In the

Supreme Court of the United States

CURTIS PARHAM,

Appellant,

v. No. 78-3

ELLIS FRANKLIN HUGHES,

Appellee.

Washington, D.C.
January 15, 1979

Pages 1 thru 49

Hoover Reporting Co., Inc.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

CURTIS PARHAM, Appellant,	:	
v.	:	No. 78-3
ELLIS FRANKLIN HUGHES, Appellee	:	

Washington, D. C.
Monday, January 15, 1979

The case in the above-entitled matter came on for argument at 11:42 o'clock, a.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:

THOMAS E. GREER, ESQ., 202 Tanner Street, Post Office Box 798, Carrollton, Georgia 30117; on behalf of the Appellant.

A. MONTAGUE MILLER, ESQ., 453 Greene Street, Post Office Box 2426, Augusta, Georgia 30903; on behalf of the 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 Parham against Hughes.

Mr. Greer, I think you may proceed whenever you're ready now.

ORAL ARGUMENT OF THOMAS E. GREER, ESQ.,

ON BEHALF OF THE APPELLANT

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

The question before the Court in this case is whether Georgia may, consistent with the equal protection and due process clauses of the United States constitution, allow the mother of an illegitimate child to recover for the wrongful death of that child, and deny that right to the father of the child, despite the fact that the mother is deceased, and despite the fact that the father maintained a meaningful relationship with that child.

And it presents the related question of whether the present classification constitutes impermissible gender-based discrimination.

The Georgia Supreme Court, in its opinion, makes the point over and over again that the legitimate state interests to be promoted by the present classification is the discouragement of an illegal act.

The illegal act that classification is purported

to discourage is the creation and the birth of children out of wedlock.

That illegal act has two participants, each with an equal degree of participation, and each with an equal degree of complicity.

QUESTION: Would you agree that the Georgia legislature could abolish the -- all claims for death by wrongful act?

MR. GREER: That they could abolish all claims for death by wrongful acts? I would think the state of Georgia could constitutionally do that.

And yet despite the fact that these parties have an equal degree of participation in the act that the state seeks to discourage, one of those parties is accorded all the rights of a natural parent.

She is accorded all the rights of a natural parent without regard to what her actual relationship with the child was, and she is accorded those rights without the necessity of any affirmative action on her part.

By contrast, the state has singled out the other participant in the illegal act as the member who will serve as the state's means of discouraging that act. He is accorded none of the rights accorded a natural parent, unless he takes affirmative action.

Appellant submits that in cases like the present

one that the classification before the Court constitutes impermissible gender-based discrimination and is otherwise in violation of the equal protection and due process clauses.

QUESTION: Does it make any difference to your case whether the mother is living or dead, or whether the child ever saw the father?

MR. GREER: Your Honor, I think it makes a tremendous amount of difference. Because I don't think the Georgia legislature is obligated to absolutely guarantee the father of an illegitimate child the right to participate in the recovery.

I think that the message of Trimble v. Gordon and Stanley v. Illinois and Weber v. Aetna Casualty is that a state must carefully attune its alternatives in this area.

I think that Georgia has failed to carefully tune its alternatives. I think it could have a carefully tuned statute like several other of the states have.

For example, Washington state has a statute which establishes a preferential scheme of recovery and allows the father of an illegitimate child to participate in that recovery if he had done one of two things -- no, if he had done both of two things: if he can prove his paternity, and if he had regularly contributed to the support of the child.

Maryland has a similar statute. Maryland allows him to participate in the recovery if he can prove that he either had his paternity judicially established, that he

acknowledged his paternity in writing, or that he had openly and notoriously acknowledged the child as his own during the child's life.

QUESTION: Is there a constitutional obligation on every state to attune its statutes to fit every conceivable situation that may arise?

MR. GREER: No, Your Honor, not every conceivable situation that may arise. I do think a blanket exclusion of fathers of illegitimate children offends the equal protection clause when a state may carefully attune its alternatives and still protect its interests in the area, which I think the state of Georgia has failed to do in the present matter.

QUESTION: Mr. Greer, as I understand it, some states permit different elements of damages and recovery for wrongful death of children on the part of parents than others.

And I suppose perhaps the tuning that you're talking about might have something to do with what elements of damages are permitted.

What elements of damages does Georgia permit you to recover?

MR. GREER: Georgia allows recovery for the value of the life of a child. And then it's subject purely to the jury's discretion from that point forward.

QUESTION: It could include a loss of consortium type of --

MR. GREER: It includes -- instructions have been approved which allow the jury to consider the loss of companionship issue.

QUESTION: So it isn't just a monetary thing that the child would have supplied you with so much money over the years?

MR. GREER: No, Your Honor. As a matter of fact, the Georgia legislature expressly repealed a statute in 1952 that required a contribution by a minor to the support of the parents.

The minor child, Lemuel Parham, was born of course to the appellant, Curtis Parham, and to Cassandra Moreen, out of wedlock.

The child's mother, Cassandra Moreen, was killed in the same accident which took the child's life. And this original action was instituted in the superior court of Richmond County.

That court held the Georgia wrongful death statute unconstitutional, and in violation of the equal protection clause, and in doing so they made several findings of fact which I think are critical to this case.

They found that --

QUESTION: Were the parents living together?

MR. GREER: No, Your Honor, not as -- no, Your Honor, they were not.

