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The ABCD'S of Indiana Legitimation Law

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THE ABCD'S OF INDIANA LEGITIMATION LAW

In 1954, the state legislature, through the passage of the new Probate Code,[1] repealed Indiana's legitimation statute.[2] The new provisions were meant to improve the legal position of illegitimates. However, the recent Indiana Court of Appeals decision in *A—. B—. v. C—. D—.*[3] brought to light an unexpected detrimental bi-product of the current Probate Code. The repeal of Indiana's old legitimation statute, combined with the appellate court's interpretation of the present probate statute in this case, have, in effect, made illegitimacy a permanent status in Indiana. There are presently no means by which the parents of an illegitimate child can legitimate that child. This development has diverted Indiana from its previous steady progress in the field of illegitimacy law and therefore deserves critical examination.

Repeal of the Legitimation Law

When the Probate Code Study Commission proposed the adoption of its new Probate Code to the state legislature in 1953, its recommendation included the repeal of many of the old laws concerning inheritance. A part of the Probate Code package was legislation repealing Indiana's legitimation statute (§ 6-2310).[4] That law had provided for the legitimation of children born out of wedlock, when the parents were subsequently married to each other and the husband acknowledged the child as his own.[5] Indiana's legitimation statute had been included in the

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1. Ch. 112, [1953] Ind. Acts 295, Ind. Code §§ 29-1-1-1 to 29-2-18-2 (1971), Ind. Ann. Stat. §§ 6-101 to 8-218 (1953).

2. Ch. 112, § 2501, [1953] Ind. Acts 409.

3. —— Ind. App. ——, 277 N.E.2d 599 (1971).

4. Ch. 112, § 2501, [1953] Ind. Acts 409.

5. "If a man shall marry the mother of an illegitimate child, and acknowledge it as his own, such child shall be deemed legitimate." Ind. Ann. Stat. § 6-2310 (1933). In interpreting § 6-2310, the Indiana appellate court stated:

> [W]here a man marries the mother of an illegitimate child, and acknowledges the child as his own, the effect of the statute is to change the legal status of the child from that of illegitimacy to legitimacy; that the status of the child being thus fixed, stands for all purposes; that there are no degrees of legitimacy in this State.

Harness v. Harness, 50 Ind. App. 364, 370, 98 N.E. 357, 359 (1912).

Provisions of this sort are quite common. H. Krause, Illegitimacy: Law and Social Policy 14 n.17 (1971) [hereinafter cited as Krause]. Professor Krause lists 38 States, the District of Columbia and Puerto Rico as having legitimation statutes. Krause incorrectly includes Indiana among these States, citing Ind. Ann. Stat. § 3-656 (1968) (Ind. Code § 31-4-2-1 (1971)) as authority. The cited statute only allows the parents of a child born out of wedlock to change his surname from that of the mother to that of the father if the parents marry each other. This is quite different from legitimation, where the child takes on the status and rights of legitimacy rather than only the mere

probate provisions because legitimation created inheritance rights which did not extend to illegitimates.[6]

The section of the Probate Code meant to replace § 6-2310 was the current § 6-207.[7] While the Commission might have felt that § 6-2310 had become superfluous in light of § 6-207, the appellate court decision in *A—. B—. v. C—. D—.* makes it clear that § 6-2310 did some things that § 6-207 cannot do.

A—. B—. v. C—. D—.

The plaintiff in *A—. B—. v. C—. D—.* had married the defendant's former wife. While married to defendant, the wife became pregnant. After the child was born the wife was divorced from defendant and was given custody of the child. She then married plaintiff. Plaintiff sought a declaratory judgment holding him to be the child's legitimate father on the grounds that the defendant was not the biological father of the child, therefore, the child was born out of wedlock, and that he, the plaintiff, had married the child's mother and acknowledged the child as his own.[8] The trial court granted the defendant's motion for summary judgment on the grounds that plaintiff lacked standing to bring the action and that the action was against public policy.[9]

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appearance of it.

