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LEGITIMATION: THE LIBERAL JUDICIAL TREND IN CALIFORNIA

Legitimation "is a legislatively established process whereby once the father fulfills certain statutory conditions, the bastard's legal status becomes that of a child born in wedlock."¹ In California, although an illegitimate child inherits from and through his mother as if he were legitimate,² before he can inherit from and through his father either his parents must intermarry³ or he must be legitimated according to section 230 of the Civil Code.⁴ In addition, an illegitimate child may inherit from his father without intermarriage of his parents if his father acknowledges him in writing according to one of the provisions of section 255 of the Probate Code,⁵ but this is a limited succession provision which only enables the bastard to inherit from but not through his father.⁶

Society has gradually become more aware of the plight of the illegitimate and today, in California, the courts are gradually stretching the protective cloak of section 230 of the Civil Code to cover more and more bastards from the bare status of the illegitimate. The attitude throughout the United States towards illegitimates has grown sympathetic, and, while California has enacted fairly liberal statutes, the California courts have taken a *very* liberal position in protecting the interests of bastards to the extent that they have exceeded the literal bounds of the legitimation statute.⁷ Presented here is a discussion of the evolution of this liberal position and a recommendation

¹ Note, *Visiting Rights of a Putative Father*, 31 Mo. L. Rev. 561, 563 (1966).

² CAL. PROB. CODE § 255.

³ CAL. CIV. CODE § 215 provides: "A child born before wedlock becomes legitimate by the subsequent marriage of its parents."

⁴ CAL. CIV. CODE § 230 provides in part:

"The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. . . ."

⁵ CAL. PROB. CODE § 255 provides:

"Every illegitimate child, whether born or conceived but unborn, in the event of his subsequent birth, is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father by inheriting any part of the estate of the father's kindred, either lineal or collateral, unless, before his death, his parents shall have intermarried, and his father, after such marriage, acknowledges him as his child, or adopts him into his family; in which case such child is deemed legitimate for all purposes of succession. An illegitimate child may represent his mother and may inherit any part of the estate of the mother's kindred, either lineal or collateral."

⁶ Estate of De Laveaga, 142 Cal. 158, 75 P. 790 (1904) (construing former Cal. Civ. Code § 1387, now CAL. PROB. CODE § 255). See 1 THE CALIFORNIA FAMILY LAWYER 762 (Cal. Cont. Educ. Bar ed. 1962).

⁷ For a discussion of the power of the legislature to provide for legitimation, see Estate of Lund, 26 Cal. 2d 472, 159 P.2d 643 (1945).

that legislation be enacted to bring the statutes into accord with current judicial and social policy.

The Early Law

At common law, a child born out of wedlock was regarded as *filius nullius*, the son of nobody, and thus could not be the heir of anyone, not even his mother.⁸ He had no right to support from his parents⁹ and, at best, was only a child of the people, *filius populus*.¹⁰ Unlike the present California law, at common law a bastard could not be rendered legitimate by any subsequent act of the parents, such as marriage, and was doomed to the status of bastard for life.¹¹ As late as 1840 an English court stated the law that: "[T]he rule of descent to English land is that the heir must be born after actual marriage of its father and mother . . . this is a rule of positive inflexible nature, applying to and inherent in the land itself which is the subject of descent."¹²

Reasons for the second-class treatment of illegitimate children at common law are found in the English practice of monogomy and belief in the sanctity of marriage, especially as influenced by the church, and in a fear of fraudulent claims against a putative father.¹³ As one writer has phrased it:

It was natural that men, as legislators, would have limited their accidental offspring's claim against them, both economically and in terms of a family relationship, especially since the social status of the illegitimate mother did not equal their own. Moreover, their legitimate wives had an interest in denying the illegitimate's claim on their husbands since any such claim could be allowed only at the expense of the legitimate family.¹⁴