They found that while the deceased child was an illegitimate child, that the father had executed the child's birth certificate at his birth, acknowledging his paternity; that the father had paid the birth expenses; that he had regularly supported the child from its birth until its death; that he had at all times acknowledged the child as his son, and was acknowledge by the child as his father.

The record reflects that the child utilized the father's name, and not the mother's.

The court went on to find that in addition to paying regular support, that the appellant had maintained charge accounts at grocery stores to further provide necessities for the support of the child.

And the court found finally that he had maintained a consistent relationship of visitation, and in fact had visited with the child virtually everyday, and had the child for many complete weekends.

And --

QUESTION: Mr. Greer, let me ask you, too: There's a suggestion that a cause of action by the administratrix is pending. Is that still pending?

MR. GREER: Your Honor, that action is pending. It has been enjoined. The administratrix is the maternal grandmother.

With regard to that point, Your Honor, I think that

is a point made by the appellee in the appellee's brief, is that it is not as though there has been no provision for recovery.

I think this Court made the point in Weber v. Aetna Casualty that the real question -- and referring back to Levy -- the real question is not whether there is a scheme of recovery, but whether there is a scheme of recovery which supports the mandate of the equal protection and due process clauses of the United States.

So there is another action pending. But I think the question before the Court is whether the scheme of recovery that exists is consistent with the equal protection clause.

The trial court found that --

QUESTION: Are you representing the estate?

MR. GREER: No, Your Honor, I represent the appellant, the natural father.

QUESTION: So you haven't -- you're not in the administratrix' lawsuit in any way?

MR. GREER: No, Your Honor.

QUESTION: Why is that being held up pending disposition of -- this case?

MR. GREER: Pending disposition of this case.

QUESTION: Is it agreed that -- that the administratrix occupies secondary capacity to either parent?

MR. GREER: No, Your Honor.

In the case of legitimate children, she would. In the case of an illegitimate child, the father is blanketly excluded from participation.

QUESTION: But why has that case been held up?

MR. GREER: I think there would be a prospect of an invalidation of -- well, I can see theoretically how that case could proceed, and the question might be, who would be entitlted to the recovery of the proceeds.

But the superior court of Richmond County chose to enjoin that case pending a decision in this case, for fear that it might proceed to that trial, and the father might be declared the proper party to maintain the action.

QUESTION: Well, is it possible there'll be a double recovery if you prevail here?

MR. GREER: Your Honor, that is an argument that the appellee has made. I think it absolutely does not exist.

And the reason that I say it does not exist is, in Glona v. Underwriters, this Court awarded to the mother of an illegitimate child the right to recover for that child's death.

Implicit in the Court's decision in that case allowing the mother to recover was the decision that other collateral relatives, or other people in the statutory scheme, would not be entitled to recover.

The same is true in Levy v. Louisiana. I think implicit in that court decision that the children could recover for the wrongful death of the mother would be a decision that she would be entitled to recover there to the exclusion --

QUESTION: Well, do you think this Court goes around awarding rights to various relatives to recover under state statute?

MR. GREER: No, Your Honor, I didn't mean to imply that, but maybe I didn't make myself clear enough.

I think that a proper decision in this case would be that the Georgia statute is not, at the present time, carefully attuned to alternative considerations.

And that would leave Georgia any number of [illegible] options, perhaps. I realize this Court does not award --

QUESTION: How about the options to the various participants in this case? Who would get the money?

MR. GREER: Your Honor, I think that in this case the father would be the appropriate party to prevail in this action; the father of a legitimate child is given that benefit.

QUESTION: Mr. Greer, in Georgia law, the unwed father could legitimate the child by filling a petition in a superior court in a county in which the child was born, I think.

Is that correct?

MR. GREER: Well, that is correct, and that is an

issue I think of paramount importance in this case, and with the Court's permission, I will address it now.

Mr. Justice Marshall, in a unanimous opinion for this Court, Quilloin v. Walcott, declined to rest the decision of that court -- of this Court in that case on the fact that the father had an option to legitimate.

He did so in that case based on the fact that there was some indication in the record that he did not know the availability of it.

In at least two other cases -- Trimble v. Gordon and Stanley v. Illinois, this Court has also declined to decide those cases, those respective cases, on the grounds that he had an option to legitimate.

In those cases, the argument was that there was no insurmountable barrier to recovery; that the father could have legitimated the child -- which is the argument made here; that he could have left a will providing for the child.

The Court ruled in those cases that the -- when attacked on equal protection grounds, it must survive traditional equal protection analysis; and that the presence or absence of an insurmountable barrier can't alter those considerations.

QUESTION: Of course, in Trimble, the father had to marry the mother.

MR. GREER: Excuse me?

QUESTION: I say in Trimble, Illinois law required marriage as the mode of legitimating an acknowledgement. And that's a bit more serious than going down to the court and filing a petition.

MR. GREER: Yes, sir. I do think -- I think the danger of resting a decision of this importance on that issue is, well, I think it would be ironic if you have the relationship -- the degree of relationship that you have between a father and a child in this case, and if you rest a decision on these grounds, I think it's ironic that Mr. Parham in this case could havelegitimated the child, by a naked formality, he could have had no relationship whatsoever with that child; never supported it; never visited it; never had any contact with it at all. And presumptively, then, would have been entitled to bring this action.

QUESTION: He would have been under a legal duty, wouldn't he, in Georgia, to support a minor child, if he were -- if it were clear that he were the father?

MR. GREER: He is under a legal duty anyway, without regard to --

QUESTION: Not until he's identified.

