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Essay: What Price Paternity

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ESSAY: WHAT PRICE PATERNITY?

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I. Introduction

Edward Gordon Weiss was born in 1960 to Hilda Weiss and Edward D. Stern. His parents cohabited but were unmarried at the time, evidently due to their families' convictions against interfaith marriage. Edward lived with both of his parents, who openly acknowledged that he was their son, until they separated when he was two. Edward continued to live with his father until joining the Army in 1985. After leaving the service, Edward returned to live near his father and his other paternal relatives.

Edward and his father remained close. At his father's request, Edward officially changed his surname from "Weiss" to "Stern" — in part to facilitate identification in his father's will. Edward's paternal grandfather died in 1990, leaving him over a half-million dollars. Edward died with an intestate estate approximating $600,000 the following year. He was survived by both of his parents, although he had long since lost contact with his mother or her kin. Edward left no spouse or issue.[1]

Who inherits from Edward's estate? His mother (assuming she is still alive), his father, or both equally? What if both parents had predeceased Edward? Although much has been written in statute and text about the inheritance rights of nonmarital children to their parents' estates,[2] little guidance exists over the

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1. These facts are patterned loosely on *In re Stern*, 311 S.E.2d 909 (N.C. Ct. App. 1984).

2. The original rule barred a nonmarital child's inheritance from anyone, whether mother or father. *See* WILLIAM M. MCGOVERN ET AL., WILLS, TRUSTS, AND ESTATES 32 (1988). Substantial inroads have been made on that prohibition; by 1934, the "virtually universal" rule was that nonmarital children could inherit from their mothers although not their fathers. *See id.* at 37 (citing Chester G. Vernier & Edwin P. Churchill, *Inheritance By and From Bastards*, 20 IOWA L. REV. 216, 216-17 (1934)). The United States Supreme Court weighed in definitively in 1977, when it ruled unconstitutional an intestacy statute restricting the rights of nonmarital children to inherit from their paternal line irrespective of proof of paternity. *See* Trimble v. Gordon, 430 U.S. 762, 763 (1977).

All states currently permit nonmarital children to inherit from and through their mothers. The same holds true for inheritance from fathers, although states remain constitutionally entitled to condition or limit that right to further some important governmental objective. *See* Lalli v. Lalli, 439 U.S. 259, 260

reverse: the rights of those parents to inherit from the children.[3]

The issue compels on practical, sociolegal, and economic fronts. Approximately one in three American babies are born to unmarried parents each year,[4] a figure

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(1978) (upholding constitutionality of inheritance statute requiring adjudication of paternity during the father's life). Approaches vary. Some jurisdictions demand merely ordinary proof of parentage from a nonmarital child seeking to inherit from the father. Others impose heightened pleading or evidentiary burdens, such as requiring proof through clear and convincing evidence or limited to some legislatively enumerated method or during the father's lifetime. The opinions expressed by writers in the field generally agree that children should not be penalized for the circumstances of their birth when pressing inheritance or other legal claims to a parent's estate. *See, e.g.*, Ralph C. Brashier, *Children and Inheritance in the Non-traditional Family*, 1996 UTAH L. REV. 93, 94-147; Karen A. Hauser, *Inheritance Rights for Extramarital Children: New Science Plus Old Intermediate Scrutiny Add Up to the Need for Change*, 65 U. CIN. L. REV. 891 (1997); Thomas Kuehn, *A Late Medieval Conflict of Laws: Inheritance by Illegitimates in Ius Commune and Ius Proprium*, 15 LAW & HIST. REV. 243 (1997); Johan Meeusen, *Judicial Disapproval of Discrimination Against Illegitimate Children: A Comparative Study of Developments in Europe and the United States*, 43 AM. J. COMP. L. 119 (1995); Patricia G. Roberts, *Adopted and Nonmarital Children — Exploring the 1990 Uniform Probate Code's Intestacy and Class Gift Provisions*, 32 REAL PROP. PROB. & TR. J. 539 (1998); Susan E. Satava, Essay, *Discrimination Against the Unacknowledged Illegitimate Child and the Wrongful Death Statute*, 25 CAP. U. L. REV. 933 (1996); Linda A. Verlander, Note, *Succession of Robinson: Clarification of Illegitimates' Succession Rights*, 42 LOY. L. REV. 169 (1996); Note, *Discrimination Against Illegitimate Children*, 90 HARV. L. REV. 123 (1976).

Advances in DNA testing allow paternity to be proven posthumously. This raises additional unresolved questions over balancing the rights of putative children with those of the decedent and his family, particularly in jurisdictions citing evidentiary concerns in upholding statutes requiring paternity determinations during the father's life. *See generally* Ilene Sherwyn Cooper, *Advances in DNA Techniques Present Opportunity to Permit Paternity Testing*, N.Y. ST. B.J., July-Aug. 1999, at 34; Charlie John Gambino, *Developments in the Law*, 70 ST. JOHN'S L. REV. 361 (1996); Michael Baden, *The Dead Can Tell Many Tales*, TIMES UNION (Albany, N.Y.), July 12, 1998, at G1.

3. At early common law, a nonmarital child was "filius nullius (the son of no one) [or] filius populi (the son of the people)." Vincent v. Sutherland, 691 P.2d 85, 87 (Okla. Ct. App. 1984) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 655 (William Carey Jones ed., 1916)). As such, the child could not inherit from or through either parent nor either parent from or through the child. Thus, the estate of a nonmarital child could pass only to a spouse or issue unless changed by statute. The rule originally existed in every state except Connecticut. *See* R.D. Hursh, *Inheritance from Illegitimate*, 48 A.L.R.2D 759, 762 (1956); *see also* Templeman v. Bruner, 138 P. 152, 152 (Okla. 1914); *Annual Survey of Oklahoma Law : Wills and Succession: Inheritance by and from Illegitimate Children*, 3 OKLA. CITY. U. L. REV. 439 (1978).

By 1956 (but earlier in Oklahoma), that rule had been changed by statute or case law in at least 25 states regarding maternal inheritance rights. *See Templeman*, 138 P. at 152; Hursh, *supra*, at 782-85. By contrast, statutes permitting paternal inheritance from the nonmarital child's estate were "exceedingly rare [and] generally . . . conditional in nature." *Id.* at 796. Modern statutes generally follow that trend by barring fathers of nonmarital children from inheriting. In fact, as of 1994, eight states, Puerto Rico, and the United States Virgin Islands additionally limited the inheritance rights of any parent, married or unmarried at the child's birth, from inheriting from that child's estate upon abandonment or "unworthiness." *See* Paula A. Monopoli, *"Deadbeat Dads": Should Support and Inheritance Be Linked?*, 49 U. MIAMI L. REV. 257, 260 n.11 (1994).

On the connection between conduct and status as heir, see generally Frances H. Foster, *Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment*, 32 U.C. DAVIS L. REV. 77 (1998). For more specific and extensive treatment of the merits of limiting paternal inheritance rights of nonsupporting fathers, see generally Monopoli, *supra*.

4. *See Babies Born to Unmarried Parents Up*, Assoc. Press, Nov. 9, 1999, *available in* 1999 WL

mirrored by Oklahoma's rate of 31.7%.[5] Single parents head up one-fourth of Oklahoma families.[6] That data, coupled with Oklahoma's elevated divorce rate and infant and child mortality rates,[7] renders the likelihood of estate battles between parental claimants reasonably acute.

Statistics probably would reveal that most intestate decedents who are survived by both parents but no spouse or issue are relatively young, and perhaps even minors.[8] While few children or even young adults die leaving significant estates, the circumstances of such untimely deaths increase the potential for the estate's enhancement via insurance or wrongful death awards.[9] This could precipitate status litigation over who occupies parental roles, particularly where the decedent was a nonmarital child retaining little or no contact with one or both parents.[10]

28137391 (citing United States Census Report tracking data up to 1994 and noting that the statistic has increased fivefold since the 1930s). That figure hit a 41% high in the early 1990s. *See id.* Comparably, the percentage of children living in single-parent homes rose from 9% in 1960 to 28% in 1998. *See* Bill Johnson, *Detroit's Single Families Define the Real State of the City*, DETROIT NEWS, Feb. 4, 2000, at A10. Nearly one-third of all children are born out of wedlock, and Census Bureau statistics show that "grandparents are functioning as parents for 1.4 million American children." Saul Friedman, *Gray Matters*, NEWSDAY, Jan. 21, 2000, at B6.

5. *See Percent of Unwed Births by State*, Assoc. Press, Sept. 13, 1999, *available in* 1999 WL 22043736 (citing 1996-97 statistics).

6. *See* Marie Price, *Income Tax Cuts Pushed to Accelerate Oklahoma's Economy*, J. REC. (Okla. City), Sept. 1, 1999, at 1 (quoting Professor Emeritus James Hibdon of the University of Oklahoma).