Initially all American jurisdictions, with the exception of Connecticut, adopted the doctrine of *filius nullius*.¹⁵ and even as late as the 19th century, virtually every state maintained this harsh doctrine.¹⁶ Over the years, however, a sense of justice has arisen and

the view of the common law has given way in large measure to the concept that the onus for the act of the parents cannot be visited justly upon the child and that placing responsibility for the support of the child upon the father equally with the mother, permitting it to become legitimated and to have a right to his name and to inheritance from him, will tend as well or better to deter the potential father than did the common law doctrine of irresponsibility, and at the same time conform more closely to our present ideas of justice.¹⁷

⁸ Robbins & Deak, *The Familial Property Rights of Illegitimate Children: A Comparative Study*, 30 COLUM. L. REV. 308, 316 (1930).

⁹ Note, *Illegitimacy*, 26 BROOKLYN L. REV. 45, 46 (1959).

¹⁰ 1 BLACKSTONE, COMMENTARIES 459 (Chitty ed. 1845).

¹¹ *Id.* at 455.

¹² *Birtwhistle v. Vardill*, 7 Eng. Rep. 1308, 1322 (H.L. 1840).

¹³ Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 489-93 (1967); Note, *Illegitimacy*, 26 BROOKLYN L. REV. 45, 47 (1959).

¹⁴ Krause, *supra* note 13, at 498.

¹⁵ Note, *Inheritance By, From and Through Illegimates*, 84 U. PA. L. REV. 531 (1936).

¹⁶ Note, *The Rights of Illegimates Under Federal Statutes*, 76 HARV. L. REV. 337 (1962).

¹⁷ *Estate of Lund*, 26 Cal. 2d 472, 480, 159 P.2d 643, 648 (1945).

Present Day Status of the Illegitimate

Today almost everywhere in the United States the illegitimate child can be legitimated by the subsequent marriage of his parents.¹⁸ Except in two jurisdictions, the illegitimate child can inherit from his mother as if born in wedlock, and he can usually inherit from his mother's relatives.¹⁹ However, only a minority of states permit him to inherit from or through his father without being legitimated by marriage, and virtually all of these states require a prior acknowledgment by the father.²⁰ Only in Arizona²¹ and Oregon²² has the illegitimate child attained equal status with the legitimate as to inheritance rights.

California Law

In California every illegitimate child is an heir, as if born legitimate, of his mother; he "may represent his mother and may inherit any part of the estate of the mother's kindred, either lineal or collateral."²³ However, the illegitimate child's right to inherit from his father is predicated upon his father's performance of certain acts²⁴ in accordance with statutory procedures. The California statutes provide three ways in which the illegitimate child can inherit from his father.

(1) The child becomes an heir of his father if his father acknowl-

¹⁸ See statutes collected in Note, *Illegitimacy*, 26 BROOKLYN L. REV. 45, 85 (1959).

¹⁹ See statutes collected in Note, *Illegitimacy*, 26 BROOKLYN L. REV. 45, 76-79 (1959). According to the note, New York and Louisiana permit inheritance from the mother only if she is not survived by lawful issue.

²⁰ See statutes collected in Note, *Illegitimacy*, 26 BROOKLYN L. REV. 45, 85 (1959).

²¹ ARIZ. REV. STAT. ANN. § 14-206 (1956) provides:

"(A) Every child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock, except that he is not entitled to the right to dwell or reside with the family of his father, if the father is married.

"(B) Every child shall inherit from its natural parents and from their kindred heir, lineal and collateral, in the same manner as children born in lawful wedlock."

²² ORE. REV. STAT. § 109.060 (1957) provides:

"The legal status and legal relationships and the rights and obligations between a person and his descendants, and between a person and his parents, their descendants and kindred, are the same for all persons, whether or not the parents have been married."

ORE. REV. STAT. § 111.231 (1957) provides:

"In applying the laws of descent and distribution of this state, full effect shall be given to all relationships as described in ORS 109.060."