MR. GREER: Yes, sir. But I mean the --

QUESTION: Theoretically.

MR. GREER: --primary support obligations for an

illegitimate child is placed the father.

QUESTION: On the father.

MR. GREER: Yes.

But it would be ironic that he could have observed that formality, and been entitled to recover without regard to his relationship, and yet he has the degree of relationship that he has, and might be denied that right because he didn't observe the formality.

And I think that that argument assumes a level of awareness with regard to the necessity and the availability of legitimation petitions that in reality just doesn't exist.

QUESTION: Would you be making the same argument if the thought -- if the father had not taken any part in supporting the child?

MR. GREER: I would never have filed a petition -- notice of appeal, if he had not had a relationship with the child.

I don't have any question that the state has the right to deny a father who has never had a relationship with the child an absolute -- failure to participate.

QUESTION: Suppose you had a mother who had never done anything for the child from the day of birth? She would have a right under the Georgia statute to bring this action, wouldn't she?

MR. GREER: She certainly does. And I think that

may be another problem with the statute. It is not one which the issues in this case address, but I think it's certainly -- I think it is certainly a potential problem.

QUESTION: You mean in each case the Court has got to inquire into the degree, how much was contributed, what the personal relationship was between the father and the child, in order to make the evaluation that you're pressing under the equal protection clause?

MR. GREER: Your Honor, I think that -- I think in the first instance, I wouldn't take it to a complete extreme. I think as this Court said in Stanley v. Illinois, that the constitution recognizes higher values than speed and efficiency.

I think you have to be reasonable within that context. I think the state certainly has an interest to protect.

But I think -- and the point I made earlier is that I think the state has to strive for a middle ground between an absolute right to recover on the part of these fathers, and an absolute exclusion of these fathers --

QUESTION: To meet -- to meet what? equal protection?

MR. GREER: Yes, sir, to satisfy the equal protection clause.

QUESTION: What do you say is the consequence of

the certificate or the paper, whatever it was that he filed after the child's birth?

MR. GREER: Your Honor, I think that in the present case, it obviates an argument made by the appellee, and that is, that the state has an interest in avoiding problems of proof of paternity.

I think this case, and cases like Trimble, are the cases which make it clear how dangerous it is to engage in blanket exclusions. Because in this case where the man executed the birth certificate, I think he obviously would have carried his burden of proof.

And I think the state is certainly entitled to exact a strict standard of proof on the father in these cases, and put the burden on him like Washington and Maryland and California do.

QUESTION: Could it have been any more difficult for him to acknowledge the paternity and legitimatize the child at that time?

MR. GREER: Your Honor, the point I would make there is a point I made before, and I'd like to elaborate on it.

I think that argument assumes a level of awareness about the necessity of legitimation that doesn't exist. And why I say that -- the appellant Parham would be very surprised to find that he had to do anything to prove to the world that

this was his child.

The child used his name, and instead of the mother's. He had gone forward on the day of the child's birth and executed the birth certificate, acknowledging to the world that it was his child.

QUESTION: Well, do you think he'd be equally surprised to find he had an action for wrongful death on the part of the child before he went to a lawyer?

MR. GREER: Excuse me, Your Honor.

QUESTION: Do you think he might be equally surprised to find out that he had a lawsuit for wrongful death of the child before he walked into a lawyer's office?

MR. GREER: No, Your Honor. I think, given the degree of the relationship that he had with his child, that he probably expected that he would be the logical alternative to the child's --

QUESTION: The surprise was to find that under Georgia law he didn't?

MR. GREER: That was his surprise.

QUESTION: Mr. Greer, do I understand your colloquy of thelast few minutes as suggesting that your argument here is addressed to the statute as applied, not facially?

MR. GREER: I think it is addressed to both. I think this is a particularly appropriate case, because the relationship that existed between the father and the child.

But I think it is invalid on its face, because it blanketly excludes --

QUESTION: Then I don't understand why you answered that had there not been evidence here of the support of this child, you would not have tried to bring the case.

MR. GREER: I don't think that I would be in a position to suggest to this Court that a state ought to more carefully tune its alternatives if I wasn't representing a client who would be within those carefully tuned alternatives.

QUESTION: Well, you'd have a very hard time proving damages, among other things, wouldn't you?

MR. GREER: Absolutely. That was a major problem. You're probably subject to a directed verdict for damages in a trial court.

QUESTION: How old was this child at the time of death?

MR. GREER: Seven years old at the time of death.

QUESTION: Seven?

MR. GREER: Yes, sir.

QUESTION: I just want to understand. As you submit the constitutional question to us, it is that the statute is facially unconstitutional under the equal protection clause, is it?

MR. GREER: It is facially unconstitutional, and it

is unconstitutional as applied to the appellant Parham.

I -- yes, sir, it is facially unconstitutional.

QUESTION: You mean you're mixing those alternative arguments?

MR. GREER: Yes, sir.

QUESTION: It's gender-based discrimination, I gather?

MR. GREER: Gender-based discrimination, I think, is -- requires a little bit of separate attention. I think there have been two emerging propositions in the area of gender-based discrimination, both of which I'm comfortable with for the purposes of this case.

One is that the classification must support some valid governmental objective, and, most importantly, it must be substantially related to the promotion of that objective.

That was present in Quilloin, I think; the asserted state interest was the promotion of legitimate family relationships.

The direct result of this Court's decision in Quilloin was to establish a legitimate family relationship. It recognized the preferences of the child in that case; it recognized an existing family unit.

