In the

Supreme Court of the United States

DETA MONA TRIMBLE AND JESSIE TRIMBLE,

Appellants,

v. No. 75-5952

JOSEPH ROOSEVELT GORDON, et al.,

Appellees.

Washington, D.C.
December 7, 1976

Pages 1 thru 45

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

DETA MONA TRIMBLE AND JESSIE TRIMBLE, Appellants,	:	
v.	:	No. 75-5952
JOSEPH ROOSEVELT GORDON, et al., Appellees.	:	

Washington, D. C.

Monday, December 7, 1976

The above-entitled matter came on for argument at 1:05 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JAMES D. WEILL, ESQ., Legal Assistance Foundation of Chicago, 343 South Dearborn Street, Chicago, Illinois 60604; on behalf of the Appellants.

MILES N. BEERMANN, ESQ., 221 North LaSalle Street, Chicago, Illinois 60601; on behalf of the Appellees.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments now in 5952, Trimble against Gordon.

Mr. Weill, you may proceed.

ORAL ARGUMENT OF JAMES D. WEILL, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. WEILL: Mr. Chief Justice, and may it please the Court:

This case is on appeal from the Illinois Supreme Court and concerns the question of whether the Illinois intestate succession statute, which excludes illegitimate children from inheriting from their fathers, but grants such inheritance rights to all legitimate children, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Deta Mona Trimble was born in 1970. Her parents were not married. Deta and her parents lived together, and she was supported by her father pursuant to an Illinois paternity adjudication and court order.

In 1974, when Deta Trimble was three and a half years old, her father, Sherman Gordon, died at the age of 28, the victim of a homicide. He left no will, and no surviving spouse. Deta is his only child.

Under the Illinois Probate Act, legitimate children inherit from either parent in intestacy. The illegitmate

child, on the other hand, will inherit from his or her mother, but is not the heir of an intestate father.

Pursuant to this statute, the probate court entered an order declaring Sherman Gordon's heirs to be his parents, siblings and a half brother. The court rejected the challenge to the constitutionality of the statute.

The Illinois Supreme Court granted leave to appeal directly to the Trimbles, and the Illinois Supreme Court then affirmed the probate court's decision. There was no written opinion, since the court held that its decision four months earlier in the case of In re Estate of Karas was dispositive. In addition to fully briefing their own case, the Trimbles had filed an amicus curiae brief in the Karas case.

QUESTION: Mr. Weill --

MR. WEILL: Yes, sir.

QUESTION: -- was there any impediment to either of the parents marrying?

MR. WEILL: No, there was none that we know.

QUESTION: And there was a paternity suit here, wasn't there?

MR. WEILL: Yes, there was a paternity suit adjudication.

QUESTION: And what prompted that? Was that a friendly suit, or an unfriendly one, or -- ?

MR. WEILL: At some point, Mrs. Trimble -- Ms.

Trimble may have been on public aid, and it would have been a public aid suit. The public aid department is required under federal law, whenever anybody is on ADC, to establish paternity and bring a suit for support.

QUESTION: Well, what this lawsuit gets down to then is a litigation between the child and the other blood relatives of the decedent, correct?

MR. WEILL: That's correct. But it is a question of whether a state which gives inheritance rights to children generally --

QUESTION: I know.

MR. WEILL: -- can exclude illegitimate children.

QUESTION: But this is what it amounts to, isn't it?

MR. WEILL: Yes, that's correct.

This Court has ruled in recent years, in several cases, that legitimate children and illegitimate children whose paternity have been established, are considered to be identically situated. The statute at issue here discriminates because it denies to illegitimate children the state-created inheritance right, which is accorded to children generally.

This discrimination is unconstitutional under any standard of review, since it does not bear the remotest rational relationship to any legitimate state interests.

There have been four suggestions made by either

the Illinois Supreme Court, or by appellees here, as to --

QUESTION: I take it, Mr. Weill, from your comment just now, you concede that the rationality standard applies?

MR. WEILL: No, we don't concede that. We still believe that strict scrutiny, or some form of heightened scrutiny, is potentially applicable. We believe that because illegitimate children bear all or most of the traditional indicia of suspectness, they've been historically discriminated against, they're a discreet and insular minority, that some kind of heightened scrutiny is applicable.

QUESTION: I thought you said that under any standard of rationality.

MR. WEILL: Well, we said under any standard of equal protection review, the statute must fall. The statute, because there is no rational basis whatsoever, the Court need not reach the question of a higher level of scrutiny.

QUESTION: How do you reconcile your answer to Justice Blackmun's question with Matthews against Lucas decided last term?

MR. WEILL: Well, the Lucas case did not concern a total exclusion of illegitimate children. The Lucas case found the statute to be very quote carefully tuned to the needs and considerations of including illegitimate children. It's not a total exclusion like this is.

QUESTION: But it differentiated illegitimate from

legitimate children, didn't it?

MR. WEILL: Yes, only marginally, and only when there was no significant evidence of pre-existing support or paternity adjudication. Where, however, the statute just blanketly excludes illegitimate children, we believe that some form of heightened scrutiny is appropriate. And Lucas is not --

QUESTION: There isn't a blanket exclusion here is there, Mr. Weill?

MR. WEILL: Yes, to the degree that illegitimate children cannot inherit from their fathers in intestacy, the state has created the total exclusion of them.

QUESTION: Well, not -- isn't there something -- you mean there -- what if the parents marry?

MR. WEILL: If the parents marry and the father acknowledges the child, then the child is legitimate.