²³ CAL. PROB. CODE § 255.

²⁴ In addition, CAL. CIV. CODE § 196a states that the father as well as the mother of an illegitimate child is responsible for the support of the child and provides for an action to enforce such responsibility. CAL. CIV. CODE § 231 provides for an action for declaration of paternity. However, "[a] judgment declaring the defendant to be the father does not change the status of the child as an illegitimate, even though the determination . . . is essential to enforce the child's support rights." 1 THE CALIFORNIA FAMILY LAWYER 757 (Cal. Cont. Educ. Bar ed. 1962).

edges paternity in a writing before a competent witness.²⁵ Any informal writing suffices,²⁶ and it "need not declare that the child therein acknowledged is illegitimate."²⁷ This method permits the child to inherit *from* but not *through* his father; he still is not permitted to inherit from his father's kindred. Section 255 of the Probate Code, which establishes this procedure is only a succession statute and not a legitimation statute.²⁸ However, the California courts have said that the statute is to be liberally interpreted to facilitate inheritance by an illegitimate child.²⁹

(2) An illegitimate can inherit from *and* through his father if his father and mother intermarry.³⁰ The marriage actually legitimates the child for all purposes and gives him the rights of a legitimate child, even if the parents marry after he reaches majority.³¹

(3) Even if the parents of the illegitimate child do not intermarry, he can inherit from and through his father as if born in lawful wedlock if his father complies with the terms of section 230 of the Civil Code and legitimizes his child,³² as discussed in detail below.

Section 230 of the California Civil Code

Section 230 of the California Civil Code is a particularly important statute since it gives an illegitimate child all the rights of a legitimate child without a marriage between his parents. The California courts have come to favor a very liberal interpretation of the statutes which provide for legitimation and inheritance by illegimates,³³ and lately, the courts have found the requirements of section 230 very easily satisfied.³⁴ The requirements under this statute are four: (1) The legitimator must be the natural father of the child; (2) he must publicly acknowledge that fact; (3) he must receive the child into his family with his wife's consent; (4) he must otherwise treat the child as legitimate.³⁵

In 1889 Chief Justice Beaty, dissenting in *Estate of Jessup*,³⁶ said:

²⁵ CAL. PROB. CODE § 255.

²⁶ *Blythe v. Ayres*, 96 Cal. 532, 31 P. 915 (1892) (letters to the child in which the father referred to her as his daughter sufficed).

²⁷ *Estate of Loyd*, 170 Cal. 85, 148 P. 522 (1915).

²⁸ *Estate of De Laveaga*, 142 Cal. 158, 75 P. 790 (1904).

²⁹ *See, e.g., Estate of Loyd*, 170 Cal. 85, 148 P. 522 (1915).

³⁰ CAL. CIV. CODE § 215. Also, the issue of a marriage which is void or annulled is legitimate. CAL. CIV. CODE § 85.

³¹ *Wolf v. Gall*, 32 Cal. App. 286, 163 P. 346 (1919).

³² *See Estate of Garcia*, 34 Cal. 2d 419, 210 P.2d 841 (1949), which clears up the confusion due to the overlapping of CAL. PROB. CODE § 255 and CAL. CIV. CODE § 230. The case holds that under section 255 there is no double requirement of reception and intermarriage for legitimation. *See also* 38 CALIF. L. REV. 322 for a discussion of *Estate of Garcia, supra*.

³³ *See, e.g., Estate of Lund*, 26 Cal. 2d 472, 481-82, 159 P.2d 643, 648 (1945); *Blythe v. Ayres*, 96 Cal. 532, 31 P. 915 (1892); *Estate of Paterson*, 34 Cal. App. 2d 305, 93 P.2d 825 (1939).

³⁴ *E.g., Hurst v. Hurst*, 227 Cal. App. 2d 859, 39 Cal. Rptr. 162 (1964); *Estate of Peterson*, 214 Cal. App. 2d 258, 29 Cal. Rptr. 384 (1963).

