ORIGINAL

In the

# Supreme Court of the United States

ROBERT M LALLI,

Appellant,

v.

ROSAMOND LALLI, ADMINISTRATRIX OF THE ESTATE OF MARIO LALLI,

Appellee.

No. 77-1115

Washington, D. C.
October 4, 1978

Pages 1 thru 35





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| v. | : | No. 77-1115 |
| ROSAMOND LALLI, ADMINISTRATRIX OF THE ESTATE OF MARIO LALLI, Appellee. | : | |

Washington, D. C.
Wednesday, October 4, 1978

The above-entitled matter came on for argument at 1:35 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, 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:

LEONARD M. HENKIN, ESQ., 22 West 1st Street, Mount Vernon, New York 10550, on behalf of Appellant.

IRWIN M. STRUM, ESQ., Assistant Attorney General of the State of New York, Two World Trade Center, New York, New York 10047, on behalf of Appellee.

# C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 77-1115, Robert Lalli against Rosamond Lalli.

Mr. Henkin, you may proceed.

ORAL ARGUMENT OF LEONARD M. HENKIN, ESQ.,

ON BEHALF OF THE APPELLANT

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

This is a second appeal from the Court of Appeals of the State of New York. On the first appeal, this Court vacated the judgment and sent the case back for a reconsideration in the light of your decision in Trimble v. Gordon. Thereafter, the Court of Appeals, by a vote of five to two, disregarded the directive of this Court and attempted to distinguish the New York statute involved, which brought us back to you.

This statute, which is the State's Powers and Trust Law, Section 4-1.2, requires an order of filiation to be obtained within two years after the birth of an illegitimate child, during the lifetime of the father, before the child can participate in distribution of the estate of his natural father.

The Attorney General indicates that he does not concede the facts. However, the Court of Appeals, in its first opinion, clearly states that the facts in this case are

uncontested.

The decedent was killed in 1974. The Respondent, his widow, is not here on this appeal. The only one who is in opposition here is the Attorney General of the State of New York, even though she has a bond in the sum of $100,000 which was required to be put at the time that she obtained the letters of administration. The Appellant was born out of wedlock. It is conceded that no order of filiation was obtained.

QUESTION: How old was the Appellant at the time of his father's death?

MR. HENKIN: He was about 26 or 28.

QUESTION: Much older than 2 years old.

MR. HENKIN: Much older than 2 years old, Your Honor.

I may say that at that time there was no procedure in New York -- at the time the father died -- whereby the father could bring a proceeding in order to have the child declared legitimate. That statute was enacted thereafter, after the father died.

There is no marriage claimed to have taken place between his natural parents. The Appellant was acknowledged by the decedent as his son in writing, duly acknowledged before a notary public. And during the lifetime of the decedent they were living together prior to the time that

natural mother of the infant died and the natural father was supporting the mother and the infant and his sister.

QUESTION: In full?

MR. HENKIN: Originally, in full, but shortly before he died, the son, having reached the age of majority, was working for the father in his business, so the father supported him in part.

QUESTION: So, it is your position that he supported him entirely as long as he was a minor?

MR. HENKIN: That's correct.

QUESTION: Under New York law, could the decedent have taken care of this child by will?

MR. HENKIN: Yes, Your Honor.

QUESTION: He did not do so?

MR. HENKIN: He did not do so because he was killed. We also do not know --

QUESTION: All of us die.

MR. HENKIN: He was killed.

QUESTION: I say all of us die.

MR. HENKIN: Yes, Your Honor.

QUESTION: Did he have a will?

MR. HENKIN: We don't know. There was no will found after he died. We don't know. He may have had a will.

QUESTION: How was he killed? Was he killed in an accident?

MR. HENKIN: No. He was killed by a stepson.

QUESTION: Also named Lalli?

MR. HENKIN: Also named Lalli.

QUESTION: Everybody in this case is named Lalli.

MR. HENKIN: That is correct, Your Honor.

QUESTION: And was that Eileen's son by another man?

MR. HENKIN: That was Eileen's son by another man.

QUESTION: Is Robert's formal birth certificate in the record?

MR. HENKIN: No, Your Honor.

