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WILLS, TRUSTS, AND ADMINISTRATION OF ESTATES

Estates: Establish Additional Means by Which Children Born Out of Wedlock May Inherit

CODE SECTIONS:	O.C.G.A. §§ 53-4-4, -5 (amended)
BILL NUMBER:	HB 251
ACT NUMBER:	341
SUMMARY:	The Act codifies the doctrine of virtual or equitable legitimation as interpreted by Georgia case law. The Act also adds genetic testing as a means by which the paternity of children born out of wedlock may be established.
EFFECTIVE DATE:	July 1, 1991

History

The English common law did not allow the offspring of an unwed couple to inherit from either parent because they were considered "filius nullius, the child[ren] of no one."[1] These offspring were "unfortunate members of society branded forever by the lusts of their mothers and fathers."[2] Georgia common law reflected the English concept of *filius nullius*.[3]

The gradual liberalization of legal strictures against children born out of wedlock began with the Georgia General Assembly's passage, in 1856, of two statutory exceptions to the *filius nullius* concept.[4] These statutes allowed the child to inherit if the parents later married and the father recognized the child as his, or if the father petitioned the court for legitimation.[5]

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1. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 113 (3d ed. 1984).

2. *In re* Pickett, 206 S.E.2d 522, 523 (Ga. Ct. App. 1974) (referring to the lot of illegitimate children under English common law).

3. *See* Note, *The Inheritance Rights of Illegitimate Children in Georgia: The Role of a Judicial Determination of Paternity*, 16 GA. L. REV. 170 (1981) (citing Edmondson v. Dyson, 7 Ga. 512 (1849)). The *Edmondson* court refused inheritance rights to a woman born out of "*lawful wedlock*" even though a special legislative act had declared her legitimate. *Edmondson*, 7 Ga. at 513.

4. *See* Note, *supra* note 3 (citing 1855-56 Ga. Laws 260). These statutes, in a similar form, can be found at O.C.G.A. §§ 19-7-20, -22 (Supp. 1991). These statutes were the first to allow inheritance through the *father*; the legislature had previously granted full inheritance rights only through the mother. *See* 1851 Cobb's Digest 299.

5. *See* Note, *supra* note 3.

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No new statutory steps recognizing the rights of children born out of wedlock to inherit through their fathers occurred until 1980, when the General Assembly added a subsection authorizing judicial determination of paternity.[6] Two simpler methods were added in 1987, allowing the father to establish a right to inheritance by signing a sworn statement admitting paternity or by signing the child's birth certificate.[7]

This statutory progression toward alleviating the harshness of rules determining legitimacy from the father was reflected in judicial decisions both on the state and federal levels. The United States Supreme Court strengthened the position of children born out of wedlock by extending the sweep of the equal protection clause of the Fourteenth Amendment to include illegitimacy.[8] While conceding that proving the filial relationship of mother and child presented fewer problems than that of father and child, the Court nevertheless determined that administrative convenience was not a sufficient reason to bar an illegitimate child from inheriting through his father.[9]

The Georgia Supreme Court also furthered the cause of children born to unmarried parents when it held in *Prince v. Black*[10] that the doctrine of "virtual or equitable legitimation" applies in Georgia.[11] Under this doctrine a child may inherit from his intestate father when the court finds "clear and convincing evidence that the child is the natural child of the father and that the father intended for the child to share in his intestate estate, in the same manner that the child would have shared if he had been formally legitimated."[12] In a subsequent case, *Simpson v. King*,[13] the court gave an example of what it would consider "clear and convincing evidence" when it accepted the results of blood tests that showed a 99.7% probability that a child born out of wedlock was the decedent's son.[14]

At the behest of the probate judges, the Fiduciary Law Section of the Georgia Bar proposed legislation codifying the *Prince* decision

6. 1980 Ga. Laws 1432 (formerly found at O.C.G.A. § 53-4-4(c) (1981)).

7. 1987 Ga. Laws 632 (formerly found at O.C.G.A. § 53-4-4 (Supp. 1990)).

8. *See* Lalli v. Lalli, 439 U.S. 259 (1978); Trimble v. Gordon, 430 U.S. 762 (1977).

9. *See* Lalli v. Lalli, 439 U.S. at 259; Trimble v. Gordon, 430 U.S. at 762.

10. 344 S.E.2d 411 (Ga. 1986), *rev'g* 336 S.E.2d 318 (Ga. Ct. App. 1985).

11. *Id.* at 413.

