Recent Developments

Decedents' Estates—DESCENT AND DISTRIBUTION STATUTES—Statute allowing inheritance by illegitimate children through the mother but silent on inheritance through the father held invidious discrimination under the equal protection clause of the fourteenth amendment.—*Green v. Woodard*, 318 N.E.2d 397 (Ohio Ct. App. 1974).

Leslie Green[1] alleged she was entitled to real estate as the natural daughter of Liston Thomas or alternatively as the stepdaughter of Emmaline Thomas. Liston Thomas died intestate May 11, 1971, and his wife Emmaline died intestate September 7, 1971. In the interim, the real estate was deeded to Elijah Woodard by Emmaline Thomas, who Leslie Green claimed was incompetent, comatose, and lacking in capacity to execute the deed. Elijah Woodard answered that Leslie Green did not have standing to bring this action because she was not related to Liston Thomas so as to bring her within the word "child" of the Ohio descent and distribution statutes.[2] The trial court granted defendant's motion for summary judgment and an appeal resulted.[3]

[1]The plaintiff Leslie Green was born on February 3, 1937; her birth certificate read "Leslie Louise Haddie Mae Dingle." No one was listed as her father because her mother was not married at the time of her birth. Her mother never married the alleged father, Liston Thomas, but her mother did marry a man named Royal at a later date. The plaintiff claimed she was baptized Lessie Mae Thomas ten years after her birth, but she did not present the baptism certificate. Green v. Woodard, 318 N.E.2d 397, 408 (Ohio Ct. App. 1974). Although the opinion does not so state, it is inferred that the plaintiff subsequently married a man by the name of Green.

[2]The plaintiff's claims were based on an interpretation of the words "child" or "children" in OHIO REV. CODE ANN. § 2105.06 (1968), the general statute of descent and distribution, to include both legitimate and illegitimate children. The same interpretation was sought of the half-and-half statute, *id.* § 2105.10, which provides for inheritance by a stepdaughter:

> When a relict of a deceased husband or wife dies intestate and without issue, possessed of identical real estate or personal property which came to such relict from any deceased spouse by deed of gift, devise, bequest, descent, or by an election to take under the revised Code, such estate, real and personal, except one half thereof which shall pass to and vest in the surviving spouse of such relict, shall pass to and vest in the children of the deceased spouse from whom such real estate or personal property came, or their lineal descendants, per stirpes.

The term descent and distribution statutes is used throughout the text to refer to both the above Ohio statutes.

[3]Green v. Woodard, 318 N.E.2d 397, 400 (Ohio Ct. App. 1974).

Leslie Green was unable to show on appeal that she was, in fact, a child of Liston Thomas, and she was not, therefore, entitled to any share of his property.[4] The Court of Appeals of Ohio, however, used the opportunity to hold that the words "child" and "children" contained in the descent and distribution statutes include all illegitimate children and not just those illegitimate children who take from and through the mother under the statute dealing with inheritance by illegitimate children.[5]

The Ohio statute[6] provided that an illegitimate child can inherit from and through its mother as if born in lawful wedlock but said nothing about inheritance from the father. The Court of Appeals of Ohio held in *Green v. Woodard*[7] that such classification was not discrimination between legitimates and illegitimates,[8] but was discrimination between illegitimate children who inherit from and through their mothers and those illegitimate children who were prohibited from inheriting from and through their fathers.[9] This intra-class discrimination, the *Green* court

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[4] *Id.* at 408.

[5] The Ohio statute, OHIO REV. CODE ANN. § 2105.17 (1968), provides:

> Bastards shall be capable of inheriting or transmitting inheritance from and to the mother, and from and to those from whom she may inherit or to whom she may transmit inheritance, as if born in lawful wedlock.

For comparative legislation see note 36 *infra*.

[6] OHIO REV. CODE ANN. § 2105.17 (1968). The terms "bastard" and "illegitimate" were used interchangeably in the opinion. Other Ohio statutes provide methods by which an illegitimate child may become, for all practical purposes, legitimate. *Id.* § 3107.13 provides that after adoption the legal relationship between adopting parents and the child is essentially the same as if the child were born to them in lawful wedlock, and *id.* § 2105.18 provides that acknowledgment of the child and marriage to the mother by the putative father will legitimate the child. Such acknowledgment requires a filing in probate court. For a comparison of the Indiana statute, see note 9 *infra*.

[7] 318 N.E.2d 397 (Ohio Ct. App. 1974).

