NOTES

UNIFORM PROBATE CODE—ILLEGITIMACY—
Inheritance and the Illegitimate: A Model
for Probate Reform

I. INTRODUCTION

On May 20, 1968, the United States Supreme Court handed down landmark decisions in Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Company. In Levy, five illegitimate children sued under article 2315 of the Louisiana Civil Code for damages for the wrongful death of their mother. The suit was dismissed by the Louisiana district court, which held that illegitimate children had no cause of action under the Louisiana statute. In Glona, a Texas domiciliary brought a diversity action in federal district court in Texas for the wrongful death of her illegitimate son, caused by an automobile accident in Louisiana. The Texas district court dismissed the suit, holding that under Louisiana law the mother had no cause of action for the death of her illegitimate child. The Supreme Court granted the petition for certiorari in Glona and noted probable jurisdiction in Levy. With Justice Douglas writing for a majority of six in each case, the Court reversed both decisions, holding that the Louisiana wrongful-death statute denied equal protection of the law both to illegitimate children and to their parents.

Levy and Glona, read narrowly, stand only for the proposition that a state wrongful-death statute cannot discriminate between beneficiaries solely on the basis of legitimacy. Read in their broadest sense, however, the opinions in the two cases condemn generally any classification based on legitimacy. A major problem with the opinions is that Justice Douglas did not specify the grounds on which he based his decision. Thus, the potential scope of the holdings is open to question. Several recent cases have interpreted Levy to condemn all classifications based on legitimacy. Similarly,

5. 389 U.S. 925 (1967).
6. Justices Black and Stewart joined Justice Harlan, dissenting, in both cases. 391 U.S. at 76.
several commentators have argued persuasively that the Levy reasoning should be extended, by a test of "close scrutiny" under the equal protection clause of the fourteenth amendment,8 to areas of the law other than wrongful death and should be extended with equal force to the child-father relationship as well as the child-mother relationship.9

One area of the law in which there traditionally has been discrimination against the illegitimate is that of inheritance. While most states allow an illegitimate to inherit from his mother by intestate succession on an equal footing with legitimate offspring,10 only three states11 allow an illegitimate to inherit from the father equally with legitimate offspring. Rather, most states require the father formally to recognize or acknowledge his illegitimate offspring in order for the child to be able to inherit from the father by intestacy.12 In a few other states a judgment in a paternity action gives the illegitimate child the right to inherit from his father.13 Not all states allow illegitimates to inherit from the mother's family, and only a few allow them to inherit from the

8. The courts tend to apply a close-scrutiny test over classifications when the interests at stake are deemed fundamental (see Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting) and Douglas v. California, 372 U.S. 353 (1963) (right of the criminally accused to a proper defense)), or when the classification involved is inherently suspect (see Brown v. Board of Educ., 347 U.S. 483 (1954) (race)).


11. Arizona, North Dakota, and Oregon have abolished illegitimacy as a legal status. See ARIZ. REV. STAT. ANN. § 14-206 (1956) ("A. Every child is the legitimate child of its natural parents. . . . B. Every child shall inherit from its natural parents and from their kindred heir, lineal and collateral, in the same manner as children born in lawful wedlock. . . ."); N.D. CENT. CODE § 56-01-06 (Supp. 1969) ("Every child is hereby declared to be the legimate child of his natural parents. . . . He shall inherit from his natural parents, and from their kindred heir, lineal and collateral. . . ."); ORE. REV. STAT. § 109.060 (1968) ("The legal status and legal relationships and the rights and obligations between a person and his descendants, and between a person and his parents, their descendants and kindred, are the same for all persons, whether or not the parents have been married.").


13. Id.
father's family. Furthermore, when a testator makes a bequest to his "children" in a will, many states have construed that term to include only legitimate children. Thus, most states discriminate against illegitimates in their inheritance laws, although there are local variations concerning the manner and extent of the discrimination.