QUESTION: Is there a reason why it wasn't?

MR. HENKIN: Apparently, there is no birth certificate, that we know of, for Robert. We do know that there is an acknowledgement which is in the record, wherein the father says -- although he could have said, "my ward," he says, "my son," in giving consent to a marriage of Robert.

QUESTION: Was he born in New York?

MR. HENKIN: He was born in New York.

QUESTION: And you can't find a birth certificate in New York?

MR. HENKIN: We don't know of any birth certificate for Robert Lalli.

QUESTION: Well, obviously, he had a birth certificate if he was born in New York.

MR. HENKIN: He may have a birth certificate, we

don't know of any. There is none in the record.

QUESTION: Did anybody look for one?

MR. HENKIN: We have not looked for one, Your Honor.

QUESTION: Mr. Henkin, I think, in your brief, you don't cite Labine v. Vincent.

MR. HENKIN: No, we do not.

QUESTION: On the ground, what, that its --

MR. HENKIN: We feel that that case is not applicable to this situation, in view of Gordon v. Trimble. We feel that the gist of the decision in Gordon v. Trimble is that where the proof of paternity is clear, as in instances given by the Court in Gordon v. Trimble, no requirement should be interposed by statute on the right of an illegitimate child to participate in the estate.

QUESTION: Then you think that Trimble v. Gordon really overruled Vincent v. Labine?

MR. HENKIN: To that extent, yes.

QUESTION: Although it didn't say so in so many words.

MR. HENKIN: That is correct, Your Honor.

We also feel --

QUESTION: Could I ask you one more question, then I'll stop.

What are we talking about here? It is totally irrelevant here, but are we talking about much money or about

very little, as was the case in the Trimble case?

MR. HENKIN: No, in this case, we have a bond of over $100,000.

(Whereupon, a three-minute recess was taken due to microphone trouble.)

MR. CHIEF JUSTICE BURGER: Now, you may proceed, Mr. Henkin, I think we are functioning again.

MR. HENKIN: Thank you, Your Honor.

QUESTION: Before you start, could you clear up something I had missed in the briefs. You mentioned two or three times Mrs. Lalli, the original Respondent, is no longer party to the case, in effect. Is the case moot?

MR. HENKIN: She did not appear in this Court, she filed no brief and she is not represented by her attorney at this time. The only one who is appearing in opposition to us is the Attorney General of the State of New York.

QUESTION: The case hasn't been settled, or anything like that, has it?

MR. HENKIN: No, it has not been settled, Your Honor. She just did not appear. She did not file any brief and she did not appear at all after we filed the notice of appeal for the second time.

QUESTION: Would you tell me one other thing. I am not sure I understood your answer to Mr. Justice Blackmun.

He asked you whether there was a lot of money involved or a small amount. You answered by saying there is $100,000 bond posted. I don't really know how that answers the question. Does that mean there is a lot of money or not much money?

MR. HENKIN: We claim that there is over $100,000 involved in this estate. We also claim that there is death course of action which he did not follow up and to which we say we are entitled to under counsel.

QUESTION: I see. So there is a substantial amount of money.

MR. HENKIN: There is a substantial amount of money involved in this case. What the actual amount is involved we will find upon the accounting if one is ordered by this Court. And this is what we are seeking and that's where we were stopped by the court below, Surrogate Court, dismissing our obligation for an accounting.

QUESTION: Mr. Henkin, if your client had been a legitimate son -- let's say a father and mother married and had one child, under the laws of intestate succession in New York, upon the father's death, does the mother get two-thirds and the child one-third?

MR. HENKIN: If he was the only child, he would get one-third -- or one-half, rather. If there were more than one child, if there were two children, they would get

two-thirds and the mother one third. But the mother of this child was dead. The Respondent is not the mother of the Appellant. She is the widow of the decedent. She was appointed Administratrix as his widow.

QUESTION: I see. In that situation, if this had been a legitimate child, under the laws of New York, how would the decedent's estate have been shared?

MR. HENKIN: One-third to her and two-thirds to the two children.

QUESTION: There is another child?

MR. HENKIN: There is another child.

QUESTION: A legitimate child?