QUESTION: Well, what if they don't marry, and he acknowledges?

MR. WEILL: If he acknowledges the child, or if the child's paternity is adjudicated, the child remains illegitimate and is not eligible to inherit under the Illinois intestacy law.

QUESTION: Now, you said there's no rational basis whatever for this. What was the historical basis long thought to be the justification?

MR. WEILL: Well, these intestacy statutes and the exclusion of illegitimate children come out of medieval England. And at that time --

QUESTION: Well, they've been regarded as valid somewhat later than medieval England, have they not?

MR. WEILL: That's correct. But the origin of them relates to an essentially land-based society. The Illinois Supreme Court suggested that its main concern was the proof problem, and that was the main --

QUESTION: There's no problem with proving the mother.

MR. WEILL: That's correct. But it's our contention that the state cannot --

QUESTION: It doesn't open itself to fraud, does it?

MR. WEILL: That's correct. The mother's maternity is relatively easy to establish. But the state here has ignored all concerns of whether or not paternity has been established of the father for the child. The Illinois Supreme Court, while it talks about the proof problem, is hypothesizing very abstract situations. It's not dealing with the reality of this situation, or analogous situations, where paternity has been adjudicated by its own court system.

In that case, there is no more doubt about paternity than there is for any other child. They're not -- the Illinois

Supreme Court also ignored situations where the child's paternity has been acknowledge.

There is no proof problem in this case. There is no question as to the paternity. It's our contention that this is supported by all of this Court's decisions in the illegitimacy area, including the Lucas decision, thatthe state cannot exclude all illegitimate children based upon proof problems, that the state has to create some form of nexus between what it considers to be the proof problem, and the scope and the quality of the exclusion. And this blanket exclusion doesn't do that.

QUESTION: I understood your response to Mr. Justice Blackmun's question to at least intimate that this was not an unfriendly adversary paternity suit. Did I get that correctly?

MR. WEILL: Well, I don't really know. The record doesn't show that. It was, I believe, brought by the public aid department. He -- the father, Sherman Gordon, did admit during the course of that trial, did admit his paternity.

QUESTION: And that was, you said, was to establish eligibility for a particular welfare --

MR. WEILL: No, that would not establish the eligibility. The eligibility -- Mrs. Trimble and the child would already have been receiving AFDC.

QUESTION: But without it, was there a difference?

MR. WEILL: No, it does not affect --

QUESTION: Well, then I did misunderstand you. I had the impression from your response that it was related to some degree of eligibility for benefits.

MR. WEILL: No, there would have been no incentive for collusion at the trial of any kind in order to get a --

QUESTION: Well, what you're talking about is that recent federal statute, as I understand it.

MR. WEILL: That's right.

QUESTION: That requires a recipient --

MR. WEILL: A pre-existing receipient.

QUESTION: That's right. And this is if a husband deserts a marriage situation, if the husband deserts, there is now an obligation to seek support, isn't there?

MR. WEILL: That's correct. But --

QUESTION: And that's what this is?

MR. WEILL: Well, no, because they weren't married. There is some additional obligations --

QUESTION: Oh, they weren't married -- and that's the same statute, isn't it?

MR. WEILL: That's right. The statute in addition to seeking to require support from father, whether or not there had been a marriage, also seeks to establish the paternity of illegitimate children under this federal mechanism.

QUESTION: And those are federal court suits,

too, aren't they?

MR. WEILL: No, only in the last resort to collect the support. But they're essentially a state court proceeding. It uses the normal state paternity proceeding, but now that portion of the state court is 75% federally funded.

QUESTION: These parents were living together, weren't they?

MR. WEILL: Yes, they were.

Second rationale offered by the Illinois Supreme Court is the so-called presumed intent argument. To claim that the statutory disposition is in accord with the presumed intent of most decedents.

This arguments fails in the first instance because the intestacy statute is state action, and a state cannot base its statutory scheme on a presumption of invidious private intent, nor can the state itself invidiously discriminate.

QUESTION: What do you mean, invidious private intent?

MR. WEILL: Well, the state is assuming here that fathers of illegitimate children want to exclude their illegitimate children. They have no intent to grant inheritance rights or otherwise have any dealings with their illegitimate children, whereas they do -- the state makes the exact opposite assumption for legitimate children. Now in cases like

Stanley this Court has found that that assumption is inaccurate, that the state is building its view of child-father relationships on totally outdated stereotypes.

QUESTION: Well, it may be inaccurate, but I think you used the word invidious. Is there anything wrong if a father in fact decides to make that choice as between illegitimate and legitimate offspring?

MR. WEILL: If the father -- if the statute included illegitimate children, and the father wanted to, by will, disinherit his legitimate children or his illegitimate children, he can do that by will. The state cannot do that for him, and the state cannot itself assume across the board of its population an intent to discriminate against illegitimate children which this Court has said in eight cases is invidious, that it is basically invidious and irrational in the first instance to discriminate against illegitimate children.

QUESTION: What cases did we use the word invidious?

MR. WEILL: I believe -- I'm not sure, but the line of eight cases striking down such discrimination certainly establishes that the illegitimacy discrimination will be closely looked at, and that it is to a degree suspicious to exclude all illegitimate children from any statutory scheme.

QUESTION: It is, though, in the power of the father to remedy that, isn't it?

MR. WEILL: That's correct. The father could --

QUESTION: By marriage or by will or by gift.