7. According to one report, Oklahoma has the second-highest divorce rate in the country. *See* Joyce Howard Price, *Oklahoma Governor Vows a Tough Fight to Protect Families*, WASH. TIMES, Apr. 4, 1999, at A2. Tracking those numbers, a recent study conducted and published by the Children's Rights Council ranks Oklahoma 45th out of 51 states (including the District of Columbia) in terms of desirability for raising children. *See* Children's Rights Council, *Top Ten States to Raise a Child* (visited Mar. 7, 2000) <http://www.vix.com/crc/bestStates.html>. The 1999 study reports a teen birth rate of 6.37%, the 11th highest rate in the country. The 1998 study ranks Oklahoma fairly low in all categories potentially affecting children: divorce rate, 47th; infant mortality and child death rate, 45th; teenage pregnancy rate, 37th; and unwed births and single parents, 24th. *See id.* For the text and statistical/methodological details of the report, see *id.*

8. The likelihood of a decedent having written a will increases with that person's age, education, married and parental status, and declining health.

9. Consider James Brindamour, the biological father of 15-year-old Colleen, who died when a car in which she was riding crashed into a tree. Although James allegedly deserted Colleen and her mother over a decade before the accident, owed tens of thousands of dollars in unpaid child support, and did not even attend his daughter's funeral, he asserted his right to one-half of his daughter's estate after it was increased by $350,000 following an insurance settlement. *See Father Returns to Claim Estate of Child he Left*, N.Y. TIMES, Jan. 17, 1994, at A10. Although the Rhode Island court ruled Brindamour was entitled to a portion of Colleen's estate under existing statutes, the case engendered subsequent statutory change by denying inheritance rights to persons more than six months behind in child support payments. *See* Michael Smith, *Memorial Mass Tomorrow for Colleen Brindamour*, PROVIDENCE J., July 30, 1999 at C5; *see also* R.I. GEN. LAWS § 10-7-2 (Supp. 1997)

For specifics on the interplay between wrongful death claims and inheritance, see Monopoli, *supra* note 3, at 265-67.

10. Aside from windfall, the bulk of the decedent's estate probably consists of property acquired from or through the custodial parent, rendering its equal division between both biological parents particularly unfair. Where neither biological parent retained custody, the decedent's estate will be distributed either to, or between, a parent or parents who did not truly occupy that social role, or to

Legitimate questions arise over whether mothers and fathers should always inherit equally and whether noncustodial or abandoning parents should be entitled to all or even half of a decedent's estate premised on biology alone.[11] Most poignantly for many such situations, children are not permitted to write wills.[12] Unlike other intestacy scenarios where statutes of descent and distribution apply only in default of exercised testamentary freedom, heirs of a child are "forced" in every literal sense. The child may not elect to favor or even disinherit one parent over the other, meaning that people with little or no financial, social, or emotional connection to the child could profit from that child's death.

To its credit, the Oklahoma intestacy scheme attempts a partial response to the situation by limiting parental inheritance rights from children born out of wedlock. Nevertheless, the statutes through which those limits are enforced are inartfully drafted. Worse, they paint an artificial and arguably unconstitutional picture of parenthood by significantly distinguishing between fathers, mothers, and their rights to a decedent's estate premised on infirm suppositions over the roles of gender, blood, and marriage to "family."

Statutes of descent and distribution reflect dual prescriptive and descriptive functions. Naming someone an "heir" indirectly constructs family. Naming someone a "parent" legitimizes that person's relationship to the decedent and re-intrenches extant notions over who deserves the title. Awarding the label based upon pure genetics subordinates behavior to biological status; withholding the label based upon marriage subordinates behavior to legal status. Ranking mothers over fathers elevates gender over everything. If law can truly order and shape cultural norms, Oklahoma's intestacy scheme must clearly state the distributional consequences of a nonmarital child's death, reflect appropriate attitudes towards the nature and meaning of family, and in particular, parenthood, and succeed in encouraging behavior protective of those children who need it most.

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adoptive parents, who displace the inheritance of biological parents following a valid adoption.

11. The issue is well illustrated by a question a student posed after a recent Wills & Trusts class. His parents had divorced when he was quite young; he added that his mother, who had raised him, offered the only parental, social, and economic support he had ever known. "What would happen in Oklahoma," he asked, "if I were to die intestate in a common accident with my mother and my wife?" My response — that aside from sub-issues of survivorship, his father would inherit his entire estate — was met with shock. "But he contributed nothing to my upbringing." Although the typical rejoinder encourages persons so situated to write a will, many people do not confront mortality until much later in life. For a psychiatrist's perspective on the causes of intestacy, see John Astrachan, *Why People Don't Make Wills*, TRUSTS & ESTATES 45 (1979) (noting that one-third to one-half of all people, including estate planners, do not have wills).

12. With little exception (noted below), all jurisdictions require that testators be age 18 or older to write a will. *See, e.g.*, GA. CODE ANN. § 53-2-22 (1998) (age 14); IDAHO CODE ANN. § 15-2-501 (1979) (age 18 or an emancipated minor); IND. CODE ANN. § 29-1-5-1 (West 1989) (age 18 or younger if a member of the Armed Forces); LA. CIV. CODE ANN. art. 1476 (West Supp. 1999) (age 16); NEB. REV. STAT. § 30-2326 (1998) (age 18 or married); N.H. REV. STAT. ANN. § 555:1 (1997) (age 18 or married); OR. REV. STAT. ANN. § 112.225 (West 1990) (age 18 or married); P.R. LAWS ANN. § 2112 (1986) (age 14 if nonholographic); TEX. PROB. CODE ANN. § 57 (West 1999) (age 18 or under if married or in the Armed Forces).

II. The Oklahoma Statute

In Oklahoma, the estate of any intestate not survived by a spouse passes to his issue;[13] the estate of any intestate not survived by spouse or issue passes in undivided equal shares to his or her surviving parent(s) and their issue.[14] The scheme presumably comports with most people's objective and subjective notions of fairness, as the decedent's property transfers to his closest family members.[15]

These broad rules are qualified by two specific provisions covering nonmarital children. Maternal inheritance rights are not altered, as "a child born out of wedlock stands in the same relation to his mother and her kindred, and she and her kindred to the child, as if that child had been born in wedlock."[16] Thus, nonmarital children always inherit from and through their mothers and vice versa unless, of course, the child has been adopted out.[17]

Circumstances change drastically on the paternal side. Under title 84, section 215 of the Oklahoma Statutes, inheritance by the nonmarital child from or through the father requires clear and convincing proof of paternity,[18] during the lifetime of the father,[19] in one of four specified ways:

> (a) the father, in writing, signed in the presence of a competent witness acknowledges himself to be the father of the child,[20] (b) the father

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13. The issue acquire all of the decedent's property unless he or she is also survived by a spouse, in which case the spouse will take anywhere from one-half of any joint industry property to one-half of the decedent's entire estate irrespective of its characterization. *See* 84 OKLA. STAT. § 213(B)(I) (Supp. 1999).

14. *See id.* § 213(B)(2)(b), (c). If the decedent leaves no survivors in the mentioned categories, the estate passes to the issue of the decedent's parents (such as siblings or nephews), then to the grandparents, then to the grandparents' issue (such as aunts or cousins), then to the decedent's "next of kin." *Id.* Only if no relative of the decedent steps forward will the estate escheat to the state. *See id.*

15. Note that the statutes are premised on the perception that biological connectedness — "degree of blood" — determines social and emotional connectedness and thus superiority in the inheritance line. For example, a third cousin twice removed will always inherit over the decedent's good friend or even a fiance, and a descendant will always inherit over an ancestor irrespective of actual subjective relationships. Whether the premise is sound, it is at least fair in that most decedents can choose to order their estates in any other way imaginable merely by writing a will.

16. 84 OKLA. STAT. § 215 (1991).

17. In that situation, while the child might still inherit from and through the biological mother, the reverse is not true. The adopting parents step into the shoes of the biological parents for all purposes, including inheritance rights. *See In re* Marriott's Estate, 515 P.2d 571, 574 (Okla. 1973).

18. *See In re* Estate of King, 837 P.2d 463, 465 (Okla. 1990).

19. *See In re* Estate of Geller, 980 P.2d 665, 669 (Okla. Ct. App. 1999).