There are additional Indiana statutes allowing change of surname and issuance of a new birth certificate upon the marriage of the parents. IND. CODE §§ 16-1-16-16, 16-1-16-17, 16-4-1-1 to 16-4-1-3 (1971), IND. ANN. STAT. §§ 35-1816, 35-1817, 35-2125 to 35-2127 (1969). None of these statutes provide for legitimation, although, in providing for the administrative formalities that normally accompany legitimation, they seem to be based upon the assumption that the marriage of the parents makes the child legitimate at common law. This assumption is erroneous. *See* note 14 *infra*.

6. IND.. ANN. STAT. § 6-2309 (1933).

7. Illegitimate children.—(a) For the purpose of inheritance to, through and from an illegitimate child, such child shall be treated the same as if he were the legitimate child of his mother, so that he and his issue shall inherit from his mother and from his maternal kindred, both descendants and collaterals, in all degrees, and they may inherit from him. Such a child shall also be treated the same as if he were a legitimate child of his mother for the purpose of determining homestead rights, and the making of family allowances.

(b) For the purpose of inheritance to, through and from an illegitimate child, such child shall be treated the same as if he were the legitimate child of his father, if but only if, (1) the paternity of such child has been established by law, during the father's lifetime; or (2) if the putative father marries the mother of the child and acknowledges the child to be his own.

IND. CODE § 29-1-2-7 (1971), IND. ANN. STAT. § 6-207 (1953).

8. A—. B—. v. C—. D—., —— Ind. App. ——, ——, 277 N.E.2d 599, 601-602 (1971).

9. The trial court had transferred the case to the juvenile docket, and thus the record is not public. In addition, the appellate court ordered the withholding from public examination of "the record (transcript), briefs, and other papers in this case." —— Ind. App. at ——, 277 N.E.2d at 619. Thus, the reasoning of the trial court is unavailable except as it is illuminated by the appellate opinion. With regard to the standing issue, the trial court apparently found plaintiff to be without any substantial present

In reversing and remanding, the appellate court found that plaintiff did have standing to raise the issues involved[10] and that no public policy consideration barred the action.[11] The court refused, however, to allow the substance of plaintiff's request, holding that Indiana courts do not have the power or authority to legitimate children born out of wedlock.[12] While it is clear that § 6-2310 would have allowed the trial court to legitimate the child in this sort of situation, according to the appellate court § 6-207 does not have the same effect. Section 6-207 deals only with inheritance rights and states merely that illegitimate children are to be treated "the same as" if they were the legitimate children of their father or mother.[13] To the appellate court this meant that § 6-207 dealt only with inheritance rights of illegitimate children and in no way affected their status of illegitimacy. The common law is hostile to the non-legislative legitimation of children born out of wedlock.[14] Therefore, since statutes in derogation of the common law are to be strictly construed, the appellate court felt compelled to refuse plaintiff's request in the absence of specific legislation.[15] Apparently, the repeal of § 6-2310 cannot be remedied by judicial action.

The appellate court decision to remand the case with these conclu-

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interest in the relief sought. *Id.* at ——, 277 N.E.2d at 608-609. As far as the public policy issue was concerned, the appellate court felt that the trial court's ruling was related to the presumption of legitimacy that attaches to a child born of a married woman. *Id.* at ——, 277 N.E.2d at 613.

10. —— Ind. App. at ——, 277 N.E.2d at 612. Plaintiff had originally sought standing on the ground that he had a right to legitimate the child. The appellate court rejected this argument, but held that there was at issue a "legal relation[ship] . . . affected by a statute" and thus plaintiff had standing under Indiana's Declaratory Judgment Act, IND. CODE § 34-4-10-2 (1971), IND. ANN. STAT. § 3-1102 (1968). The particular statute involved allows a father whose paternity has been established to inherit from his illegitimate child. IND. CODE § 29-1-2-7 (1971), IND. ANN. STAT. § 6-207 (1968). *See* note 7 *supra*. The appellate court decided that the expectancy interest in the child's estate was sufficient to give the plaintiff standing to show that he was the natural father of the child. —— Ind. App. at ——, 277 N.E.2d at 610.