MR. WEILL: That's right -- it's not always within the power of the father to marry. He may be already married, or the mother may be already married. He could conceivably write a will. But as we point out in the brief, very, very few Americans write wills, and particularly those of the class not only of the decedent father here, but of, to a large degree, the fathers of illegitimate children. Their illegitimacy tends to occur in low and moderate income units where there isn't a lot of property, there is not a great incentive to write a will. Not writing a will may be because there's no access to lawyers, or whatever. So the argument that he could have written a will, in this case, a 28 year old man who died from a homicide, does not in the end justify the state's own invidious actions.

The state cannot discriminate just because it allows some people to opt out of that discrimination.

In addition -- we're turning to the presumed intent for a second. There is a poll in Illinois that is reported in Mr. Kraus' book which shows that this just is not -- does not reflect -- the statute does not reflect the desires of Illinois people, including any particular subgroups, sects, races the poll is broken down --

QUESTION: Well, is that a separate basis for attack on the statute, that you take a poll and it doesn't --

what the legislature has enacted doesn't reflect the will of the people?

MR. WEILL: No, but in this case it helps to explain why the Illinois Supreme Court did not rely on the presumed intent argument itself. The ILlinois Supreme Court never mentioned that it thought the statute was in accord with the desires of these fathers. All the Illinois Supreme Court mentioned, essentially, was the proof problem, and the last point, which is the Illinois said that it had an interest in promoting legitimate family relationships. So to that degree, the poll explains why that wasn't reached.

On the legitimate family relationship point, this Court has said in several cases that penalizing illegitimate children for the sins of their parents is neither a just nor an effectual way to accomplish the state's goal of encouraging legitimacy and encouraging marriage.

293 QUESTION: Does this Court have to presume that legislation on a state legislature represents public policy in that state? I'm not sure how important it is, but --

MR. WEILL: I'm not sure I understand the question, that it reflects the policy here of protecting and strengthening family --

QUESTION: You say that the law of Illinois is contrary to the wishes of the people of Illinois.

MR. WEILL: Well --

QUESTION: And does not reflect the public policy espoused by a majority of the people of Illinois. As I say, I don't really know what materiality or relevance that has, but it seems to me that if, as, or when it ever became material, that a court would have to presume that a law enacted by a state legislature does, in fact, represent the policy views of the people of that state, until the law is amended.

MR. WEILL: That's generally correct. I was only making the point here, because the Illinois Supreme Court has not, in this instance, said that this law reflects the general intent of the people of Illinois, that that was not a basis.

Now, that presumption certainly can be made, even if the Illiniois Supreme Court didn't make it. But again, that does not -- I go back -- that does not justify the state's own invidiously discriminatory action.

QUESTION: Well, does that concept need the blessing of the highest court of the state, or does it flow from the action of the legislature, as Justice Stewart has suggested?

MR. WEILL: It does flow from -- there is a presumption that the legislation represents what the people want. But I suggest to --

QUESTION: Well, this does. I mean, that's the best evidence of what people want is what their legislatures enact, isn't it?

MR. WEILL: That's correct. But we're talking about it in a different context here, in an abnormal context where the presumed intent argument does not relate to what the people as a whole want. It's an argument about what decedents in particular want, decedents in a particular group. The Illinois court refused to find, or did not find, that that was happening here. It's not a presumption as to the general population.

I'd like to turn very briefly to the Labine case, which this Court decided a few years ago. It's our position that Labine is substantially distinguishable on several grounds. The first case, Labine is significantly inclusive of illegitimate children in a way that the Illinois statute is not. Labine had a mechanism of support for minor, illegitimate children. Labine let illegitimate children inherit before the state escheated to the state. Labine also involved a right to inherit where there was the unilateral acknowledgement by the father, and an expression -- unilateral expression of an attempt to legitimate.

In addition, Labine involved an --

QUESTION: It's a little too fast for me, Mr. Weill. The third was that in Labine they allowed inheritance when there was unilateral expression by the father. That was inheritance if there was a will, wasn't it?

MR. WEILL: No, the --

QUESTION: The intestacy succession.

MR. WEILL: Yes. The second to last paragraph of the majority opinion in Labine discusses the Louisiana Supreme Court decision, the Miller case, in which the unilateral acknowledgement and statement of intent to legitimate in that acknowledgement by the father entitled the child to intestate succession rights.

QUESTION: And statement of intent to legitimate, which we don't have here.

MR. WEILL: That's right. But Louisiana had a mechanism for that. Illinois has created no mechanism. Illinois' mechanism is the paternity adjudication, but then Illinois turned around and ignored that in its intestacy scheme.

QUESTION: I see. And the first distinction you gave was, that there they provided for support, but here the support -- I don't get that distinction.

MR. WEILL: They provided for support for the minor child from the intestate estate of the father, from the heirs of the father. The child had a right to so-called alimony support from the estate, not support while the father was alive. Since the Gomez decision, that's been true in all states.

#362 QUESTION: Basic to all of that is Louisiana is based on the Napoleonic Code and the rest of the states is

based on the common law.

MR. WEILL: That's correct. Louisiana had a very unusual --

QUESTION: It sure is.

MR. WEILL: -- scheme, and its our position that that's distinguishable in a variety of ways, others of which are mentioned in the brief.

I'd like to reserve the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Beerman.