20. The writing need not comport with any particular form as long as paternity is directly and unequivocally acknowledged therein. *See In re* Craven's Estate, 268 P.2d 236, 241 (Okla. 1954) (although witnessed, letter addressed to alleged nonmarital daughter and which bore affectionate term "dad" immediately above putative father's signature did not directly, unequivocally and unquestionably acknowledge paternity); Ridgeway v. Logan, 239 P.2d 778, 783 (Okla. 1952) (suggesting that school records reflecting paternal relationship may suffice). A will acknowledging paternity, whether valid for purposes of testate distribution or not, may meet the requirements of the statute for purposes of intestacy. *See* Barber v. Barber, 180 P.2d 658, 659 (Okla. 1947) (holding language in invalid will leaving "to my beloved daughter Peton Barber, the sum of one dollar" sufficient acknowledgment for purposes of

> and mother intermarried subsequent to the child's birth, and the father, after such marriage, acknowledged the child as his own or adopted him into the family, (c) the father publicly acknowledged such child as his own, receiving it as such, with the consent of his wife, if he is married, into his family and otherwise treating it as if it were a child born in wedlock,[21] or (d) the father was judicially determined to be such in a paternity proceeding before a court of competent jurisdiction.[22]

Thus, the child can be legitimated for inheritance purposes by three methods entirely within the control of the father and one method within the control of any interested party who brings a paternity action. Although the statute interposes obstacles to nonmarital children inheriting from or through their paternal line, it has survived an equal protection attack on the ground that it properly balances the child's inheritance rights against Oklahoma's interest in orderly and efficient estate distribution.[23]

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daughter's intestate succession). Plaintiffs seeking to inherit under this section must show proof of the document and circumstances of its execution, particularly that it was signed in the presence of a competent witness. *See* Hulett v. First Nat'l Bank & Trust Co., 956 P.2d 879, 887 (Okla. 1998) (discussing no proof of actual signing in presence of witness); *In re* Lewis's Estate, 194 P.2d 174, 176 (Okla. 1948) (same); Burns v. Lawson, 107 P.2d 555, 556 (Okla. 1940) (same).

21. It seems that the court will protect the purpose behind this rule without resorting to overt formalism, as there is no requirement that the father explicitly and publicly proclaim the child as his, but it will suffice if the child is taken by the father into his house and cared for as his own. *See* Jones v. Snyder, 249 P. 313, 315 (Okla. 1926). Nevertheless, while there is no specific form for acknowledgment of paternity, *see* Parish v. Ned, 264 P.2d 762, 766 (Okla. 1954), the acknowledgment must be relatively direct, unequivocal and unquestionable regarding paternity. *See* Doty v. Vesel, 124 P.2d 982, 983-84 (Okla. 1942). *See generally In re* Estate of Geller, 980 P.2d 665 (Okla. 1999) (reasoning evidence that putative father advised mother that he would "do the right thing" and provide financial assistance for nonmarital child insufficient to show public acknowledgment of child to relatives, friends, acquaintances and others, and thus insufficient to allow child to inherit through putative father); *In re* Swarer, 566 P.2d 126, 129 (Okla. 1977) (holding numerous visits, gifts, and use by parties of terms "father" and "son" sufficient to establish public acknowledgment); *In re* LaSarge's Estate, 526 P.2d 930, 932 (Okla. 1974) (holding that, while no express definition of "public acknowledgment" exists, it generally means disclosing facts of paternity without concealment to relatives, friends, acquaintances; father's filing paternity action will suffice).

Although section 215(c) suggests that the proof needed to establish inheritance rights in the father's estate are (1) nonmarital birth; (2) father's public acknowledgment; (3) father's reception of the child as his own, with his wife's consent, if married; and (4) father's treatment of the child as if it were a child born in wedlock, *In re* Estate of King, 837 P.2d 463 (1990), adds an unusual twist to this portion of the statute by requiring a fifth element — proof of paternity. It is absurd to require this proof under section 215(c), given its context within a larger statute designed to establish that exact relationship for purposes of inheritance.

22. *See* 84 OKLA. STAT. § 215 (1991). By its terms, the statute does not apply to issue born of a legally void marriage or one which has ended in divorce or annulment. *See, e.g.*, Atkins v. Rust, 33 P.2d 799, 799-800 (Okla. 1934) (holding children born of void marriage could inherit from father); *In re* Atkins' Estate, 3 P.2d 682, 684 (Okla. 1931) (same); *see also* Green v. Green, 309 P.2d 276, 278 (Okla. 1957) (holding that the child inherited after ceremonial marriage even though father had been married previously and was not divorced). Presumably, issue of common law marriages also would not fit within this statute assuming its elements could be proved.

23. *See In re* Estate of King, 837 P.2d 463, 466-67 (Okla. 1990).

Section 215 is titled "Inheritance By *and From* Illegitimate Child."[24] That title, the comprehensiveness of the ensuing scheme, and the statute's specific statement that it covers the relationship of the child "to his father and his kindred, *and the latter and his kindred to child*," all suggest that it speaks to two issues: inheritance rights flowing down from the putative father to the child, and inheritance rights flowing up from the child to the putative father.[25] Reading the statute this way, a father claiming intestacy rights from or through the child would seem able to inherit from the child whenever that child could have inherited from or through the father under any one of the four enumerated methods. However, section 215 is in turn limited by an even more specific provision in section 216: "[i]f an illegitimate child, who has not been *acknowledged or adopted* by his father, dies intestate, without lawful issue, his estate goes to his mother, or, in case of her decease, to her heirs at law."[26]

III. Assessing the Oklahoma Statute

A. Defect: Ambiguity

Neither statutory[27] nor judicial[28] elaboration of the requisite "acknowledgment"

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24. 84 OKLA. STAT. § 215 (1991) (emphasis added).

25. *Id.* (emphasis added).

26. *Id.* § 216 (emphasis added). Additionally, while section 215 does not apply to children born of an invalid or annulled marriage, there is no such explicit retreat in section 216, creating the potential for mischief if the same is not read into the interpretation of the statute. Exacerbating the confusion, in 1974 the Oklahoma legislature decreed that "all children born within the State of Oklahoma shall be legitimate." 10 OKLA. STAT. 1.2 (1991).

27. Compare section 216 with the following example of a statute explicitly tying inheritance rights of fathers to the child's prerequisites for establishing paternity:

> (a) For purposes of intestate succession, an illegitimate child shall be treated as if he were the legitimate child of his mother, so that he and his lineal descendants are entitled to take by, through and from his mother and his other maternal kindred, both descendants and collaterals, and they are entitled to take from him.
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> (b) For purposes of intestate succession, an illegitimate child shall be entitled to take by, through and from:
>
> (1) Any person who has been finally adjudged to be the father of such child pursuant to the provisions of G.S. 49-1 through 49-9 or the provisions of G.S. 49-14 through 49-16;
>
> (2) Any person who has acknowledged himself during his own lifetime and the child's lifetime to be the father of such child in a written instrument executed or acknowledged before a certifying officer named in G.S. 52- 10(b) and filed during his own lifetime and the child's lifetime in the office of the clerk of superior court of the county where either he or the child resides. Notwithstanding the above provisions, no person shall be entitled to take hereunder unless he has given written notice of the basis of his claim to the personal representative of the putative father within six months after the date of the first publication or posting of the general notice to creditors.
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> (c) Any person described under subdivision (b)(1) or (2) above and his lineal and collateral kin shall be entitled to inherit by, through and from the illegitimate child.
>
> (d) Any person who acknowledges himself to be the father of an illegitimate child in his duly probated last will shall be deemed to have intended that such child be treated as expressly provided for in said will or, in the absence of any express provision, the same

contemplated by section 216 exists. It presumably parallels the three "acknowledgment" avenues of the four paternity proofs described in section 215, which suggests that a father can inherit from a nonmarital child whenever the child could have inherited from the father, *except where* parentage was established by court order. Stated differently, a judicial determination of paternity alone, without subsequent or prior acknowledgment by the father, would not entitle the father or his relatives to inherit from or through the child, although it would allow the child and his relatives to inherit from and through the father.[29]

So read, the statutory scheme seems fair, at least in terms of its requirements of fathers. Those who adopt or voluntarily acknowledge their children without a paternity action inherit, as do those who "voluntarily" acknowledge their children before or following one. Nevertheless, the statute debatably permits inheritance by those persons merely adjudicated fathers in court proceedings as well. For example, suppose that a child is born of teenaged parents, and the putative father completely denies paternity. Thereafter, DNA tests establish with a relatively high degree of certainty that the claimed father indeed bears the genetic relationship. The father nevertheless refuses to contribute to the child's support, claiming he is unable to do so. The mother's family does not press the issue. Should the child die, will the father inherit? Is a determination of paternity acknowledgment by proxy?

Although the suggested reading of the statute suggests that the answer is "no," the father could claim that the paternity action alone, or in conjunction with his failure to appeal the determination, establishes the requisite relationship to permit his inheritance. If so, how hollow the term "fatherhood" becomes. The parameters of the "acknowledgment" required by section 216 should be more clearly stated or more specifically tied to those listed in section 215 to avoid wasteful litigation over its meaning and to better encourage nonmarital fathers to engage in meaningful relationships with their children.