11. —— Ind. App. at ——, 277 N.E.2d at 614. While the presumption of legitimacy of a child born of a married woman is unassailable in some states, Indiana has allowed the presumption to be questioned in court, provided that the interests of the child are protected. Thus, in A—. B—. v. C—. D—., the court required that the child be joined as a party so that his interests would be fully represented. *Id.* at ——, 277 N.E.2d at 619. *See* P. v. Department of Health, 200 Misc. 1090, 1094-95, 107 N.Y.S.2d 586, 591 (1951).

12. —— Ind. App. at ——, 277 N.E.2d at 603. A—. B—. v. C—. D—. is apparently the first case in which the issue of the court's power to grant legitimation was considered. Moreover, the appellate court raised the issue on its own.

13. —— Ind. App. at ——, 277 N.E.2d at 604-606.

14. "A bastard may, lastly, be made legitimate, and capable of inheriting, by the transcendent power of an act of parliament and not otherwise." 1 W. BLACKSTONE, COMMENTARIES* 459. In A—. B—. v. C—. D—., the court made it clear that the common law rule set forth by Blackstone is in force in Indiana. —— Ind .App. at ——, 277 N.E.2d at 603.

15. —— Ind. App. at ——, 277 N.E.2d at 606.

sions of law leaves the plantiff in an undesirable position should he decide to press the case further on remand. If the defendant's presumptive paternity[16] is not overcome at trial, the child will still be regarded as the defendant's legitimate son. Alternatively, plaintiff can, with sufficient evidence,[17] overcome defendant's presumptive paternity and the child would then be deemed illegitimate. At the same time the plaintiff can seek to establish his own paternity and have himself declared the father of the child, in which case the boy would be his illegitimate son.

Since adoption removes the legal burdens of illegitimacy and normalizes the family relationship in all respects,[18] it is important to examine the relationship of state adoption proceedings to plaintiff's alternatives. If the plaintiff pursues the matter on remand, adoption becomes more or less feasible depending upon the trial result. If the defendant succeeds in upholding his presumption of paternity, plaintiff would need defendant's permission to adopt the child.[19] On the other hand, if plaintiff rebuts defendant's presumption of paternity, defendant's consent would no longer be an obstacle to adoption, since Indiana law requires only the consent of the mother to adopt a child born out of wedlock.[20]

The problem with so employing the adoption procedure is that such use creates and perpetuates legal fiction. In simple terms, the plaintiff may be adopting his own son. The adoption laws clearly do not envision this possibility. Indiana law requires that, before adoption can proceed, notice be given to the father of the illegitimate child, if he is known, and,

16. Since the child's mother was married to defendant at the time of the child's birth, the law presumes the defendant's paternity. *See* Buchanan v. Buchanan, —— Ind. App. ——, 267 N.E.2d 155 (1971).

17. Blood tests had shown that the putative father could not have been the biological father. —— Ind. App. at ——, 277 N.E.2d at 618.

18. IND. CODE § 31-3-1-9 (1971), IND. ANN. STAT. § 3-122 (1968).

19. IND. CODE § 31-3-1-6 (1971), IND. ANN. STAT. § 3-120 (Supp. 1972).

> The person seeking to adopt the child has the burden of proving that the living parents of the child have violated their natural and legal obligations to the child in such a manner that they come within the terms of the Indiana statute authorizing waiver of consent of the natural parents. If what the parents have done or have failed to do is not named in the statute as grounds for dispensing with consent, then the child simply cannot be adopted without the parents' consent.

Note, *Dispensing With Parental Consent in Indiana Adoption Proceedings,* 40 IND. L.J. 378, 379 (1965). *See also* Emmons v. Dinelli, 235 Ind. 249, 133 N.E.2d 56 (1956).

20. IND. CODE § 31-3-1-6 (1971), IND. ANN. STAT. § 3-120 (Supp. 1972). *But see* Stanley v. Illinois, —— U.S. ——, 92 S. Ct. 1208 (1972). *Stanley* recognized a substantial interest of the unwed father in retaining custody of his illegitimate children after the death of the natural mother. *Id.* at ——, 92 S. Ct. at 1213. This ruling may mean that unwed fathers' rights regarding the adoption of their children are constitutionally protected, and, therefore, that their consent to adoption is also required. In the context of A—. B—. v. C—. D—., this would not present a problem since the plaintiff, the unwed father, would undoubtedly give his consent to adoption.

that the father may appear at the hearing to voice any possible objection he might have to the adoption.[21] Thus, the plaintiff in our situation might be required to acquiesce in his own act. Statutes in the family law area should mirror reality, not distort it.