In light of Levy and Glona, and their progeny, the state inheritance statutes that discriminate on the basis of legitimacy are of dubious constitutionality. Moreover, there has been over the past decade a perceptible trend in state and federal laws to bring the illegitimate child into a position of parity with his legitimate counterpart with regard to various legal rights. Furthermore, commentators such as Norman Dacey have soundly criticized probate laws on various grounds, and have exerted discernible pressure for a reform of probate law into a system more responsive to present-day needs. In light of these developments, therefore, it is likely that many states will be revising their inheritance statutes to provide illegitimates with certain legal rights that compare favorably with those accorded legitimate offspring.

The Uniform Probate Code (Code), which was approved by the American Bar Association in August 1969, deals with the probate issues of legitimacy.
lem of inheritance by illegitimates both with regard to intestate succession—section 2-109—and also with regard to the construction of a bequest to "children" by will—section 2-611. This Note will examine the issue whether the Code, which presents a comprehensive model for probate reform, deals with the problem of inheritance by illegitimates in an appropriate, desirable, and constitutional manner. The Code provisions concerning illegitimacy relate to many other provisions of the Code in which childhood status is relevant; therefore, it will be useful to analyze these other provisions in order to assess the over-all effect of section 2-109 and section 2-611 in an integrated probate system. On the other hand, the formulae set out in sections 2-109 and 2-611, if constitutional, could constitute a desirable model for probate reform—even apart from the entire reform package of the Code—for those states that wish to, or, indeed, who are forced to, reform their laws in this important area.

II. THE ILLEGITIMATE AND INTESTATE SUCCESSION UNDER THE UNIFORM PROBATE CODE

A. Section 2-109

1. Meaning

Article 2 of the Code deals with intestate succession and wills. Under that article, section 2-109 defines "child" for the purpose of intestate succession. Furthermore, since section 1-201, the general definitional section of the Code, adopts the section 2-109 definition of "child," that definition is established for all purposes throughout the Code. Section 2-109 provides:

If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person,

(1) an adopted person is the child of an adopting parent and not of the natural parents except that adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and that natural parent.

(2) In cases not covered by (1), a person born out of wedlock is a child of the mother. That person is also a child of the father, if:

(i) the natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or

(ii) the paternity is established by an adjudication before the death of the father, or is established thereafter by clear and con-

20. See pt. II. B. infra.
21. UPC § 1-201(3) provides: "'Child' includes any individual entitled to take as a child under this Code by intestate succession from the parent whose relationship is involved and excludes any person who is only a stepchild, a foster child, a grandchild or any more remote descendant."
vincing proof, except that the paternity established under this subparagraph (ii) is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his, and has not refused to support the child.

The language of the statute seems to be clear for the most part, but there may be an ambiguity that could best be dealt with in a comment to the statutory language. Subsection (2) is intended to define the right of an illegitimate who is not subsequently adopted under subsection (1) to inherit by intestacy. Such a person is always the "child" of the mother, and is also the "child" of the father if he is legitimated by the marriage of his natural parents or if he or his mother can establish the identity of the natural father to the satisfaction of subparagraph (2)(ii) of the section. Although the language of subsection (2) seems to be clear on its face, it appears to contain a latent ambiguity in that subparagraph (2)(i) runs headlong into "one of the strongest presumptions" in this area of the law—the presumption of legitimacy. This doctrine, which derives from English law and which is very common in American jurisdictions, raises a strong presumption, usually rebuttable only by proof of impotency or nonaccess, that any child born in wedlock is legitimate. The presumption is an outgrowth of the time when bastardy was not only a source of reproach and ridicule, but also a source of grave material and legal disadvantage. Although the stigmas attached to bastardy, both personal and legal, have gradually dissipated somewhat over the years, the presumption has remained. The source of the crucial ambiguity lies in the fact that the term "wedlock" is used in a more narrow sense in the Code than it is in the presumption of legitimacy.