ORAL ARGUMENT OF MILES N. BEERMANN, ESQ.,

ON BEHALF OF THE APPELLEE

MR. BEERMANN: Mr. Chief Justice, and may it please the Court:

There is no decision of this Court that has held that illegitimates are a suspect class. Therefore, we submit that the proper test to determine whether or not this particular statute violates the equal protection clause is not the strict scrutiny test that counsel would ask us to adhere to, or even a higher scrutiny, but the reasonable basis test in whether or not this statute bears some rational relationship to a legitimate state purpose.

I think in one of the questions counsel was asked about that, and if I may, I think that the state purposes that this statute served are, one, to encourage family

relationships; two, to regulate property of decedents who die intestate, property that's located within the borders of the states; three, the stability of land titles; and four, the prompt and definitive determination of the valid ownership of property left by decedent.

Also, I would say that along with that is the prompt adjudication of probated estate.

Another one of the purposes would be to deter spurious claims, which I'll get into.

QUESTION: Mr. Beerman, we're not really talking about very much in this estate, are we?

MR. BEERMAN: No, your honor, as a matter of fact we're talking about $1500.

QUESTION: And your clients concede -- maybe it doesn't make any difference anyway -- do they have a blood relationship to this little girl?

MR. BEERMAN: Well, my client -- I have only one client, your honor, and that's the mother of the decedent. So that she's a blood paternal grandmother of the little girl.

QUESTION: I suppose you're not defending the Illinois statute as a matter of policy, if you were a legislator, and it says that a paternity suit or an acknowledgement isn't enough; there has to be marriage in addition?

MR. BEERMAN: Well, it still sets up a mechanism

whereby the child can be recognized. Insofar as Labine, which counsel alluded to, when the father of Labine acknowledged the child, he could have also made another statement along with that acknowledgement, allowing the child to inherit, but he didn't do that.

In this case, the decedent didn't marry the mother of the child, and didn't acknowledge the child. Now, technically, the child was acknowledged for him in the paternity proceedings. There was an order that issued from the circuit court of Cook County deciding that he was the father, and ordering him to pay support for the child.

But getting back to these state purposes, they were recognized as being valid, not only in Labine, but in this Court's opinion in Weber versus Aetna, even though the Weber decision went the other way because it was discrimination, as I recall it, among illegitimates. It is clear that the power to make such rules, to bear that relationship to the state purposes, should be left to the states.

Getting to the statutory will theory, I believe that the statutory will theory is a viable and valid theory. I think that the laws of intestacy are an attempt by the state to determine to whom the decedent would want his property distributed if he was to die unexpectedly or without making a will.

Now, the fact, as counsel alludes to, that most

people don't make wills, I think proves that people are satisfied with the legislative action in this area, that, for example, in Illinois if there's no will, and there's a surviving spouse and no children, the surviving spouse, I believe, receives everything. If there are children, the surviving spouse receives one third and the children receive two thirds.

In this particular case, the decedent, by making a will, could have left everything to his child. Now, in Illinois, a surviving spouse, if she's left out of the will, can renounce the will. The children have no right to renounce the will. And there is no right in a child in Illinois to inherit from its father. So that -- and that doesn't make any difference whether you're legitimate or illegitimate, you give away to your mother, so to speak -- she has a right to renounce the will, and children have no right to renounce the will.

QUESTION: How about -- maybe an afterborn child has some rights?

MR. BEERMAN: An afterborn child -- if I recall the statute correctly -- is an automatic renunciation -- is an automatic revocation of the will, your honor. And the afterborn child takes as if the decedent dies intestate. So that if the decedent had cut out all his children that were born before the afterborn child, the afterborn child

could take as if there was no will, even though the other children were cut out.

QUESTION: It isn't quite right to say the children have no rights, because if there is no will at all and the parent dies intestate, there are rights.

MR. BEERMAN: I didn't mean to imply that, Justice Stevens. You're 100% correct. What I'm stating is that the children in Illinois have no inherent rights to inherit from their father. And yes, if the father dies intestate, legitimate children would inherit two thirds or all of his estate as the case may be.

QUESTION: With respect to your argument about the problem of probate, certainty of title, and prompt ownership and all the rest, how does that apply when you've got an adjudication, as you do in this case, of paternity? Why is that any harder to establish than the normal legitimate fatherhood?

MR. BEERMAN: I don't know that it isn't, except that you may, I suppose -- what the legislature had in mind when they added the added criteria or the added condition of having the parents intermarry, would be so that the illegitimate children would not take the exclusion of legitimate children.

The -- I think one of the main problems here is, you know, the philosophical problem of whether or not the

fact that a child has been decreed to be the child of the decedent, if you will, means that that child is the natural object of the decedent's bounty. The child is the victim of an illicit relationship. And I think that overriding all of these concerns is the family relationship.

QUESTION: Well, that family argument has always puzzled me somewhat, because it would seem to me that by saying to the father, if you have illegitimate children, they cannot share in your estate, that is less of a deterrent than if you said to the father, if you have an illegitimate child, that child will share with your children. Why does one deter the misconduct more than the other?

MR. BEERMAN: I don't think it's -- I look at it from the opposite. I think that by stating that -- what the legislature was trying to do, I think, and what the public policy of the state is, is to foster legitimate family relationships, and not to foster illicit relationships by stating that if you die intestate, your illegitimate children will share in your estate. I'm not sure if I'm answering your question, but the -- I don't know if there is an answer. The point is that the father, if he wanted to, could make a will and leave all of his estate to any of his children, or to none of his children, as the case may be.

QUESTION: Well, if you rely on the ability to make the will, of course that answers everything.

MR. BEERMAN: Well, I really think it does. I don't think that there's anything mysterious about making a will.

