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BY

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INTRODUCTION

Over the past two decades, the law concerning the rights of illegitimates has undergone drastic changes. In the context of state intestate succession laws, these changes have occurred primarily as a result of the United States Supreme Court decision in *Trimble v. Gordon*. This article is limited to the illegitimate's right to acquire property by intestate succession in Arkansas and focuses on the decisions of the United States Supreme Court, the statutes of Arkansas before and after *Trimble v. Gordon* and the recent decisions of the Arkansas Supreme Court. As Arkansas has elected not to apply *Trimble v. Gordon* retroactively, it is unlikely that the issue of the rights of bona fide purchasers will occur frequently or except in unusual circumstances. Nevertheless, as the Arkansas Supreme Court has indicated, the rights of bona fide purchasers might be considered in the proper case. Comments are included on this issue. Although the decisions of the Arkansas Supreme Court involving illegitimates decided prior to *Trimble v. Gordon* are not discussed, a number of them are cited in the Footnotes, as these cases still represent good law on questions of evidence. It is hoped this article is of value to attorneys, landmen, title examiners and others concerned with real estate in which the rights of illegitimates are involved.

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COMMON LAW BACKGROUND

At common law an illegitimate child did not possess the right to inherit property. He was regarded as *filius nullius*, or the child of no one. The common law rule regarding illegitimate children was summarized by Professor Blackstone in his Commentaries on the Laws of England wherein he stated:

> I proceed next to the rights and incapacities which appertain to a bastard. The rights are very few, being only such as he can acquire; for he can inherit nothing, being looked upon as filius nullius, sometimes filius populi. Yet he may gain a surname by reputation, though other children have a settlement in their father's parish; but a bastard in the parish where born, for he hath no father... [H]e cannot be heir to any one, neither can he have heirs, but of his own body; for being nullius filius, he is therefore of kin to nobody, and has no ancestor from which any inheritable blood can be derived... A bastard may, lastly, be made legitimate, and capable of inheriting, by the transcendent power of an act of parliament, and not otherwise.

The common law treatment of illegitimates reflected the moral and social view that illegitimate children were tainted and rightless beings that deserved nothing. In early England, the social emphasis was on lineage which was traced through marriage which publicly affirmed the ties between families. This emphasis on marriage left the child born out of wedlock a misfit whose only hope was to marry and begin a family of his own. Legislative and judicial disfavor of illegitimate children has been slow to change. From the era in early England until today, piecemeal legislation reflects a legislative reluctance to enact protective legislation for illegitimate children. Through the late 1960s the most significant statutory advances concerning illegitimate children, and their right to take property by intestate succession, were maternal intestate succession laws and automatic legitimation when the parents of an illegitimate child subsequently married. Most states still failed to give illegitimate children the right to inherit from their fathers in the absence of a will and some states even limited the father's power to devise to an illegitimate child. However, in 1968, illegitimate children finally secured constitutional protection.
The first case dealing with the rights of illegitimate children to acquire property by
intestate succession was *Labine v. Vincent* decided in 1971. In *Labine*, the United States
Supreme Court upheld a Louisiana statute that prevented an illegitimate child from sharing
in the estate of her father on an equal basis with legitimate children even though the father
had publicly acknowledged that the child was his own. Under Louisiana law, an
illegitimate child who had been publicly acknowledged by the father as his natural child
could only inherit to the exclusion of the State. In upholding the Louisiana statute, the
majority based its decision upon deference to the state's right to regulate property
distributions holding that "the choices reflected by the intestate succession statute are
choices which it is within the power of the state to make". The majority noted that the
legislative purpose behind the Louisiana statute was "[t]o further strengthen and preserve
family ties". The majority did not apply a traditional equal protection analysis to the
statute, stating in a footnote that "[e]ven if we were to apply the 'rational basis' test to the
Louisiana intestate succession statute, that statute clearly has a rational basis in view of
Louisiana's interest in promoting family life and of directing the disposition of property left
within the State". The majority also relied heavily upon the finding that Louisiana statute
had not created an "insurmountable barrier" to an illegitimate child's ability to inherit from
her father. The father of the illegitimate child could have provided for her in a will, he
could have legitimated her by marrying her mother, or he could have stated in his ack-
nowledgement of her paternity that he wished to legitimate the child, thus entitling her to
inherit property by intestate succession as any other legitimate child could have.

The four dissenting justices, speaking through Justice Brennan, argued that to
disfavor illegitimate children in intestate distributions was irrational and in violation of the
Equal Protection Clause of the Fourteenth Amendment. The Louisiana statute imposed an arbitrary burden upon illegitimate children because of their status over which they have no control and "punish[ed] innocent children for the fault of their parents." The dissenters did, however, recognize that a state might have an interest in "requiring people to go through certain formalities in order to eliminate complicated questions of proof and the opportunity for both error and fraud in determining paternity after the death of the father." The dissenters would have held that the Louisiana statute was unconstitutional since the father had gone through a state authorized formality for declaring paternity. There was no difficulty of proof and no opportunity for fraud or error.

On April 26, 1977, the United States Supreme Court handed down its decision in the landmark case of *Trimble v. Gordon*. In *Trimble*, an illegitimate child who had been supported by the father and openly acknowledged by him as his natural child, was excluded from sharing in his father’s estate pursuant to § 12 of the Illinois Probate Act. There had also been a circuit court order establishing the father’s paternity which entitled the child to support payments. Since, however, the child’s parents had never married, as required by the Illinois statute, she could not share in her father’s estate.

The United States Supreme Court held that the Illinois statute was unconstitutional. Justice Powell, speaking for the majority, found that § 12 of the Illinois Probate Act was not a reasonable way of promoting the state’s interest in "encouraging family relationships and in establishing an accurate and efficient method of disposing of property at death". Although the majority did not term illegitimacy a "suspect class", thereby subjecting the statute to strict scrutiny, the majority noted that "[illegitimacy classifications approach sensitive and fundamental personal rights]." The Court, however,
applied a "stricter scrutiny" than it would have applied to statutes involving economic and social regulation.\textsuperscript{31}

As to the asserted state interest in "the promotion of [legitimate] family relationships", the majority stated that "§ 12 bears only the most attenuated relationship to the asserted goal"\textsuperscript{32} and that "the Equal Protection Clause requires more than the mere incantation of a proper state purpose".\textsuperscript{33} Even though the state’s interest in preserving and promoting the family unit was a legitimate state interest, the majority impressed that "a State [cannot] attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships".\textsuperscript{34} Placing such burdens "on the head of an infant is illogical and unjust. . . [and] contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing".\textsuperscript{35} The Court conclusively held that promoting marriage and encouraging family relationships (or discouraging promiscuity) is not a sufficiently substantial governmental interest to uphold an illegitimacy classification in the intestacy context against an equal protection challenge.

The majority did, however, recognize that the State’s interest in "establish[ing] a method of property distribution" offered a "more substantial justification" for the statute,\textsuperscript{36} stating that:

\begin{quote}
The more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their father’s estates than required either for illegitimate children claiming under their mother’s estates or for legitimate children generally. (emphasis added) We think, however, that the Illinois Supreme Court gave inadequate consideration to the relation between § 12 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.\textsuperscript{37} (emphasis added)
\end{quote}

The majority realized that the states have primary responsibility in the area of disposition of intestate property within state boundaries, but the Illinois statute in question
had created an "impenetrable barrier" to an illegitimate child's right to share in the
father's estate. Although the majority recognized that allowing illegitimates to inherit from
or through their fathers would create problems of proof of paternity, the Court held that
"difficulties of proving paternity in some situations do not justify the total statutory disin-
heritance of illegitimate children whose fathers die intestate."39

The majority dispensed with the argument that the Illinois statute did not create an
"insurmountable barrier" to an illegitimate child's ability to share in her father's estate by
stating that "this analysis loses sight of the essential question: the constitutionality of
discrimination against illegitimates in a state intestate succession law",40 and that "[h]ard
questions cannot be avoided by a hypothetical reshuffling of the facts",41 noting that if the
decedent had left a will or had married the illegitimate child's mother the case would have
never come before the Court.42 In other words, the statute was unconstitutional on its face.