[8] *Id.* at 404. On the basis of Labine v. Vincent, 401 U.S. 532 (1971), it would appear that the court in *Green* felt that discrimination between illegitimate and legitimate children was reasonably related to the state interest the statute was designed to promote. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972), which dealt with a workmen's compensation statute, was cited by the *Green* court in distinguishing *Labine*, but careful scrutiny of the *Weber* opinion indicates that the Court may have preferred to overrule *Labine*. However, the facts of the *Weber* case did not lend themselves to such a holding because they did not deal directly with descent and distribution statutes.

[9] 318 N.E.2d at 406. Indiana also has set up this intra-class distinction, although the Ohio court in *Green* stated that Indiana treated all illegitimates the same as legitimates. *Id.* at 402. IND. CODE § 29-1-2-7 (Burns 1972) states in part:

> (a) For the purpose of inheritance to, through and from an illegitimate child, such child shall be treated the same as if he were the legitimate child of his mother, so that he and his issue shall inherit

ruled, was not reasonably related to the statutory purpose and could not stand under the equal protection clause of the fourteenth amendment.[10]

The *Green* court recognized the current trend to treat illegitimate children the same as legitimate children.[11] The court found that traditional rationales for discrimination between legitimates and illegitimates were no longer valid.[12] In fact, the court found that application of the rationales had not reduced illegitimate births.[13] These findings significantly detracted from a showing of a reasonable relationship between the statutory purpose and the classification of illegitimate children who can inherit from and through their mothers and those illegitimate children who were prohibited from inheriting from and through their fathers. The court's discussion, therefore, went beyond that necessary to deal with the classification in the Ohio statute and implied that any discrimination against illegitimates, "which punishes innocent children for their parents' transgressions, has no place in our system of government which has as one of its basic tenets equal protection for all."[14] Perhaps the *Green* court wanted to take the larger step—that of declaring any distinction between illegitimates and legitimates for purposes of descent and distribution statutes in-

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from his mother and from his maternal kindred, both descendants and collaterals, in all degrees, and they may inherit from him. Such child shall also be treated the same as if he were a legitimate child of his mother for the purpose of determining homestead rights, and the making of family allowances.

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

[10]318 N.E.2d at 406. See note 29 *infra.*

[11]318 N.E.2d at 402. *Accord,* Estate of Jensen, 162 N.W.2d 861 (N.D. 1968). The *Green* court also referred to a 1965 amendment to the Social Security Act which enlarged the definition of "child" to permit illegitimate children to receive Social Security benefits. 42 U.S.C. § 416(h)(3) (1970). Several decisions have upheld this amendment as not being invidiously discriminatory in violation of the equal protection clause. *E.g.,* Perry v. Richardson, 440 F.2d 677 (6th Cir. 1971); Watts v. Veneman, 334 F. Supp. 482 (D.D.C. 1971), *rev'd in part,* 476 F.2d 529 (D.C. Cir. 1973).

[12]Reasons given in the past for the distinction between legitimates and illegitimates were to preserve feudal tenure, to discourage illegitimate relationships, to avoid artificial presumptions of intent, to encourage legitimate family relationships, and to protect the rights of legitimate children. 318 N.E.2d at 400.

[13]*Id.* The court, however, cited no authority to support this assertion.

[14]Estate of Jensen, 162 N.W.2d 861, 878 (N.D. 1968).

vidious discrimination—but prior United States Supreme Court decisions seem to preclude this.[15]

In *Labine v. Vincent,*[16] the United States Supreme Court upheld Louisiana inheritance statutes which denied an illegitimate child a share with legitimate children in the parents' estates.[17] While on its face the *Labine* decision would appear to be controlling in *Green,* the Court of Appeals of Ohio used the intra-class rationale to distinguish the cases.[18] This distinction is significant because the focus of the rational basis test is changed. In *Labine,* the Court discussed the traditional state interest in intestate succession statutes and concluded that it was within the state's power to make such a distinction so long as an insurmountable barrier to inheritance was not erected.[19] Justice Harlan, in a concurring opinion, attempted to show that Louisiana had a rational basis for the classification since the father could manifest his desire for an illegitimate child to inherit by making a will in which the child was a beneficiary.[20]

Earlier cases alluded to this insurmountable barrier that prevented illegitimates from ever participating as a legitimate.[21] In

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[15]It was the court's own interpretation of prior United States Supreme Court decisions that seemed to preclude such a holding, particularly the court's interpretation of Labine v. Vincent, 401 U.S. 532 (1971). It should be noted at this point, as the *Green* court recognized, that *Labine* was a five to four decision, in which one of the majority wrote a concurring opinion and the dissent attacked the majority for its failure to articulate a rational basis for the difference in treatment. *Id.* at 548.

[16]401 U.S. 532 (1971).

[17]The Court so held even though the child had always used the name Rita Vincent, and the father, Ezra Vincent, had acknowledged her under statutory requirements and had given her a home.