³⁵ *Wong v. Young*, 80 Cal. App. 2d 391, 393, 181 P.2d 741, 743 (1947). *Accord, Estate of Flood*, 217 Cal. 763, 21 P.2d 579 (1933). The text of CAL. CIV. CODE § 230 is set out in note 4 *supra*.

³⁶ 81 Cal. 408, 434, 22 P. 742, 749 (1889).

The only argument that can be made against his claim to inherit his father's estate rests upon a strict construction of the statutes, remedial in their nature, designed to secure to innocent unfortunates in his situation a just share of the rights to which they are by nature as fully entitled as are legitimate offspring. . . . I adhere to the view . . . that in cases of this kind the only strictness required is in proof of paternity. That being satisfactorily established by plenary proof, I think courts should lean strongly in favor of a finding that the father of an illegitimate child has done what every honest and humane man should be not only willing but eager to do, and what a just law would compel the unwilling to do.³⁷

In recent years the courts seem to have taken this approach to heart. In the following paragraphs the judicial treatment of the requirements of section 230 are examined.

Public Acknowledgment

The courts have not actually strayed from the apparent meaning of the "public acknowledgment" requirement. A father cannot hide the fact of paternity from his relatives³⁸ or maintain a clandestine household³⁹ if a child is to be legitimated under section 230. The courts have been quick to add, however, that no more is required than public acknowledgment of paternity; there need be no acknowledgment of illegitimacy.⁴⁰ A 1958 case, *Estate of Abate*,⁴¹ seems to liberalize the usual acknowledgment requirement⁴² that the father's family be told of the existence of the illegitimate child. In *Abate* the court found that a lack of communication to the family of the father did not defeat legitimation when the father was concerned about his own health (he died of cancer 15 days after the birth of the child) and never was "called on" to discuss the child.⁴³ In coming to its decision in *Abate* the court called attention to the principle set out in *Estate of Gird*⁴⁴ that "[t]here is no provision as to what shall constitute a 'public acknowledgment,' and the words of the statute must be taken in their ordinary sense"⁴⁵

Reception into the Family

The family can consist of the man, his illegitimate children and their mother,⁴⁶ or merely of the father and his illegitimate child.⁴⁷

³⁷ *Id.* at 435, 22 P. at 750.

³⁸ *Estate of Baird*, 193 Cal. 225, 223 P. 974 (1924); *Estate of Jessup*, 81 Cal. 408, 22 P. 742 (1899).

³⁹ *Estate of Baird*, 193 Cal. 225, 223 P. 974 (1924).

⁴⁰ *Estate of Flood*, 217 Cal. 763, 778, 21 P.2d 579, 584 (1933), where the court said: "To require references to the child as illegitimate would, therefore, prevent legitimation and defeat the very object of the statute." *Blythe v. Ayres*, 96 Cal. 532, 589, 31 P. 915, 926 (1892), where the court said: "No sound reason can be adduced why the acknowledgment should contain a declaration of bastardy."

⁴¹ 166 Cal. App. 2d 282, 333 P.2d 200 (1958).

⁴² Prior decisions required that the father disclose paternity to his relatives. Cases cited note 38 *supra*.

⁴³ *Estate of Abate*, 166 Cal. App. 2d 282, 290, 333 P.2d 200, 205-06 (1958).

⁴⁴ 157 Cal. 534, 108 P. 499 (1910).

⁴⁵ *Id.* at 542, 108 P. at 503; *Estate of Abate*, 166 Cal. App. 2d 282, 288, 333 P.2d 200, 204 (1958).

⁴⁶ *Estate of Gird*, 157 Cal. 534, 108 P. 499 (1910).