THE NEED FOR NEW LEGITIMATION LEGISLATION

A—. B—. v. C—. D—. points to a legislative vacuum that needs to be filled. There are three reasons why Indiana needs either a new legitimation statute or re-enactment of old § 6-2310. First, the absence of a legitimation statute creates an unreasonable exception to the law's general scheme of restricting the class of children deemed illegitimate to a minimum. Second, the lack of such a statute means a deprivation of some of the rights accorded legitimate children. Third, this deprivation raises a Constitutional question of over-breadth with regard to the entire classification of illegitimacy.

An Unreasonable Exception

If, as the appellate court suggested, repeal of Indiana's legitimation statute was based on the mistaken assumption that § 6-207 would do all that § 6-2310 did, then re-enactment is called for on the ground that the legislature has been proven wrong. Repeal did change Indiana's legitimacy law significantly. But to change the law so as to prevent legitimation in cases where a child's parents marry after his birth is inconsistent with other Indiana law on illegitimacy.[22] Under present Indiana law, a child is legitimate if his parents marry after conception but prior to birth,[23] if he is conceived of a void or annulled marriage,[24] or if he is a child of a common law marriage.[25] The inconsistency of preventing legitimation of a child whose parents are married to each other and who recognize the child as their own seems particularly unreasonable in cases like *A—. B—. v. C—. D—.* where marriage prior to birth is not possible, i.e., when the father is not available or marriage is prevented by the existence of a

21. IND. CODE § 31-3-1-6(h) (1971), IND. ANN. STAT. § 3-120 (Supp. 1972).

22. Indiana's Children Born Out of Wedlock Act is prefaced with the statement that:

> It is the obligation of the state of Indiana to provide proper legal procedures that will enable children born out of wedlock to have proper care, maintenance, education, protection, support and opportunities the same as children born in wedlock. . . .

IND. CODE § 31-4-1-1 (1971), IND. ANN. STAT. § 3-323 (1968). Indiana's position in these cases is also inconsistent with trends throughout the country. *See* KRAUSE, *supra* note 5, at 9.

23. Doyle v. State *ex rel.* Shetterly, 61 Ind. 324, 326-27 (1878).

24. IND. CODE §§ 31-1-7-2, 31-1-7-3, 31-1-7-6 (1971), IND. ANN. STAT. §§ 44-107, 44-108, 44-106 (1968).

25. IND. CODE § 31-1-6-2 (1971), IND. ANN. STAT. § 44-112 (1968).

prior marriage not yet dissolved. In such cases legitimation would seem to be the consistent and reasonable approach.

The Denial of Substantive Rights

It might be argued that the distinction between legitimacy and illegitimacy is no longer an important one since Indiana has taken important steps toward equalizing the treatment of all children, legitimate or not.[26] However, the distinction does have adverse legal consequences.

For example, the Probate Code defines "child" to include legitimate children and adopted children, but not illegitimate children except for purposes of § 6-207.[27] When applied to the pretermitted children section of the Code,[28] this definition effectively prohibits illegitimate children from taking an intestate share of a parent's estate against a will executed before their birth which unintentionally excludes them. This result makes sense in terms of illegitimate children for whom paternity has never been established or where a paternity suit led only to a support decree. Since a father probably would not want to make a public record of his relationship to the illegitimate child, it might be expected that the child would be excluded from specific mention in his father's will for the sake of discretion. If the Pretermitted Heir statute included illegitimate children, specific mention of the illegitimate child would be necessary if the father wished to exclude that child from his will. A case can be made that this child should be prevented from disrupting his father's will by claiming an intestate share of the estate. However, this reasoning does not apply when the parents marry and acknowledge the child as their own subsequent to its birth. In that case, the father would have no misgivings about specifically mentioning the child in his will.

