

The State of South Carolina



Opinion No 25-9
P-15

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January 21, 1986

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Dear Mr. Pope:

You have requested on behalf of the Honorable Frank H. Ward, Probate Judge of Newberry County, the guidance of this Office relative to inheritance by illegitimate children from their fathers' estates. As you suggested in your letter, the law in this area is most complex and uncertain and thus definitive conclusions upon the various issues are, for the most part, unreachable. Nonetheless, I will attempt to provide some guidance to you and the judge in this area.

On April 26, 1977, the U.S. Supreme Court declared an Illinois statute which allowed illegitimate children to inherit only from the mothers' estates to be violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution holding that it unlawfully discriminated against illegitimates. Trimble v. Gordon, 430 U.S. 762 (1977). The then-existing scheme for intestate succession in South Carolina as it related to illegitimates was similar to the Illinois statute and authorized illegitimates to inherit only from their mothers' estate. Section 21-3-30, South Carolina Code of Laws (1976).

The South Carolina Supreme Court on April 2, 1984, issued its opinion wherein it concluded that the limitation in § 21-3-30 that provides for inheritance by illegitimates only from their mothers' estates was violative of equal protection. Wilson v. Jones, 281 S.C. 230, 314 S.E.2d 341 (1984). Significantly, that opinion concluded as well that "illegitimate children can inherit from their fathers' estates but only those whose fathers' deaths occurred after April 26, 1977." Id., S.E.2d at 343. Of course, § 21-3-30

Gary T. Pope, Esquire
January 21, 1986
Page 2

of the 1976 Code did not expressly preclude illegitimates from inheriting from their fathers' estates; it provided instead that an illegitimate may inherit from his mother. Since at common law an illegitimate could not inherit from his natural father in the absence of statutory authorization, (10 C.J.S. Bastards, § 26 and 10 Am.Jur.2d Bastards, § 146) and § 21-3-30 authorized illegitimates to inherit only from their mothers' estates, there existed no statutory authority in South Carolina for an illegitimate to inherit from his father's estate. Wilson, however, now instructs that as to those illegitimates whose fathers died on or after April 26, 1977, § 21-3-30 must be read as authorizing them to inherit from their fathers' estates in the same fashion that they may inherit from their mothers' estates.

Importantly, § 21-3-30 was amended by Act No. 155 of 1985 effective June 20, 1985, and provides in relevant part:

Any illegitimate child whose father dies intestate possessed of any real or personal property is an heir-at-law if paternity has been established by order or decree of a court of competent jurisdiction during the lifetime of the father or the father has signed an instrument acknowledging the child as his. 1/

As to those illegitimates whose fathers died after June 20, 1985, their right to inherit is governed by Act No. 155. Thus, an illegitimate who falls within this category is an heir-at-law of his father and may inherit as a legitimate child in the manner prescribed in § 21-3-20 provided that paternity has been established by judicial decree or order during the father's lifetime or the father has acknowledged the child as his by written instrument.

1/ I note that statutory provisions similar to this amended provision have been held to be constitutional. See, Lalli v. Lalli, 439 U.S. 259 (1978); Mitchell v. Frueler, 297 N.C. 206, 254 S.E.2d 762 (1979).

Gary T. Pope, Esquire
January 21, 1986
Page 3

The language of Act 155 provides no indication that it is to be applied retroactively to govern inheritance by illegitimates whose fathers died prior to June 20, 1985. And, ordinarily a statute will be applied prospectively only, unless there is a clear legislative intent to the contrary. Schall v. Sturm, Ruger Co., Inc., 278 S.C. 646, 300 S.E.2d 735 (1983); Merchants Mutual Insurance Co. v. S.C. Second Injury Fund, 277 S.C. 604, 291 S.E.2d 667 (1982). Regarding statutes affecting inheritance, the Court has specifically provided that such statutes should only be applied prospectively.

As the right of one person to inherit property of another becomes vested on the death of the latter, the statutes in force at the time of his death, as against statutes in force at a prior or subsequent date govern the disposition of an estate. [cite omitted]

* * *

The state has no power to divest or impair vested rights... .

Muldrow v. Caldwell, 173 S.C. 243, 250-252, 175 S.E. 501 (1934).

An analogous situation was presented in Lucas v. Hancock, 383 S.W.2d 491 (Ark. 1979). There, Arkansas, similar to South Carolina, had amended its inheritance statutes after Trimble v. Gordon, *supra*, to provide for inheritance by illegitimates only upon presentment of certain criteria that must have occurred during the lifetime of the illegitimate's father. The Court ruled that inheritance by illegitimates whose fathers died prior to the passage of the amendatory provision, were not governed by the statute; and thus refused to give the provision retroactive effect. The Court identified that the right of an illegitimate to inherit vested upon the death of his father. Courts in other jurisdictions have reached the same conclusion. See, Cox v. Schweiker, 684 F.2d 310 (5th Cir. 1982); Nagle v. Wood, 423 A.2d 875 (Conn. 1979). We believe that our court would follow its precedent noted in Muldrow v. Caldwell, and hold that Act 155 does not operate retroactively and thus does not govern inheritance by illegitimates whose fathers died prior to June 20, 1985, the effective date of the statute.