B. Defect: Absurdity

Although section 216 might initially appear reasonable and commendable, its strict application to actual facts reveals the potential for ludicrous results. Recall the

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as a legitimate child.

N.C. GEN. STAT. § 29-19 (1984).

28. Although cases have elaborated on the meaning of "acknowledgement" where the child is the claimant, the Oklahoma case law on this reverse point is slim. In one case, a child born of an unlawful marriage inherited property from his mother at her death. Thereafter, his father publicly acknowledged paternity, both orally and in writing, and maintained the relationship of parent and child. To the court, the child was acknowledged and thus legitimated for all purposes, and upon the death of that child intestate and without issue, the father succeeded to the child's estate. *See In re* Chew's Estate, 193 P.2d 572, 575 (Okla. 1948) (recognizing that "this exact question has not been presented to this court before"). One other Oklahoma case suggests in dicta that any acknowledgement meeting the requirements of section 215 would suffice for purposes of section 216. Parish v. Ned, 264 P.2d 762, 766 (Okla. 1953).

29. One explanation for the disparity might be that section 215 was amended in 1977, adding subsection (d) in response to *In re Benson*, 558 P.2d 384, 389 (Okla. 1977) (holding adjudication of paternity alone insufficient to entitle child to inherit under section 215). Section 216 was not similarly altered at that time, leaving a gap between the two intestacy provisions.

mandate of section 216: "If an illegitimate child, who has not been *acknowledged or adopted* by his father, dies intestate, without lawful issue, his estate goes to his mother . . . [or] her heirs at law."[30] First, suppose that the nonmarital child dies survived by a spouse, no children, a non-acknowledging father, and a maternal second cousin, twice-removed. Strictly applied, section 216 would distribute the decedent's entire estate to the second cousin twice-removed in derogation of the spouse's rights. That result would be absurd, particularly given the characterization of coverture property as acquired through "joint industry" for intestacy, divorce, and elective share purposes.[31] The difficulty emanates from the dual usage of the term "child," employed to describe both one's age and one's relationship to others. The legislature apparently assumes the first meaning by overlooking the possibility that a person born to unmarried parents might be an adult, and married, himself.

Now assume that a nonmarital, minor child died intestate survived by no spouse or issue, a father who had failed to acknowledge her, a stepfather who failed to support her, and a maternal aunt with whom she was close. Although state statutes unanimously provide that parental status is not accorded to stepparents for purposes of intestacy, a literal application of the statute would result in the stepfather taking to the exclusion of the aunt,[32] irrespective of his (or for that matter, the mother's) contribution to the decedent's welfare.

Arguably, the statute creates no actual mischief given its construction through case law. Nevertheless, permitting its poorly drafted provisions to survive amendment invites needless litigation by unworthy heirs over the precise meaning of its terms and exceptions, and potentially inhibits worthy heirs from pressing claims contrary to its deceptively simple mandates.

C. Defect: Unconstitutionality

Far worse than its poor drafting, the Oklahoma scheme impermissibly distinguishes the inheritance rights of fathers and other paternal relatives to nonmarital, intestate children from those of their maternal counterparts. Structurally, it reinforces dangerous assumptions over the unflagging virtuousness of mothers and the entire responsibility of fathers for the circumstances of a child's birth. This disparity is made clear when applying Oklahoma law to the Introductory

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30. 84 OKLA. STAT. § 216 (emphasis added).

31. Nevertheless, case law early on held that the spouse in fact was entitled to the decedent's intestate estate irrespective of the literal language of this statute. *See* Pulliam v. Churchman, 236 P. 875, 876 (Okla. 1925) (rejecting position taken elsewhere that maternal relatives would trump decedent's spouse on grounds that statute was designed to deprive the putative father, not others, from rights to inherit). For the contrary position, see *In re* De Cigaran's Estate, 89 P. 833, 836 (Cal. 1907) (holding decedent's estate passed to maternal half-sister and not to surviving husband).

32. Thankfully, case law again rescues the provision from this interpretation. *See* Darrough v. Davis, 275 P. 309, 311 (Okla. 1929) (holding grandmother of nonmarital child on its mother's side takes entire estate to exclusion of stepfather; section 216 is inapplicable, again premised on purpose to deprive paternal line from sharing nonmarital child's estate under certain circumstances). Note that the *Darrough* case conflicts with what appears to have been the original majority rule: that statutes of descent and distribution dealing with the estates of nonmarital persons trump the more general statutes where the decedent was born within marriage. *See* Hursh, *supra* note 3, at 761.

hypothetical. Even though the decedent's mother left when he was two years old, his paternal grandfather left him a half-million dollars, and he remained close to his father until his death, the most that decedent's father stands to inherit under Oklahoma law would be one-half.[33] The other one-half, well over a quarter of a million dollars, will automatically transfer to the erstwhile mother irrespective of her care for or contribution to the child.[34] Reversing the situation by placing the mother and her relatives in the familial role would entitle her to 100% of the decedent's estate, irrespective of the percentage generated from paternal relatives. In short, a nonmarital father is limited to 0%-50% of his deceased child's estate conditioned upon the "commendability" of his post-birth conduct relative to the child, while a nonmarital mother is assured 50-100% of her deceased child's estate irrespective of moral or ethical standing to claim even a cent.[35]

Regarding equal protection, the United States Supreme Court's position is clear. Although purely social or economic legislation may draw class-based distinctions if rationally related to any legitimate governmental purpose,[36] legislation crafted around gender-based classifications faces a strong presumption of constitutional invalidity and must demonstrate "exceedingly persuasive justifications."[37] Such

33. The result was far more inequitable in the actual case, where Edward's paternal line was entirely disinherited as there had been no judicial determination of paternity during Edward's life. The tragic irony is that such a statutory demand hurts most where the father voluntarily acknowledges the child, obviating the need for court action anyway.

34. Transferring half to the maternal line contradicts the expressed policy in Oklahoma that in some instances, distributive preference should be given to the side of the family having provided the particular estate asset. *See* 84 OKLA. STAT. § 222 (1991) ("Kindred of the half-blood inherit equally with those of the whole blood in the same degree, unless the inheritance come to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance."). Some other jurisdictions avoid that result by curtailing maternal inheritance rights in assets provided by the father and vice versa. *See, e.g.*, 91 MISS. CODE ANN. § 91-1-15 (West 1999).

35. Consider:

	acknowledging father	unacknowledging father
deserving mother	Mother and Father split the decedent's estate 50/50	Mother takes 100% of the decedent's estate; Father takes 0%
undeserving mother	Mother and Father split the decedent's estate 50/50	Mother takes 100% of the decedent's estate; Father takes 0%

Under the four possible combinations, mother takes one-half of the estate 50% of the time and *all* of the estate 50% of the time, whereas father takes one-half of the estate 50% of the time and *none* of the estate 50% of the time. The statute renders mothers' conduct irrelevant. Whether deserving or undeserving of inheritance, they begin with a presumption of 100% acquisition which only decreases upon valid paternal acknowledgment.

36. *See* Vacco v. Quill, 521 U.S. 793, 799 (1997) (legislative classification or distinction neither burdening fundamental right nor targeting suspect class will be upheld against equal protection challenge so long as it bears rational relation to some legitimate end); *see also* Romer v. Evans, 517 U.S. 620, 631 (1996).

37. United States v. Virginia, 518 U.S. 515, 531 (1996).

legislation violates the Equal Protection Clause of the Fourteenth Amendment unless it furthers important governmental objectives through substantially related means.[38] Additionally, the case law addressing the economic rights of nonmarital children in their parents' estates admonishes that courts apply an intermediate level of review to statutes "based on illegitimacy."[39] Both standards demand that the legislation's goals are important and that the methods it employs are likely to achieve them. By distinguishing rights based on gender and the decedent's "legitimacy," section 216 must survive this searching review.[40]

Oklahoma's dichotomous scheme thus passes constitutional muster only if one interprets the legislation on nongender grounds as distinguishing either marital from nonmarital fathers or nonmarital fathers who acknowledge their children from nonmarital fathers who do not.[41] True, these classifications exist in the

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38. *See* Craig v. Boren, 429 U.S. 190, 210 (1976) (holding that statute setting forth lower legal drinking age for women than for men violated the Equal Protection Clause). *Compare id. with* Reed v. Reed, 404 U.S. 71 (1971). The standard of review, loosely referred to as "middle-tier," was not formally articulated in connection with gender-based classifications until *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

39. *See generally* Lalli v. Lalli, 439 U.S. 259 (1978); Trimble v. Gordon, 430 U.S. 762 (1977); Callison v. Callison, 687 P.2d 106 (Okla. 1984) (holding that classification based on illegitimacy is unconstitutional unless it has evident and substantial relationship to legitimate state interest). Although those cases arose within the context of legislation governing the rights of the nonmarital child rather than those of the parent, it seems that the distinction is irrelevant as the statutory scheme here is in fact based on illegitimacy since equivalent provisions do not arise where the child was born of married parents who perhaps divorced thereafter. *See also In re* Stern, 311 S.E.2d 909, 911 (N.C. App. 1984) (refusing to strike similar statute on equal protection clause challenge).