MR. HENKIN: No, illegitimate child also. But the one that I represent and the one who made an application and is the Appellant is one of the two children.

QUESTION: One of the two illegitimate children.

MR. HENKIN: Right.

In addition to our argument that this case is controlled by the decision in Trimble v. Gordon, by the fact that this, acknowledgement in writing, acknowledged before a notary, which is one of the grounds specified in Note 14 to the gist of the decision, considering the language immediately preceding that note in the text, we say that under the New York law, Section 24 of the Domestic Relations Law, creates two classes of illegitimacy, those whose natural parents

went through a marriage ceremony before or after their birth, no matter how invalid is that marriage. Because that section specifically says that if the natural parents of an infant marry, regardless of how invalid that marriage is, that child is a legitimate child of both its parents who went through that marriage ceremony.

We say to you that, consequently, although the Court of Appeals completely ignored our argument to that respect, that section when contrasted with Section 4-1.2 of the Decedents Estate Law creates entirely a different class of illegitimates. As to those as to whom there was a marriage ceremony, even though invalid, they are entitled to inheret. But because our client's parents complied with the New York statute and did not marry, our child, our Appellant is denied the right to participate in his father's estate. Because as to him the bar of Section 4-1.2 is interposed and is he is held to be illegitimate.

And I say to Your Honors that this particular distinction into those two classes by virtue of those two sections has absolutely no logic or reason and absolutely is discriminatory and denies my client equal protection of the law.

QUESTION: Your client could have had all the protection you now seek without his parents being married if he -- if the natural father -- had complied with the statory

statutory requirement; is that not so?

MR. HENKIN: He could not do it, if Your Honor pleases. He could not comply with the statutory requirements because this particular section which is cited in the opinion, in the dissenting opinion in the Court of Appeals, on the second appeal, pursuant to your referral, was not in effect until long after the father died. At the time the father was living, there was no such section, and if there was any attempt made by the father to bring a proceeding, to get an order of filiation, such an application would have been denied, as it was denied in Matter of Rickey M. v. Sharon R., 49 Appellate Division, 2d, 1035. And it couldn't be done at that particular time.

QUESTION: Mr. Henkin, you said a moment ago that your father and mother here complied with the New York law and didn't marry. Would you explain what you meant by that.

MR. HENKIN: Because the father had a wife living at the time, who is the widow, the Respondent in this case who does not appear on this appeal.

QUESTION: So he would have been guilty of bigamy had he married.

MR. HENKIN: That is correct, but the statute, Section 24 of the Domestic Relations Law, specifically says that, regardless of the validity of the marriage, even if the marriage is not valid, even if the marriage is absolutely

no good from its inception, any child born before or after is a legitimate child of those people who went through a marriage ceremony, if they are the parents of that child, without any proof whatsoever being required of compliance with another affiliation or any other requirement. The fact of marriage as to those children, even a bigamous marriage, is sufficient to make them legitimate. Whereas, as to all other children where there was no marriage, bigamous or otherwise, there is, under the New York statute, an absolute requirement that at two years of age a child should go -- or his parents should go and make an application for an order of filiation. Because if that order of filiation is not applied within two years after the child is born, regardless, even if there was such a situation as we have in the Trimble v. Gordon case, that particular child, no application having been made within two years, would not be given a right to participate in the estate,because that is the provision of the statute.

QUESTION: But he could still draw a will.

MR. HENKIN: Yes, Your Honor. But in Gordon v. Trimble, this Court said that the will does not have to be drawn, and that that fact, that no will has been drawn,has no constitutional significance as to the right of the child.

QUESTION: Your client also challenged the two-year provision of the New York Filiation Law, did it not, in a

separate attack?

MR. HENKIN: We raised that question in both our appeals. The Court of Appeals said that because there is no question that no order of filiation was ever entered -- we don't claim that such an order was entered -- we should not attack the two-year provision.

But we say to Your Honors even if at the age of 15 he got an order of filiation -- assuming he did get such an order, it wouldn't have helped him because he couldn't participate in any --

QUESTION: Except that you could have challenged the statute on that ground, that you did challenge on but it wasn't passed on by the Court of Appeals.