[18]318 N.E.2d at 405.

[19]401 U.S. at 535-36. The majority felt that, since illegitimates could take when there were no other descendants, ascendants, collateral relations or surviving wife, there was no insurmountable barrier. But, as the dissent pointed out, a father who publicly acknowledges his child is not likely to disinherit him. *Id.* at 556. Why should the State make this decision? Has the classification really been shown to be reasonably related to the statutory purpose? The answers to these questions were clear to the Ohio court in *Green,* and the court restrained its decision only in deference to the *Labine* holding.

[20]*Id.* at 540. But does this reasonably relate the classification to the statutory purpose? The dissent maintained that the insurmountable barrier test, taken from Levy v. Louisiana, 391 U.S. 68 (1968), and applied by the majority to find a rational basis in *Labine,* was invalid for this purpose. In fact, there was no insurmountable barrier in *Levy* since the illegitimate child would have been able to recover under the original statutory scheme if the mother had formally acknowledged him.

[21]Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968).

Levy v. Louisiana,[22] a statutory tort action for wrongful death recovery was found not to be a bar to illegitimate children recovering for the wrongful death of their mother, although the statute purportedly authorized such recovery only by legitimate children. In *Labine*, the Court felt that *Levy* could not be fairly read to say that a state may never treat an illegitimate child differently from legitimate offspring.[23]

Therefore, the *Green* court viewed *Labine* as confirmation of a state's power to prohibit, unless certain formalities are met, illegitimate children from sharing as other children under intestate succession statutes.[24] Had the *Green* court closely examined the justices' positions in *Weber v. Aetna Casualty & Surety Co.*,[25] together with the *Labine* dissent, it might have concluded that the United States Supreme Court was dissatisfied with the equal protection analysis in *Labine* and would not reach the same conclusion again.[26] In *Green*, however, the Ohio statute did not discriminate between illegitimates and legitimates as the Louisiana statute in *Labine* did.[27] An entirely separate classification was under attack in *Green*. A distinction in statutory schemes existed. Louisiana did not treat any illegitimate children the same as legitimate children, but Ohio treated some illegitimates the same by allowing them to inherit through their mothers but not their fathers.[28] This intra-class distinction in the Ohio statute was the invidious discrimination.

The *Green* court dealt with several arguments that attempted to establish a reasonable relationship between the classification and the statutory purpose.[29] Action or inaction of the father as

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[22]391 U.S. 68 (1968). The Supreme Court held that, since legitimacy or illegitimacy of birth has no rational relationship to the nature of the wrong allegedly inflicted upon the mother, the statute constituted an invidious discrimination against the children. See discussion of the *Levy* dissent in note 20 *supra*.

[23]401 U.S. at 536.

[24]The intra-class distinction present in the Ohio statute allowed the appellant to avoid the problem of dealing directly with the *Labine* decision.

[25]406 U.S. 164 (1972).

[26]See the discussion in notes 20 *supra* and 29 *infra*.

[27]The Ohio statute is set out in note 5 *supra*.

[28]318 N.E.2d at 405.

[29]Traditionally, there are two tests used by the Court in interpreting legislation challenged under the equal protection clause of the fourteenth amendment. The test utilized depends on the interest involved. Historically, the rational basis test has been used in the areas of economic and social regulation. This test holds a statute valid if the classification is reasonably related to the statutory purpose of furthering a legitimate state interest. The second test, the compelling state interest test, is used when statutes affect fundamental rights or when suspect classifications exist. The statutes are not afforded a presumption of constitutionality, as they are under the rational basis test, but

it affected legitimate or illegitimate children was not a consideration of the court.[30] Further, the composite reasoning of prior cases was rejected: (1) that the devolution of property within a state rests within the discretion of the state,[31] (2) that illegitimate children are not completely discriminated against because they may be recognized and left property by will or be legitimated by adoption or acknowledgment,[32] (3) that proof of paternity is difficult,[33] and (4) that spurious and fraudulent claims may be brought.[34] The court recognized that under close examination these arguments were really not directed at the factual nexus betwen the classification and the statutory purpose.[35]

The proof marshalled by the *Green* court was beyond that necessary to show that the intra-class distinction made by the Ohio statute was invidious discrimination. The *Green* court suggested that, were it not for its interpretation of *Labine* and related case law, it was ready to hold that any classification of children as illegitimates and legitimates was not reasonably related to the state's interest and statutory purpose in descent and distribution laws. The *Green* decision, together with the *Weber* opinion and the *Labine* dissent, indicates that more courts are likely to find that statutes which allow illegitimate children to in-

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the burden of proving a compelling state interest is on the person asserting the validity of the statute—a burden that is rarely carried. Balancing the individual interest against the state purpose is the major distinction of the compelling state interest test. Several recent United States Supreme Court decisions have indicated that factors of both tests are being considered—a hybrid approach. This approach was used in *Weber*, which is often cited as holding that illegitimacy is a suspect classification because of the discussion of the compelling state interest test and Justice Blackmun's concurring opinion. *See* 406 U.S. at 176. For a thorough discussion of the hybrid approach, see Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). For an excellent discussion of equal protection doctrines in a case analysis, see Stroud, *Sex Discrimination in High School Athletics*, 6 IND. L. REV. 661 (1973).