40. In striking legislation totally prohibiting fathers of nonmarital children to inherit from their estates, one court has even applied strict scrutiny under its state constitution. To the court, the statute had to reflect the least restrictive means "to advance a compelling state interest." *In re* Estate of Hicks, 675 N.E.2d 89, 93 (Ill. 1996).

41. If the statute is read to distinguish on these grounds, it would be reviewed under a deferential "rational basis" test, ensuring only that the legislation was reasonably related to a legitimate governmental interest. For example, in *Rainey v. Chever*, 510 S.E.2d 823 (Ga. 1999), the Georgia Supreme Court invalidated a statute denying inheritance rights to nonmarital fathers who had failed or refused to acknowledge or support their children. The Georgia Court subjected the statute to a heightened, middle-tier review. While the Supreme Court of the United States denied the petitioner's *writ of certiorari*, Justice Thomas wrote a scathing dissent to that denial, in part arguing that rational review was the proper scrutiny to apply to the state statute, in that it "does not necessarily draw a gender-based classification but arguably distinguishes between two different categories of men: fathers who support their children born out of wed-lock and fathers who do not." Rainey v. Chever, 119 S. Ct. 2411, 2412 (1999).

Legislation similar to that at issue in *Rainey* has withstood the rational basis review urged by Justice Thomas in other contexts or jurisdictions. *See, e.g.*, Parham v. Hughes, 441 U.S. 347, 355-58 (1979) (plurality opinion upholding statute prohibiting fathers who had not legitimated the child from bringing wrongful death action; four justices applied rational review, determining that the statute did not invidiously discriminate based on gender but rather on fathers who had legitimized their children and those who had not); King v. Commonwealth, 269 S.E.2d 793 (Va. 1980) (upholding statute providing that father and kin can inherit from or through nonmarital child only if father openly treated child as his own and did not refuse to support child); Ganim v. Roberts, 529 A.2d 194 (Conn. 1987) (upholding statute requiring fathers of nonmarital children to undergo statutory legitimacy procedure before inheriting from estate of deceased child as providing a rational means for furthering the legitimate state interest of avoiding fraudulent claims); Scheller v. Pessetto, 783 P.2d 70 (Utah App. 1989) (upholding statute preventing nonmarital father from inheriting unless he has openly treated the nonmarital child as his

statute, but only blinders of epic proportion would permit one to ignore the additional and very real gender-based distinctions the statute creates and perpetuates.

The state holds an unassailable interest in guarding the rights of all children, particularly those whose parents are unmarried.[42] One policy base behind section 216 may be to protect the nonmarital child's estate (and by implication, the child) from unworthy claims. This justification holds most true where the decedent remained a minor or dependant at death. Requiring paternal acknowledgment before inheriting from a child's estate protects that estate from depletion through spurious or fraudulent claims,[43] a concern commonly invoked when justifying limits on a child's right to inherit from a putative father.[44] More cynically, limiting the inheritance rights of nonmarital fathers who fail to acknowledge or otherwise provide for their children might force acknowledgment and encourage paternal responsibility. Nevertheless, it is unclear that requiring pre-death acknowledgment, and by only fathers at that, substantially furthers either goal.

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own).

There is precedent for this classification within the adoption context, where the court has stated that a married biological father has legal rights as a father "from the outset," while an unmarried biological father must earn such rights through conduct. *See In re* Adoption of Baby Girl M., 942 P.2d 235, 239-40 (Okla. Ct. App. 1997) (discussing 10 OKLA. STAT. § 60.6(3) (1991)); *see also* Lehr v. Robertson, 463 U.S. 248 (1983) (upholding statute entitling all mothers but only certain fathers of nonmarital children to prior notice of adoption proceeding); Quilloin v. Walcott, 434 U.S. 246, 255-56 (1978) (upholding state statute requiring both parents' consent to adoption of child born in wedlock but only mother's consent for child born out of wedlock unless father legitimated child).

42. Controversial studies suggest that children born out of wedlock already disproportionately suffer other economic, cultural, and educational disadvantages and are more likely to commit crimes than their "marital" counterparts. *See, e.g.*, Rainey v. Chever, 119 S. Ct. 2411, 2411 (1999) (Thomas, J., dissenting from denial of certiorari). Justice Thomas stated:

> The rising incidence of out-of-wedlock births and delinquent fathers has had dire social consequences, including, in one expert's view: "lower newborn health and increased risk of early infant death; retarded cognitive and verbal development; lowered educational achievement; lowered levels of job attainment; increased behavioral problems; lowered ability to control impulses; warped social development; increased dependence on welfare; increased exposure to crime; and increased risk of being physically or sexually abused."

Id. (quoting Appendix to Petition for Cert. at 11, *Rainey* (No. 98-1478) (affidavit of Patrick F. Fagan, former Deputy Assistant Secretary for Family and Social Services Policy, U.S. Department of Health and Human Services)); *see also* Francine Dube, *Morgentaler Credits Abortion for Reduction in Crime Rate*, NAT'L POST, May 10, 2000, at A07. For comprehensive analysis of significant relevant studies to date, see Paul R. Amato & Joan G. Gilbreth, *Nonresident Fathers and Children's Well-Being: A Meta-Analysis*, 61 J. MARRIAGE & FAM. 557 (1999).

43. *See, e.g.*, *In re* Estate of Hicks, 675 N.Ed.2d 89, 96-97 (Ill. 1996) (discussing state interest in ensuring estate's distribution to only actual family members); Ganim v. Roberts, 529 A.2d 194, 198 (Conn. 1987) (discussing state interest in avoiding fraudulent claims); Scheller v. Pessetto, 783 P.2d 70, 73-74 (Utah App. 1989) (discussing state interest in fair and efficient disposition of property at death, and in encouraging the development of "actual familial relationships" between fathers and their nonmarital children).

44. *See, e.g.*, Pitzer v. Union Bank of Cal., 969 P.2d 113, 119 (Wash. Ct. App. 1998) (ultimately striking state statute requiring nonmarital child to establish proof of paternity through signed acknowledgment on equal protection grounds).

Here is the paradox: if the acknowledgment standard is low or loose, and if it tracks the "acknowledgment" required under section 215, it is probably constitutional but relatively ineffectual, as the standard (and in large measure, its proof) would be entirely within the control of the putative father from the beginning. Thus, a paternal claimant to a decedent's estate will be well positioned to clear the hurdle imposed by section 216 anyway, rendering it meaningless to the proposed purpose *unless* the acknowledgement must take place during the child's lifetime. For example, a written and witnessed statement of paternity alone does not necessarily compel or ensure the payment of child support. A father delinquent in support obligations could still meet the acknowledgment requirement and inherit from the decedent's estate. Worse, a father could theoretically "acknowledge" the child while the father was alive but after the child's death.[45] Second, if the acknowledgment standard is high or strict, then it has teeth but may well be unconstitutional in requiring nonmarital fathers to establish a much closer relationship to their children than nonmarital mothers. Much turns on whether the acknowledgement tracks, in meaning and proof, the provisions of section 215. If so, the standard might be fairly high, as Oklahoma case law demands a relatively clear, unambiguous, and widely disseminated acknowledgement of paternity, and usually with some economic component, before a child can inherit from a putative father. For that matter, the acknowledgement standard should be even *higher* when the estate claimant is the deceased's parent rather than the deceased's child, for the precise reason stated before: under section 215, the requisite conduct and proof thereof is entirely within the parent's control.

In any event, how much do potential inheritance rights really affect a father's interest in a child's well being? If the interest genuinely exists, the presence or absence of inheritance rights are irrelevant to that parent. If not, it seems unlikely that an attenuated possibility of future inheritance has any effect on a genetic father's willingness to be a behavioral father as well.[46]

These concerns aside, it is difficult to discern the legitimate interest served by requiring special conduct only of nonmarital fathers. By automatically bestowing the status of mother/heir upon women who give birth but denying the same to the men who make an equally important genetic contribution, Oklahoma law suggests that motherhood is a purely biological construct whereas fatherhood is a purely social one.[47] The archetype is not new. There is no relationship "so near and

45. *See, e.g.*, Dunlap v. Moody, 479 S.E.2d 456 (Ga. Ct. App. 1996) (father argued that applying for letter of administration after child's death qualified as "sworn statements" of paternity).

46. I recognize the possibility of anticipated reward motivating behavior, as where one befriends a rich, elderly relative with the hopes of acquiring large sums upon that person's death. However, equivalent motivation seems fairly remote in this situation, as (1) assuming the paternal role carries duties and responsibilities that friendship never will, and (2) most persons who consider a child's death at all probably consider it unlikely that the child will have a significant estate in any event.