QUESTION: Well, then, I suppose you could have a statute that said, blacks cannot inherit from whites, because you presume whites wouldn't want blacks to inherit their property, and they could always make a will to leave their property to whomever they wanted to. What would be wrong with such a statute?

MR. BEERMAN: I don't think that bears any relationship to a legitimate state purpose. I can't conceive of one.

QUESTION: Well, the legitimate state purpose would be that, presumably, if people had to take a poll, most people would assume that more whites would want their property to go to people of the same race than to people of another race. Isn't that a realistic assumption, even if it may not be a very attractive one?

MR. BEERMAN: I can imagine under circumstances it could be realistic.

QUESTION: Well, wouldn't it be -- what would be wrong with that? People could avoid that consequence, too. How is that different from saying, you cut out the illegitimates? Why couldn't you have this same kind of statute on racial grounds, in other words?

MR. BEERMAN: Well, because I don't think that this kind of statute is something that the legislature -- I don't think they have the right to put up the statute. I think that statute would be clearly unconstitutional, a denial of equal protection.

Let's take -- we can carry the hypothesis a little further. If you have a white man married to a black woman, then if he wanted to die-- he couldn't die intestate then, because under your hypothetical situation, his money wouldn't go to his children, assuming that they would be deemed black. So that he would have to make a will in order to leave his money to his children.

QUESTION: I thought you started out by saying illegitimate children were not a suspect class.

MR. BEERMAN: I don't think they are, your honor.

QUESTION: Well, there's the answer to it all.

MR. BEERMAN: I think that is the answer to it. I think that there has been no decision --

QUESTION: Well, please don't forget it.

MR. BEERMAN: I'm sorry, your honor, I won't.

QUESTION: Well, another element was introduced in the hypothetical question, as I understood it. Illegitimacy is not suspect, but a racial discriminatory statute would be quite suspect.

MR. BEERMAN: That's correct. And that's what would

make the statute in Justice Stevens' hypothetical clearly unconstitutional.

QUESTION: Well, clearly suspect as the threshold.

MR. BEERMAN: At the least. At the least. And then I don't think there could be any rational or reasonable purpose to the state in passing such a statute.

The other things that I wanted to point out -- and I think, Mr. Chief Justice, that you've alluded to some of them -- is that the decedent could change this so-called statutory will by a number of methods. He could execute a written will, he could create a joint tenacy, he could designate a beneficiary of a life insurance policy, he could create a trust, he could make a gift, there's a number of things he could do either under Illinois statute or by law, by federal law.

He could have -- and as I've already stated -- he could have left the entire estate to this child to the exclusion of everyone.

QUESTION: You're talking about a man whose net worth is less than $1,500 had all these options?

MR. BEERMAN: Theoretically, he had all those options.

QUESTION: Oh, theoretically.

MR. BEERMAN: I don't think there's any question about it. I think -- I don't know that we're talking in a

limited fashion about Sherman Gordon, the decedent in this case.

QUESTION: Well, I am. Anybody else here besides me?

MR. BEERMAN: In reality, your honor, I would say you're probably correct, that Sherman Gordon -- although he might have had some life insurance. He might have had a life insurance policy from his job. There are a number of things he might have had. In today's society --

QUESTION: You're talking about all this great legal advice he had that he could get. I want to know, where could he get it from?

MR. BEERMAN: Well, he could have got it at a number of places. In Chicago --

QUESTION: Is there any reason that he would have ever thought of a will? A man with $1,500? How much do you charge for drawing wills in Chicago? Around 1,500?

MR. BEERMAN: Well, a will of this type would probably cost about $25 to $50.

QUESTION: Really?

MR. BEERMAN: Right.

QUESTION: Well, how many do you get like that? None. I mean, why not be realistic. A man with that much income whose about to get his head blown off is not the type of person who gets into all these legal niceties.

MR. BEERMAN: I don't believe though, your honor, that we can set up a standard based on this one particular man. Because I don't think we're talking about this one particular man. I know that your question alludes to him, and you've statedquite succintly to me that you are talking about him. But if we start going on a case to case method of who is the man in this case, could he have made a will, and if counsel is right, and all of these people are in that position, I just don't agree with that. There are legal poverty offices all over the city of Chicago. Counsel is a member of one. I -- probably Sherman Gordon could have made a will and not been charged any fee at all by going into counsel's office. So that I think that that theory --

QUESTION: When was he killed?

MR. BEERMAN: 1974, I believe.

QUESTION: And you had all these offices then?

MR. BEERMAN: Oh, yes. Yes. I think we had even more of them then than we do now, your honor.

QUESTION: Strange.

QUESTION: I suppose that $25 or $50 will wouldn't be a burden on the Legal Aid if they're willing to come all the way to Washington on a case.

MR. BEERMAN: Mr. Chief Justice, I think that it's about like a half a paragraph of a will. All he had to do was start out with the normal opening paragraph and state that

he leaves everything that he owns to his daughter, and name her. And have three witnesses, and that would have been the end of it. And he could have probably got that or half a page. So maybe $25 is too much.

One of the --

QUESTION: Of course this was -- it should be resolved whether it was $1,500, $15,000 or a million and a half. The principles are the same, are they not?

MR. BEERMAN: I'm in perfect agreement with that. That's the whole point. I'm sure that if the Court was convinced that we were just talking about this one case, and there was only $1,500 involved, and that whatever the Court did in this case didn't transcend these particular facts, that we wouldn't be here arguing the case.