In this case, there is no way that this classification, which penalizes one participant to the illegitimate act, and--

MR. CHIEF JUSTICE BURGER: We'll resume there at 1:00 o'clock, counsel.

MR. GREER: Thank you, Your Honor.

[Whereupon, at 12:00 o'clock, noon, the Court was recessed until 1:00 o'clock, p.m.]

AFTERNOON SESSION

[1:01 p.m.]

MR. CHIEF JUSTICE BURGER: Counsel, you may resume.

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

I had begun to address the issue of gender-based discrimination in the present case. And I stated previously, there appeared to be two emerging propositions in the area of gender-based discrimination.

The first is that the classifiaction must support a valid governmental objective. In addition, it must be substantially related to the promotion of that objective.

I think the present classification, while it recognizes a valid state interest, that is, the promotion of legitimate family relationships, could never promote that legitimate state interest.

As Justice Douglas said in Glona, it is preposterous to assume that people give birth to illegitimate children in contemplation of the fact that they may be one day allowed to recover for their wrongful death.

As this Court stated in Weber v. Aetna Casualty, it is illogical to assume that people will shun illicit relationships for fear that their children may not one day be able to reap the benefits of a workmen's compensation law.

And as Justice Hill, in his dissenting opinion in

the Georgia Supreme Court stated, the sanction employed by the state in this case comes too late to possibly promote the legitimate state interests.

So I think it fails that emerging proposition in the area of gender-based discrimination.

QUESTION: Mr. Greer, before lunch you said a state -- you felt the emerging propositions required the states to strike kind of a middle ground.

Supposing that there were a foster father of this child who had done everything your client has for the child, except conceive him. Would you think the state had to permit him to recover under the wrongful death statute?

MR. GREER: Your Honor, I think you more nearly approach the situation of Trimble v. Gordon there, where you had an existing family unit, and in that situation. It's certainly a different question from the present one.

I think it'd be very unlikely you'd have a situation where you would have a foster father and a natural father both having meaningful relationships with the child.

I think this Court has traditionally recognized the strong interests of the natural parent in its child. And I think that should be given some consideration.

The second emerging proposition --

QUESTION: The strong interest hasn't been a -- strong enough to lead him to change the child's status to

one of legitimacy.

MR. GREER: Your Honor, as I've said before, I think that that argument is dangerous because it assumes a level of awareness about the necessity of that step.

QUESTION: He didn't have any trouble going to a lawyer and getting some legal advice after the child's death.

MR. GREER: Once the child was deceased. I think it would normally -- where apparently there is clear negligence, where a person feels another person is responsible, I think it's not illogical that a person might consider he might be entitled to recover for the injury.

On the other hand, in a situation where he had done everything he knew to do to indicate to the public and the world that the child --

QUESTION: How do we know that? How do we know that he had done everything that he knew about?

MR. GREER: Your Honor, the record establishes that he had executed the birth certificate, that he had given the child its name, that he had supported the child.

Those are the acts that are normally associated with a father-son relationship. And beyond that we get to the point where --

QUESTION: Well, isn't it an equally plausible hypothesis that he was willing to go that far, but he didn't

want to take the next steps to make the child legitimate because it might increase his liabilities and responsibilities?

MR. GREER: Your Honor, I do not think that is a logical hypothesis in the present case for the simple reason -- I mean the appellee has made the point that maybe he provided the support because there were criminal sanctions if he didn't.

Well, if that's the point to be made, then he could have provided a minimal level of support and avoided the criminal sanctions, but he didn't have to go to the further extreme of visiting with the child on a daily basis, and he certainly didn't have to maintain additional charge accounts for the benefit of the child, and provide additional support.

I think it's good faith as a parent has been demonstrated in this case.

QUESTION: The child's mother is dead?

MR. GREER: Deceased, killed in the same accident that took the life of the child.

QUESTION: Killed in the same accident.

So -- and under Georgia law, I suppose the child would have been -- have become a legitimate child had the mother and father been married after his birth?

MR. GREER: Yes, Your Honor.

QUESTION: That would have been the only way to make the child legitimate, wouldn't it?

MR. GREER: Could have filed a petition for

legitimation.

He could have filed a petition to legitimate the child without marrying the child.

QUESTION: To legitimate the child?

MR. GREER: Yes, sir.

QUESTION: How -- what --

MR. GREER: There's a procedure, a statutory procedure, in Georgia by which the father may file a petition to legitimate the child if he chooses.

QUESTION: Not just to acknowledge paternity, but to legitimate the child?

MR. GREER: To legitimate the child.

QUESTION: Turn the child from a bastard, to use a correct word, to a legitimate child?

MR. GREER: Yes, Your Honor.

I submit to the Court that the proposition stated by the Court in Trimble and Stanley that this equal protection question should be decided on its own merits, and not with regard to the presence or absence of an insurmountable barrier is still the proper way to decide the case.

If I could discuss just --

QUESTION: Did the father live with the child?

MR. GREER: Your Honor, the record does not reflect that one way or the other.

QUESTION: But the father did support the child?

MR. GREER: Absolutely.

QUESTION: And you said charge accounts? What charge accounts --

MR. GREER: Maintained charge accounts at grocery stores --

QUESTION: In the child's name?

MR. GREER: The record does not indicate whether they were in the child's name or not, but that he maintained charge accounts utilized for the additional support of the child.

QUESTION: But they did not live together, did they?

MR. GREER: No, sir, they did not.

QUESTION: Does the record state why?