47. Note how the assumption inverts when the word is used as a verb rather than a noun. To "father" a child, meaning "to sire," speaks at a precise point in time, and denotes pure genetics. To "mother" a child means "to care for," suggesting an ongoing relationship, and denoting pure behavior. *See generally* Sarah N. Gatson, *Labor Policy and the Social Meaning of Parenthood*, 22 LAW & SOC.

certain, as that of mother and child."[48] A recent Oklahoma case elaborates: "When a woman gives birth to a human being, both a natural and legal relationship of mother and child is created, regardless of whether the mother is or ever was married, and the child has the same inalienable rights as any other child born to the mother."[49]

Pure biology does not and should not automatically entitle the mother to all the rights of parenthood, as the theory behind adoption laws in Oklahoma makes clear.[50] Although data clearly shows that fathers are far more likely than mothers to abandon or fail to support their children (nonmarital or otherwise),[51] both scenarios are possible.[52] More critically, premising statutory distinctions on supposition is particularly inappropriate, as gender classifications must be genuine, not "hypothesized" nor reliant on "overbroad generalizations about different talents, capacities, or preferences of males and females."[53] As the Supreme Court

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INQUIRY 277 (1997) (discussing the construction of the female gender around the motherhood role).

48. Brown v. Dye, 2 Root 280, 281 (Conn. 1795).

49. Vincent v. Sutherland, 691 P.2d 85, 85-86 (Okla. Ct. App. 1984) (permitting nonmarital child to acquire remainder interest in maternal grandmother's will).

50. Law recognizes the social component of parenthood most directly by eliminating biological parents' rights, including those of inheritance, "to" a child following adoption. The articulated policy is that of giving the child a "fresh start," free of the connections and constraints of the pre-adoptive situation. *See, e.g.*, 10 OKLA. STAT. § 7505-6.5(B) (Supp. 1999) (noting that after final adoption decree, "biological parents of the adopted child . . . have no rights over the adopted child or to the property of the child by descent and distribution").

51. Anecdotally, the phrase "unwed mother" is common, "unwed father" is not. The explanation is probably that the status of mother is readily visible as the mother will usually have custody of and be caring for the child, whereas so few nonmarital children reside with their biological fathers.

More concrete support exists. Concern with child support collection enforcement and "responsible fatherhood" prompted a significant component of President Clinton's proposed budget for fiscal year 2001, which contains $125 million in "Fathers Work" grants "to put approximately 40,000 non-custodial parents (mainly fathers) who owe child support to work and help them connect with their children." Office of the Press Secretary to the President, *The Clinton-Gore Administration FY2001 Budget: Maintaining Fiscal Discipline While Making Key Investments*, Presswire, Feb. 8, 2000 at M2, *available in* 2000 WL 12932995. The current administration maintains that child support collections have nearly doubled since 1992, *id.*, when "[t]he national delinquency rate for used car loans was less than three percent . . . , while the delinquency rate for child support owed to mothers was an astounding 49 percent in 1990," Monopoli, *supra* note 3, at 258 n.2 (quoting Press Release, Children's Defense Fund, June 17, 1994).

According to some reports, it appears that the problem is significant in Oklahoma, which "arguably provides the lowest level of child support of any state in the country." Brian Ford, *Vote Likely on Child Support Guidelines*, TULSA WORLD, Apr. 4, 1999, at A1 (quoting University of Oklahoma Economics Professor W. Robert Reed in his review of recent studies showing Oklahoma to have between the 47th to 50th lowest child support in the nation).

52. *See, e.g.*, Andrew Gottesman, *Alleged Deadbeat Mom Part of Growing Trend*, CHICAGO TRIB., Aug. 30, 1994, at 2; Robert Kessler & Ken Moritsugu, *Alleged "Deadbeat Mom" Arraigned, Officials Believe LI Case is a First*, NEWSDAY, Oct. 29, 1999 at A08; Paulo Lima, *"Deadbeat" Sweep Nets 34, Including Two Mothers*, RECORD (N. New Jersey), May 19, 1999, at L01; *"Deadbeat Mom" Pays $3,000 Debt for 2 Kids*, MILWAUKEE J. & SENTINEL, June 22, 1999, at 2.

53. United States v. Virginia, 518 U.S. 515, 533 (1996); *see* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 143 (1994) (noting that generalizations must not be archaic or overbroad). *See also generally* Cynthia A. McNeely, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family*

has elsewhere remonstrated, making such generalizations "based on sex . . . demean the ability [and] social status of the affected class."[54]

As it now stands, the Oklahoma statutes are both over- and under-inclusive. Capping the inheritance rights of all nonmarital fathers sweeps in many deserving fathers yet bypasses many undeserving mothers. The legislature has two options. First, it could retreat entirely from the requirement of acknowledgment by either parent, although doing so would eviscerate the protection the legislation ostensibly seeks. Second, assuming that limiting the inheritance rights of non-acknowledging parents incentivizes responsible parenthood at all, first strengthening then similarly conditioning the rights of nonmarital mothers would only increase the likelihood of the statute meeting its goals, even if few mothers would fit within its provisions.[55]

Another conceivable interest driving section 216 could be to ensure the orderly and efficient distribution of decedent's estates.[56] To the extent that the statute demands only time-consuming and evidence-intensive inquiry into the father's and not the mother's post-birth conduct, at least 50% of the decedent's estate is immediately assured a maternal home, with the other half soon to follow unless the father seeks distribution and proves acknowledgment. Requiring identical probing into the mother/child relationship impedes expeditious administration, at least where there is some genuine issue of material fact.

Nevertheless, efficiency and justice often trade off; the most streamlined way to resolve a dispute is not always (and in fact, is rarely) the most fair. As the Illinois Supreme Court stated while striking a restrictive paternal inheritance statute in *In re Estate of Hicks*,[57] "gender-based discrimination cannot be justified on the grounds of administrative convenience."[58] Additionally, real differences exist between expanding the universe of possible heirs by completely trading behavior for status versus shrinking that world by barring the claim of a facially qualified taker.[59] Unswerving dedication to crystalline intestacy laws ad-

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Court, 25 FLA. ST. U. L. REV. 891 (1998) (discussing the judicial role in creating and perpetuating stereotypes based on gender, particularly within the family law context).

54. Parham v. Hughes, 441 U.S. 347, 354 (1979).

55. Depending on how broadly the court construes "acknowledgement," the objective proof of pregnancy and delivery alone could satisfy section 216 as applied to mothers. *See, e.g.*, Miller v. Albright, 523 U.S. 420, 437 (1998) (noting in Immigration and Nationality Act, 8 U.S.C. § 1409 (1994) (INA) context that the requirement of acknowledgement in the parental context produces the "rough equivalent" of the documentation establishing the blood relationship between mother and child). If so, the requirement would seem superfluous, unless the legislature aimed higher by requiring actual care and support.

56. *See In re* Stern, 311 S.E.2d 909, 911 (1984) (discussing state interest in safeguarding the just and orderly disposition of estates and the dependability of titles arising under intestacy); *In re* Estate of Fay, 375 N.E.2d 735, 738 (N.Y. 1978) (same).

57. 675 N.Ed.2d 89 (Ill. 1996).

58. *Id.* at 95 (quoting Reed v. Reed, 404 U.S. 71, 76 (1971) ("To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause.")).

59. Compare, for example, a scheme permitting any "close friend" to claim heirship status with one

ministered with scientific precision would actually suggest that the statute entirely abolish *any* requirement of "acknowledgment," either for putative parents or children, and distribute property based on genetics alone. This result easily could be achieved by limiting all intestacy claims to "proof of kinship," established through DNA testing either before or following the decedent's life. However simple, that result would be unfair.

Finally, limiting paternal inheritance rights might be designed to punish the father and simultaneously protect the custodial parent and/or stepparent against "paying thrice," with gifts to the child being partially divested in favor of an absent parent; costs expended in raising the child never being recouped from the absent parent; and wrongful death or other insurance awards being shared with an absent parent who may view them as a windfall.[60] Again, this view presumes two things: (1) that it is always within the father's control to ensure that the child is born in wedlock,[61] and (2) that all children born out of wedlock grow up with their biological mothers in single-parent homes.[62]

The Oklahoma intestacy scheme seems suspect on a broader ground. While the probability that a parent would refuse to acknowledge or support a child seems higher when the child's parents are unmarried (either because they never were married or have since divorced), there is nothing inherently magical about the ability of marriage to ensure that both parents meet the child's emotional and economic needs. Specifically, the Oklahoma scheme creates a second level of distinction between parents who were married versus those who were not married at the time of the child's birth. True, the classification probably survives constitutional inspection as reasonably related to a legitimate state end, but recall that a minor child cannot write a will and can break the parent/child relationship only by seeking its legal severance. Since that fact (again coupled with the low value of most children's estates) lessens the child's leverage over continued parental affections,[63] why not increase his or her protection by refusing to award

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barring the rights of an abandoning or abusive spouse to inherit. The first expands the list of potential takers and concomitant judicial determinations infinitely; the second by definition limits the claimant and resulting challenge to two.