Another recognized purpose of the statute is the prevention of spurious claims. The Court has recognized that purpose in many of its decisions, most notably in the Jiminez case decided in 1974. The Illinois Supreme Court in the Karas case alluded to the grandfather type example where a grandfather died, and he had one child, a son, who pre-deceased him, by let's say, 15 or 20 years. And the grandmother, the wife of the present decedent, is left surviving. And she would be entitled to his entire estate by the laws of intestacy. And now some person comes along claiming to be the illegitimate child of the son who had

been dead for 20 years. And there's really no way to disprove the paternity. On the other hand the child, of course, has a tough time proving it. But it puts this widow of the grandfather in an awfully tough position.

QUESTION: I suppose you don't know why the Karas case didn't come here? That was a much larger estate?

MR. BEERMAN: Well, not only that, there were two cases there, your honor. And they both stopped there, at the Illinois Supreme Court. I'm sorry, but I don't know why they didn't come here.

It's out --

QUESTION: Mr. Beerman, you're talking about the intestate law of Illinois?

MR. BEERMAN: Yes, your honor.

QUESTION: And the purpose, as I understand it, is to take care of estates where there is no will.

MR. BEERMAN: That's correct, your honor.

QUESTION: While how is it a defense to it that he could make a will to get around it?

MR. BEERMAN: Well, because we're talking about the narrow issue, your honor. The laws of intestacy take up two or three pages in the Illinois statutes. The thing that we're talking about takes up about two sentences. And the theory being that if you accept the theory of the statutory will, thatthe man who dies intestate is presumed to know the

law, and is presumed to adopt the laws of intestacy as his so-called statutory will, then he knows that if he's got an illegitimate child, that illegitimate child cannot recover. He knows, for example, as Sherman Gordon can be presumed to know in this case, that if he had a mother and some brothers, he had a mother, father, some brothers and sisters, as I recall -- the mother, and father, and the brothers and sisters would share equally. Now, he further knows that by writing a will he could have disinherited all of those people and left his entire estate to the little girl.

QUESTION: So that it is an adequate defense to any constitutionality of the state law, the fact that a will could have corrected it?

MR. BEERMAN: I'm not accepting the theory that the state law was unconstitutional.

QUESTION: Well, it is -- this provision can be corrected by a will.

MR. BEERMAN: This particular --

QUESTION: That's your position?

MR. BBERMAN: Yes, sir.

QUESTION: And that's the reason that it's constitutional.

MR. BEERMAN: No, that's one of the reasons.

QUESTION: Well, is it constitutional or not?

MR. BEERMAN: Yes, I believe it's consitutional.

QUESTION: But it can be corrected by a will?

MR. BEERMAN: The situation can be changed by a will.

QUESTION: But --

MR. BEERMAN: I don't accept the fact that there's anything to correct, that's my point.

QUESTION: Mr. Beerman, the claim as I understand it, is that you have thousands and thousands and thousands of people who die intestate, all of whom who could have made a will. But you have a large portion of the population who die intestate. And that the children of those intestate decedents are of two kinds, some are legitimate and some are illegitimate. And of course you could have -- all of them could have made a will and left his property as he wanted to.

But looking at it solely from the point of view of the surviving child, what is the justification in terms of the child for treating the illegitimate differently from the legitimate? First, one justification you gave was, well, you want to prevent spurious claims. But does that apply when there's a judicial determination that there's a relationship here? That's one. Look at it from the point of view of the child. How does your argument about making a will have any merit?

MR. BEERMAN: Well, for one thing the fact that the child might be left something from the child's standpoint,

it certainly won't legitimate the child. I think that from the child's standpoint, it probably doesn't help him. Except that it doesn't legitimate him by becoming an heir of his father.

And by the same token, I think that you are then getting into the realm of where do you stop. Do you then pass a law that says the illegitimate child has to recover --

QUESTION: It just -- the claim is that they should be treated the same as a legitimate child is treated. There is no claim here that they take preference to a widow, or anything like that.

MR. BEERMAN: Society doesn't treat them that way, though, in almost every respect. Unfortunately, that's the case. And I think that the Illinois legislature has recognized that. And I think that the Illinois legislature has announced the public policy of the state, that they won't be treated the same because --

QUESTION: Because over the years society has treated illegitimates as a less desirable class of people, the legislature can continue to do so, is that your argument?

MR. BEERMAN: I don't think it's exactly that, Mr. Justice Stevens. I think it's because --

QUESTION: They're a less worthy group of people.

MR. BEERMAN: No, I don't think they look at it fromthe standpoint of the illegitimate. I think they look at

it from the standpoint of the parent. And that the parent -- the legislature in the State of Illinois acting through its general assembly wants the parent to be involved -- not be involved in illicit relationships. And -- so that--

QUESTION: What they say to the father is, that if you're involved in an illicit relationship, you don't have to worry about your property going to the child of that illicit relationship.

MR. BEERMAN: Because, that child might not be -- or the legislature presumes that the people of the state do not intend that that child is the natural object of the testate -- or the intestate man's father.

QUESTION: In other words, you say to the father, you can do this and you don't have to worry about the consequences.

MR. BEERMAN: Well, I don't think that's exactly, because there are other consequences.

#651 QUESTION: Paternity suit.

MR. BEERMAN: Exactly. Which there was in this case. And he was--

QUESTION: Youdon't have to worry about this particular consequence?