It seems clear from a reading of section 2-109 that the policy of that section is to enable illegitimates to inherit from their natural parents—hence "wedlock" is intended to mean marriage between the natural parents of a child. The policy of the presumption of legitimacy, however, is to avoid bastardization of as many children as possible—hence "wedlock" simply means any marriage at all. Accordingly, the presumption has been held to override an acknowledgment by the true father from an adulterous relationship when there was no clear proof of nonaccess or impotence of the legal husband. Therefore, since the policy of section 2-109

dictates that "wedlock" means marriage only between the natural parents, that interpretation should be made explicit either in the statute or in a comment to that section, and the presumption of legitimacy should be similarly limited in those jurisdictions that may adopt the Code formulation of section 2-109.

2. Constitutionality

Assuming that section 2-109 can be read literally, subject to the above qualifications, it must, of course, pass the test of the equal protection clause of the fourteenth amendment in order to be valid. While Justice Douglas did not clearly specify the equal protection test which he applied in Levy and Glona, it appears that section 2-109 would be valid vis-à-vis inheritance by illegitimate children under either the rationality test—the basic test of equal protection—or under the close-scrutiny test—the test applied when a basic civil right or an inherently suspect classification is involved. The provision would be valid for the simple reason that it makes no classification on the basis of illegitimacy. Section 2-109(1) makes no distinction whatever between legitimates and illegitimates, and section 2-109(2) merely establishes a burden of proof of paternity in the child-father relationship which the illegitimate must meet before he can inherit from his natural father. Substantively, section 2-109(2) takes the position that all children have the right to inherit equally from their natural parents. The draftsmen of the provision recognized, however, that while there are few, if any, problems of proof in ascertaining the child-mother relationship, such problems may be substantial indeed in ascertaining the child-father relationship. Thus, section 2-109(2)(ii) sets out a standard of proof for the illegitimate or his next friend to meet in establishing paternity if it has not been established by adoption under subparagraph (1). By imposing a burden of proof, then, section 2-109(2) does not entail a classification that must pass muster before the appropriate equal protection test, but rather, it entails a standard that must be measured by due process considerations.


28. See text accompanying notes 7-9 supra.
31. Gray & Rudowsky, supra note 9, at 15, suggest that perhaps the Court in Levy and Glona has taken a middle ground between the rationality and strict-scrutiny tests.
32. In Glona, Justice Douglas suggested that the danger of fraudulent claims is properly handled by an appropriate burden of proof rather than by making a classification which amounts to a denial of equal protection. 391 U.S. at 75-76.
One of the prime purposes of imposing a burden-of-proof requirement is to prevent fraudulent claims. So stated, such a requirement certainly serves a valid state purpose. However, if the burden imposed is too heavy—that is, if it is tantamount to a bar to recovery in a substantial number of cases—it may operate as a deprivation of property without due process of law on those unable to meet the unreasonable burden. It does not appear, however, that the standard adopted in section 2-109(2)(ii) is so onerous as to be violative of due process. If the only means of establishing paternity were by an adjudication before the death of the father, the standard would be of doubtful validity since the illegitimate’s legal rights would be determined by the volitional acts of other people—the father by acknowledgment, or the mother by prosecuting a paternity suit. By allowing clear and convincing proof of paternity after the father’s death, however, the statute, unlike many of the present provisions requiring acknowledgment by the father while he is alive, allows the child or his next friend to gather appropriate proof of paternity in cases in which the father has died without acknowledging the child. The “clear and convincing” standard of section 2-109 is consistent with other burdens of proof relating to legal relationships involving deceased persons. Thus, it appears that the provisions of section 2-109 governing inheritance of the illegitimate child by, through, or from his natural father are constitutional.

On the other hand, there may be raised grave doubts concerning the constitutionality of that portion of section 2-109 relating to the right of a father or his kindred to inherit from or through his illegitimate child. The Code provides that even if paternity is established under section 2-109(2)(ii), the father and his kindred cannot inherit from or through the child “unless the father has openly treated the child as his, and has not refused to support the child.” The rationale behind that provision seems to be to encourage fathers at least informally to acknowledge and support their illegitimate children. While this purpose may be a rational one under traditional equal protection analysis, it cannot stand if the close-scrutiny test of equal protection is applied. The Supreme Court has held in *Skinner v. Oklahoma* that a statute touching