MR. HENKIN: We are challenging the statute on the ground of Gordon v. Trimble and also because Section 24 of the Decedents Estate Law created two classes of illegitimates, without any distinction between them except the fact of marriage.

And we say to you that just because the marriage did not take place, the New York statute requires to get an order of filiation, which is discriminatory.

QUESTION: In Trimble, hadn't there been a judicial determination prior to the death of the father?

MR. HENKIN: There was a judicial determination.

QUESTION: Not here?

MR. HENKIN: In this case, there wasn't, but under Note 17, this Court said that it is not necessary to have judicial determination, an acknowledgement is sufficient, under Note 17, to have the same effect as the judicial determination.

QUESTION: But the fact is that there was a judicial determination in Trimble.

MR. HENKIN: Yes, that is correct. There was none in this particular case.

I would say that where the proof is such that it is clear that there is no issue of paternity, such as here where there is an acknowledgement and support, that there is no requirement to have a judicial determination, because this is going from the middle ground, that the Court spoke of in Gordon v. Trimble, to the extreme of requiring judicial determination within two years after the birth of the child, and no child could have been that smart to get that determination at that age, or to have the parents of a child who are living in peace together to go and apply, all of a sudden, where the man is supporting the woman and the children, for her to go and apply for an order of filiation. Accordingly, Mr. Justice Cook and Mr. Justice Felsberg (?) said, "This will be serving only to break up the family for a mere formality," where there is no reason why the child should have such order applied for. Because where the father is voluntarily

supporting his children, then there is no reason to make a court application. Accordingly, the children of the involuntary parent, or involuntary father, will be benefited, but the children of the voluntary father who is supporting them, will be denied their right to support and their right to distribution as to their estates.

QUESTION: What's the widow's position in all this? She is taking the position that this is not a child of the decedent?

MR. HENKIN: That was her original position, but she admitted on the first appeal to the Court of Appeals that the issue involved, as to whether or not a child could participate -- that was the point of their making their first appeal, when we first went before this Court.

QUESTION: Mr. Henkin, I want to be sure I didn't misunderstand you. Do I correctly understand that you tell us the decedent could not in fact or in law have secured a certification of filiation during his lifetime?

MR. HENKIN: That is correct, Your Honor, because Section 522 of the Family Court Act was amended to permit such an application to be made by laws of 1976, Chapter 665, taking effect as of January 1977.

QUESTION: So that, during his lifetime, he could not have secured an order of filiation?

MR. HENKIN: And if he made such an application during

his lifetime, under the Matter of Rickey M.and Sharon R., 49 Appellate Division, 2d, 1035, such application would have been denied.

QUESTION: Is that case in your brief?

MR. HENKIN: No, it is not, Your Honor.

QUESTION: Could you give me that citation again.

MR. HENKIN: Matter of Rickey M. v. Sharon R., 49 Appellate Division, 2d, 1035, 1975 case.

QUESTION: Mr. Henkin, why would it be denied?

MR. HENKIN: Because there was no provision in the statute at that time for the father to make such application. The statute was amended only in 1976.

QUESTION: You mean up until 1976 in New York -- that must have been the last state.

MR. HENKIN: This man was killed in 1974.

QUESTION: I mean New York didn't get around to letting children inherit from their fathers until 1976, wouldn't that make New York the last state to do it?

MR. HENKIN: You are talking with reference to the children born before that time?

QUESTION: Yes.

MR. HENKIN: That's why we are here, claiming that the statute is unconstitutional.

QUESTION: But the child or mother can apply, can't they?

MR. HENKIN: Yes, the mother could apply. But the mother didn't apply because they were living together as one family. There was no reason for it.

QUESTION: So your statement is really a very technical one, that the father couldn't apply. Certainly, a proceeding could have taken place in which the father could have admitted --

MR. HENKIN: If the mother applied, if the father did not support her. And also, she had to apply only within two years after the birth of the child. The Attorney General says, in Gordon v. Trimble, if that case arose after the statute of the State of New York, that child, because there was adjudication, would have been entitled to inherit.

We respectfully submit to you that that is not the case, because the New York statute required that that application be made only within the first two years after the child was born.