Finally, in support of the Illinois statute, it was argued that the law "mirror[ed] the
presumed intentions of the citizens" and that it should be presumed that the decedent
knew how his property would be disposed of under the intestacy statute. His failure to
make a will reflected his approval of the state's scheme of intestate distribution.43 The
majority recognized that this argument had some "superficial appeal"44 but that the law
was not enacted for that purpose.45 In the history of the Illinois act the Court found a
"primary purpose [of] provid[ing] a system of intestate succession more just to illegitimate
children than prior law, a purpose tempered by a secondary interest in protecting against
spurious claims of paternity".46 The majority refused to "hypothesize an additional state
purpose that [was] ignored by the [court below]".47 The Court did not, however, overrule
Labine, probably because the Louisiana statute had created different subclasses of
illegitimates with different rights.48
The four dissenters found *Trimble* constitutionally indistinguishable from *Labine*. Rehnquist would have upheld the Illinois law on the grounds that the statute was conceivably related to the asserted state interests and that a federal court should not second-guess legislative judgment in an area traditionally reserved to the states, especially since illegitimacy classifications had never been held "suspect".

The next case decided by the United States Supreme Court involving a states' scheme of intestate succession which contained classifications that failed to treat legitimate and illegitimate children equally was *Lalli v. Lalli* decided in 1978. In *Lalli*, the Court upheld a New York statute which required an illegitimate child to present "an order of filiation declaring paternity" from a court of "competent jurisdiction... during the lifetime of the father". Although the illegitimate offered evidence of his relationship with his father, including a notarized document wherein the decedent referred to the child as "my son", as well as affidavits that indicated the decedent's acknowledgement of paternity, the Court upheld the New York statute and excluded the illegitimate children from sharing in the intestate's estate.

The majority distinguished *Trimble*, first, on the ground that the single requirement under § 4-1.2 (that paternity be established during the father's lifetime) was an evidentiary one, noting that the illegitimate child in *Trimble* would have inherited under the New York statute. The declaration of paternity in Louisiana that entitled the child to support payments would have met the evidentiary requirement imposed by § 4-1.2. Under the New York law the marital status of the parents was irrelevant.

Another distinction involved the state interest asserted in justification of the Illinois statute that was struck down in *Trimble*. Whereas Illinois defended its statute on the ground that it encouraged legitimate family relationships, no such justification was offered.
in favor of the New York law. Instead, as the majority recognized, "[t]he primary state goal underlying the challenged aspects of § 4-1.2 is to provide for the just and orderly disposition of property at death," and that the disposition of property at death "is an area with[in] which the states have an interest of considerable magnitude." The majority felt that the state's interest was directly advanced by the statute "because of the peculiar problems of proof that are involved in the context of paternal inheritance by illegitimate children." The Court stated that:

Proof of paternity . . . frequently is difficult when the father is not part of a formal family unit. (emphasis added) The putative father often goes his way unconscious of the birth of a child. Even if conscious, he is very often totally unconcerned because of the absence of any ties to the mother. Indeed the mother may not know who is responsible for her pregnancy.

The majority also gave some meaningful deference to the legislative judgement that led to the enactment of the New York statute since the problems of proof associated with paternity in the context of intestate succession had been the subject of a comprehensive study by "individuals experienced in the practical problems" of estate administration. These "practical problems" included: due process concerns (notice to unknown illegitimates), the finality of judgments in probate proceedings, and, of course, the stability of land titles.

"Because of the particular problems of proof, spurious claims might be difficult to expose" and the New York statute considered in Lalli "sought to protect 'innocent adults and those rightfully interested in their estates from fraudulent claims of heirship and harassing litigation instituted by those seeking to establish themselves as illegitimate heirs'". The state's interests were referred to by the court as being "substantial".

Upon finding that the state's interest was substantial the majority then tested the means adopted by the state to advance the asserted state interests, noting that, the "requirement [of an order of filiation declaring paternity during the father's lifetime was]
designed to ensure the accurate resolution of claims of paternity and to minimize the potential for disruption of estate administration" and that "[a]ccuracy is enhanced by placing paternity disputes in a judicial forum during the lifetime of the father". Furthermore, the majority stated, the requirement "permits a man to defend his reputation against 'unjust accusations in paternity claims', which was a secondary purpose of § 4-1.2". Since this "procedural prophylactic" was "sufficiently related to the State's interest in 'the orderly settlement of estates and the dependability of titles to property passing under intestacy laws'" the New York law requiring an adjudication of paternity during the lifetime of the father was upheld.

The legislative history of the statute indicated that the legislature had "desired to grant to illegitimates in so far as practicable rights of inheritance on par with those enjoyed by legitimate children" and the New York statute "represent[ed] a carefully considered legislative judgement as to how this balance [between competing interests] could be achieved". It was not necessary for the state to employ the means least restrictive to the rights of illegitimate children.

Four justices, speaking through Brennan, would have found the state's interest adequately served by a "'formal acknowledgement of paternity'" and invalidated the New York statute as violative of the Equal Protection Clause of the Fourteenth Amendment. They felt that requiring an elevated standard of proof such as clear and convincing evidence, would adequately serve the state's interest while imposing a lesser burden on illegitimate children.

*Reed v. Campbell* is the most recent decision by the United States Supreme Court dealing with the rights of illegitimate children to acquire property by intestate secession. In *Reed*, the illegitimate's father died intestate four months prior to the Court's decision
in Trimble. At the date of his death, § 42 of the Texas Probate Code precluded an illegitimate child from sharing in the father’s estate unless the parents had subsequently married. The lower court held that § 42 was applicable because Trimble did not apply retroactively. The child’s parents had, in 1957, participated in a ceremonial marriage that was invalid because the father’s divorce from his first wife was not final. His estate remained open in February 1978 when the illegitimate notified the administratrix and the probate court of her claim. She later filed a formal complaint. A jury established paternity but denied her claim because her parents were never validly married. On appeal she claimed that she was entitled to inherit because Trimble rendered the Texas law unconstitutional and also that she should be legitimated on various theories. These arguments were rejected by the Texas appellate court. The Texas Supreme Court refused to hear her case, however, the United States Supreme Court noted probable jurisdiction and reversed.

The United State Supreme Court began by stating that "we have unambiguously concluded that a State may not justify discriminatory treatment of illegitimates in order to express its disapproval of their parent’s misconduct... [although]... there is a permissible basis for some ‘distinctions made in part on the basis of legitimacy’". Citing Lalli, the Court noted that it would uphold "statutory provisions that have an evident and substantial relation to the State’s interest in providing for the orderly and just distribution of a decedent’s property at death". The Court stated further that:

*The state interest in the orderly disposition of decedents estates* (emphasis added) may justify the imposition of special requirement upon an illegitimate child who asserts a right to inherit from her father, and, of course, it justifies the enforcement of generally applicable limitations on the time and the manner in which claims may be asserted. After an estate has been finally distributed, the interest in finality may provide an additional, valid justification for barring the belated assertion of claims, (emphasis added) even though mistakes of law or fact may have occurred during the probate process.
The Court held that the Texas court had erred in denying the illegitimate child’s claim on the grounds that "(1) her father died before April 26, 1977, and (2) her claim was filed after April 26, 1977" noting that the Texas statute at issue had been held invalid by the state’s courts where litigation was pending on the date that Trimble was handed down. Because the intestate’s estate was still open when the illegitimate’s claim was asserted, the state’s interest in the orderly administration of estates was not adversely affected and "the interest in avoiding unjustified discrimination against children born out of wedlock... should... have been given controlling effect". There were no dissenters in this case.