MR. BEERMAN: This particular consequence, correct. It's our contention --

QUESTION: And yet the common law, as I remember

having learned it many years ago, was that an illegitimate child was nobody's child, didn't inherit from the mother
656 or the father, filius nullius.

MR. BEERMAN: That's correct.

QUESTION: And so to the extent that Illinois does allow intestate inheritance for the mother, it has ameliorated the harshness of the common law rule.

MR. BEERMAN: It has been on the books for many years in Illinois, this particular rule. That's correct, your honor.

The other point we want to make on this issue is, that it's our contention that this Court's decision in Labine versus Vincent controls -- and it especially controls -- because in this case and under the facts of this situation, the father here could have done more for his child than could the father in Labine.

For example, in Labine, the child must be acknowledged in order to take under the father's will. See, that's one thing that we haven't heard yet. You just couldn't make a will in Labine and leave your estate to the child, under Louisiana law, which as Justice Marshall points out, is entirely different than the other 49 states.

Then even if the child is acknowledged, and you make a will leaving him part of your estate, you can only leave him one fourth or one third of the estate, and that's

if there are no surviving legitimate children or their heirs. While in Illinois, Illinois has ameliorated the rule, as you point out, Justice Stewart, of filius nullius, because if he made the will he could leave the child everything.

Also, there's apparently in Louisiana acknowledgement is a condition precedent to the child's right to claim support from the father. That's not true in Illinois, as is evident in this case, because when a paternity suit is brought, the defendant doesn't have to plead guilty. He can put up a defense, and if the court finds that he's guilty, then he doesn't -- he never has to acknowledge the fact that he's the father, he's adjudicated the father, and he's made to support the child.

Also, in Louisiana an acknowledged child can inherit from a father intestate if the father has no heirs, collateral or lineal, to the exclusion only of the state. And of course in Illinois, an illegitimate can never inherit intestate from the father. That's the main difference.

The other striking point is that in Louisiana legitimate children have a right of forced heirship in their father's estate, whereas in Illinois, as I pointed out, legitimate children don't have that right.

So it's our contention that Labine would control even more, in this case, than it did on the facts of its own case.

I'd like to allude to the sex discrimination issue, although counsellor hasn't talked about. We have serious doubts that it's even properly before the Court. I think we've briefed all that. I just would like to point out one other thing, that when the notice of appeal was originally filed in this case -- and I'm sorry that this is not in my brief, but I hope that your honors will indulge me -- when the notice of appeal was originally filed in this case, from the order of the probate court of Cook County declaring the heirship, only the mother was named as an appellant in only a representative capacity. She was named as Jessie Trimble, as the mother and next friend of the child, Deta Mona Trimble. So that we don't believe she's a proper appellant.

Now, the record got pretty muddied up, because what happened after that was, when they made their motion under Illinois Supreme Court rule 302 (b) for direct appeal to the Illinois Supreme Court, thus bypassing the appellate court -- and we do that in matters of importance that require prompt determination -- all of a sudden she became an appellant. And there's no -- nothing in the record, nobody objected to it. I have to admit that. But she suddenly became an appellant. Then, she also became an appellant in the notice of appeal to this Court, and in her brief amicus curiae in the Karas case, she was named as a party.

But the fact is that under Illinois Supreme Court

rule 301 the notice of appeal is a jurisdictional step, and I don't think that anyone can waive it by not arguing it, and I don't think anybody can cure it. So I don't really believe that she's a proper party in this Court.

QUESTION: Well, is this a suggestion that we don't
707 have jurisdiction of the appeal?

MR. BEERMANN: No, no. It's of this issue, your honor. The sex discrimination issue. Because our argument is that in the sex discrimination issue, it cannot really apply -- and now I'm into the merits of it -- it cannot really apply to the illegitimate because the illegitimate, there is no discrimination based on the sex of the illegitimate. Male illegitimates and female illegitimates are treated the same way.

But their argument is that the mother, a female person, is being discriminated against on the basis of her sex and treated differently than a male person, because the female person has to -- she does not have the -- their theory is this, that she does not have the assistance of the fact that theillegitimate can inherit from the father in easing her burden of supporting the illegitimate.

We don't agree with this contention. And I think it's really getting far-fetched. But our point is, we're not quite sure, based on this record, although we did brief it on the merits, that that issue really is before the Court

because of the jurisdiction.

QUESTION: How can we pass on the rules of the Supreme Court of Illinois? Isn't that the best court to pass on that?

MR. BEERMAN: I would say you're correct, your honor.

QUESTION: And you deliberately bypassed it.

MR. BEERMAN: No, no, I didn't bypass it, they bypassed it.

QUESTION: Well, you didn't raise it.

MR. BEERMAN: I wasn't in the case then, your honor. I hate to give you that answer, but let me -- let me tell you what happened.

QUESTION: Well, all right. That's a good enough answer.

QUESTION: If it's jurisdictional, it doesn't make any difference whether you were in the case or not.

MR. BEERMAN: Well, that's my point. I want you to understand something because you talked about it earlier. Because of the size of the estate, nobody was defending this case in the Illinois Courts. It never was defended in the Illinois Supreme Court. There was oral argument in the Illinois Supreme Court. It was a unilateral argument. Only the appellants in this case argued in the Illinois Supreme Court. They had a very short argument, and it's in the record that the Chief

Justice cut short their argument on the basis that the case was controlled by the Karas opinion.