QUESTION: The New York Court of Appeals, in its opinion at A2, in this case, says that "under our New York statute, the right to inherit depends only upon proof that a court of competent jurisdiction has made an order of filiation declaring paternity during the lifetime of the father."

MR. HENKIN: That is not correct.

QUESTION: Well, we are not going to second guess

the New York Court of Appeals on what New York law is.

MR. HENKIN: If Your Honor pleases, the statute is printed in the record and it is in my brief, and the language of that statute is very clear.

QUESTION: "Has to be made during the pregnancy of the mother or within two years from the birth of the child."

MR. HENKIN: Right. That is correct.

QUESTION: That's what the statute says.

MR. HENKIN: That's exactly what the statute says. As a matter of fact, I think there is a note somewhere that they didn't reach that point.

QUESTION: You mean the Court of Appeals doesn't have advance sheets?

MR. HENKIN: The decision of the Court of Appeals -- the opinion of the Court of Appeals, if Your Honor pleases, is printed -- the first one in Appendix A in the Jurisdictional Statement, 75-1148.

QUESTION: You do say that an order of filiation could have been secured under New York law at the behest of somebody other than the natural father, during the natural father's lifetime?

MR. HENKIN: Yes.

QUESTION: That is by the mother, the natural mother?

MR. HENKIN: The natural mother could have made the application.

QUESTION: Or anybody else? The child?

MR. HENKIN: The child, yes -- two-year old child who could possibly do it, if he were smart enough at the age of two to do so.

QUESTION: But you say that as a matter of practical fact the natural mother wouldn't have done it, and why was that?

MR. HENKIN: The natural mother would not have done it because she was living together with the father and he was supporting her and the children.

QUESTION: Was she his sister-in-law?

MR. HENKIN: No.

QUESTION: Her name was Lalli, too, wasn't it?

MR. HENKIN: Her name was Lalli because she was living with Mr. Lalli. That was her name by pregnancy. They were maintaining the household. He bought her a house where she lived together with the two children of this particular -- what shall I say, relationship -- and in addition the child born to her by prior marriage -- by prior relationship with some other man.

QUESTION: And where was Mrs. Lalli all this time?

MR. HENKIN: She was living in another house.

MR. CHIEF JUSTICE BURGER: Your time has expired, Mr. Henkin.

Mr. Strum.

ORAL ARGUMENT OF IRWIN M. STRUM, ESQ.,

ON BEHALF OF THE APPELLEE

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

The New York statutory scheme does not discriminate against illegitimates inheriting either from their mother or father. It merely provides in the case, where an illegitimate is claiming through his father, that there be an order of a New York court determining parentage made during the lifetime of the father.

While the statute does refer to a two-year requirement, the New York courts have not enforced that two-year requirement. In the brief filed by the Attorney General, there are decisions which indicate that is not the law of New York at the present time, although there has not been a determination on that by the New York Court of Appeals.

QUESTION: The Court of Appeals has never read it out of the statute. In this case, they just ignored it.

MR. STRUM: The lower courts have. They have treated it for various reasons, constitutional and otherwise, as just being an unwise legislative describement. But, other than that, the requirement that the order be obtained during the lifetime of the father, I think, is a reasonable one. I think we are here not to consider the peculiar equities of this particular case -- and there may be equities on the

Appellant's side. I don't argue that there are not.

What we are here to evaluate is the New York statutory scheme, and whether the Legislature of the State of New York in protecting its citizens and in passing laws with regard to descent and distribution, could require, as a requirement in the case of illegitimates inheriting from their father, that there be a court order during the lifetime of the father in order to prevent fraud, in order to prevent a situation where New York estates would not be closed. Obviously, situations could arise where illegitimates are not known of and they could make claims later on and it would destroy the sanctity of decrees which determine distribution in the State of New York.

I think for that reason the Legislature, as indicated by the report of the Bennett Commission, was justified in making this requirement. I think the requirement is a reasonable one, and I think that is the only test.

QUESTION: Is it reasonable to assume that the two-year limit was placed there by the Legislature, or probably placed there by the Legislature, so that the facts could be ascertained while there were people around who could testify?