In summarizing the current state of the law respecting the rights of illegitimates to inherit property through intestate succession from a constitutional standpoint, it can be seen that the interest in providing for the orderly administration of decedents’ estates (by reducing the risk of error and the prevention of fraudulent and spurious claims, assuring the finality of judgment in probate proceedings, and increasing the stability of titles) will support legislation that regulates the time and manner in which illegitimates have to present their claims even though legitimate and illegitimate children are treated unequally. It certainly seems reasonable that time and manner restrictions might be considered a necessity in the probate context, especially when the rights of innocent third parties might be affected, however, given the decision in Reed, if the decedent’s estate has not been finally closed these limitations may be unconstitutional.

ARKANSAS’ STATUTORY LAW REGARDING THE EFFECT OF ILLEGITIMACY ON INTESTATE SUCCESSION

Prior to the United States Supreme Court decision in Trimble v. Gordon, Arkansas law precluded an illegitimate child from sharing in his intestate father’s estate. The
relevant statute provided:

61-141. Illegitimate children - Concerning the effect of illegitimacy on intestate succession:

(a) If the parents of a child shall have lived together as man and wife and, before the birth of the child, shall have participated in a marriage ceremony in apparent compliance with the law of the state where the marriage ceremony was performed, though the attempted marriage be void, their child is deemed to be the legitimate child of both parents for all purposes of Intestate succession. A child born or conceived during a marriage is presumed to be the legitimate child of both spouses for the same purposes.

(b) If a man have a child or children by a woman, and afterward shall intermarry with her, and shall recognize such child or children to be his, such child or children shall be deemed and considered as legitimate.

(c) Any child conceived following artificial insemination of a married woman with the consent of her husband shall be treated as their child for all purposes of Intestate succession; consent of the husband is presumed unless the contrary is shown by clear and convincing evidence.

(d) An illegitimate child or his descendants may inherit real or personal property in the same manner as a legitimate child from such child’s mother or her blood kindred; but such child may not inherit real or personal property from his father or from his father’s blood kindred.

(e) Property of an illegitimate person passes in accordance with the usual rules of Intestate succession to his mother and his kindred of her blood; but the father of such person, or the blood kindred of such father, may not inherit from the illegitimate child (or his descendants) either real or personal property. [Acts 1969, No. 303, §11, p. 919.]

After the United States Supreme Court handed down its decision in Trimble, however, the Arkansas statute was amended to conform to the Court’s mandate concerning the rights of illegitimate children to succeed to their father’s estates. The present statute dealing with the effects of illegitimacy on intestate succession provides:

28-9-209. Legitimacy of child - Effect:

(a)(1) If the parents of a child have lived together as man and wife and, before the birth of their child, have participated in a marriage ceremony in apparent compliance with the law of the state where the marriage ceremony was performed, though the attempted marriage is void, their child is deemed to be the legitimate child of both parents for all purposes of intestate succession.

(2) A child born or conceived during a marriage is presumed to be the legitimate child of both spouses for the same purposes.

(b) If a man has a child or children by a woman, and afterward intermarries with her and recognizes the child or children to be his, the child or children shall be deemed and considered legitimate.
(c) Any child conceived following artificial insemination of a married woman with the consent of her husband shall be treated as their child for all purposes of intestate succession. Consent of the husband is presumed unless the contrary is shown by clear and convincing evidence.

(d) An illegitimate child or his descendants may inherit real or personal property in the same manner as a legitimate child from the child’s mother or her blood kindred. The child may inherit real or personal property from his father or from his father’s blood kindred provided that at least one (1) of the following conditions is satisfied and an action is commenced or claim asserted against the estate of the father in a court of competent jurisdiction within one hundred eighty (180) days of the death of the father:

1. That a court of competent jurisdiction has established the paternity of the child or has determined the legitimacy of the child pursuant to subsections (a), (b), or (c) of this section; or

2. That the man has made a written acknowledgment that he is the father of the child; or

3. That the man’s name appears with his written consent on the birth certificate as the father of the child; or

4. That the mother and father intermarry prior to the birth of the child; or

5. That the mother and putative father attempted to marry each other prior to the birth of the child by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid; or

6. That the putative father is obligated to support the child under a written voluntary promise or by court order.

(e) Property of an illegitimate person passes in accordance with the usual rules of intestate succession to his mother and his kindred of her blood and to his father and his kindred of his father’s blood, provided that paternity has been established in accordance with subsection (d).

(f) Nothing contained in this section shall extend the time within which a right of inheritance or a right to a succession may be asserted beyond the time provided by law relating to distribution and closing dependents’ estates or to the determination of heirship, or otherwise.

ARKANSAS CASE LAW - CASES DECIDED SUBSEQUENT TO TRIMBLE V. GORDON

Although the Arkansas Supreme Court did not have to review the constitutionality of Ark. Stat. Ann. § 61-141 in Sims v. First National Bank of Hot Springs because the illegitimate child sought to inherit through maternal lines, this case is of value in that it exemplifies the evidentiary requirements necessary to establish a claim. These evidentiary
elements were essentially the same under pre-Trimble decisions.98

In Sims, John B. Sims and Claire Lee Sims petitioned the court to be appointed personal representatives of the estate of Claire Moore Sims.99 John B. Sims was listed as an heir in this petition.100 After John B. Sims submitted two fraudulent wills for probate, one of the heirs contested the fact that he was an heir at law.101 After he admitted that the wills were fraudulent, the court appointed the First National Bank of Hot Springs as administrator in succession.102 The trial court ruled that he was not an heir.103 Sims then employed an attorney who obtained additional information, including a Texas birth certificate which showed that a John Burkett, Jr. was born to a Clara Browning and a John Burkett on January 7, 1932.104 The trial court, as permitted by Ark. Stat. Ann. § 22-406.4 (Supp. 1977), within 90 days set aside its first order and scheduled a second hearing to consider the additional evidence.105 The court then found that John B. Sims was the illegitimate son of Claire Moore Sims and thus entitled to share in her estate.106

The testimony showed that, until their divorce in 1930, the decedent was married to D. O. Sims and to this union four children were born.107 It was agreed by all of the witnesses that John B. Sims was about two years old when he came to Hot Springs to live with the decedent, who raised him as one of her children.108 They also agreed that Claire Moore Sims had met someone on the highway outside of Hot Springs and that John B. Sims was handed to her through a car window.109 She referred to him as "John Bentley" and he did not go by the name Sims until he started school.110 It was also undisputed that a sixteen year old boy named Joseph A. Seyl came to live with the decedent following the 1930 divorce.111 John B. Sims claimed to be the illegitimate child of Claire Moore Sims and Joseph A. Seyl.112
A family friend testified that she knew that the decedent had become pregnant and moved away to have a child and upon her return she told the witness that she had a son that she had named "Johnnie".\(^{113}\)

The decedent’s sister also testified that following the 1930 divorce, Claire Moore Sims became pregnant at the age of 34 and left Hot Springs to have the child.\(^{114}\) She also testified that the decedent told her that she had named the child after their cousin John Burkett, that Seyl had left town with her sister, and that Claire Moore Sims told her that Seyl was the father of her child. \(^{115}\)

The other heirs at law of Claire Moore Sims appealed arguing that, because it had been determined that the decedent’s signature on the birth certificate was forged, the birth certificate was irrelevant.\(^{116}\) The Arkansas Supreme Court, however, ruled that "[t]he least effect the birth certificate had was to render testimony of [the decedents’ sister] more probable within the meaning of the definition of relevancy".\(^{117}\) The appellants also argued that the trial court erred in setting aside its first order, however, the Arkansas Supreme Court dispensed with this argument as being "without merit" citing Ark. Stat. Ann. § 22-406.4 (Supp. 1977).\(^{118}\) The appellants’ final argument was that the evidence was insufficient to support the trial courts’ findings.\(^{119}\) The court stated that the evidence was sufficient and that the testimony of the decedent’s sister alone "would almost compel the conclusion reached by the trial court." \(^{120}\) The testimony of interested witnesses could be discounted and no one had questioned the appellee’s status as an heir at law prior to the dispute concerning the fraudulent wills.\(^{121}\)