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33. 391 U.S. at 76.
34. See, e.g., Manley v. Georgia, 279 U.S. 1 (1929).
35. See note 12 supra and accompanying text.
36. Compare, e.g., N.M. STAT. ANN. § 20-5-2 (Supp. 1969) (interested party cannot obtain judgment against a deceased person on his own evidence unless such evidence is corroborated by other material evidence) with W. VA. CODE ANN. § 57-3-1 (1966) (interested party shall not be examined as a witness in regard to any personal transaction or communication between himself and a deceased except on his own behalf).
37. UPC § 2-109(2)(ii).
38. 316 U.S. 585 (1942).
on fundamental rights must not be underinclusive. Yet section 2-109(2)(ii) arguably is underinclusive since it does not cut off the rights of all fathers who desert or fail to support their children, but rather cuts off the rights of only those who happen to have illegitimate children. Thus the constitutionality of the last clause of section 2-109(2)(ii) may turn on how the right to inherit is characterized or on how the use of ancestry (in the sense of legitimacy) as a means of classification is viewed.\textsuperscript{39} If the right to inherit is deemed a basic civil right, or if classification based on legitimacy is deemed suspect—as is classification based on race—then the strict test of equal protection will apply,\textsuperscript{40} and the last clause of section 2-109(2)(ii) may not pass that test.

3. Desirability

If section 2-109 meets the tests of the equal protection and due process clauses of the fourteenth amendment, as it probably does, it still must accomplish a desirable distribution in order to be appropriate for adoption by the various states either with or without the rest of the Code package. The law of intestate succession has two principal aims: to achieve a distribution of property at death which society deems fair, and to distribute property according to the presumed intent of the deceased.\textsuperscript{41} If a socially equitable distribution were the sole aim of intestacy statutes, the distribution plan based on the definition of "child" in section 2-109(2) could not be faulted. It seems only fair that the natural offspring of decedents should be the object of their bounty in the state's estate plan. Illegitimate offspring are no less deserving of their natural parents' bounty because of a mere accident of birth than are their legitimate brethren. In fact, given the extent of the stigma that still attaches to bastardy,\textsuperscript{42} it could be argued that illegitimates may be more entitled to compensation in the form of inheritance than legitimate children, at least from the standpoint of social justice. At any rate, it seems clear that from the standpoint of equitable distribution the most desirable plan is to treat legitimates and illegitimates as nearly equally as possible, especially in light of the proof considerations that must be taken into account—and section 2-109(2) accomplishes this end.

However, achieving a socially equitable distribution is only one of the goals of intestacy statutes; reflecting the presumed intent of the ordinary testator in lieu of a valid will is the other primary goal. With regard to this latter goal it could readily be argued that most decedents, especially fathers, would not wish to have

\textsuperscript{39} See note 16 supra.
\textsuperscript{40} See notes 29 & 30 supra and accompanying text.
\textsuperscript{41} See Gray v. Rudovsky, supra note 9, at 24.
\textsuperscript{42} See V. Sacks, supra note 26, at 143-47.
their illegitimate offspring included among their heirs. But if the statute is designed to reflect presumed intent, it must still do so within constitutional limits. If the normal testator's presumed intent is in fact frustrated by the provisions of section 2-109(2), it is clear that the fourteenth amendment requires that result. In *Shelley v. Kraemer*, the Supreme Court held that the equal protection clause prohibits court enforcement of restrictive covenants based on race. The reasoning of *Shelley* can be applied by analogy to the instant situation—a state is not allowed by statute or other state action to attribute a discriminatory intent to those who may not in fact have had such an intent. Given the additional fact that a testator who is so inclined can exclude illegitimate children from his estate by disinheriting them by will, there appears to be no reason whatever to inject a presumption of discriminatory intent into the intestacy laws. Rather, the burden of discrimination properly lies with the testator. Thus, it appears that the legal estate plan of the Code based on the definition of "child" in section 2-109(2) reaches a desirable result in light of both social values and presumed intent.