60. *See supra* notes 9-11 and accompanying text.

61. Not all marriage proposals are accepted. In fact, studies show that more children are born out of wedlock today precisely because women are empowered in rejecting forced marriages due to reduced social stigma in bearing and rearing children alone. "It's accepted by society. Getting legally married is not a big issue. As long as society accepts women having babies out of wedlock, it will continue." Rita Rubin, *Pregnancy No Longer Pushes Women to Wed*, USA TODAY, Nov. 9, 1999, at D1 (quoting remarks of Census Bureau demographer Amara Bachu on report issued that day).

62. One estimate shows that the percentage of nonmarital children whose biological parents continue to cohabit has risen from 27% to 41% in the last two decades. *See id.*

63. The role of anticipated inheritance in securing the creation and maintenance of interpersonal relationships has been commented on, perhaps most famously by Bentham.

> [Through the will,] the power of the present generation is extended over a portion of the future .... By means of an order not payable till after his death, he procures for himself an infinity of advantages beyond what his actual means would furnish. By continuing the submission of children beyond the term of minority, the indemnity for paternal cares is increased .... In the rapid descent of life, every support on which man can lean should

the status of "heir" to *any* parent, whether married at the child's birth or not, who refuses to openly acknowledge *and support* that child to his or her capabilities?[64]

Interestingly, the statute applicable to decedent's estates before July 1, 1985, recognized and addressed this possibility, at least with respect to minor decedents.[65] Under title 84, section 213(A), the estate of a decedent who died leaving neither spouse nor issue passed to either surviving parent or both in equal shares.[66] However, if that decedent was a minor who left no issue, the estate passed to the parents equally only if they were living together; if not, the estate was to transfer to the parent "having had the care" of the deceased minor.[67] The word "care" contemplated that the claiming parent had borne the entire burden of parental duty toward the minor during the separation of the parents and until the time of the minor's death.[68] Equal care could result in an equal split of the estate as though the parents were never separated.[69] Note that the statute drew no distinction between marital and nonmarital children. Why the legislature retreated from the "care" requirement when redrafting section 213 in 1985 is unclear; perhaps it thought that too much uncertainty was imported into the statute by including such relatively amorphous terms.

D. Defect: Contrary to Public Policy

Intestate succession schemes come into play only when the decedent has failed to properly exercise the near-constitutional[70] right of testamentary freedom. Because no intestacy scheme could or ever should meet the dispositive wishes of every individual person who has not written a will, they are broad by nature. Nevertheless, an important goal behind any statute of descent and distribution, and a factor in its legitimacy, is the extent to which the scheme approximates the goals of most similarly situated decedents most of the time.

Irrespective of the constitutionality of the Oklahoma intestacy provisions, precious few children would desire a parent, whether father or mother, married

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be left untouched, and it is well that interest serve as a monitor to duty.
JEREMY BENTHAM, THE THEORY OF LEGISLATION 184-85 (C.K. Ogden ed. 1931).

64. This is the approach taken by the Uniform Probate Code, which refuses to distinguish parents either on the basis of gender or marital status before, during, or after the birth of the child. Under its provisions, "[i]nheritance from or through a child by either natural parent or his [or her] kindred is precluded unless that natural parent has openly treated the child as his [or hers], and has not refused to support the child." UNIF. PROBATE CODE § 2-114(c) (1990).

65. Limiting the application of the provision to minor children seems warranted, as an adult child can always write a will disinheriting either or both parents.

66. *See* 84 OKLA. STAT. § 213(A) (Supp. 1999).

67. *Id.*; *see In re* Estate of King, 239 P. 234, 236 (Okla. 1925) (finding parents "not living together" for purposes of statute where father remarried but returned to family three days before death of child; and noting father's financial aid not controlling factor over who has had care of minor).

68. *See* Stafford v. Stovall, 235 P. 238, 239 (Okla. 1925).

69. *See* Alberty v. Alberty, 180 P. 370, 370 (Okla. 1919).

70. *See* Hodel v. Irving, 481 U.S. 704, 705 (1987) (stating that although not constitutionally protected, the right to devise property, particularly to one's children, has been an integral part of Anglo-American jurisprudence since feudal times, and that any abridgement must be carefully scrutinized).

at birth or not, to inherit from their estate, after refusing to acknowledge the child during life.[71] Empirical support for the supposition is both elusive and unlikely, as most children do not even think of such matters during life and because there is no written evidence via the will of such disinheriting intent at death. It almost seems that law presumes that all children's property is actually that of the parents anyway, either because courts believe that to be true or because any other dispositive scheme would import too much subjectivity (and thus inefficiency) into a relatively objective arena. This concern again easily could be met merely by requiring acknowledgment and/or support by all parents all of the time. Parental failure to do so would cause the property to pass to the next closest relative, either directly or through representation, who had actually treated the child in the desired way.[72]

IV. Suggested Statutory Reform

Revising the statute to ensure its constitutionality would require only adding that its provisions apply to biological mothers as well as fathers. Nevertheless, as outlined above, additional changes should be made to enhance its fairness, dedication to constitutional and policy issues, and clarity. The following tentative proposals address each problem:

> *84 Okla. Stat. § 213. Descent and Distribution*
> * * * *
> (B)(2)(b) if there is no surviving issue, to the surviving parent or parents of the decedent in undivided equal shares. Inheritance from or through a child by either parent or his or her kindred is conditioned on proof of parentage, and is precluded if that parent has failed or refused to acknowledge and/or support the child.[73]

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71. Many states have invoked "presumed intent" to justify restricting nonmarital fathers from decedent's estates. For example, in *In re* Estate of Hicks, 675 N.Ed.2d 89, 93-95 (Ill. 1996), the state unsuccessfully claimed that its denial of paternal inheritance rights effectuated the probability that most nonmarital children "typically have a much closer relationship with their mothers than with their fathers," and would want to limit inheritance to those who had experienced the physical and emotional ramifications of pregnancy and the ensuing child-rearing responsibilities. By contrast, the court in *King v. Commonwealth*, 269 S.E.2d 793, 795-96 (Va. 1980), was persuaded by the state's assumption that nonmarital children would have "no affections" for non-legitimating putative fathers, even though the result of applying the intestacy bar in that case was to cause property to escheat to the state. *But see* Monopoli, *supra* note 3, at 277 (citing child psychology studies to extrapolate that many child decedents might actually want the abandoning/neglectful parent to inherit).

72. There is precedent for passing property to an "heir" who is not related by blood, marriage, or legal adoption. The most radical suggestion would import into this arena notions similar to the equitable or constructive adoption, or common law marriage. Thus, failing parental takers, perhaps the child's property could pass to that person who exercised the most care and obligation to the child during his or her life, whether sibling, grandparent, aunt or uncle, or even an unrelated surrogate.

73. This revision is patterned after the section 2-114 of the Uniform Probate Code (UPC), which sets forth requirements for the parent and child relationship irrespective of the parents' marital status. Note that the prior UPC statute, revised in 1993, applied the rule to only the father.

* * * *

84 Okla. Stat. § 215. Inheritance by and from Nonmarital Child

A. Inheritance by a Nonmarital Child from or through the Parent

[Option #1]

For inheritance purposes, a child born out of wedlock stands in the same relation to his mother/mother's kindred and his father/father's kindred as if that child had been born in wedlock upon proof of parentage by a preponderance of the evidence.[74]

[Option #2]

For inheritance purposes, a child born out of wedlock stands in the same relation to his mother and her kindred as if that child had been born in wedlock. For like purposes, every such child stands in identical relation to his father and his kindred whenever: (a) the father clearly acknowledges his paternity of the child in a written and witnessed writing; (b) the father and mother marry after the child's birth, and the father thereafter acknowledges the child as his own; (c) the father adopts the child or publicly acknowledges the child as his own; or (d) paternity is judicially determined in a paternity proceeding

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One change is made here. As written, the UPC requires such parental conduct of only "natural" or biological parents, whereas I would extend the requirement to cover all parent/child relationships, whether created through adoption or through birth using the gametes of each parent or one or more donated gametes.

A 1998 California case supports expanding the provision. A married couple were unable to bear children. They procured a donor egg, inseminated it with donor sperm, and brought the child to term using a surrogate mother. After the agreement was reached, but before the child was born, the husband and wife separated and ultimately divorced. While the wife sought a judicial determination that the biological father was in fact responsible for child support, the husband denied bearing any legal obligation or responsibility to the child. While the husband may in fact be the "natural" parent and thus subject to the provisions of the UPC, one could easily imagine the same scenario but where the sperm was donated as well as the egg. In that case, the husband would not be the "natural" parent of the child, and without expanding the UPC provision, would not be subjected to its rules before claiming inheritance rights from her.