In *Brown v. Danley*\(^{22}\) the Arkansas Supreme Court upheld the statutory presumption that a child born during wedlock is the legitimate child of both spouses, and the rule of evidence which excludes testimony by a parent that tends to bastardize a child, against a
challenge that the presumptions and rules of evidence discriminate against black persons by making it more difficult for them to prove paternity, thereby denying them equal protection.\textsuperscript{123}

In this case John W. Brown (Jr.) was born four and a half months after the marriage of John W. Brown (Sr.) and his mother, Inez Hall.\textsuperscript{124} Brown (Jr.), however, claimed to be the illegitimate son of the deceased Henry Smiley, who died intestate in 1976 leaving a substantial estate.\textsuperscript{125} Smiley had been married from 1910 until his wife's death in 1965.\textsuperscript{126} Brown was born in 1937.\textsuperscript{127} He claimed that he was entitled to the decedent's entire estate.\textsuperscript{128}

The Arkansas Supreme Court first recognized that Ark. Stat. Ann. §61-141(a)(Repl. 1971)\textsuperscript{129} creates "a statutory presumption that a child born during a marriage is the legitimate child of both spouses".\textsuperscript{130} The statutory presumption reflects the same presumption that existed at common law and "continues until it is overcome by the clearest proof that the husband was impotent or was without access to his wife during the time the child might have been conceived".\textsuperscript{131} The court did state, however, that "the common law presumption may be weaker when the child was conceived before the marriage".\textsuperscript{132}

The testimony by Brown's mother that Smiley was his father and that she had not had sexual relations with John W. Brown (Sr.) prior to the appellant's birth was excluded "under [the] settled rule that parents cannot bastardize a child born in wedlock by testifying to their own nonaccess to one another".\textsuperscript{133} There was no other evidence offered that the putative father was impotent or that he had no access to the appellant's mother when the child might have been conceived.\textsuperscript{134}

The court recognized that a statute similar to § 61-141(d) was held unconstitutional in \textit{Trimble v. Gordon}.\textsuperscript{135} Since the court would have reached the same conclusion in this
case whether or not the Arkansas statute was constitutional, the court did not pass upon
the constitutionality of the Arkansas law which prohibited illegitimates from inheriting from
their fathers.\textsuperscript{136} The argument that the presumptions and rules of evidence discriminated
on the basis of race was without merit; the challenged rules rests upon "sound principles
of public policy" and "color has nothing to do with it."\textsuperscript{137}

\textsection{61-141} (Repl. 1971) was unconstitutional in light of the decision of the United States
Supreme Court in \textit{Trimble v. Gordon},\textsuperscript{139} noting that "[t]he statutes are so nearly identical
in effect that it cannot be seriously argued that one can meet equal protection standards
and the other not" and that "[t]here is no way by which our statute can be distinguishable
from the statute involved in \textit{Trimble}, so as to meet the equal protection requirements
applied in \textit{Trimble}.\textsuperscript{140}

Although the probate judge below had attempted to distinguish this case from
\textit{Trimble} on the facts by stating that the relationship between the mother and father in the
\textit{Trimble} case was "substantial", whereas in this case the relationship was a "casual" one,\textsuperscript{141}
the Arkansas Supreme Court stated that "[t]he United States Supreme Court held [the
statute considered in \textit{Trimble}] unconstitutional on its face".\textsuperscript{142} The factual background of
this case was important in determining that the appellant had standing by ""alleg[ing] such
a personal stake in the outcome of the controversy as to assure that concrete adverseness
which sharpens the presentation of issues upon which [the] court so largely depends for
illumination of difficult constitutional questions"".\textsuperscript{143} Since the appellant met the "Baker"
test he had standing.

The court also recognized that the Arkansas legislature had passed the emergency
clause of Act 1015 of 1979, by which Ark. Stat. Ann. \textsection{61-141(d)} was amended, in an effort
to meet the constitutional mandates of *Trimble* and expounded on in *Lalli*.\(^{144}\) Since, however, there was no express declaration or necessary implication from the language used, Act 1015 could not be applied retroactively.\(^{145}\) The Arkansas Supreme Court opted for a "clear and convincing" standard of proof of paternity, which was met by the appellant, and allowed the illegitimate to share in the father's estate.\(^{146}\)

The "clear and convincing" evidence that led the court to hold that the requisite degree of proof was met consisted of a birth certificate that showed the decedent to be the appellant's father, the fact that the appellant had used the decedent's surname all his life, the appellant's testimony that he had always called the decedent "daddy" and that the decedent called him "son", the decedent had provided him with food and clothing and took him places, and the appellant lived with the decedent during summer months and on weekends.\(^{147}\) Furthermore, in the administratrix's verified petition for appointment the appellant was listed as an heir at law of the decedent and his relationship to the decedent was stated to be "grandson".\(^{148}\) The appellant was the beneficiary of the decedent's life insurance policy and administrator over his insurance.\(^{149}\) The court referred to this evidence as "clear, cogent and convincing" and "overwhelming".\(^{150}\)

In *Frakes v. Hunt*,\(^{151}\) the Arkansas Supreme Court decided that *Trimble v. Gordon*\(^{152}\) would not be applied retroactively to affect the descent of property occurring upon the intestate's death in 1972.\(^{153}\) The court recognized that a retroactive application of the *Trimble* decision "[would create] a title problem that could materially hamper the improvement of property".\(^{154}\) Quoting extensively from the appellant's brief, the opinion recites:

> Appellant recognizes that if Ark. Stat. Ann. §61-141(d) is declared unconstitutional the court will be required, in some cases, to enunciate rules that will protect those persons who have relied upon the statute. *In some cases, equity and justice will require exception to permitting inheritance by illegitimates where heirs or bona-fide purchasers for value have acted in reliance on a justified assumption that no illegitimate exists.* (emphasis added)\(^{155}\)
The appellant in this case argued that, since no bona-fide purchasers were involved and there had been no reliance by the heirs of the decedent upon the non-existence of an illegitimate, the holding in *Trimble* should apply.\textsuperscript{156} The court, however, held that where the rights of inheritance had finally vested \textsuperscript{157} *Trimble* would not apply retroactively. This was a necessity, the court reasoned, in order "to prevent chaotic conditions arising from the lack of a title to real property."\textsuperscript{158}

Justice Fogleman dissented vigorously arguing that the Arkansas Supreme Court did not have the authority to determine whether or not the holding in *Trimble* should be applied retroactively; that determination being one for the United States Supreme Court.\textsuperscript{159} He felt that Trimble should be applied retroactively until the United States Supreme Court held otherwise and that the case should have been remanded to the trial court for a determination of whether or not the appellant had met the "clear and convincing" standard of proof of paternity since no bona-fide purchaser's rights were involved.\textsuperscript{160}

*Compton v. White*\textsuperscript{161} involved an appeal from a Jefferson County Probate Court decree which granted three illegitimate children the right to inherit from their father. The probate judge had ruled that Ark. Stat. Ann. §61-141(d), which prevented an illegitimate child from inheriting from his father, as well as the common law rule to the same effect, was unconstitutional and applied *Trimble* retroactively.\textsuperscript{162}

While this case was pending on appeal, the Arkansas Supreme Court decided *Lucas v. Handcock*\textsuperscript{163} and *Frakes v. Hunt*\textsuperscript{164} which resolved all issues in this case.\textsuperscript{165} Adhering to their decision in *Lucas*, the court agreed that Ark. Stat. Ann. §61-141(d) was unconstitutional.\textsuperscript{166} Since, however, in *Frakes* the court had decided that *Trimble* would not be applied retroactively, the decision of the probate court was reversed.\textsuperscript{167} Where the decedent passed away prior to the United States Supreme Court's decision in *Trimble* and
the pleadings in this case were not filed until after the Trimble decision, the appellee's claim could not prevail.170

It is worth noting that the evidence presented was sufficient to sustain the finding that the appellees were the natural children of the decedent.169 The decedent had acknowledged that the children were his own and had set up a separate savings account for each child.168 Furthermore, this evidence was "virtually undisputed".171