MR. STRUM: Yes, I would assume that was the purpose behind it. I can understand the difficulty in requiring it within two years, because you are dealing with a very young child, a baby, and perhaps you don't want to cut off that

child's right. So I can understand why the New York courts have gone out of their way to excise that two-year provision, but I also understand why it is there. I think it is a functional purpose.

QUESTION: Does the acquiescence of the Court of Appeals or the apparent acquiescience of the Court of Appeals in this interpretation by its constituent courts, mean the same thing, or should it mean the same thing to us as a holding of the highest court of the State construing the statute?

MR. STRUM: Well, I would not classify it as a holding, and I would not go so far, but --

QUESTION: Could it be equated?

MR. STRUM: -- I think for the purposes of this argument and for the purposes of the constitutionality of the New York statute, yes, I think it can be equated.

QUESTION: In any event, there was no order of filiation?

MR. STRUM: In this case, there was none whatsoever.

QUESTION: During the lifetime of the father.

MR. STRUM: No. And there was no attempt to get one.

QUESTION: Ever.

MR. STRUM: Yes. Let's be clear about this. This statute went into effect in 1967. The decedent --

QUESTION: '76, we were told.

MR. STRUM: No. The statute, this statute of the EPTL went into effect in '67. The decedent died in '74. There was ample opportunity. The Appellant was an adult. There was ample opportunity for him to go to court during the lifetime of his father, if he believed that there was justification for such an application.

QUESTION: That is 4-1.2 went into effect in '67.

MR. STRUM: Yes, that is correct. That is the statute now before this Court, no other statute.

QUESTION: However, if he sought counsel, counsel might have advised him that since the two-year period had expired there was no use.

MR. STRUM: There is no showing that he attempted to seek counsel. Furthermore, we are not discussing, I believe, Your Honor, probabilities or possibilities. We are discussing a statutory scheme. I think the Legislature, in making that determination, had every right to reasonably require this. I think he had, certainly, an opportunity to go to court and make an application. And if the court then were to turn him down, he could have appealed on that basis.

QUESTION: If you are talking about the statutory scheme, I suppose, under the statute, if there was a court order, prior to the death of his father, obtained on the petition of either the son or the mother, it would satisfy the statute, whether or not the father was around, could be

found or participated in the hearing.

MR. STRUM: I would assume so, Your Honor.

QUESTION: He could go to court and say the father had disappeared and still --

MR. STRUM: He could have been served by publication.

QUESTION: All right, but nevertheless he needn't be available to give evidence, or anything.

MR. STRUM: No.

QUESTION: Mr. Strum, what's wrong with the day after the father dies, what's wrong with determining --

MR. STRUM: You are then depriving the father of the opportunity to give evidence. There is a difference between him having a right to be there and give evidence and participate, if he so chooses, and being precluded in the absolute by his death. And I think that is a distinction which is important.

QUESTION: How do we say that this statute is constitutional and not unconstitutional because the two-year provision will never be enforced? Is that what you want us to say?

MR. STRUM: No, Your Honor, I think we don't reach that question because the two-year provision has nothing to do with this case.

QUESTION: Don't we have to talk about that statute, eventually?

MR. STRUM: I don't believe, Your Honor, that we should be talking about a statute in the abstract, necessarily. We should be talking about a statute as applied. I think as applied in this case the Appellant hasn't ripened the question because there was no attempt to obtain the order of filiation within the two-year period. And, furthermore, because New York doesn't apply the two-year requirement.

QUESTION: Do you want us just to ignore the statute?

MR. STRUM: I would suggest that the two-year requirement is not applicable to this case.

QUESTION: I am saying about the statute.

MR. STRUM: No, the statute should not be ignored, it should be enforced.

QUESTION: How can we mention a statute and ignore a part of it?

MR. STRUM: Well, the part that we are ignoring -- or I suggest be ignored -- is not in this case.

QUESTION: This case involves a 28 year-old man and is not bound by the two-year old provision.

MR. STRUM: That is correct, Your Honor.

QUESTION: I don't know what I think of somebody who wrote that.

QUESTION: Is it true that the courts in New York have all agreed that the two-year provision is invalid or

should be ignored?

MR. STRUM: The courts that have heard that question have agreed to that.

QUESTION: Yes, that's what I am talking about.

