66 N.C. App. at 514, 311 S.E.2d at 914-15 (Johnson, J., dissenting).

56. *Herndon*, 57 N.C. App. at 320-21, 291 S.E.2d at 307. The weakness in this reasoning is obvious. A decedent cannot exclude any of his legal heirs when he dies intestate. Thus, the question is not whether decedent intended for his illegitimate child to inherit, but whether the child is recognized as a legal heir. *See*, Note, *Survey of Developments in North Carolina Law: Property*, 61 N.C.L. REV. 1171, 1212 (1983).

57. *Stern*, 66 N.C. App. at 516, 311 S.E.2d at 914 (Johnson, J., dissenting).

Many state legislatures have recognized that statutes which are constitutional under *Trimble* and *Lalli* do not adequately protect the inheritance rights of illegitimate children and thus have enacted more flexible statutes. Some of the most protective statutes allow an illegitimate child to take by intestate succession if her father "openly and notoriously" recognized her[58] or if a "mutually acknowledged relationship of parent and child" was present.[59] Under these statutes, the state's interest in the orderly disposition of estates is subordinated to provide inheritance to "the informally acknowledged child."[60] In New Mexico[61] and Massachusetts[62] paternity may be established in an intestate succession proceeding by a preponderance of the evidence. Under this approach, a father's acknowledgement of his child is strong evidence of paternity, but is not required for inheritance.[63] This inheritance scheme reaches both informally acknowledged children and illegitimate children who would have been able to establish paternity only in an adversary proceeding during their father's lifetime. The Minnesota Supreme Court has interpreted its statute[64] to allow a paternity

58. *See* IOWA CODE ANN. § 633.222 (West 1963); KAN. STAT. ANN. § 59-501 (1976) (notorious recognition sufficient to establish paternity for intestate succession); *see also* Hawk's Estate v. Lain, 329 N.W.2d 660 (Iowa 1983) (in the absence of blood tests, testimony of mother and photographs of father and child together were sufficient to find paternity by a preponderance of the evidence); *In re* Wolf's Estate, 242 Iowa 1012, 48 N.W.2d 890 (1951) (testimony that it was common knowledge that decedent was the father and that decedent had admitted he was father supported a finding of paternity); Kuhn v. Hicks, 229 Kan. 536, 626 P.2d 794 (1981) (clearly identified voluntary child support constitutes recognition).

59. *See* MICH. COMP. LAWS ANN. § 700.111(4)(c) (West 1982). In *In re* Vellenga, 120 Mich. App. 699, 702, 327 N.W.2d 340, 342 (1982), the Michigan Court of Appeals held that because an unborn child could not acknowledge her father she was unable to take intestate from him when he died before her birth. For an annotation critical of this result, see *In re* Vellenga: *An Heir Apparently Not*, 1984 DET. L. REV. 829 (1984).

60. The failure of the revised Louisiana statute to provide for the "informally acknowledged child" is discussed at length in Note, *A Survey of Recent Changes in Intestate Succession Law Affecting Illegitimate Children—The Informally Acknowledged Child Is the Ultimate Loser*, 29 LOY. L. REV. 323 (1983).

As Justice Brennan pointed out in *Lalli*, the child who is recognized and supported by his father is unlikely to have filed a paternity suit and thus will be unable to inherit under any statute that, like North Carolina's, requires recognition in a criminal or civil proceeding or entry with a clerk of court. *See Lalli*, 439 U.S. at 278 (Brennan, J., dissenting). This creates the bizarre result that a father who recognizes and even lives with his illegitimate child will have none of his estate go to the child, while a father who is compelled by the courts to support his child will have his estate shared by the child. One commentator is particularly concerned about the offspring of the growing number of cohabitation relationships who become victims of society's preference for legitimate relationships, even though they were never denied the father's presence or support during his life. *See* Note, *supra* note 6, at 216-17. Thus, the state's permissible interest in preventing fraud upon estates causes the impermissible result of punishing children for their parents' choice not to marry. *See supra* note 35.