Section 2-109(1), which relates to inheritance by adopted persons, also seems to achieve a desirable disposition. That subsection is apparently designed to apply to three types of situations, only two of which deal directly with illegitimacy. The first situation involves the case in which the parents of a legitimate child are divorced, one of the parents subsequently remarries, and the new step-parent adopts the child. This situation, by its very nature, would not arise with regard to an illegitimate child. The second situation is the case in which one of the natural parents of a child, whether legitimate or illegitimate, dies, the surviving spouse remarries, and the new step-parent adopts the child. In such a case the child would only be the child of the surviving spouse and the step-parent, and not of the deceased natural parent. Thus, adoption would cause the child, whether legitimate or illegitimate, to lose his right to inherit through his deceased natural parent, to the extent that he has not already done so before the act of adoption takes place. The third situation involves the case in which an illegitimate child is born, one of the natural parents marries a spouse other than the other natural parent, and such new spouse adopts the child. In this case, the child would inherit by, from, and through only his married natural parent and step-parent, not from the other natural parent. Similarly, the other natural parent

43. 354 U.S. 1 (1948).
45. An individual is free to discriminate against anyone he pleases so long as no state action is involved. *See generally* *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Civil Rights Cases*, 109 U.S. 3 (1884).
could not inherit by, from, and through the child, at least by intestacy.

Section 2-109(1), insofar as it relates to illegitimates in the second and third situations just mentioned, appears to be desirable both from the standpoint of social justice and that of the presumed intent of the deceased. Furthermore, section 2-109(1) is not inconsistent with the statutory provisions presently in force in many states with regard to adopted children. At first glance, it might appear that section 2-109(1) fails to take adequate account of natural filial relationships in that adoption causes a child to lose his right to inherit by, through, or from his other natural parent. On the other hand, there are persuasive reasons why an adopted child should not inherit by, through, or from his other natural parent. In the first place, any social-justice argument that could be made to the contrary is neutralized by the fact that the illegitimate will be taking by intestacy by, through, or from someone—namely the adopting parent as well as his or her natural-parent spouse. In addition, insofar as section 2-109(1) is designed to reflect the presumed intent of both the adopting parent and the other natural parent it seems to do so—surely the adopting parent would wish to make his adopted child the object of his bounty, and it is almost as likely that the other natural parent would not wish for his estate to be distributed to a child who has been adopted, and in many cases reared, by another person. Finally, in many adoption cases, the other natural parent may not be known to the child—especially an illegitimate child—and it would seem to be a valid


47. In fact, the traditional rule in many states has been that an adopted child still retains his right to inherit by, from, and through his natural parents, and in some states this is still the rule. See, e.g., Ala. Code tit. 27, § 5 (Supp. 1969). The trend in recent years, however, has been to subordinate the interest of fostering natural filial relationships to that of fostering unity in the adopting family. The New York experience in this regard is instructive. Until 1963, New York law, in accordance with the traditional rule, provided that an adopted child inherited from his natural as well as his adopting parents. Ch. 147, § 1, [1961] N.Y. Laws 781-82. In 1963 the law was changed to provide that an adopted child retained the right to inherit from his natural parents only when a natural parent remarried and consented to the adoption of the child by his or her spouse. N.Y. DOM. REL. LAW § 117 (McKinney 1964). Finally, in 1966 the law was changed further to provide that "[w]hen a natural . . . parent . . . marries or remarries, and consents that the stepfather or stepmother may adopt such child, such consent shall not . . . affect the rights of such consenting spouse and such foster child to inherit from and through each other and the natural and adopted kindred of such consenting spouse." N.Y. DOM. REL. LAW § 117 (McKinney Supp. 1969). In addition to fostering family unity, the effect of the present New York provision, as well as that of UPC § 2-109, is to give the adopted child the same relative rights that a natural child of the same parents would have.