Gary T. Pope, Esquire
January 21, 1986
Page 4

As earlier mentioned, inheritance by illegitimates, whose fathers died prior to June 20, 1985, but after April 26, 1977, is governed by the law as defined in Wilson v. Jones, supra. Our Court in Wilson provided no indication that paternity must be established by a court during the lifetime of the father or be acknowledged by written instrument in order for an illegitimate to inherit from his father. Indeed, the Court's express language "we hold illegitimate children can inherit from their fathers' estates" and its recognition that inheritance by illegitimates from their fathers' and mothers' estates should be on equal basis instructs otherwise. Similar conclusions have been reached in Lucas v. Hancock, supra; In Re: Maislin's Estate, 436 A.2d 539 (N.J. 1981); and Cox v. Sweiker, supra. In advising I direct your attention to the significant body of law that holds that a paternity action does not survive the death of the putative father. See, Hayes v. Smith, 480 A.2d 425 (Conn. 1984); Anno. 58 A.L.R.3d 188, 191 "cases almost unanimously support that bastardy proceedings may not be instituted after death of the putative father..."; 10 Am.Jur.2d, supra, § 97. Nonetheless, Wilson apparently assumes that at least for the purpose of establishing inheritance rights, paternity may be established after the death of the father. It is interesting and probably indicative of legislative intent that § 20-7-420(7) as amended after the Court's decision in Wilson by Act 484 of 1984, provides that an action to determine paternity may be brought "if the father is deceased, in the county in which proceedings for probate of his estate have been or would be commenced," thus legislatively providing a forum and venue for determining paternity after the death of the putative father.

I advise as a matter of procedure that if an illegitimate claims a right of inheritance in the estate of his putative father, whose death occurred after April 26, 1977, and prior to June 20, 1985, and paternity has not been established during the lifetime of the decedent by judicial order, the Probate Court should refer the issue of paternity to the appropriate Family Court for determination. As provided in § 20-7-420(7), the Family Court maintains exclusive jurisdiction to determine paternity, and this jurisdiction survives the death of the putative father. The Family Courts could then determine whether the paternity proceedings may be barred by laches or the appropriate statute of limitation (see, S.C. Dept. of Social Services v. Lowman, 269 S.C. 41, 236 S.E.2d 194 (1977)) and whether the illegitimate has met his burden of proof. With regard to

Gary T. Pope, Esquire
January 21, 1986
Page 5

the burden of proof, courts have recognized that the establishment of paternity after the death of the putative father is an area presenting unique and difficult problems since the availability of the father is a substantial factor contributing to the reliability of the fact-finding process. Lalli v. Lalli, supra; Cody v. Johnson, 415 N.E.2d 1131 (Ill. 1980); Hayes v. Smith, supra. Thus, the Family Court may well be justified in requiring a higher degree of proof than that ordinarily required in a paternity action brought during the lifetime of the father wherein the father is available as a witness and the Court has the benefit of reliable scientific evidence. 2/

You have additionally asked whether § 21-7-480 is unconstitutional insofar as it limits legacies to illegitimate children from their fathers. This Office in the issuance of its opinion does not declare a legislative enactment to be unconstitutional. We will advise on occasion our opinion as to how a court may rule in the future when presented with the constitutional question. Incidentally, in any review of legislation we presume all statutes to be constitutional until they are otherwise declared by a court. We advise in response to your question that the courts of this State would likely conclude that § 21-7-480 is unconstitutional insofar as it limits legacies to illegitimates from their fathers. However, since we have located no court decisions that have conclusively determined such a statute to be unconstitutional, and since § 21-7-480 was applied by our State Supreme Court to limit a legacy as recently as 1979 without any comment upon its constitutionality, we express some reservation as to this conclusion. 3/

2/ During the lifetime of the father, paternity may be established by a preponderance of the evidence. Albert v. Blackwell, 280 S.C. 128, 311 S.E.2d 102 (S.C.App. 1984).

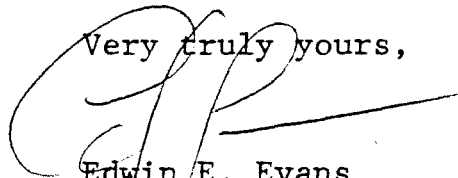
3/ The State Supreme Court in Ray v. Tate, 272 S.C. 472, 252 S.E.2d 568 (1979), applied § 21-7-480 to limit a legacy to a paramour in 1979 without comment upon its constitutionality; however, the constitutionality of the statute was not at issue. I note as well that a recent decision of the South Carolina Supreme Court has limited the prohibition of § 21-7-480 upon excessive legacies to illegitimates finding that it applies only if the illegitimate is born during the time his father is lawfully married. See, Williford v. Downs, 270 S.C. 110, 240 S.E.2d 654 (1978).

Gary T. Pope, Esquire
January 21, 1986
Page 6

Theories offered to justify § 21-7-480 insofar as it restricts legacies to illegitimates would likely be that (1) it encourages legitimate family relationships; and (2) it recognizes a legitimate concern that fathers of illegitimate children will provide for the illegitimate childrens' financial concern to the neglect of their wives' or legitimate children. The U.S. Supreme Court's reasoning in Trimble v. Gordon, *supra*, rejected similar arguments since the discrimination of the illegitimate child is not reasonably related to the goal of controlling parents behavior. In addition, our Court's ruling in Boan v. Watson, 281 S.C. 516, 316 S.E.2d 401 (1984), strongly suggests that § 21-7-480, insofar as it treats fathers of illegitimate children differently from mothers of illegitimate children, would be found to be unconstitutional. In Boan, our Court reasoned that gender based economic distinctions that by law are applicable at the time of death are unconstitutional.

I recognize that the research and conclusions contained herein leave many issues unanswered; nonetheless, I have, where practical, provided guidance to the Probate Court. If I may further discuss these questions with you, please call upon me.

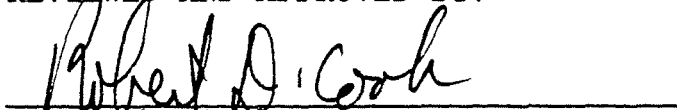
Very truly yours,



Edwin E. Evans
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