12. *Id.* The natural father in *Prince* held the child out as his son in every way, but died before changing the boy's last name to his own. The court found the clear and convincing evidence it sought in "[t]he fact that Lorenzo named Reginald as his beneficiary under insurance policies, and that he applied for and attained Social Security benefits for himself and Reginald as his son." *Id.*

13. 383 S.E.2d 120 (Ga. 1989).

14. *Id.* at 122. The court also looked at the preparations the decedent made to create a secure environment for his child as "clear and convincing evidence that Mr. Simpson intended for his unborn child to be born into a legitimate family environment." *Id.*

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during the 1990 session of the General Assembly.[15] Since it did not pass, the Legislative Committee of the Fiduciary Section planned to introduce a similar bill in the 1991 session.[16]

In addition to the codification of the *Prince* doctrine of equitable legitimation, the probate judges were interested in adding genetic testing as another means of establishing paternity.[17] The judges thought the same rules should apply in heirship that apply to determining support while the father is still alive.[18]

HB 251

The sponsor of the bill was contacted by the probate judge in his county, who asked him to introduce legislation that would add paternity tests to the ways in which the right to an inheritance can be established.[19] Later, the Legislative Committee of the Fiduciary Law Section "joined forces" with the sponsor to expand the scope of the bill to include the codification of the *Prince* decision.[20]

The Act amends Code section 53-4-4 by striking subsection (c) and replacing it with a new subsection (c) that contains provisions establishing paternity through equitable legitimation and through genetic testing.[21]

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15. Telephone Interview with John M. Sheftall, Chairman, Legislative Committee of the Fiduciary Law Section of the Georgia Bar (Apr. 1, 1991) [hereinafter Sheftall Interview].

16. *Id.*

17. *Id.*

18. Interview with the Honorable Floyd E. Propst, Judge, Fulton County Probate Court, in Atlanta, Ga. (Apr. 3, 1991) [hereinafter Propst Interview].

19. Telephone Interview with Rep. William C. "Billy" Randall, House District No. 101 (Apr. 4, 1991). The request that Rep. Randall sponsor the genetic testing legislation proposed by the probate judges came from the Honorable William G. Self, Judge, Bibb County Probate Court. *Id.*

20. Sheftall Interview, *supra* note 15. The original bill did not contain a provision for codifying *Prince*. *See* HB 251, as introduced, 1991 Ga. Gen. Assem. This provision was added in the Senate Special Judiciary Committee by committee substitute. *See* HB 251 (HCS), 1991 Ga. Gen. Assem.

21. HB 251, 1991 Ga. Gen Assem. To the new subsection (c) a subsection (1)(E) was added to codify the doctrine of equitable legitimation established in *Prince*. This subsection provides as follows:

> (c)(1) A child born out of wedlock may not inherit from or through his father or any paternal kin by reason of the paternal kinship unless, during the lifetime of the father and after the conception of the child:
>
> (E) There is clear and convincing evidence that the child is the child of the father and that the father intended for the child to share in the father's intestate estate in the same manner in which the child would have shared if legitimate.

O.C.G.A. § 53-4-4 (Supp. 1991).

The new subsection that adds genetic testing as a means of establishing paternity

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These two subsections greatly broaden the circumstances under which a court will allow a child born out of wedlock to inherit through the child's intestate father. Not only is virtual or equitable legitimation allowed,[22] but if genetic testing reveals paternity, a rebuttable presumption of paternity is created.[23]

The Act also amends Code section 53-4-5, relating to inheritance of the father *from* a child born out of wedlock, by striking subsection (b) and replacing it with a new subsection (b) that allows for genetic testing to be used when the child is the decedent and the father is seeking to inherit.[24] However, a protective measure was added that prevents the father from inheriting if he cannot show that he has provided support for the child or failed to hold the child out as his own.[25]

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provides as follows:

> (2)(B) There shall exist a rebuttable presumption of paternity of a child born out of wedlock if there shall have been performed, after the conception of the child, parentage-determination genetic testing which establishes at least a 97 percent probability of paternity. Parentage-determination genetic testing shall include, but not be necessarily limited to, red cell antigen human leucocyte antigen (HLA), red cell enzyme, and serum protein (electrophoresis) tests or testing by deoxyribonucleic acid (DNA) probes.

Id.

22. O.C.G.A. § 53-4-4(c)(1)(E) (Supp. 1991).
23. O.C.G.A. § 53-4-4(c)(2)(A)—(B), (3) (Supp. 1991).
24. O.C.G.A. § 53-4-5 (Supp. 1991).
25. O.C.G.A. § 53-4-5(b)(2) (Supp. 1991).

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