⁴⁷ *Estate of Jones*, 166 Cal. 108, 115-16, 135 P. 288, 290 (1913); *Darwin v. Ganger*, 174 Cal. App. 63, 72, 344 P.2d 353, 358 (1959).

As early as 1892 in *Blythe v. Ayres*⁴⁸ the court held that if there is no family proper into which a child could be received, the element of reception into the family is foreign to the case. In *Blythe*, the father had never seen his child, but the fact that he had contributed to her support and spoke proudly of her to all he knew satisfied the court that the daughter had been legitimated.

Today the courts continue this nebulous concept of family home into which a father may receive his child. In the recent case of *Hurst v. Hurst*⁴⁹ the mere renting of an apartment in the name of father, mother and child was enough to constitute a home into which the child was received, although the child and his mother never entered the apartment. The court considered this sufficient reception because the father did not have any other home.⁵⁰ In coming to this conclusion the court was supported by several recent liberal decisions which strained to satisfy the reception requirements of the statute.⁵¹ In one of these cases the court found that occasional visits to the father's house, never for longer than from noon to dusk, in addition to payment of \$100 towards the illegitimate daughter's wedding, were sufficient to constitute reception.⁵² In another recent case the court found that a father legitimated his *unborn* child by living with its mother until she left him—a few days before the birth of the child.⁵³

The *Hurst* court, finally, called attention to *Estate of Peterson*⁵⁴ where the court found the plaintiff legitimated by a few visits and letters to her father after she had reached majority. In *Peterson* the court found these acts sufficient to constitute reception because "[i]t is apparent that few adults, however desirous they might be of attaining a legitimate status, would be willing to abandon their own families and leave their settled places of residence in order to achieve this goal."⁵⁵ Indeed, in light of these cases, it is understandable that the *Hurst* court aligned its decision with the prevailing liberal attitudes and found adequate reception in the mere renting of an apartment.⁵⁶

With the Consent of His Wife

Of course if a man has no wife this requirement is omitted;⁵⁷ but if the father has a wife from whom he is separated, a child cannot be

⁴⁸ 96 Cal. 532, 592-93, 31 P. 915, 927-28 (1892).

⁴⁹ 227 Cal. App. 2d 859, 39 Cal. Rptr. 162 (1964).

⁵⁰ *Id.* at 870, 39 Cal. Rptr. at 170.

⁵¹ *Estate of Peterson*, 214 Cal. App. 2d 258, 29 Cal. Rptr. 384 (1963); *Lavell v. Adoption Institute*, 185 Cal. App. 2d 557, 8 Cal. Rptr. 367 (1960); *Estate of Wilson*, 164 Cal. App. 2d 385, 330 P.2d 425 (1958).

⁵² *Estate of Wilson*, 164 Cal. App. 2d 385, 330 P.2d 425 (1958).

⁵³ *Lavell v. Adoption Institute*, 185 Cal. App. 2d 557, 8 Cal. Rptr. 367 (1960).

⁵⁴ 214 Cal. App. 2d 258, 29 Cal. Rptr. 384 (1963).

⁵⁵ *Id.* at 263, 29 Cal. Rptr. at 386.

⁵⁶ See B. WITKIN, SUMMARY OF CALIFORNIA LAW 845 (1965 Supp.): "The requirement of reception into the family home, badly strained by *Estate of Peterson* . . . has been virtually eliminated by *Hurst v. Hurst* . . ."

⁵⁷ *Serway v. Galentine*, 75 Cal. App. 2d 86, 170 P.2d 32 (1946).

legitimated without her consent.⁵⁸ In 1959 a federal court, construing California law, anticipated a liberalization of this requirement and held that in light of the recent liberal California decisions, consent of the de facto wife in lieu of that of the legal wife was sufficient.⁵⁹ California courts, however, have maintained that the statute requires consent of the legal wife.⁶⁰ Nevertheless, in 1965, in *Hurst v. Hurst*,⁶¹ the California appellate court devised an ingenious way to avoid the obstacle of consent. The court granted a *nunc pro tunc* decree at the son's request so that his father's divorce would relate back prior to the alleged acts of legitimation. In this way the father's legal wife did not have to give her consent for the child to have been legitimated. Thus, while California courts say that consent of the wife is required, the *Hurst* decision indicates a willingness to liberalize this requirement of the statute.

