

1980 S.C. Op. Atty. Gen. 151 (S.C.A.G.), 1980 S.C. Op. Atty. Gen. No. 80-99, 1980 WL 81981

Office of the Attorney General

State of South Carolina

Opinion No. 80-99

October 13, 1980

***1 SUBJECT: Illegitimate Children, Parent and Child**

(1) An illegitimate child is excluded from sharing in the recovery under §§ 15-51-10 et seq. [Wrongful Death Act] for the wrongful death of his father.

(2) Insofar as §§ 15-51-10 et seq. totally exclude an illegitimate from recovery for the wrongful death of his father, they are unconstitutional.

TO: The Honorable Patsy S. Stone
Judge of Probate

QUESTIONS:

1. Does South Carolina law prohibit an illegitimate child from recovering for the wrongful death of his father?
2. If so, is this prohibition unconstitutional?

STATUTES AND CASES:

§§ 15-51-10 et seq., and § 20-1-60, Code of Laws of South Carolina, 1976, as amended; [Levy, etc. v. Louisiana, et al.](#), 391 U.S. 68; [Trimble v. Gordon](#), 430 U.S. 762; [Weber v. Aetna Casualty](#), 406 U.S. 164; [Parham v. Hughes](#), 441 U.S. 347; [Lalli v. Lalli](#), 439 U.S. 259; [U.S. v. Clark](#), 445 U.S. 23, 63 L.Ed.2d 171; [McDonald v. So. Railway Co.](#), 71 S.C. 352, 51 S.E. 138; [Gregg v. Coleman](#), 235 F.Supp. 237, 240 (E.D.S.C.); 78 A.L.R.3d 1230 Annot. 'Right of Illegitimate Child, After [Levy v. Louisiana](#), To Recover Under Wrongful Death Statute For Death of Putative Father'.

DISCUSSION:

You have presented this office with the following situation. An illegitimate child who has lived in his father's household and has been acknowledged, wishes to share in the distribution of funds derived from an action for the wrongful death of his father. Inquiry is made as to whether or not he has this right. It is the opinion of this office that under the South Carolina Wrongful Death Statutes, he does not.

The statutory scheme in South Carolina governing wrongful death actions [§§ 15-51-10 et seq., Code of Laws of South Carolina, 1976, as amended] makes no provision for an illegitimate child to share in the recovery of a wrongful death action for the death of his father. § 15-51-20 provides, inter alia, that the wrongful death action 'be for the benefit of . . . child or children' of the deceased. While arguably this section could be construed to include illegitimates [but compare, [McDonald v. So. Railway](#), 71 S.C. 352, 51 S.E. 138], § 15-51-30 clarifies the legislative intent to treat illegitimates differently. Said section explicitly provides for recovery by an illegitimate for the wrongful death of his mother. By intentional omission, under the South Carolina statutory scheme an illegitimate is excluded from recovery for the wrongful death of his father. Cf. [Gregg v. Coleman](#), 235 F.Supp. 237, 240 (E.D.S.C.).

This statutory scheme which has the effect of totally prohibiting an illegitimate child from sharing in the recovery of the benefits of a wrongful death action for the death of his father, while permitting legitimates to recover and while permitting illegitimates to recover for the wrongful death of their mother, is violative of the equal protection clause of the Fourteenth Amendment. ¹ [Levy, etc. v. Louisiana, et al.](#), 391 U.S. 68; [Parham v. Hughes](#), 441 U.S. 347; [Trimble v. Gordon](#), 430 U.S. 762.

*2 In [Levy](#), the Supreme Court held unconstitutional a Louisiana statute which barred illegitimate children from maintaining an action for their mother's wrongful death stating:
legitimacy or illegitimacy at birth has no relation to the nature of the wrong allegedly inflicted on their mother . . . it is invidious to discriminate against them when no action, conduct or demeanor of theirs is possibly relevant to the harm that was done to the mother.

Thus, the court determined that the state's classification was not a rational one.

Subsequent court decisions have reaffirmed that denial to an illegitimate the right to recover for the wrongful death of his father, based upon the status of illegitimacy, is an invidious discrimination violative of equal protection. [See](#), [78 A.L.R.3d, 1230 Annot.](#) 'Right of Illegitimate Child, After [Levy v. Louisiana](#), To Recover Under Wrongful Death Statute For Death of Putative Father'; also, [Weber v. Aetna Casualty](#), 406 U.S. 164. CONCLUSION

1. South Carolina's statutory scheme for wrongful death [[§ 15-61-20 et seq.](#)] makes no provision for an illegitimate child to share in the recovery for the wrongful death of his father.
2. This absolute prohibition of an illegitimate sharing in the recovery for the wrongful death of his father is invidious and a denial of equal protection.

Edwin E. Evans
Assistant Attorney General

Footnotes

- 1 South Carolina law provides no procedure short of subsequent marriage to the mother by which a father may legitimize an illegitimate child. [See](#), [§ 20-1-60](#). This limited method was unavailable in this case because the mother was married to another man. The child was without recourse to alter his 'illegitimacy,' though it was no fault of his own. As such he was totally barred from recovery under South Carolina's statutory scheme for the wrongful death of his father, even though he lived in the same household.
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