QUESTION: Will you give us the citations.

MR. STRUM: There are citations in the brief, Your Honor.

QUESTION: There are citations which say, "We are ignoring the two-year limit"?

MR. STRUM: Yes, there are. They get around it for various reasons.

QUESTION: That's not what I said. Do you have one that says, "We ignore it"?

MR. STRUM: Not those words, Your Honor.

QUESTION: That's right. I didn't think you did. I didn't find any.

MR. STRUM: But the courts have failed to apply it.

QUESTION: Are we limited to do that?

MR. STRUM: Well, I think you are limited to the facts in this case, and the application of those facts to the statute.

QUESTION: Mr. Strum, if we should disagree with you -- I don't know what the Court will do -- on the issue of whether the requirement of filiation during the lifetime of the father is constitutional, and assume we conclude that

to be unconstitutional, then we must squarely face the two-year problem, mustn't we?

MR. STRUM: I think if you are going to say that the requirement that it be during the lifetime of the father is unconstitutional, then I think the whole statute will probably fail.

QUESTION: Then you concede that the two-year -- I don't understand how you can concede what you in substance do, although not quite in words, that the two-year provision is unreasonable because it treats some illegitimates irrationally in a different way from other illegitimates without a rational justification. How can you say that and say that five years after birth the father dies and still the child must be barred?

MR. STRUM: I, personally, am not suggesting to Your Honor that the two-year requirement is unreasonable. I am saying to you that the New York courts, when considering --

QUESTION: But you said we should assume that the New York courts would not enforce it because it is perfectly obvious that it is unreasonable. That's, in substance, what you've said, and then you cite cases.

MR. STRUM: Yes.

QUESTION: Why don't we just quote the Court of Appeals, because they are passing on their own statute and

they didn't say a word about the two years?

MR. STRUM: No, they didn't because they felt it was not --

QUESTION: Why don't we just base our opinion on what they said?

MR. STRUM: That's what I am asking this Court to do.

QUESTION: I see.

MR. STRUM: The only reason I raise the two-year question is because the Appellant raised it.

QUESTION: The cases to which you refer are those cited on the bottom of page 4 of your brief, Matter of Thomas and Matter of Flemm.

MR. STRUM: Yes. And there is another case, I believe, Matter of Nurse. We will provide those citations to the Court.

QUESTION: You have already provided two of them. And do you represent that there are no cases contrary to that?

MR. STRUM: I know of no cases where that question has arisen where the New York courts have applied that two-year statute.

I believe that the statute in Illinois, which, of course, was considered in Trimble v. Gordon, is completely different. That statute prohibited, in the absolute, inheritance

by an illegitimate from his father, except under one specific, very limited, circumstance, that of where the natural mother and father married and there was an acknowledgement at that point.

The New York statute does not attempt in any way to discriminate. It merely says in the case where someone is claiming to be an illegitimate child, through a father, that there be a court order determining that during the father's lifetime. And, I respectfully submit that is a substantial difference, not only in approach but in meaning.

QUESTION: Or that the natural mother and the father have married, even after the birth of the illegitimate child?

MR. STRUM: Yes, that would legitimatize the child.

QUESTION: And even though the marriage be void or voidable.

MR. STRUM: Right. That would be legitimate under another statute which is not at issue here.

QUESTION: You don't have to have an acknowledgement, you just have to have a marriage, right?

MR. STRUM: That's correct.

QUESTION: Unlike the Illinois law.

MR. STRUM: Unlike the Illinois statute.

And I submit that had the situation arose, as applied in Illinois, in New York, an inheritance would have been

permitted because there was a court order. That's all the New York law says, there has to be a court order.

QUESTION: You mean in New York if somebody has a 56 year-old child and if they get married that child is legitimatized, merely by the marriage?

MR. STRUM: Sure. That would legitimatize the child.

QUESTION: She has to marry --

MR. STRUM: The natural father, yes.

QUESTION: What if she just marries John Smith?

MR. STRUM: You wouldn't know, except there would be a question of proof.

QUESTION: General Strum, let me question you once more about the state interest that this statute vindicates. We are talking about requirement that the order be obtained during the lifetime of the father. As I understand it, the state interest is giving the father the opportunity to deny parentage.