Note also that the revised statute affects not only inheritance rights of the parents, but also inheritance rights of the parent's relatives claiming through that parent by representation, which the Oklahoma statutes address in section 215(C) and (D).

74. Note two changes from current section 215. First, proof of parentage is required before inheriting from either parental line. Second, section 215 states that states that "[f]or inheritance purposes, a child born out of wedlock stands in the same relation to his mother and her kindred, *and she and her kindred to the child*, as if that child had been born in wedlock." 84 OKLA. STAT. § 215 (Supp. 1999) (emphasis added). As revised, the statute makes clear that this portion refers only to rights of the child to inherit from and through the mother and not vice-versa. The same change has been made in the following sentence regarding the father.

before a court of competent jurisdiction, whether before or after the child's or father's death.

For all purposes, the issue of all void marriages or marriages ending in divorce or annulment are deemed to have been born in wedlock.

B. Inheritance by the Parent From or Through Minor Nonmarital Child

[Option #1]

The marital status of a decedent's parents at that decedent's birth is irrelevant to the disposition of his or her intestate estate, which passes as prescribed in § 213(B)(2)(b).[75]

[Option #2]

The marital status of a decedent's parents at that decedent's birth is relevant to the disposition of his or her intestate estate only to the extent that any portion thereof would pass to his or her parent(s) or their kindred. If so, inheritance from or through the child by either parent or his or her kindred is precluded unless that parent has acknowledged the child (as set forth in § 215 Part A) and has not failed or refused to support the child. Any portion so precluded will pass to the other parent or his or her kindred.[76] If both parents are precluded from inheriting under this provision, the decedents' property should pass as though both had predeceased.

The suggested revisions are preliminary, intended to encourage reflection over and discussion of the critical issues involved in determining who should occupy the status of "heir," particularly where the decedent is a minor child of nonmarital parents.[77]

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75. This option should be chosen only if the legislature decides to abolish the distinction between automatic inheritance by married parents and qualified inheritance by unmarried parents by enacting legislation similar to proposed section 213.

76. This option should be chosen only if the legislature decides to preserve the distinction between inheritance from marital versus nonmarital children by avoiding the enactment of legislation similar to proposed section 213 and by selecting option #2 for 84 OKLA. STAT. § 215(A). Note that the statute as revised also cures the ambiguities inherent in the current section 216, *see infra* notes 81-85 and accompanying text, by ensuring that the intestate scheme of a nonmarital decedent's estate differs *solely* with respect to inheritance rights of the parents and their kin.

77. Applying the revised statute to the introductory hypothetical has two effects. First, it is irrelevant if, as the hypothetical suggests, the nonmarital decedent is an adult. As such, he is able to write a will leaving everything to whomever he chooses, including total disinheritance of either or both parents. Second, were he to have died a minor, his estate would either be split 50/50 between his mother and his father, or his father would have inherited everything to the extent that his mother has refused to support the child.

V. Conclusion

Fathers, whether married or not, play an increased role in child rearing. This trend has moved beyond the family and into the courts, most demonstrably through retreat from presumptions favoring the mother in custody disputes.[78] While research reveals no Oklahoma cases where the father has challenged his limited inheritance rights, the probability that such a case will eventually arise is high given sociological trends. Neither the Supreme Court nor any other federal court has entertained the issue; the handful of state courts having done so are split between upholding and striking the statute on equal protection grounds.[79] Much turns on the nature of the obstacles interposed to the nonmarital father's inheritance and the level of review applied by the Court. True, the Oklahoma scheme does not entirely bar such fathers from inheriting; depending on how it is construed, it might even pose little barrier at all. Nevertheless, Oklahoma is uniquely positioned to recognize and encourage the increased paternal role by invalidating legislation such as section 216, which unfairly distinguishes between genders based on outdated and ultimately irrelevant data and outmoded notions of the nature of parenthood. Amending the legislation now is particularly appropriate given the current administration's concern over the integrity of the family and its children.[80]

Section 216 should be rehabilitated before a test case arises, the facts of which would probably tell one of two tales: an irresponsible father seeking half of a decedent's estate from a deserving mother by challenging the constitutionality of the statute,[81] or a responsible father seeking all of a decedent's estate from a

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78. Oklahoma law was once fairly rigid in its award of custody of nonmarital children to biological mothers, whereas fathers had no inherent rights or responsibilities, but could become liable for the child upon consent or court order. *See* Plunkett v. Atkins, 371 P.2d 727, 730 (Okla. 1962). As one court succinctly and crudely stated, "the father of a bastard is not entitled to its custody, and is not chargeable with its support in the absence of a specific statute, contract to pay, adoption, or liability from bastardy proceedings." State v. Boston, 102 P.2d 889, 892 (Okla. Crim. App. 1940). Today, there is no overt special distinction between fathers and mothers in custody disputes, as the court has the discretion to award custody of nonmarital children to either parent guided by that child's best interests. *See* Department of Human Servs. *ex rel.* Martin v. Chronister, 945 P.2d 511, 513 (Okla. Ct. App. 1997).

79. *See supra* notes 40-41, 43, 56 and accompanying text.

80. Oklahoma has earmarked $10,000,000 of a federal grant to help fund its "Oklahoma Marriage Initiative." Although the focus of that initiative seems targeted at reducing this state's divorce rate, the federal grant is also geared toward "promoting marriage, reducing out-of-wedlock pregnancies and 'encouraging the formation and maintenance of two-parent families.'" *Oklahoma's Federal Funds to Promote Marriage*, ARIZ. REPUBLIC, Mar. 26, 2000, at A7, *available in* 2000 WL 8010734; *see also* Joyce Howard Price, *Oklahoma Governor Vows a Tough Fight to Protect Families*, WASH. TIMES (D.C.), Apr. 4, 1999, at A2, *available in* 1999 WL 3081855; Barbara Hoberock, *New Director Tallies DHS Accomplishments*, TULSA WORLD, July 28, 1999, at 12, *available in* 1999 WL 5408358.

81. In *Rainey v. Chever*, 510 S.E.2d 823 (Ga. 1999), a 20-year-old decedent died tragically in a car crash allegedly caused by a manufacturing defect. His biological father, who had virtually no prior contact with his son, immediately filed a suit seeking monetary damages for his death. The applicable intestacy statute precluded any father of a nonmarital child from inheriting from that child upon failure or refusal to openly treat the child as his own or failure or refusal to provide support for the child. Under

nondeserving mother.[82] Were a court to find the current statute constitutional in hearing such a case, the father, whether deserving or not, would always lose to the benefit of the mother.[83] Were a court instead to find the current statute unconstitutional and thus default to the 50/50 rule set forth in section 213(B),[84] the undeserving father would gain and the deserving father would lose absent extraordinary (and unlikely) judicial relief.[85] Neither result is palatable in terms of societal goals. It is better to address the problem now by revising the statute to apply to all parents, of both genders, irrespective of their marital status at the decedent's birth or death. Doing so accords proper deference to the unique contributions each parent makes, arguably maximizes protection of children, and minimizes potential windfalls when minors die intestate.

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the statute, the father was entitled to no portion of the decedent's estate, but because it was ruled unconstitutional, he was awarded half after default to the general provision. *See id.* at 520-21.

82. In *In re Stern*, 311 S.E.2d 909 (N.C. Ct. App. 1984), the 53-year-old decedent died leaving an estate exceeding $600,000. When he was born in 1927, his parents were not married due to religious prohibitions at the time. The decedent lived with his parents (who lived together out of wedlock) and generally stayed quite close with his paternal relatives. The decedent's father left $500,000 to the decedent in his will. When the decedent died intestate one year later, the court ruled that his entire estate passed to his maternal side since the father had not met the stringent requirements for inheritance from a nonmarital child under that state's statute. *See id.* at 910.

83. *See supra* note 35 and accompanying text (original chart).

84. *See, e.g., In re* Estate of Hicks, 675 N.E.2d 89 (Ill. 1996) (ruling that specialized statute covering rights to inherit from nonmarital child was unconstitutional, resulting in application of general statute).

85. Consider the changed results from the chart above were the statute to be found unconstitutional and the court to default to the general intestacy rule:

	acknowledging father	unacknowledging father
deserving mother	[No net position change] Mother and Father split the decedent's estate 50/50	[- net position change] Mother's share decreases from 100% to 50% of the decedent's estate
undeserving mother	[No net position change] Mother and Father split the decedent's estate 50/50	[+ net position change] Mother's share decreases from 100% to 50% of the decedent's estate