In Ford v. King,172 the putative heirs of Rafe Ford, who died in 1928, intervened in a partition suit claiming that they were entitled to a share in the proceeds arising from the sale of 200 acres of land in Union County.173 The land had been in the possession of some of Ford's descendants for 50 years until March 1978 when nine of his descendants brought suit for partition and a determination of heirship.174 In May, the court entered a decree determining heirship and ordering a partition sale.175 In June, the appellants herein intervened, claiming that they too were descendants of Rafe Ford.176 Their intervention was dismissed in February 1979 and this appeal ensued.177

The Arkansas Supreme Court rejected the appellant's claim based upon illegitimacy stating that "[i]n 1928, there could be no inheritance by an illegitimate child with respect to the estate of the father".178 Even though the rule was held unconstitutional in Trimble, "that decision was not retroactive except as to litigation pending on April 26, 1977, the date of the decision".179 This case was not pending on that date.180

The appellants also claimed that their mother, Susie Ford, was the legitimate daughter of Rafe Ford, arguing that Susie's mother was married to Ford and lived with him for many years.181 There was, however, no proof to support the assertion.182

The appellant's final argument was that Susie Ford was the illegitimate child of Rafe Ford, but was legitimated when Ford acknowledged her as his child.183 Under Ark. Stat.
An. §61-141(b) if a man and woman had a child and subsequently intermarried, and he recognizes the child as his own, the child is considered to be legitimate. Three witnesses testified that Ford had said that Susie was his daughter, however, two gave no persuasive details to support Ford’s statement and the other witness’ testimony was discounted because he was an interested party.

The appellants also introduced a marriage license into evidence that showed that Ford married Sylvia Furlough in 1900, when he was 41 and she was 39, which meant that Sylvia was born in 1861. They also introduced a marriage license showing that Susie Ford was 18 when she was married in 1892. These two documents read together meant that Sylvia would have been 13 when Susie was born which the court referred to as “a possibility but certainly not a probability”. The appellees also presented a marriage license showing that Susie Ford was 18 when she married a different man in 1885. This would have meant that Sylvia was only six years old when Susie was born. The court stated that "[t]he record leaves some doubt about whether Sylvia was Susie’s mother".

The court held that the appellant’s proof was "decidedly deficient" stating that:

In most cases presenting a similar issue there is substantial proof of the putative father’s access to the mother or relationship with her, as by oral testimony, letters, birth certificates, death certificates, marriage licenses or other evidence. . . . (emphasis added) But here there is no proof that Rafe Ford even knew Sylvia Furlough in 1874, 26 years before he married her, much less that at the age of 15 he fathered a child.

The court concluded that the appellant’s proof was "too far in the field of speculation".

In Stewart v. Smith, Ada Stewart, sister of the deceased Wesley Shaw, Sr., challenged the appellate court’s affirmance of an appointment of a personal representative for the estate of Shaw, granted pursuant to the appellee’s petition for appointment filed on December 1, 1975. The appellee listed himself as the "son" of Wesley Shaw, Sr. and
also listed as grandchildren the infant children of petitioner Smith's decedent. Ada Steward raised the question of their legitimacy and asserted that any claim by petitioner Smith's decedent and petitioner Shaw "derives solely from their status as alleged illegitimate children and or descendants of such illegitimate children of the decedent."

The personal representative, appointed at the request of petitioner Shaw, "is the nominee of persons whose interest in this litigation is adverse to petitioner both in theory and in fact".

The Arkansas Supreme Court, in affirming the Court of Appeals' decision, held that, as of the date of the decision in *Trimble v. Gordon*, "litigation was pending as to the right of petitioners to inherit as illegitimate descendants of the decedent."

In *Wright v. Vales*, the appellants claimed to be the illegitimate children of Moses Wright who died on December 31, 1977. The administratrix, in her response to their petition, acknowledged that the appellants were the illegitimate children of Moses Wright. The probate court had excluded them from sharing in Wright's estate however, finding the appellants to be the lawful children of Precious and Earnest Davis.

In 1945 the appellants' mother married Earnest Davis in a ceremonial wedding performed by a minister. The appellants' mother, Precious Davis, testified that she and Davis permanently separated in 1946 and that she and Moses Wright had a relationship from 1947 until 1949, during which time the appellants were born.

The trial court, in reaching the conclusion that the appellants were the legitimate children of Precious and Earnest Davis, relied on the presumption that a child born in wedlock is legitimate. The testimony of Precious Davis, that her husband had no access to her during the period in which the appellants were conceived, was excluded.

The Arkansas Supreme Court affirmed the decision of the trial court on both points, stating that "[t]he presumption of legitimacy of children born during the wedlock of two
persons is well grounded in common law and Arkansas statutory law". Furthermore, "a parents' testimony is incompetent when it is employed to bastardize a child".

The appellants also argued that there never was a legal marriage between Precious and Earnest Davis because there was no evidence that a marriage license was issued and recorded as required by Arkansas law. The court responded by holding that "our marriage license statutes are merely directory and not mandatory, and... Arkansas has no statute providing a marriage is void when no license is obtained".

The appellants also contended that the legitimacy presumption should not apply because the only proof in the record revealed that Precious and Earnest Davis had not been together since 1946 and that the oldest appellant was not born until 1948. There was also testimony that Moses Wright acknowledged himself as the father of the appellants. The court held that "this [evidence was] not sufficient to rebut the appellants' legitimacy status" and that "the presumption of legitimacy rule can only be overcome by the clearest evidence that the husband was impotent or without access to his wife". Since there was no evidence that Earnest Davis was impotent and the only evidence of nonaccess was the testimony of his wife, the appellants failed to rebut the presumption of legitimacy.

In Lewis v. Petty, the Arkansas Supreme Court upheld the decision of the Faulkner County Probate Court which found that Carmen Petty was the illegitimate daughter of Major William Lewis. The Arkansas Supreme Court held that the application of a "clear, cogent and convincing proof" standard was properly applied to the question of whether Carmen Petty was the illegitimate daughter of the intestate decedent, Major William Lewis, where the case arose between the court's decision in Lucas v. Handcock, which declared Ark. Stat. Ann. § 61-141 unconstitutional under the authority

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of *Trimble v. Gordon*, and the effective date of Act 1015 of 1979 which amended the invalidated statute.

The appellant in the instance case, collateral heirs of Major William Lewis, argued that the appellee, Carmen Petty could not inherit from Lewis' estate absent some form of written acknowledgment by Major Lewis that the appellee was his daughter or a judicial determination of parenthood during the lifetime of the parties. The Arkansas Supreme Court held, however, that the evidence presented below met the "clear, cogent and convincing proof" standard. There was testimony that Major Lewis had dated Carmen Petty's unwed mother (deceased) prior to Carmen Petty's birth, Major Lewis was listed as the father on her birth certificate, she was enrolled at school as Carmen Lewis, her marriage license was issued to Miss Carmen Lewis, she was known throughout the small community where she lived as Major Lewis' daughter, there was testimony that Major Lewis recognized her as his daughter and provided her with some financial support, there was testimony that Carmen Petty referred to Major Lewis as "daddy" and that he asked that her children be told that he was their grandfather, and Carmen Petty attended Major Lewis' funeral. There was also evidence of a similarity of appearance between Carmen Petty and Major Lewis.