Treat the Child as Legitimate

The standard for determining whether the child is treated as legitimate is the manner in which a parent would treat his legitimate child.⁶² The test is somewhat subjective: the father need not necessarily treat the child as the majority of fathers would, but as *he* would treat his own legitimate child.⁶³ The court has held that if the father were to refer to him "as his *illegitimate child*, this would constitute a failure to *treat the child as legitimate*"⁶⁴

The Adoption Cases

Two recent cases do not liberally construe section 230. Both are adoption cases and both interpret the reception requirement of the statute.

In *Guardianship of Truschke*,⁶⁵ the father's consent to the adoption of his offspring by another was found not to be necessary, as he did not legitimate the child merely by spending money and buying clothes in expectation of its birth. The court said that this was not constructive reception.⁶⁶ In *Adoption of Irby*,⁶⁷ the court held that the father did not legitimate his child by acknowledging it and trying to see it over the mother's objection. Perhaps these more literal interpretations can be explained by the fact that they *are* adoption cases involving very young natural fathers. Courts are usually governed by what is in the best interest of the child.⁶⁸ As the court said in *Irby*: "The resolution of the issues herein does not require the application of the policy of the law which favors legitima-

⁵⁸ *Laugenour v. Fogg*, 48 Cal. App. 2d 848, 120 P.2d 690 (1942).

⁵⁹ *McDaniel v. Flemming*, 172 F. Supp. 153 (S.D. Cal. 1959).

⁶⁰ *Adoption of Graham*, 58 Cal. 2d 899, 377 P.2d 275 (1962); *Darwin v. Ganger*, 174 Cal. App. 2d 63, 344 P.2d 353 (1959).

⁶¹ 227 Cal. App. 2d 859, 39 Cal. Rptr. 162 (1965).

⁶² *Estate of Gird*, 157 Cal. 534, 108 P. 494 (1910).

⁶³ *Blythe v. Ayres*, 96 Cal. 532, 31 P. 915 (1892).

⁶⁴ *Estate of Flood*, 217 Cal. 763, 778, 21 P.2d 579, 584 (1933).

⁶⁵ 237 Cal. App. 2d 75, 46 Cal. Rptr. 601 (1965).

⁶⁶ *Id.* at 79, 46 Cal. Rptr. at 604.

⁶⁷ 226 Cal. App. 2d 238, 37 Cal. Rptr. 879 (1964).

⁶⁸ *Id.* at 242, 37 Cal. Rptr. at 882 (dictum).

tion, since in any event the child will be legitimated, either by acknowledgment by its father under Civil Code, section 230, or by adoption by the respondents.⁷⁶⁹

Conclusion

It is clear that California courts favor legitimation when legitimation is in the best interest of the child involved. The courts have given the legitimation statute a very liberal interpretation⁷⁰ and have recognized the interest of society in legitimation.⁷¹ The California courts have gone far to see that the sins of the parents are not visited upon the illegitimate child. Instead of straining the existing statutes to their bursting points, however, why not enact a new and more liberal legitimation statute? Perhaps the approach of Arizona and Oregon deserves consideration.⁷² In these two states the illegitimate is treated as legitimate in all matters concerning property rights and obligations;⁷³ and, technically, in Arizona there is no status of illegitimacy.⁷⁴ After all, an illegitimate child is still the offspring of his father, just as is his legitimate half-brother. Is there any reason why he should be deprived of inheritance rights from his father because he was his father's mistake?