Another example of the legal consequences of an "illegitimate" classification is the wrongful death action. Under Indiana law the father of an

26. Examples may be found in the Children Born Out of Wedlock Act, IND. CODE §§ 31-4-1-1 to 31-4-2-2 (1971), IND. ANN. STAT. §§ 3-623 to 3-658 (1968).

27. The term "child" is defined as including "an adopted child," but the term does not include "a grandchild or other more remote descendants, nor, except as provided in section 205 [§ 6-205], an illegitimate child." IND. CODE § 29-1-1-3 (1971), IND. ANN. STAT. § 6-103 (1968). The reference to § 6-205, which deals with the inheritance rights of kindred of the half-blood, is clearly an error. It should refer to § 6-207, which deals with illegitimates.

28. When a testator fails to provide in his will for any of his children born or adopted after the making of his last will, such child, whether born before or after the testator's death, shall receive a share in the estate of the testator equal in value to that which he would have received if the testator had died intestate, unless it appears from the will that such omission was intentional, or unless when the will was executed the testator had one (1) or more children known to him to be living and devised substantially all his estate to the spouse who survives him.

IND. CODE § 29-1-3-8(a) (1971), IND. ANN. STAT. § 6-308(a) (1968).

illegitimate child may not maintain an action for the wrongful death of this child, even though he has acknowledged and supported the child.[29] This distinction may be valid if the father has never married the child's mother and never lived with the child. Such a result makes little sense, however, where the parents are married to each other and raise the child as would any other parents.

Finally, classifying a child as illegitimate gives rise to a host of potential conflict of laws problems that may cause a forfeiture of some of the rights a child would have had in Indiana[30] prior to the repeal of § 6-2310.

In sum, being classified as illegitimate results in the denial of substantive rights accorded to legitimate children. The denial is clearly unreasonable in terms of children who could have been legitimated under § 6-2310.

Constitutional Protections

The preceding sections have suggested that the absence of a legitimation statute seems to be an inconsistent and unreasonable situation which denies certain rights. This result requires examination of the fourteenth amendment and the protections it affords those unreasonably denied rights enjoyed by others.

Under the fourteenth amendment, statutory classifications which are too broad or over-inclusive may be held unconstitutional.[31] A statu-

29. L. T. Dickason Coal Co. v. Liddil, 49 Ind. App. 40, 45-46, 94 N.E. 411, 413. (1911). The case gives the right to bring the action to the child's "next of kin" and excludes the putative father from that group.

30. [G]reat population mobility makes the following question possible: "what are the rights of a child born out of wedlock under the laws of State #1, who now lives in State #2 which gives no legal relevance to illegitimacy, and who seeks to inherit from his father who died without a will, if the father was domiciled in State #3 which denied illegitimates any right to inherit from their fathers, died in State #4 which allows any illegitimate child to inherit if his paternity was established by court action during the father's lifetime, and left realty and personal property in all four States?"

KRAUSE, *supra* note 5, at 10.

31. KRAUSE, *supra* note 5, at 60-61. The over-inclusive—under-inclusive test was the first one developed in the Supreme Court's interpretation and application of the fourteenth amendment. *See* Plessy v. Ferguson, 163 U.S. 537 (1896). This test is sufficient to cover the discrimination dealt with in this note. However, the Supreme Court has recently added another consideration to the equal protection issue; if the state cannot show that there is a rational connection between the discrimination in a statute and its purpose then the statute violates the equal protection clause. Railway Express Agency v. New York, 336 U.S. 106 (1949). This rational basis standard was first applied to the area of illegitimacy law in Levy v. Louisiana, 391 U.S. 68 (1967), and Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1967). These companion cases dealt with the power of Louisiana to deny the benefits of its wrongful death statute to illegitimate children. The Court held the statute unconstitutional on the ground that the purpose of the discrimination, to deter the birth of illegitimate children, could not be effectuated by the discrimination involved. 391 U.S. at 72. However, in Labine v.