The appellants also argued that testimony as to the general reputation in the community on the issue of paternity should not have been allowed. The Supreme Court, however, recognized that Arkansas' Uniform Rules of Evidence, Ark. Stat. Ann. §28-1001 (Repl. 1979), Rule 803(19) provided a hearsay exception for "[r]eputation. . . among members of his family. . . or among his associates, or in the community, concerning a person's birth. . . relationship by blood. . . ancestry, or other similar fact of his personal or family history" and that the witnesses were long-time residents of the small community.
where Carmen Petty was raised and they knew her mother and Major Lewis.\textsuperscript{227}

The collateral heirs of Major Lewis also argued that the appellee’s birth certificate should not have been admitted into evidence.\textsuperscript{228} The Arkansas Supreme Court disagreed recognizing that Rule 803(9) of the Rules of Evidence provided a hearsay exception for "records of data compilations, in any form, of birth . . . or marriages, if the report thereof was made to a public office pursuant to requirements of law."\textsuperscript{229} Since the birth certificate, signed by Carmen Petty’s mother, which listed Major Lewis as Carmen’s father, had been filed for record with the proper authorities\textsuperscript{230} it was "prima facie evidence in all courts and places of the facts therein stated".\textsuperscript{231} No challenge was made as to the authenticity of the birth certificate.\textsuperscript{232}

This case is important in that the case lists factors which, when taken together, will allow an alleged illegitimate to meet the required "clear, cogent and convincing proof" standard in establishing paternity.

In \textit{Allen v. Wallis},\textsuperscript{233} the Arkansas Supreme Court reversed and remanded an order of the Van Buren Probate Court which found that the three children of Fletcher Haywood Allen were not the lawful heirs of Allen’s deceased uncle, Wager Kirkwood.\textsuperscript{234} The probate judge had based his decision on the premise that the appellant’s claim accrued before the law was changed allowing illegitimates to inherit and that the appellants had to prove that their parents were married by "clear, cogent and convincing evidence".\textsuperscript{235}

The Arkansas Supreme Court reversed finding by a "preponderance of the evidence" that the parents were married and that "the appellants were entitled to inherit through their father pursuant to Ark. Stat. Ann. §61-141 (Supp. 1981).\textsuperscript{236} Although the appellants, Oneta Allen, Fletcher Harold Allen and Dixie Aleta Marie Hamlin, could not produce a marriage certificate, it was shown that their parents had lived together for approximately
seventeen years and had held themselves out as husband and wife.\textsuperscript{237} Part of this period was spent in Texas, a state that recognizes common-law marriages.\textsuperscript{238} Fletcher Harold Allen offered testimony that he never knew that his parents had never wed.\textsuperscript{239} All three of the children's birth certificates showed that Fletcher Allen was the father, two listing "Mrs. Fletcher Allen" as the mother and one showing "Iva Allen" as the mother.\textsuperscript{240} Also, Fletcher Allen once mailed Iva a card addressed to "Mrs. Fletcher Allen" in Indiana, a state which also recognizes common-law marriages.\textsuperscript{241} A Clarksville, Arkansas newspaper announcement announced the birth of Dixie Aleta Marie as the daughter of Mr. and Mrs. Fletcher Allen.\textsuperscript{242}

The probate judge also held that the appellants could not inherit as the illegitimate children of Fletcher Haywood Allen under Ark. Stat. Ann § 61-141 since the Arkansas Supreme Court had ruled in \textit{Frakes v. Hunt},\textsuperscript{243} that \textit{Trimble v. Gordon},\textsuperscript{244} would not be applied retroactively and Fletcher Allen had died in 1969.\textsuperscript{245} The Arkansas Supreme Court held that this was incorrect since the appellants did not become the heirs of Allen's uncle, Wager Kirkwood until his death in 1979 after \textit{Trimble} was decided.\textsuperscript{246} The court, however, based its decision upon the fact that the Allens had a common-law marriage pursuant to Texas law and also stated that "[w]here there is a cohabitation apparently matrimonial, a strong presumption of marriage arises which increases with the passage of time. . . especially where the legitimacy of a child is involved".\textsuperscript{247} The appellees had failed to overcome this presumption by proving that there had not been a marriage.

In \textit{Henry v. Johnson},\textsuperscript{248} the Arkansas Supreme Court held that "to the extent, if any, that our prior decisions have implied that county courts have jurisdiction to determine heirship, they are overruled".\textsuperscript{249} Although Article 7, Section 28, of the Arkansas Constitution grants exclusive jurisdiction to the county courts in all bastardy proceedings, the court
held that "a determination of heirship is not a bastardy proceeding within the meaning of Article 7, Section 28", and that "an illegitimate child may bring a petition for the determination of heirship in the probate court where the decedent's estate is being administered". The court distinguished the type of bastardy proceeding where there is a living putative father and a proceeding to determine heirship by the standard of proof required in each type of action, "a preponderance of the evidence" will suffice in the former, whereas the latter requires "clear and convincing evidence" of paternity. In the instant case the appellant sought only to establish heirship in a probate court and she did not attempt to establish liability for expenses, visitation right, or support payment. The probate court erred in dismissing her claim for lack of jurisdiction.

In Boatman v. Dawkins the Arkansas Supreme Court was asked to decide if Ark. Code Ann. § 28-9-209 (1987) violates the Equal Protection Clause of the Fourteenth Amendment. The Appellant in this case alleged that, because the statute provides that an illegitimate child must file a claim against her father's estate within 180 days of his death, while a legitimate child has a longer period, the statute is invalid.

In this case, Steve Holmes, the illegitimate's father, died intestate on May 17, 1983. On May 31, 1983, the appellee filed a petition in probate court seeking to have herself appointed personal representative of Holme's estate. Kristy, the illegitimate child, received no notice of the petition for probate. The appellee, Mable Dawkins, was appointed administratrix on August 16, 1983. On March 6, 1986, the appellant, as mother and next friend of Kristy, who was an infant, filed a petition in probate court to determine heirship. A final order closing the estate had not been entered. The probate court found that Kristy was the illegitimate child of Steve Holmes but, because she had not asserted her claim within 180 days of his death, she could not inherit.
On appeal to the Arkansas Supreme Court, the appellant argued that the differential treatment of illegitimate children amounted to "unjustified discrimination". The Arkansas Supreme Court, however, gave deference to the Arkansas legislature, noting that the state's laws respecting illegitimates had been changed for the express purpose of complying with the mandates of *Trimble*. The court cited *Lalli*, for the proposition that the 180 day limitation on illegitimates seeking to inherit from their fathers was a reasonable time limitation and that in *Lalli*, "'during the lifetime of the father'... was a constitutionally valid limitation on time." The court then held that "[o]bviously, the statute, Ark. Code Ann. § 28-9-209 (1987). ... does not violate the equal protection clause of the fourteenth amendment".

The appellant argued that the trial court should have applied Ark. Code. Ann. § 1-56-116 (1987) which allows a minor up to three years from the time he or she reaches majority to assert an action but the court dispensed with this argument as being "without merit".

In support of the Arkansas law the court stated:

> *The probate statute giving an illegitimate child 180 days to file a claim is a statute creating a new right, and the right is created for only 180 days. ... (emphasis added) The provisions requiring it to be asserted in a particular mode and within a fixed time, are conditions and qualifications attached to the right itself, and do not form a part of the law of the remedy. If it is not asserted within the permitted period, it ceases to exist and cannot be claimed or enforced in any form.* (emphasis added)

In other words, the provisions in Ark. Code Ann. § 28-9-209 (1987) created a new right that did not exist at common law, the 180 day period formed part of that right, therefore the 180 day limitation period was not typical statute of limitations.

The appellant's final argument was that she was not given notice of the petition for probate as required by Ark. Code Ann. § 28-40-111 (1987), and therefore the 180 day
statute was inapplicable. The court, however, would not consider the argument because it had not been properly raised below.

Justice Hickman, Purtle, and Hays dissented. In a stinging dissent, Justice Purtle argued that Arkansas statutory treatment of illegitimates violated the Equal Protection Clause of the Fourteenth Amendment. The dissenting justice first stated additional facts not set out in the majority opinion.

The appellee and administratrix, Mable Dawkins, was the mother of Steve Holmes. She visited her granddaughter Kristy even after her son’s death. She gave no notice to Kristy or her mother, the appellant, Hortense Boatman, of her petition for appointment as administratrix of Holmes’ estate. Furthermore, when Kristy was born, Hortense Boatman and Steve Holmes executed an affidavit in which Holmes acknowledged that he was Kristy’s father. His name also appeared on Kristy’s birth certificate.