MR. STRUM: That is one state interest.

QUESTION: Oh. What else is there?

MR. STRUM: Also, the state interest is in seeing to it that there is an orderly distribution of estates. In other words, the situation is that we don't wish anyone, after somebody dies, to come in and make a claim, because of the difficulty of proof, and because of the question that you would

have to keep estates open for an inordinate period of time.

QUESTION: Why? Why couldn't you have the normal rule you have in states, that claims have to be filed within a limited period of time?

MR. STRUM: Because you would have to publish.

QUESTION: You do anyway, because don't you occasionally have estates in which people claim to be legitimate children and there is a contest over that?

MR. STRUM: Yes, but you would be opening --

QUESTION: Therefore, you have to make that claim within a specified period of time.

MR. STRUM: Oh, sure.

QUESTION: Why couldn't the same rule take care of this problem?

MR. STRUM: It could, except that you are going to have people who are going to come in and make claims and say they didn't know, or they had no opportunity to know.

QUESTION: You have that with legitimates, too. You have the same thing.

Let's focus for a moment -- Your primary interest, I gather, is that you want to give the father the opportunity to deny parentage.

MR. STRUM: That's correct.

QUESTION: That's the real reason for the cutoff. Well, supposing the papers of the father -- and there is

abundant evidence of the fact that he is -- not just in the somewhat ambiguous way you have here -- but he has repeatedly acknowledged it, written it out many, many times that the person involved "is my true and natural son." What is the state interest in giving such a father an opportunity to contradict what he has said repeatedly to the contrary?

MR. STRUM: How, Your Honor, do you draw the line?

QUESTION: You may draw it in terms of standards of proof. You might require proof beyond all doubt, beyond a reasonable doubt, something like that. But when you have uncontradicted proof and thorough agreement on the facts -- and I know you don't have that here -- then what is the state interest?

MR. STRUM: Well, again, I think --

QUESTION: And then do you not discriminate against some illegitimates?

MR. STRUM: I don't think you discriminate. I think the legislature has the right to set the standard of proof. Now, providing that standard of proof is a reasonable one, providing the requirements are reasonable --

QUESTION: This is not a standard of proof. This is saying that no matter how convincing the proof. This is a standard of eligibility.

MR. STRUM: It is that, but it is a standard of eligibility by way of judicial determination.

I think the legislature has the right to say, 'We want a judicial determination when it can be had and when it can be fairly had, not when somebody can be put upon' -- I am not saying it would happen in every case or in any case. I am saying it is to preclude the possibility. So you have to draw a line. You have to draw standards. You have to mark everything off. If you don't mark everything off, what you are going to have is confusion and chaos. I think the legislature has a right to do that. I think as long as they act fairly and reasonably, I think it is within their right.

QUESTION: Sole justification, according to you, is to protect the right of the father to testify to the contrary when the record makes it clear he has no such desire?

MR. STRUM: That's a determination that you are making after the fact. I think the legislature in the right to protect its citizens has the right, in the first hand, to set the standards. I think people are then required to live up to those standards, like in any other situation.

QUESTION: What you are saying, perhaps, is that New York is not obliged to have a perfect statute, so long as they have a reasonable one.

MR. STRUM: I quite agree with the Chief Justice.

QUESTION: Does the state take any position with respect to this claimant at all, as to whether he is or is not the natural child of --

MR. STRUM: I have no knowledge of the facts. This case came up on a very incomplete record.

Your Honor, there was a motion made to dismiss with regard to the status. So the only issue before the court was the status of the claimant. Now, the Attorney General was not a party at that time. We are only a party with regard to the constitutionality of the state statute. I really don't want to comment.

QUESTION: You are conceding nothing factually, then?

MR. STRUM: No, I am not, because I am not in a position to, Your Honor.

QUESTION: But it is clear that your argument would be precisely the same if you were prepared to concede the facts?

MR. STRUM: Yes, sir.

QUESTION: So we should treat the legal issue as though the facts were tantamount to being conceded, realizing they will be challenged later?

MR. STRUM: Yes.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:28 o'clock, p.m., the case was submitted.)