MR. GREER: No, Your Honor, it does not.

QUESTION: Or whether she married somebody else?

MR. GREER: No, sir, Your Honor, the record does not indicate whether she was married to somebody else.

QUESTION: But I suppose under Georgia law, had she been married to somebody else when the child was born, it would have been her husband's child, at least by presumption?

MR. GREER: Yes, sir.

QUESTION: Mr. Greer, before following up on one of Mr. Justice Rehnquist's questions about the relationship, supposing that the legislature had made a study of the problem that this case illustrates and found that in about 94, 95

percent of the cases that the fathers were unknown and unidentified; about 5 percent of the cases, the fathers did legitimate the child; and there are only a handful of cases, like this one, where the father of an illegitimate child has a meaningful relationship with the child?

Would you say the statute was unconstitutional or not?

MR. GREER: Your Honor, that is the final point that I had hoped to address before I sit down. And that gets into the second area that this Court -- the terms that this Court has talked of, and that is, the area of engaging in overall generalizations with regard to proclivities and tendencies of the sex.

QUESTION: And supposing it's overbroad to the extent that two percent of the cases that are subject to the statute?

Is it unconstitutional or not?

MR. GREER: I think if there were statistical indications to that regard, I think it may still be unconstitutional.

I think the Court does not --

QUESTION: Supposing this is the only case that this situation happens in? Is it still unconstitutional?

MR. GREER: As applied to this appellant, I thinkit is, Your Honor.

I don't think the Court needs to reach that point, because the present --

QUESTION: Well, how do we know that that's not the fact?

MR. GREER: Well, the point --

QUESTION: It certainly is rather unusual for the mother and the child to be killed in the same accident, and then have the father both be the father of an illegitimate and one who has a meaningful relationship with the child.

MR. GREER: I think in reality, Your Honor, that the statistics, if they were available, would be shocking.

I think they would reveal that some illegitimate children are raised by their mothers; some are raised by collateral relatives; some will be raised by grandparents; some will be raised by neighbors and friends --

QUESTION: But we really don't know, do we?

MR. GREER: No, sir.

QUESTION: Supposing the legislature thought they were at the case -- the one I described for you?

MR. GREER: Excuse me?

QUESTION: Supposing the legislature assumed, perhaps incorrectly, that if a study were made, it would show the figures I described?

MR. GREER: I think the --

QUESTION: Would the statute be unconstitutional?

MR. GREER: In the first instance, I think there's nothing to indicate that the legislature or the supreme court had at its disposal any statistics even approaching that regard.

I think the statistics -- the empirical data in support of the propositions in cases like Califano v. Goldfarb, Weinberger v. Wiesenfeld, were much more compelling than what's been offered here.

All that's been offered here is the generalization by the Georgia Supreme Court, unsupported by any statistics --

QUESTION: But there's one difference, and that is, you in effect conceded in the cases that where the father was unidentified and had no relationship, there would be no -- nothing unconstitutional about denying recovery.

MR. GREER: I conceded that a statute which provided for an effort in that area would more nearly comport with reality and the equal protection and due process clauses, because it would more nearly comport with reality, because in those cases where he could not prove his paternity, or could not prove contact with the child, then the state could justifiably exclude him from participation.

QUESTION: Well, doesn't -- don't you have to only answer that in a sex discrimination case where the basis of review, I take it you urge, is somewhat above the mere rationality standard, that administrative convenience just isn't -- at least if it -- at least if it's not much -- very

burdensome to individualize, that the state shouldn't be permitted to individualize?

MR. GREER: That has been the position of this Court as I understand it, that administrative convenience dis not a sufficiently legitimate state interest to warrant total exclusion of a class.

QUESTION: What if the mother had been killed in the accident -- had not been killed in the accident, but she survived?

I take it it would be your position that the mother and the father would share in a claim for death.

MR. GREER: I think the Court may one day be confronted with that question in the area of legitimate children, where Georgia prefers mothers over fathers in the area of legitimate children; Georgia does.

The majority of the states allow the mother and the father to share in that recovery.

QUESTION: And you would claim here if she survives from the accident, she could intervene and share?

MR. GREER: If he could prove -- I think a statute like Maryland's or Washington's is desirable where they require him to prove more than the fact that he's the father; that he needs to establish a paternity and a --

QUESTION: No, I'm not atalking about some other statute. I'm talking about the statute of Georgia as it is

today.

Would you claim that the mother and the father would have to share?

MR. GREER: Under the facts of the present case, I think that would be the constitutional answer.

QUESTION: Then -- but if the mother and father were married, and the child were legitimate, they would not share, under Georgia law, would they?

MR. GREER: Under Georgia law as it presently exists --

QUESTION: The mother gets it all.

MR. GREER: Well, I think it should be that way in both cases.

I certainly think it should be that way with legitimate children.

QUESTION: Either way it should be the same?

MR. GREER: Yes, sir.

And as a final comment before I conclude, I think the kind of generalizations the Georgia Supreme Court engaged in are the kind that this Court has traditionally not tolerated; the generalizations like the father of the child who does not take the trouble to legitimate the child suffers no real loss when the child was killed.

And I think the present facts illustrate the fallacy of that argument. The overbroad generalization that it's the

father who has control over whether a legitimate family unit will exist.

That almost assumes that the father of an illegitimate child could force a marriage with the mother if he wanted to. Unlike Califano and other cases, those propositions are not supported statistically in any regard, and I don't think they can justify the present classification.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Miller.