Justice Purtle argued that, because no guardian or attorney ad litem was appointed for the nine-month-old Kristy Holmes and no notice was given to her, she was deprived of due process stating that "[e]ven if Ark. Code Ann. § 28-9-209 (1987) is constitutional, the facts of the case require a different result than that reached by the majority." He felt, however, that "Ark Code Ann § 28-9-209(1987). . . is discriminatory on its face and should be declared invalid," stating that "[i]f prohibiting an illegitimate child from inheriting from his father’s estate is not a proper state interest, then certainly limiting the right of inheritance by illegitimate children cannot be justified on the same grounds."

This case is difficult to square with the United States Supreme Court’s decision in Reed. Here, as in Reed, the illegitimate’s claim to share in her father’s estate was asserted before the intestate’s estate was finally closed. The United States Supreme Court in Reed allowed the illegitimate’s claim where there had been no final order closing the estate and
no innocent third party rights were implicated. In the *Boatman* case the state’s interest in the finality of probate proceedings would not have been adversely affected by a allowing the illegitimate to share in the remaining estate. Furthermore, the state’s interest in preventing fraudulent and spurious claims, which led the United States Supreme Court to uphold the statute in *Lalli* on the basis that the statue served an evidentiary function, would not have been adversely affected by allowing the illegitimate child in the *Boatman* case to inherit where it was certain that the decedent was the illegitimate’s father.

**RIGHTS OF BONA FIDE PURCHASERS**

The Arkansas Supreme Court has yet to decide a case involving the right of an illegitimate child to inherit where the rights of an innocent purchaser for value are implicated. The court has, however, indicated that the rights of the bona fide purchaser who has relied on prior law will prevail. In *Frakes v. Hunt* the court recognized that "[In some cases, equity and justice will require exception to permitting inheritance by illegitimates where heirs or bona-fide purchasers for value have acted in reliance on a justified assumption that no illegitimate exists". Although the Arkansas Supreme Court held that *Trimble* would not be given retroactive effect in *Frakes* and in *Boatman v. Dawkins* that Arkansas’ 180 day limitation on illegitimates for asserting claims is valid, thus reducing the likelihood that a case will arise wherein the rights of a bona fide purchaser are involved, this problematic area is worthy of note.

When a case with the same factual background as *Boatman* next arises it is almost certain that the attorney representing the known illegitimate who hasn’t received notice of the opening of his father’s estate will raise the due process issue that was not properly presented in *Boatman*. Assuming that the illegitimate prevails, the 180 day limitation may not be applicable. In this situation, third party reliance could likely be present.
A recent Mississippi case, *Collier v. Shell Oil Co.*, dealt with the issue of reliance on pre-Trimble law by a bona fide purchaser. In *Collier*, the legitimate heirs of Lou Vander McLaurin executed oil and gas leases to Shell Oil Company. Shell later assigned an overriding royalty to Amoco Production Company. Shell transferred its interest to a subsidiary corporation. Before the period for illegitimates to assert their claims had expired, the illegitimate heirs of Lou Vanden McLaurin asserted their right to inherit as against the legitimate heirs, Amoco and Shell. When the case came before the Mississippi Supreme Court, that court began its opinion by stating that:

> Interests in land are not protected as vested property rights where the interests have been acquired by inheritance and without detrimental reliance and no subsequent transaction has been executed. One who has acquired title by operation of law under prior interpretation of the law regulating descent and distribution must yield to a subsequent change of interpretation.

The court then cited several Mississippi cases wherein illegitimate heirs were allowed to take notwithstanding the fact that rights of inheritance had vested in legitimate heirs. The court, however, noted that this case was different because the legitimate heirs had conveyed interests in the subject property to an innocent purchaser for value.

In denying the illegitimate’s asserted right to inherit the court relied on Article 1 Section 10 Clause 1 of the United States Constitution stating that "the Constitution denies to the states the power to enact any law impairing the obligation of contracts". The rights of the illegitimate were subject to the bona fide purchaser’s (Shell and Amoco) contract rights. The court stated further:

Shell and then Amoco are bona fide purchasers for value. At the time they took neither land records nor accessible law gave them notice that McLaurin’s illegitimate heirs had rights in his estate. As such, Shell and then Amoco, acquired title against the world. Indeed, we have recognized that "every reasonable intendment should be made to support the titles of bona fide purchasers of real property, and that no equity can be any stronger than that of a purchaser who has put himself in peril by purchasing a title for valuable consideration without notice of any defect in it". (emphasis added)

By the same token, the states’ interest in the stability of land titles is very much at issue today. Purchasers of interests in land should not be required at their peril to predict the future course of constitutional law.
Although the Mississippi Court used Art. 1, § 10, Cl. 1 of the United States Constitution to support its decision, it seems that protecting the rights of a bona fide purchaser rests upon equitable principles. As previously indicated the Arkansas Supreme Court has recognized the implications that could result when stale claims are presented and the rights of innocent third parties are subject to being adversely affected.
CONCLUSION

The law concerning the effect of illegitimacy in Arkansas has undergone some drastic changes since the United States Supreme Court decided the *Trimble* case. However, many of the principles, presumptions and rules of law that were presented in the discussion of the recent decisions of the Arkansas Supreme Court existed prior to *Trimble*. It is hoped that this article has created some interest in this area of the law since it is important for anyone involved in land transactions be familiar with the effects that illegitimacy might have on intestate succession and title to real property.
FOOTNOTES


3. F. Pollack and F. Maitland, supra note 1.


5. Id.


7. Note, Equal Protection and the Illegitimate Child, supra note 4 at 232 n. 14. In the twelfth century the church had become committed to the doctrine that children who were born out of wedlock became legitimated by the subsequent marriage of their parents. See 1 F. Pollock and F. Maitland, The History of English Law, 127 (1895).

8. Id.

9. In Levy v. Louisiana, 391 U.S. 68 (1968) the United States Supreme Court struck down, as violative of equal protection, a Louisiana statute which prohibited a illegitimate child from recovering for the wrongful death of her mother when a legitimate child would have enjoyed such a right. Justice Douglas, speaking for the majority reasoned that "[l]egitimacy or illegitimacy of birth has no relation to the nature of the wrong... inflicted on the mother". Levy represents the first decision by the court that recognized that illegitimates as a class should have constitutional protection from "invidious discrimination".


11. Id. at 533-34

12. Id. at 534.

13. Id. at 537.

14. Id. at 536.


16. Id. at 539.

17. Id.

18. Id. at 541.
The father and mother, as authorized by Louisiana law, had jointly executed a Louisiana State Board of Health form, acknowledging paternity, before a notary. This public acknowledgement gave the illegitimate child the right to claim support from her parents or their heirs but did not give the child the legal right to share equally with legitimate children in the parent's estate. Furthermore, the public acknowledgement gave the child the right to be only a limited beneficiary under her father's will. Labine v. Vincent, 401 U.S. 532 at 533.

The Illinois statute provided that:

An illegitimate child is the heir of his mother and of any maternal ancestor, and of any person from whom his mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if living. A child who was illegitimate whose parents intermarry and who is acknowledged by the father as the father's child is legitimate. Ill. Rev. Stat. c. 3, §12 (1973).

The negative implication of the Illinois law was to deny an illegitimate, whose parents had not subsequently married, even though acknowledged by the father, the right to share in the father's estate.

The father's estate consisted of a 1974 Plymouth automobile worth approximately $2,500.

In Weber, the court established the right of dependent, unacknowledged illegitimate children to receive worker's compensation benefits equal to illegitimate children.

33. Id. at 769.

34. Id.

35. Id. at 769-70, quoting, Weber, supra note 30 at 175.

36. Id. at 770.


38. Id at 771, quoting, Gomez v. Perez, 409 U.S. 535, 538 (1973). (In Gomez the court held invalid a Texas statute which gave only legitimate children the right to paternal support.)