61. N.M. STAT. ANN. § 45-2-109(B)(3) (1978).

62. MASS. GEN. LAWS ANN. ch. 190, § 7 (West 1981).

63. Despite testimony of "lack of communication between decedent and [son] over a period of 36 years," the New Mexico trial court found paternity established. *In re* Estate of Padilla, 97 N.M. 508, 512, 641 P.2d 539, 543 (1982). Decedent's acknowledgement to mother, pediatrician, and friend; and grandmother's testimony that decedent visited child, met the "stricter" standard for illegitimate child's inheritance from father. Higgins v. Ripley, 16 Mass. App. 928, 928, 450 N.E.2d 186, 186 (1983).

64. MINN. STAT. ANN. § 525.172 (West 1975) provides:

> An illegitimate child shall inherit from his mother the same as if born in lawful wedlock, and also from the person who . . . shall have declared himself to be his father . . . or from the person who has been determined to be the father of such child in a paternity proceeding before a court of competent jurisdiction . . . .

proceeding for intestate succession after a father's death. The court found these proceedings necessary for full protection of illegitimate children despite the state's interest in facilitating disposition of estates:

> [W]e recognize the legitimate concern that has been expressed in some of the cases from other jurisdictions about the risk of fraudulent claims against the putative father's estate. However, this risk is not significantly greater in paternity actions brought after the putative father's death than in many other types of actions, including an action by a party seeking to prove that he is the *legitimate* child of a decedent. Most importantly, we believe that the risk is outweighed by the injustice which is done to the innocent child by denying it an adjudication of paternity simply because its putative father happened to die.[65]

The Illinois legislature has made statutes allowing an adjudication of paternity after the father's death more acceptable to states concerned about fraud by giving plaintiffs a burden of proof by clear and convincing evidence.[66]

Despite the advantages of such legislative reform in improving the fairness of inheritance laws, however, the North Carolina General Assembly is unlikely to adopt an approach that balances the equation strongly in favor of the inheritance rights of illegitimate children.[67] It is worthwhile, therefore, to propose those changes most vital to the needs of illegitimate children which might reasonably be expected to be added to the paternal acknowledgement provisions of section 29-19(b) in the near future.

The rights of illegitimate minors who are entitled to their fathers' support must be afforded greater protection. Children under eighteen should be granted a one year grace period from the date of their father's death to establish paternity.[68] This amendment would benefit both informally acknowledged children and those who had not been supported by their father. In addition, an illegiti-

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The statute does not specify whether the proceeding must take place before the father's death. *Id.*; *see* Weber v. Anderson, 269 N.W.2d 892, 894-95 (Minn. 1978). The North Carolina statute is not open to judicial interpretation on this point because it refers specifically to paternity proceedings which must take place during the father's lifetime. N.C. GEN. STAT. § 29-19(b)(1) (1984). *See supra* notes 15-17 and accompanying text.

65. Weber v. Anderson, 269 N.W.2d 892, 895 (Minn. 1978). The North Carolina General Assembly was apparently concerned about preventing claims that would slow the disposition of estates, a point not addressed by the Minnesota court, and about fraud.

66. Act of June 11, 1975, § 2-2(h), ILL. ANN. STAT. ch. 110½, § 2-2(h) (Smith-Hurd Supp. 1984). *See also* Cody v. Johnson, 92 Ill. App. 3d 208, 415 N.E.2d 1131 (1980) (rejecting argument that decedent's heirs were deprived of equal protection because they could not introduce blood test to disprove paternity after the putative father's death).

Justice Brennan's dissent in *Lalli* suggests that a state's interest in preventing fraud would be served by a statute requiring "formal public acknowledgements of paternity," or by statutes requiring proof of paternity by "clear and convincing evidence, or even beyond a reasonable doubt." *Lalli*, 439 U.S. at 278-9 (Brennan, J., dissenting).

North Carolina requires proof beyond a reasonable doubt for support actions during the father's lifetime. N.C. GEN. STAT. § 49-14(b) (1984). Furthermore, it makes no special provisions for informally acknowledged children, thus carefully safeguarding estates from fraudulent claims. *See* notes 15-17 and accompanying text.

67. The historical treatment by North Carolina of illegitimate children's inheritance rights suggests this conclusion. For a discussion of the developments of North Carolina law on inheritance for illegitimate children, see *supra* notes 6-19 and accompanying text and note 44.