ORAL ARGUMENT OF A. MONTAGUE MILLER, ESQ.,

ON BEHALF OF THE APPELLEE.

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

This is perhaps one of those unusual cases where insofar as the appellee is concerned, the defendant in the lower court, it really makes no difference to him whether he wins or oloses before this Court.

The facts, I think, in order to clarify the reason for a lack of evidence in this case, is that the defendant was sued by both the father of the illegitimate child,and by the grandmother as administratrix of the estate.

QUESTION: Mr. Miller, I'm not --

MR. MILLER: No, sir.

QUESTION: -- I'm not sure I understand your disavowal that it makes no difference.

Are you conceding liability to someone?

MR. MILLER: May it please the Court, I think that that will be the net effect. The mother's case has already been settled, because there were no hindrances in that action as there are here, and there will be, if this Court rules the statute to be unconstitutional.

QUESTION: So there would be settlement then, as I understand you, either with the administratrix or with the father, if he should prevail here?

So it doesn't make any difference; this is your approach?

MR. MILLER: Yes, sir, that's my approach here.

Of course, as a lawyer having to practice in the state of Georgia, I would defend the statute vigorously. I think that it's difficult for a court sometimes to understand the problems that we havein the area of illegitimate children with fathers who cannot be located.

And I think that there is a real state interest to be protected by the state of Georgia in passing the act which they did pass.

QUESTION: Well, suppose that we affirm, is Georgia law clear that the estate has a cause of action?

MR. MILLER: Yes, sir, code section 105.1309 provides that.

QUESTION: But there's no windfall to your client?

MR. MILLER: There's no windfall whatsoever. And the measure of damages, may it please the Court, is the full value of the life of the decedent without deducation for necessities, whether that be for an adult, an illigitimate child, or a legitimate child.

The measure is the same.

QUESTION: What could the recovery be for the estate?

MR. MILLER: The recovery for the estate would be the full value of the life of the decedent without deduction for necessities, as set forth by the minds of an enlightened and impartial jury.

QUESTION: You think that's the same measure as might be available to a mother?

MR. MILLER: It is the same measure in writing.

QUESTION: Even though the -- even though the mother -- suppose both parents were dead, but there's a cause of action available to the estate of the child. Or -- it stated the mother, is that it?

Which estate are you talking about?

MR. MILLER: I'm referring, Mr. Justice White, to the estate of the child, in this instance. But the point I was attempting to make is that the measure of damages is the same, whether the suit is by a mother for the death of a child, or by a father for the death of a child, or by the

administrator or administratrix for the death of a child; or for a grownup, for that matter.

QUESTION: So it isn't -- so the major damages when the mother is suing is not the pecuniary value that the continued life of the child might mean to her?

MR. MILLER: No, sir.

QUESTION: But you would have a tougher time with a jury, would you not, if neither parent were alive, simply having a court appointed administratrix testify -- administrator testify, than if you had a live mother or father as -- when you're testifying on the issue of loss of the value of companionship?

MR. MILLER: Mr. Justice Rehnquist, I certainly can't deny that that is a problem which would present itself, but likewise I cannot deny that when a child is dependent upon a parent, that increases, perhaps, the value of that child's life.

I don't see how you could ever get around that. And I think it makes a difference whether a child is 7 or 21, or whether the mother and the child had a meaningful relationship; any number of other things which could throw some light on the value of a person's life.

QUESTION: Well, lots of children have a more meaningful relationship with their parents when they're 7 when they're 15?

MR. MILLER: Yes, sir.

Again, I think that the Court should understand the posture in which the case got here. And that is that the defendant filed a motion for summary judgment in the pending action. And that motion for summary judgment by the defendant was opposed by an affidavit by the father of the illegitimate child.

And those are also the facts that happen to be before the Court. So there may be some facts that the Court has inquired about that no one knows because the superior court of Richmond County held that the affidavit of the father as to these facts were taken as true, and therefore rendered its decision based upon that.

QUESTION: Mr. Miller, I take it under Georgia law, the father is not an heir of the deceased child.

MR. MILLER: Mr. Justicee Blackmun, I think that that is a correct statement, and I think that it is also correct that the mother of an illegitimate child is not -- does not inherit.

And I think that is the better question which should be brought to this Court for the decision, and that is, who are the heirs at law of a person who is illegitimate? And I think that that would eliminate an awful lot of problems that would be brought forth in the event that this Court would hold the Georgia statute unconstitutional.

Because eventually, you will find that if this statute is unconstitutional, then of course the right of action of the mother is unconstitutional; perhaps the right of action vested in the mother of a legitimate child to the exclusion of the father is unconstitutional.

Then we don't have any rights of action for wrongful death in the state of Georgia, because they're all based thereon.

QUESTION: It would be a windfall?

MR. MILLER: Yes, it would be a windfall then.

QUESTION: Until the legislature got busy.

MR. MILLER: Well, they don't have much time. It would be awhile. They're only in session for 40 days, and they have begun, and they'll finish in January, first part of February.

I think that in this case that we should think for a minute about not only the problems thatmight be caused, but by the manner in which the state of Georgia has rtreated illegitimate children.

Georgia by statute has allowed a father to file a petition to legitimate the child, and it's a very simple matter. It's simply a petition brought in the county where the child resides, stating that he is the father, and he can have the child assumehis name is he so desires.

It's not a very difficult thing. And I think to

decide a case based on the level of awareness that might exist through the citizen's estate for a law that has been on the books now for 92 years, and has never been challenged by anyone, father, mother or otherwise.