I didn't get into the case until it came to this Court. And if I -- it's easy for me to say now. If I was in the case, I would have raised these points. But the point is --

QUESTION: Well, Mr. Beerman, isn't your point -- let me see if I state, because I think I -- I want to be sure I understand it correctly, that to the extent that your opponent claims a gender-based discrimination, the fact that she is inheriting -- cannot inherit from her father although she might have been able to inherit from her mother, she may not make the argument that her mother could make the argument that her mother could make, that's what you're saying.

MR. BEERMAN: That's correct.

QUESTION: It may be that she had standing to make the argument. But you're just saying that she cannot make whatever argument her mother could make. It's a standing question really.

MR. BEERMAN: Well, the way they're making the argument --

QUESTION: She cannot argue the impact of a statute on her mother, that's what you're saying.

MR. BEERMAN: They're making the argument through

the mouth of the mother.

QUESTION: Right. I see what you're -- you're saying that the mother is not a party in her own right. But it wouldn't make any difference if we thought the child had the standing to assert this claim anyway.

MR. BEERMAN: Well, if the child has the standing to assert the claim, then of course it can be asserted. Because I make no claim that the child isn't the proper party.

QUESTION: Right, I see. The parties here, Deta is the illegitimate child.

MR. BEERMAN: That's correct, your honor.

QUESTION: Jessie is the mother.

MR. BEERMAN: Right.

QUESTION: And Joseph Roosevelt Gordon is the mother's father, is that it?

MR. BEERMAN: No, he's the father of the decedent.

QUESTION: Father of the decedent.

MR. BEERMAN: He's the natural father of the decedent. I represent the decedent's mother, Ethel Mae King. The other people, the father and the brothers and sisters, have seen fit not to take part in these proceedings.

QUESTION: But these -- Joseph Gordon is one -- a member of the class. Another member of which you represent.

MR. BEERMAN: Right, that's correct.

So that without belaboring the point, we still don't believe that the sex discrimination is properly before the Court. And we also state that there is a necessary distinction here that was alluded to before in the other argument, that there is a biological difference between the mother and the father. And as counsel has stated, the mother's maternity is almost never an issue. I can't conceive of when it would ever be an issue, unless you had a kidnapping of a child out of a hospital nursery. The mother is always present when the child is born. So our contention is that the mother is not being discriminated against. And the child, of course, is not being discriminated against because of her sex, because male and female illegitimates are treated the same.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Very well. Do you have anything further, Mr. Weill?

REBUTTAL ARGUMENT OF JAMES D. WEILL, ESQ.,

ON BEHALF OF THE APPELLANTS.

MR. WEILL: Just one point, your honor. I believe the standing issues are fully treated in the briefs.

I'd just like to point out that most of the arguments that opposing counsel has made have been implicitly or explicitly rejected by this Court's unanimous opinion in Reed versus Reed. In Reed, a case involving an estate of

less than a thousand dollars, by the way, this Court, where there was sex discrimination in the appointment of administrators in intestate estates, this Court rejected the constitutionality of that statute, even though it recognized that it eased the probate court's administrative burden, or judicial burden, and even though most of those sexually discriminatory appointments could have been altered by a will of the decedent.

The Reed case is structured very much the way this case is. And this Court unanimously rejected the same structure in a similar context. Sex, like illegitimacy, has not been treated as a suspect class by a majority of the Court, but also bears many of the same traditional indicia.

And we'd just call that to the Court's attention.

QUESTION: Mr. Weill, are you familiar with the

#775 expression illegitimii non carborundum?

MR. WEILL: Yes.

QUESTION: Do you think it has any application to this case?

MR. WEILL: No, I don't.

QUESTION: I was going to add: your opponent argues rather forcefully that Labine is stronger -- is not as strong a case on its facts as this. Do you want to respond to that at all? Because I think it's critical.

MR. WEILL: Well, I believe that this case is

clearly stronger than Labine on the facts. First, there was an adjudication here of the father's paternity. For all purposes, in Illinois, Illinois has said that this is the father's child, or was the father's child.

Now, the Illinois Supreme Court turns around and says that there are proof problems. Okay, there are just no proof problems in this case at all. It's stronger than Labine in that sense.

Secondly, the Labine scheme, as I mentioned, was inclusive of illegitimate children. This Court has consistently struck down total exclusions of illegitimate children from any statutory scheme in the last eight years. The two partial exceptions have been Labine and Lucas. In both of those cases, there were substantial benefits to the class of illegitimate children. Labine may not have been as carefully tuned as Lucas was, but it was significantly inclusive.

Those are the two major points that I'd make.

QUESTION: I believe the point that your brother made was that in Louisiana the father was not free to make a will to designate the illegitimate as a beneficiary without doing something further. And in Illinois, by contrast, the father was always free simply by naming him as a legatee in the will, to make him one.

MR. WEILL: Well, on the facts of the case --

QUESTION: Make her one. Excuse me, it's a daughter.

MR. WEILL: On the facts of the case, the father in Labine and the subclass of fathers in Labine, were free to make wills, because there were acknowledgements there.

QUESTION: They had to acknowledge and then make
#797 a will. They couldn't make a will and name the illegitimate legatee unless they acknowledged.

MR. WEILL: Right.

QUESTION: But in Illinois, by contrast, they're free to do so with or without acknowledgement. I think that's the point you made. And you agree with that.

MR. WEILL: Yes.

MR. CHIEF JUSTICE BURGER: Very well. Thank you gentlemen.

The case is submitted.

[Whereupon, at 1:56 o'clock, p.m., on December 7, 1976, the case in the above-entitled matter was submitted.]