In the opinion of one author, Harry D. Krause, such discrimination between the rights of legitimate and illegitimate children constitutes a violation of equal protection of the law.⁷⁵ Certainly, as Krause points out, the basis for the class distinction is faulty. The reasons given today for the distinction between legitimate and illegitimate are those which have been given throughout the ages: discouragement of promiscuity; protection of the family unit; and uncertainty of paternity.⁷⁶ Yet these arguments are easily refuted today. Statistics show that laws governing legitimacy have not protected the family unit and have not discouraged promiscuity.⁷⁷ In fact, a statutory imposition of responsibility would probably be more effective in discouraging promiscuity and protecting the family unit

⁶⁹ *Id.* at 240, 37 Cal. Rptr. at 881.

⁷⁰ See, e.g., *Estate of Lund*, 26 Cal. 2d 472, 159 P.2d 643 (1945); *Blythe v. Ayres*, 96 Cal. 532, 31 P. 915 (1892).

⁷¹ *Davis v. Stroud*, 52 Cal. App. 2d 308, 315, 126 P.2d 409, 412-13 (1942), where the court stated that it is important to determine paternity so that the father rather than society be required to support the child.

⁷² CAL. CIV. CODE § 230 was enacted in 1872 and was based on Cal. Stats. 1869-70, ch. 385, § 9, at 531. CAL. PROB. CODE § 255 was enacted in 1931 and was based on former Cal. Civ. Code § 1387 and Cal. Stats. 1850, ch. 96, § 2, at 220. The Arizona statute, on the other hand, was enacted in 1956, and the Oregon statute in 1957.

⁷³ ORE. REV. STAT. §§ 111.231, 109.060 (1957). The text of these statutes is set out in note 22 *supra*.

⁷⁴ ARIZ. REV. STAT. ANN. § 14-206 (1956). The text of this statute is set out in note 21 *supra*.

⁷⁵ Krause, *supra* note 13.

⁷⁶ *Id.* at 489-93.

⁷⁷ For example, there were 7.1 illegitimate births per 1000 unmarried women in the United States in 1940, and the rate increased to 23.4 births per 1000 unmarried women in 1964. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 496 (1966).

than are the present legitimacy laws.⁷⁸ As to the problem of uncertainty of paternity, as long as there are careful means of establishing paternity,⁷⁹ that objection is not valid. Once paternity is established, there is no reason the illegitimate child should not be admitted to the rights of the legitimate.⁸⁰

If fathers naturally feel less affection for their illegitimate offspring and do not wish to include them as heirs, they should disinherit such children by will and should not be aided by the legislature.⁸¹ As stated in *Davis v. Stroud*,⁸² it is in the interest of the public that parents care for their children and not leave the responsibility to the state. It is true that the illegitimate can obtain support from his father through a support order which will last after the death of the father and will be a claim against his estate.⁸³ However, a support order is only for the benefit of minor or incapacitated children⁸⁴ and will not provide for an indigent adult who could have inherited from his father. It is also possible that a minor child could be the recognized offspring of his father and yet never have obtained a support order before the death of the father.⁸⁵ Unless such child has been legitimated under section 230 or has been acknowledged in writing prior to the death of his father under California law he can expect nothing from the estate of his father.

It is true that legitimate children and the wife of a deceased father/husband would tend to be most annoyed at the appearance of some unknown bastard at the moment the estate is to be settled. However, the illegitimate child exists as the child of his father, and there is no rational reason with modern blood tests⁸⁶ and the increasing incidence of fragmented families resulting from divorce to deny him the full rights of the legitimate.⁸⁷ An illegitimate son is as much

⁷⁸ See *Estate of Lund*, 26 Cal. 2d 472, 480, 159 P.2d 645, 648 (1945) (dictum).