[30]318 N.E.2d at 406.

[31]Labine v. Vincent, 401 U.S. 532 (1971); Strahan v. Strahan, 304 F. Supp. 40 (W.D. La. 1969), *cert. denied*, 404 U.S. 949 (1971); Watts v. Veneman, 334 F. Supp. 482 (D.D.C. 1971), *rev'd in part*, 476 F.2d 529 (D.C. Cir. 1973).

[32]Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Labine v. Vincent, 401 U.S. 532 (1971).

[33]Miller v. Laird, 349 F. Supp. 1034 (D.D.C. 1972); Estate of Pakarinen, 287 Minn. 321, 178 N.W.2d 714 (1970) (decided prior to the 1971 amendment of MINN. STAT. ANN. § 525.172 (1969)); Blackwell v. Bowman, 150 Ohio St. 34, 80 N.E.2d 493 (1948).

[34]Beaty v. Weinberg, 478 F.2d 300 (5th Cir. 1973); Jiminez v. Richardson, 353 F. Supp. 1356 (N.D. Ill. 1973); Schmoll v. Creecy, 54 N.J. 194, 254 A.2d 525 (1969).

[35]318 N.E.2d at 406.

herit from and through their mothers but prohibit illegitimate children from inheriting from and through their fathers are in violation of the equal protection clause of the fourteenth amendment.[36]

BRUCE HEWETSON

Criminal Procedure—SEARCH WARRANTS—Erroneous statements made by federal agent in affidavit for search warrant were immaterial and did not authorize suppression of evidence.—*United States v. Marihart,* 492 F.2d 897 (8th Cir.), *cert. denied,* 419 U.S. 827 (1974).

The United States Supreme Court's denial of certiorari in *United States v. Marihart*[1] left unresolved the crucial question of what standard is to be applied in scrutinizing affidavits which support the issuance of warrants and allegedly contain false statements. Defendants James Marihart, Edwin Kensley, and Michael Guerra were jointly charged, in a four count indictment[2] returned on March 22, 1972, with possessing firearms in violation of 18 U.S.C. § 1202(a)(1)(App.).[3] The indictment and arrest of the

[36]The Indiana statute creates an intra-class distinction similiar to that invalidated in *Green.* An illegitimate child who would not take an intestate share of his natural father's estate under present Indiana law may wish to challenge the Indiana statute in the same manner as the plaintiff did in *Green.* At least two major problems will be encountered. First, the Indiana statute allows illegitimate children to inherit from and through their fathers if paternity is established by law during the father's lifetime. See IND. CODE § 29-1-2-7 (Burns 1972) set out at note 9 *supra.* The Ohio statute has no such provision, and a good argument can be made that the requirement of establishing paternity during the father's lifetime provides a rational basis for the statutory classification. Secondly, even if the Indiana statute were declared invalid, the child should be prepared to prove convincingly that he is, in fact, the illegitimate child of the alleged father. Failure to do so precluded recovery in *Green.*

Similar challenges may arise in states with comparable legislation. *See* ILL. REV. STAT. ch. 3, § 12 (1973); KY. REV. STAT. ANN. § 391.090 (1972); MASS. GEN. LAWS ANN. ch. 190, § 5 (1969); MICH. STAT. ANN. § 27.3178 (151) (1962); N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (1967); PA. STAT. ANN. tit. 20, § 2107 (Spec. Pamphlet 1972); TENN. CODE ANN. § 31-105 (1955); W. VA. CODE ANN. § 42-1-5 (1966).

[1]492 F.2d 897 (8th Cir.), *cert. denied,* 419 U.S. 827 (1974).

[2]"Each count charge[d] possession on October 20, 1971, of a different firearm, and also allege[d] all of the defendants had previously been convicted of a felony." United States v. Marihart, 472 F.2d 809, 810 n.1 (8th Cir. 1972) (hearing on probable cause issue).

[3]18 U.S.C. § 1202(a)(1)(Appendix 1970) provides in pertinent part:

(a) Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony . . .

. . .