So it must be a very unique situation, and one which I would submit to the Court would allow the state to proceed as it did and to hold that this particular statute is constitutional.

It was passed in 1887, and amended one time in 1952. Prior to that time, of course, there was no cause of action for wrongful death by common law.

QUESTION: Is there any particular reason -- I know notice your co-counsel is from -- your opponent is from Carrollton, which I gather is in western Georgia, and that this suit was filed in the Richmond County Court which I gather is Augusta.

Is there any venue provision that's involved there?

MR. MILLER: Yes, sir, Mr. Justice Rehnquist, the suit must be brought in the county of the residence of the defendant if he is a resident of the state where the accident occurred.

So that was his only venue.

We also, in the codification of the laws, have stated on numerous occasions in the statutes that there can be no discrimination on account of a person being illegitimate;

that there can be no defense of a child being illegitimate in an action brought by the mother, whether in her own right or in a representative capacity, or as the mother; and that a mother can proceed to file an action and collect the proceeds arising out of the death of her child, natural child, whether it be legitimate or not.

I can find no reason to vary from the most recent decision of Lolly v. Lolly or the Quilloin decision in arriving at the constitutionality of this case. And the Quilloin v. Walcott, the options that are available -- and were available -- to this father, putative father, are the same.

And Mr. Justice Marshall, writing an unanimous opinion of the Court, stated that necessarily it existed that the father could have brought a petition to legitimate the child, and therefore obtained a veto right over the adoption of the child.

And I would think that it must be that the interest of the father in being able to veto the adoption of a child would far outweight the right of a father to bring an action for damages for the death of a 7-year-old child.

It is incomprehensible to met that that would not be true. And this Court held that since that was some middle ground that the father could take, that is, between exclusion and a case-by-case method, or in the Trimble case, having to marry the mother, that he could in this instance bring a

very informal petition and legitimate the child, and thereby could have obtained the veto rights to the adoption.

QUESTION: Well, Mr. Miller, do you represent the maternal grandmother in this case?

MR. MILLER: No, sir, I represent the defendant. The maternal grandmother is the other plaintiff.

QUESTION: She is the other plaintiff whose action you said was proceeding?

MR. MILLER: Yes, sir.

QUESTION: And you represent the defendant who is being sued for negligence as a result of the wrongful -- claimed wrongful death?

MR. MILLER: That's correct.

In the Lolly case, of course, this Court again held in looking at the New York statute -- Mr. Justice Powell writing the decision -- that the father, putative father, could have in that instance brought a petition -- I think it would be a petition -- to legitimate the child by simply during his lifetime acknowledging the child, and thereby the child would have been able to inherit from the father's estate.

And although the decision was 5 to 4, I submit that the rationale there is the same as exists here in that the interim step was also available to the father.

QUESTION: Mr. Miller, are you sometime going to tell me why that's a value to the state?

MR. MILLER: Of value to the state, in my opinion, Mr. Justice Marshall, it is of value to the state in that we are able to dispose of litigation without having to look for parents.

And I realize that while it might appear that this Court has rejected that before, I think that it is now a valid argument.

QUESTION: Well, that would be a valid interest if this were a question of whether or not an illegitimate father could inherit or something like that.

But you don't have to look for parents. This is a plaintiff in a lawsuit. He found himself and walked into court and filed a complaint.

MR. MILLER: Yes, sir, that --

QUESTION: If he hadn't, you would have no duty whatsoever.

MR. MILLER: That is correct.

But it is not unusual in our state to have more than one person, and sometimes several, making claims to one source. And what it means, just very practically, is that you cannot settle with any putative father until you have a decision from the highest court in that state --

QUESTION: That he is the father?

MR. MILLER: -- that he is the father.

QUESTION: I see.

MR. MILLER: And that means that I've got to defend everyone of them. I can't settle it. And another jury two months from now may decide --

QUESTION: That somebody else is the father?

MR. MILLER: -- the facts in that case proved his case. And then I do have a double recovery, which I think is a real issue.

QUESTION: But in this case, the father gave his own name to the boy?

MR. MILLER: That's the way the record appears.

QUESTION: Well, that's the way the record is.

MR. MILLER: Yes, sir.

What happened --

QUESTION: So the state didn't have any trouble there, did they?

MR. MILLER: The state would not have had, I do not think, any trouble --

QUESTION: And you wouldn't either, would you?

MR. MILLER: I don't think I would have any trouble locating this man.

QUESTION: So why the necessity of going through this petition business?

MR. MILLER: Because, Mr. Justice Marshall, I think that what you do if you rule the statute unconstitutional that you would have to extend some laws to say that this was

a formal acknowledgement, and a formal acknowledgement is all that's necessary.

Now what happened is simply that either the mother or the father signs a birth certificate. And that's all that happened; the father signed the birth certificate.

QUESTION: Well, I thought the father here got the birth certificate.

MR. MILLER: No, sir, the birth certificate, as Your Honors know, have been issued routinely, as a matter of law.

QUESTION: But I thought the counsel said the father was the one who went to obtain the birth certificate? Isn't that what this record says?

MR. MILLER: I cannot answer that yes or no. But I think the state is, by law, has placed the burden of obtaining birth certificates not on the parents, but rather on the hospital or the physicians that deliver the child.

And I would like to answer your question no, because I don't recall it being that way. But I would be presumptuous to do so.

QUESTION: I have a little difference in incentive here as compared to the inheritance cases, don't you?