tory classification is over-inclusive if within its scope it includes persons that should not reasonably be included.[32] A frequently cited case dealing with the problem of over-inclusion is *Aptheker v. Secretary of State*,[33] which struck down, under the fifth amendment, a federal law revoking petitioners' passports on the ground that a group classified in terms of membership in the Communist Party included within it a great variety of persons who shared little besides membership. The classification failed to take into consideration the varying degrees of party affiliation in light of the underlying purpose behind the law—to protect the government from violent overthrow by certain radical factions of the Communist Party.[34] In a like manner, Indiana's classification of illegitimate children is over-inclusive. Included among "illegitimate" children are those who live in a normal family environment with their biological parents, who are married to each other.[35]

According to *A—. B—. v. C—. D—.*, the repeal of § 6-2310 expanded the "illegitimate" classification to include children who, for a period of 123 years, would have been deemed legitimate under state law. When, and if, a child so situated is denied the enjoyment of the rights of a legitimate child (or his father is excluded from rights enjoyed by legiti-

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Vincent, 401 U.S. 532 (1971), the Court retreated from its previous position. *Labine* involved the constitutionality of Louisiana's intestate succession statute, which denied an illegitimate child the right to inherit from his father. The Court stated that it was not for the Court to examine the rationality of Louisiana's statute. *Id.* at 538.

> [T]here is nothing in the vague generalities of the Equal Protection and Due Process Clauses which empower this Court to nullify the deliberate choices of the elected representatives of the people of Louisiana.

Id. at 539-40.

In Stanley v. Illinois, —— U.S. ——, 92 S. Ct. 1208 (1972), discussed at note 20 *supra*, the Court again changed its position. In *Stanley*, the Court relied heavily on the due process clause in stating that although a statute's purpose is in accord with constitutional requirements, the means employed to achieve that purpose must be rational. *Id.* at ——, 92 S. Ct. at 1213. Finally, in Gomez v. Perez, —— U.S. ——, 93 S. Ct. 872 (1973), the Court used the broadest language to date in dealing with the rights of illegitimates. Relying on earlier decisions, the Court stated that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." *Id.* at ——, 93 S. Ct. at 875. This language seems to say that *any* denial of a substantial right to illegitimates is *per se* invidious discrimination. This would be true regardless of the state's purpose in discriminating. *Gomez* does not mention *Labine*, but its effect may be to overrule *Labine subsilento*.

32. KRAUSE, *supra* note 5, at 60-61. For a general discussion of over-inclusion and the fourteenth amendment, see Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

33. 378 U.S. 500 (1964).

34. *Id.* at 510-512.

35. *See* notes 27-29 *supra* & text accompanying. Since this note deals with the subject of legitimation, it does not attempt to determine if the classification as illegitimate of children situated differently, i.e., those who live with unmarried parents, those for whom paternity has been established, etc., might violate the over-inclusive standard as well. The law is certainly overbroad with regard to children formerly legitimated. It may also be overbroad in regard to others.

mate fathers), that child will have a strong Constitutional argument against the law that denies him those rights: the Indiana illegitimacy classification is too broad in that it includes within its scope children against whom the state has no rational basis for discriminating. As was noted earlier in the cases of the Pretermitted Heir section of the Probate Code and wrongful death actions, the reasons for denying illegitimates and their fathers certain rights may make sense in terms of some children born out of wedlock, but they do not make sense in terms of those formerly covered by the legitimation statute. Therefore, the classification should be re-drawn so as to be more reasonably related to the purposes of the statutes which employ it.

CONCLUSION

Until its repeal in 1954, § 6-2310 and its forerunners had been the law of the state since 1831. It was repealed in the mistaken belief that the statute put in its place would serve the same purpose. Repeal of this legitimation statute subjects children and their parents to needless difficulty and may lead to the outright denial of rights to which they are reasonably entitled. Furthermore, the repeal of this statute makes the entire illegitimacy classification constitutionally suspect and may thus produce needless litigation. All of these facts point to the need for prompt reenactment of § 6-2310 or similar legislation.

It was in part the stated purpose of the Probate Code Study Commission to "erase the Scarlet Letter" of illegitimacy.[36] Instead of achieving that goal, for many they made that letter an indelible one. It is now up to a future legislature to correct that mistake.

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36. INDIANA PROBATE CODE STUDY COMMISSION, PROPOSED NEW PROBATE CODE, pt. II, 16 (1952).