68. *See* LA. CIV. CODE ANN. art. 209 (West Supp. 1984).

mate minor will benefit from a rebuttable presumption of paternity if he can show that the alleged father was known to have lived with the mother at the time of conception[69] or that the minor lived with the father immediately after birth.[70] Although these changes would reduce the certainty of the disposition of estates, they are warranted because of the compelling needs of dependent children. Further, the inheritance rights of the heirs of a father who acknowledges and provides for his illegitimate child in his duly probated will should be granted as they pose no danger of fraudulent claims on the illegitimate child's estate.

Several commentators in addition to Judge Johnson have proposed that the North Carolina Supreme Court protect further the inheritance rights of illegitimate children by expounding a doctrine of constructive compliance with section 29-19(b).[71] A broad theory of constructive compliance would allow intestate inheritance whenever the child could establish proof of paternity by convincing evidence.[72] The objective would be to protect illegitimate children whose fathers voluntarily acknowledged their paternity and provided support, but failed to certify their paternity in strict compliance with section 29-19(b). The effect of this practice would be to transform the formal requirements of section 29-19(b) into a looser standard equivalent to "open and notorious recognition."[73]

An alternative standard for constructive compliance with section 29-19, more consistent with legislative intent[74] but less protective of illegitimate children, would be to grant inheritance rights if the illegitimate child's convincing proof of paternity includes at least one written document tending to establish acknowledgement of paternal obligation. Unfortunately, this standard would be more useful to the heirs of the child's father as in *Stern*, who could rely on a probated will, than it would be to illegitimate children. The doctrine could be extended, however, to a child who could show a consistent pattern of support documented by checks signed by the father to the child's mother or guardian or by checks for payment of expenses for the household in which the father and child were living as part of the proof of paternal acknowledgement.

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69. *Cf. Id.*, comment (b) ("[p]roof of filiation may include, but is not limited to: 'Informal' acknowledgement; scientific test results; acknowledgement in a testament; and proof that the alleged parents lived in a state of concubinage at the time of conception").

70. Note that while this change would help plaintiffs in *Stern*, it would not affect the result in *Herndon* in which the child began living with his father at age nine, but the parents never lived together. *See supra* note 54 and accompanying text. These presumptions follow from the assumption of the public generally that the man living with the mother or supporting the infant is its father.

71. *See* Note, *supra* note 56, at 1211 (1983); Note, *supra* note 6, at 211-12.

72. Such an approach would have compelled the North Carolina Court of Appeals to rule differently in both *Stern* and *Herndon*. In both *Stern* and *Herndon* the father openly acknowledged his paternity and had the child live with him and take his name. *See supra* notes 20 & 54 and accompanying text. On these facts the court would have found constructive compliance. If the North Carolina Supreme Court had been presented with this argument in Mitchell v. Freuler, 297 N.C. 206, 207, 254 S.E.2d 762, 762 (1979), it would have been required to recognize constructive compliance because decedent lived with his son for the final seven years of the decedent's life, took out insurance policies in his son's name, and openly acknowledged his paternity. In each of these cases, the danger of fraud was not present.

73. *See supra* note 58 and accompanying text.

74. One student commentator has suggested that equitable legitimation, and not constructive compliance, should be recognized, allowing all possible avenues of proof, such as photographs, letters and testimony, to prove paternal acknowledgement. *See* Note, *supra* note 36, at 254-55.

Though the holding in the *Stern* case was rather narrow, its implications are significant. *Stern* establishes for North Carolina the modest proposition that the same equal protection and statutory analysis is applicable under section 29-19(b) whether the plaintiff is an illegitimate child or the heir of an illegitimate child's father. It also upholds a standard of strict statutory construction of section 29-19. The decision's harsh result, however, should alert the North Carolina General Assembly that its concern for prevention of fraudulent claims upon estates has severely restricted the statute's ability to equalize inheritance rights between legitimate and illegitimate children and that statutory reform, therefore, is needed. In particular, the statute should be amended to address the problems of illegitimate minors not formally recognized by their fathers. Finally, the North Carolina Supreme Court should recognize the doctrine of constructive compliance with section 29-19(b) and establish a more flexible and equitable standard for the lower courts to follow.

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