In the inheritance cases, it's generally the illegitimate child whose striving to show paternity. And here it's a little bit like the unknown aheirs of property

on which oil is discovered. You conceivably have the incentive in the illegitimate -- the parent who fathered the illegitimate child, rather than in the illegitimate child.

MR. MILLER: That's correct; I agree with that.

But with a pool of money comes perhaps more than one putative father, and therein lies the real problem.

QUESTION: There may be more than one unknown heir at the wellhead where the oil is found.

MR. MILLER: Yes, and as each well is struck, the heirs generally come forward.

QUESTION: On page 4 of the appendix, it says the natural father did execute the birth dcertificate.

MR. MILLER: Yes, sir, he signed the birth certificate. Either the mother or the father sign the birth the certificate.

QUESTION: It said the father did.

MR. MILLER: Yes, sir.

QUESTION: Well, what else did the state need more than that?

MR. MILLER: What else did the state need more than that?

QUESTION: Yes, sir.

MR. MILLER: The statute says that he has a right to legitimate the child, and I don't think the state of Georgia has to acquiesce and say that that is sufficient

acknowledgement of the child to make the child no longer illegitimate.

QUESTION: Well, he admits it's his child.

MR. MILLER: Yes, sir.

QUESTION: Under Georgia law, that does not make the child legitimate; is that --

MR. MILLER: No, sir, it does not make the child legitimate.

QUESTION: He must file a petition?

MR. MILLER: Or marry the mother. Either/or.

QUESTION: Well, why do you think he went to that trouble of executing it?

Just for the sake of writing a piece of paper?

MR. MILLER: No, sir, I doubt that very seriously. I think he probably loved the child. I have no doubt about that.

QUESTION: Mr. Miller, did Mr. Greer tell us that the Georgia law requires unwed fathers to support their children, regardless?

MR. MILLER: Yes, sir.

QUESTION: How does Georgia go about locating them?

MR. MILLER: They do not locate them. They leave that either to the child or to the mother to bring that action. It is a criminal statute, also, but I've never heard of that being applied by the state unless it was to recoup

some benefits that had been paid, or an action was requested by the child or the mother.

And lastly, I think that I wanted -- a point that I wanted to cover is that I know of no way, really, that a mother can legitimate a child.

I do believe that if that were true, there wouldbe very few cases in which a child would remain illegitimate. I think on some occasions, certainly, a mother would not want to legitimate a child.

But if it didn't require her to marry the father, but simply to legitimate the child, I'm sure that there would be no illegitimate children, and therefore, no problems that we have today in this particular action.

I submit to the Court that there is a rational and reasonable state interest to be protected, and I submit that the vague generalities of equal protection and due process do not require that each case be decided on its merits, which would be certainly not required, and that they can do as they did in enacting this statute, and provide that the father could recover for the death of the child if he married the mother or filed a petition to legitimate the child.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Miller.

Do you have anything further, counsel?

MR. GREER: If I may be permitted?

MR. CHIEF JUSTICE BURGER: Very well. You have three minutes left.

REBUTTAL ARGUMENT OF THOMAS E. GREER, ESQ.,

ON BEHALF OF THE APPELLANT

MR. GREER: Counselffor appellee makes the point that these facts may be subject to speculation with regard to the relationship between the father and the child, because they were only documented in an affidavit.

What counsel for appellee does not point out is that it is a matter of record in this Court now that that affidavit and every other pleading and every brief that's been filed in this case was served on the maternal grandmother throughher attorney for the express reason of giving them an opportunity to contest those facts if there were any -- if they existed to the contrary.

There has been no effort to intervene in these proceedings, although under Georgia law they are fully entitled to do so. There's been no response to the affidavit, no response to the brief in the Georgia Supreme Court, and no response to the brief in this court. And they were served with all those documents.

Appellee asked the Court to affirm the decision of the Georgia Supreme Court relying on Quilloin v. Walcott. I think that that case is distinguishable in several regards.

I think the relationship between the father and the

child there was sporadic, number one.

Number two, the father there was accorded at least a hearing. The state properly applied the best interests of the child test, and the father lost in that hearing. He has not even a --

QUESTION: Would it make any difference to your case if the father had never seen the child after the child's birth, having filed -- hadn't done anything about the birth certificate? On your equal protection argument?

MR. GREER: On the equal protection argument? Yes, Your Honor, I think it does -- well, I think -- the whole point -- I hate to be redundant -- is, that I think the failing -- the failure of the state of Georgia is the failure to recognize a middle ground between what Your Honor talks about and total exclusion, total exclusion and the absolute right to recovery.

I think that's the failure. I think the Court in Quilloin was distinguishing between the rights of the father of an illegitimate child and the -- of a divorced father. I think arguably it might promote the objectives of legitimate family relationships there.

But here the present classification distinguishes between two participants in an illegitimate act, purportedly to discourage that illegitimate act. And I fail to see how it could ever, ever promote that state interest that it serves.

Is the time -- the red light, okay.

MR. CHIEF JUSTICE BURGER: The red light will tell you.

MR. GREER: I think the -- there was an implication made by counsel for appellee that these fathers only come forward when there's monetary advantage involved. I think that's another overbroad generalization that's not supported.

This father didn't do that. He was a father to this child from the beginning to the end, and I think that warrants some sort of deference, and I think that's been the message of this Court.

I thank the Court for the privilege.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:33 o'clock, p.m., the case in the above-entitled matter was submitted.]