39. Id. at 772.

40. Id. at 774.

41. Id.


43. Id.

44. Id. at 775.

45. Id.

46. Id. at 776.


50. Id. at 777-86 (Rehnquist dissenting).


52. Id. at 261-62. The New York statute at issue provided that:

   [A]n illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a
proceeding instituted during the pregnancy of the mother or within two years from the birth of the child. N.Y. Est., Powers and Trust Law § 4-1.2 (McKinney 1967). The court did not test the constitutionality of the "during pregnancy... or within two years from the birth" requirement. Lalli, 439 U.S. at 267 n. 5.

53. Id. at 258-59.
54. Id. at 276.
55. Id. at 267.
57. Id.
58. Id.
59. Id. at 268.
60. Id.
62. Id. at 269.
63. Id. see note 65, infra.
64. Id. at 270.
65. Id. at 271, quoting, Bennett Commission Report at 265. (The Bennett Commission was created by the New York Legislature in 1961. It was instructed to recommend needed changes in certain areas of state law, including that pertaining to the descent and distribution of property, and the practice and procedure relating thereto. Lalli, 439 U.S. at 269 n.7)
67. Id. at 271.
68. Id.
69. Id. (citing Bennett Commission Report at 266).
70. Id. at 273.
72. Id. at 274 (citing Bennett Commission Report at 265).
73. Id. at 274.
74. Id. at 274-776.
75. Id. at 277-79.
76. 476 U.S. 852 (1986).
77. Id. at 852-53
78. Id.
79. Id at 853.
80. Id.
82. Id. at 854.
83. Id. Because the issue of legitimation was not raised properly below, the U.S. Supreme Court did not reach the question of legitimation. Reed, 476 U.S. at 854 n. 4.
84. Id.
85. Id. at 853.
87. Id. at 855.
88. Id.
89. Id. at 856.
90. Id.
96. 571 S. W.2d 600 (Ark 1978).
97. For other cases wherein the evidence presented was sufficient to establish paternity see Allen v. Wallis, 650 S.W.2d 225 (Ark. 1983); Lewis v. Petty, 613 S.W.2d 585 (Ark. 1981); Compton v. White, 587 S.W.2d 829 (Ark. 1979); Lucas v. Handcock, 583 S.W.2d 491 (Ark. 1979).

98. See Tuttle v. Phillips, 460 S.W.2d 328 (Ark. 1970); Parker v. Hadley, 296 S.W.2d 391 (Ark. 1956); Rogers v. Morgan, 210 S.W.2d 129 (Ark. 1948).


100. Id.

101. Id.

102. Id.

103. Id. at 601.


105. Id.

106. Id.

107. Id.

108. Id.


110. Id.

111. Id.

112. Id.

113. Id. The rule in Arkansas that allows a witness who is unrelated to the decedent to testify regarding the intestate’s lineage based upon general repute in the community is a minority rule. See Daniels v. Johnson, 226 S.W.2d 571, 15 A.L.R. 2d 1401 (1950).


115. Id.

116. Id.

117. Id. at 603.

118. Id.
120. Id.
121. Id.
123. Id. at 385-86.
124. Id. at 385.
125. Id.
126. Id.
128. Id.
130. Id. at 385.
131. Id at 386 (citing Thomas v. Barnett, 310 S. W.2d 248 (Ark. 1958)).
133. Id. at 386 (citing Thomas, note 128 supra).
134. Id.
135. Id.
136. Id.
138. 583 S. W.2d 491 (Ark. 1979)
141. Id. at 492-93.
142. Id.
144. Id at 496.
146. Id. at 496.
147. Id. at 494.
148. Id.
149. Id.
154. Id. at 499.
155. Id. at 498.
156. Id.
157. Id. at 499, *quoting*, Allen v. Harvey, 568 S. W.2d 829 (Tenn. 1978)).
159. Id. at 499-503 (Fogelman dissenting).
160. Id.
161. 587 S. W.2d 829, 830 (Ark. 1979).
162. Id.
163. 583 S. W.2d 491 (Ark. 1979).
166. Id.
167. Id.
168. Id. at 831.
169. Id. at 830.
171. Id.
172. 594 S. W.2d 227 (Ark. 1980).
173. Id.
174. Id.
175. Id.
176. Id.
178. Id. at 228.
179. Id. (citing Compton v. White, 587 S. W.2d 829 (Ark 1979)).
180. Id.
181. Id.
182. Ford v. King, 594 S. W.2d 227, 228 (Ark 1980).
183. Id.
184. Id.
185. Id.
186. Id.
188. Id.
189. Id.
190. Id.
191. Id.
193. Id. (citing Lucas v. Handcock, 583 S.W.2d 491 (Ark. 1977); Daniels v. Johnson, 226 S.W.2d 571 (Ark. 1950).

194. Id.

195. 601 S. W. 2d 837 (Ark. 1980).

196. Id. at 838.

197. Id.

198. Id.


201. 613 S. W.2d 850 (Ark. 1981).

202. Id. at 851.

203. Id.

204. Id.

205. Id. (There was no evidence that a marriage license was issued or recorded).


207. Id.

208. Id.

209. Id. (citing Bankston v. Prime West Corporation, 610 S. W.2d 586 (Ark. App. 1981)).

210. Id.


212. Id. (citing DePotty v. DePotty, 295 S. W.2d 330 (Ark. 1956)).

213. Id.

214. Id.

215. Id. (citing Thomas v. Barnett, 310 S. W.2d 248 (Ark. 1958)).


218. Id. at 587.
219. 583 S. W. 2d 491 (Ark. 1978).
222. Id.
223. Id.
224. Id.
225. Id.
227. Id. (citing Daniels v. Johnson, 226 S. W. 2d 571 (Ark. 1950)).
228. Id.
229. Id. at 586-87.
230. Id. at 587.
232. Id.
233. 650 S. W.2d 225 (Ark. 1983).
234. Id. at 227.
235. Id. at 225.
236. Id.
237. Id.
239. Id.
240. Id. (No certificate of marriage could be produced).
241. Id.
242. Id.

244. 430 U.S. 762 (1977).


246. Id.

247. Id. at 226-27. (citing Coogler v. Dorn, 328 S.W.2d 506 (Tex. 1959)).

248. 730 S. W.2d 495 (Ark. 1987).

249. Id. at 496. Earlier cases had held that Chancery Courts do not have jurisdiction to determine paternity, establish support payments or establish visitation rights. These cases, however, did not deal with probate proceedings for the determination of heirship of an illegitimate. Id. See Jarmon v. Brown, 692 S.W.2d 618 (Ark. 1985); Stain v. Stain, 689 S.W.2d 566 (Ark. 1985); Rapp v. Kizer, 543 S.W.2d 458 (Ark. 1976); Higgs v. Higgs, 299 S.W.2d 837 (Ark. 1957).

250. Id.

251. Id.

252. Id.


254. 743 S. W.2d 800 (Ark. 1988).

255. Id. at 801.

256. Id.

257. Id.

258. Id.


260. Id.

261. Id.

262. Id.

263. Id.


265. Id.
266. Id. at 802.
267. Id.
268. Id.
269. Boatman v. Dawkins, 743 S. W.2d 800, 802 (Ark. 1988), quoting, Walsh v. Mayer, 111 U.S. 31 (1884)).
270. Id. at 802.
271. Id.
272. Id. at 803 (Purtle dissenting).
274. Id.
275. Id.
276. Id.
277. Id.
279. Id. at 803-04.
280. Id. at 803.
282. Id. at 498.
283. Id.
284. 534 So.2d 1015 (Miss. 1988).
285. Id. at 1016.
286. Id.
287. Id.
288. Id. at 1016-17.
290. Id. (citing In Matter of Estate of Smiley, 530 So.2d 18 (Miss. 1988); Halloway v. Jones, 492 So.2d 573 (Miss. 1986); Berry v. Berry, 463 So.2d 1031 (Miss. 1984); In Matter Estate of Kimble, 447 So.2d 1278 (Miss. 1984).

291. Id.

292. Id. at 1018 (citing U. S. Const. Art. I, §10, cl. 1.).

293. Id at 1018-19.
ADDITIONAL READINGS