⁷⁹ An action for declaration of paternity is provided by CAL. CIV. CODE § 231. If a party refuses to submit to a court-ordered blood test in an action where paternity is a relevant fact, the court may resolve the question of paternity against that party. CAL. EVIDENCE CODE § 892. For a discussion of blood tests and proof of facts in determining the issue of legitimacy, see Note, *Parent and Child: Blood Tests as Proof of Non-Parentage*, 39 CALIF. L. REV. 277 (1951).

⁸⁰ See *Estate of Jessup*, 81 Cal. 408, 434, 22 P. 742, 749 (1889) (dissenting opinion of Beaty, C.J.).

⁸¹ See Krause, *supra* note 13, at 498.

⁸² 52 Cal. App. 2d 308, 315, 126 P.2d 409, 412-13 (1942).

⁸³ *DeSylva v. Ballentine*, 96 Cal. App. 2d 503, 215 P.2d 780 (1950).

⁸⁴ CAL. CIV. CODE § 241.

⁸⁵ "Although many and perhaps most of them later acquire full citizenship by adoption or legitimation, there are those, and they probably still count millions, who will never have a father; many of them because the mother was permitted by the law to barter away the paternity suit." Ehrenzweig, *The "Bastard" in the Conflict of Laws—A National Disgrace*, 29 U. CHI. L. REV. 498, 500 (1962).

⁸⁶ For a discussion of bloodtests and proof of facts in determining the issue of legitimacy, see Note, *Parent and Child: Blood Tests as Proof of Non-Parentage*, 39 CALIF. L. REV. 277 (1951).

⁸⁷ "No excuse remains to continue the disabilities and moral prejudices of another day at the expense of today's children and to perpetrate the an-

a brother of the child of a present marriage as is the child of a previous marriage. As long as the illegitimate is proved to be the child of the man in question, the child should be entitled to the same treatment as any other offspring of his father.

Suggested Statute

The adoption cases⁸⁸ give us some indication that a legitimate status is not always the best solution for the plight of the illegitimate child. Hence, perhaps a statute, such as that of Arizona,⁸⁹ which makes all children the legitimate children of their natural parents, is too broad. Possibly a detailed statute would be more flexible and would better protect the interests of the child in each case.⁹⁰ A possible solution for California would be a codification of current judicial ideas underlying the liberal cases:

(a) A child is the legitimate child of its mother for all purposes. He is the heir of his mother and represents his mother in inheriting from her kindred, lineal or collateral.

(b) An illegitimate child becomes the legitimate child of its natural father for all purposes, including inheritance from and through his father if the court finds it in the best interest of the child and if:

(1) The father acknowledges his relationship to the child in writing; or

(2) The father and mother marry either prior to or after birth, whether or not the marriage is later declared void for any reason; or

(3) The father acknowledges the child as his own and treats it as such; or

(4) The father's paternity is declared in a judicial proceeding for the establishment of that fact.⁹¹

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cient double standard by force of law." Krause, *Bringing the Bastard into the Great Society, A Proposed Uniform Act on Legitimacy*, 44 TEXAS L. REV. 829, 859 (1966).

⁸⁸ Guardianship of Truschke, 237 Cal. App. 2d 75, 46 Cal. Rptr. 601 (1965); Adoption of Irby, 226 Cal. App. 2d 238, 37 Cal. Rptr. 379 (1964). See text at notes 65-69 *supra*.

⁸⁹ The text of the Arizona statute is set out in note 21 *supra*.

⁹⁰ One author has suggested a detailed uniform act on illegitimacy, and he maintains that such detailed provisions are preferable to the statutes of Arizona and Oregon, because the proposed uniform provisions permit flexibility in avoiding legitimation when legitimation is not in the best interest of the child. Krause, *supra* note 87, at 845.

⁹¹ CAL. CIV. CODE § 231, provides: "An action may be brought for the purpose of having declared the existence or nonexistence between the parties of the relation of parent and child by birth or adoption." The child or the mother may bring the action. *Pasquale v. Pasquale*, 219 Cal. 408, 27 P.2d 76 (1933).

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