48. Adoption statutes and procedures generally produce a clean break between the natural parents and the child. Especially in the case of agency adoptions, the natural parents often do not know who the adopting parents are. See, e.g., Katz, Judicial and Statutory Trends in the Law of Adoption, 51 Geo. L.J. 64, 66-69 (1962).
state interest to attempt to protect the new family unit by not creating an economic incentive for the child to investigate his natural parentage. Thus, it is submitted that the Code's solution of treating an adopted child as the child of the adopting parent in place of the other natural parent is the best way of dealing with situations involving illegitimacy and adoption.

B. The Impact of Section 2-109 on Other Provisions of the Uniform Probate Code Relating to Intestate Succession

Section 2-109, which treats the illegitimate offspring as the child of the natural mother in all cases, and the child of the natural father if certain conditions of proof are met, cannot be viewed in a vacuum. Although that section could be severed from the rest of the Code, it forms an integral part of article 2 relating to intestate succession and wills. As mentioned above, the general definitional section of the Code in article 1 adopts the section 2-109 definition of "child" throughout the entire Code. In article 2 itself, the new and broader definition of "child" affects no less than fifteen other sections. It may be useful to survey some of those sections briefly to discern the over-all impact of section 2-109 on inheritance law and to point out certain areas where draftsmen may wish to adjust their planning to take the impact of section 2-109 into account.

The intestate share of the surviving spouse is determined by section 2-102. Since the share of the surviving spouse varies depending on the existence of issue of the decedent, treating illegitimates as heirs of a deceased father would change the spouse's

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49. Full integration of the adopted child into the adopting family is a major social objective of adoption. Lingering ties with one or both natural parents would seem to undermine that objective. See Katz, supra note 48.

50. See note 21 supra and accompanying text.

51. Naturally, since UPC § 2-109 defines "child" and since children are an essential beneficiary in any intestacy scheme, the substantive and procedural rules governing intestate succession which the UPC sets forth will be applicable to illegitimates as well as legitimate children. See, e.g., UPC § 2-104 (children must survive the testator for 120 hours in order to take an intestate share); UPC § 2-107 (halfbloods take as if they were of the whole blood); UPC § 2-111 (debts owed to the decedent will only be charged against the debtor's share); UPC § 2-801 (renunciation). Treating illegitimates as children under these provisions, however, does not create any special problems for draftsmen.

52. UPC § 2-102 provides:
The intestate share of the surviving spouse is:
1) if there is no surviving issue or parent of the decedent, the entire intestate estate;
2) if there is no surviving issue but the decedent is survived by a parent or parents, the first [$50,000], plus one-half of the balance of the intestate estate;
3) if there are surviving issue all of whom are issue of the surviving spouse also, the first [$50,000], plus one-half of the balance of the intestate estate;
4) if there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the intestate estate.

The same analysis would apply to UPC § 2-102A for community property states.
share considerably, at least when the father has no legitimate issue. Rather than taking the whole intestate estate under section 2-102(1) or the first 50,000 dollars plus one half of the remaining estate under sections 2-102(2) or (3) if illegitimates were not treated as heirs of the father, the widow would now take one half of the intestate estate under section 2-102(4). Thus, because of the effect that section 2-109 has on section 2-102, the married father of illegitimate offspring who wants his wife to inherit his entire estate would be forced to draft a will to achieve that particular disposition.

Section 2-103\(^5\) allocates that portion of the intestate estate which remains after the surviving spouse takes her share, or the entire estate if there is no surviving spouse. Under section 2-103(1), treating illegitimate children as heirs of the father will affect the size of the shares that pass to legitimate children. It is not difficult to imagine a case in which heirs who would otherwise take per capita would be relegated to taking by representation by virtue of the existence of an illegitimate child of a degree closer to the parent, since shares are determined pursuant to section 2-106, relating to representation, and the illegitimate simply would be added to the class of heirs at the appropriate level. Similarly, illegitimates can take by representation through their dead parents, thus creating another class of heirs in some cases, and reducing the per capita shares of the first degree accordingly. Perhaps even more important than its effect on section 2-103(1) is the possible effect of section 2-109 on sections 2-103(2), (3), and (4). Under those provisions, the share of the decedent's parents, his brothers and sisters, and his grandparents respectively are all contingent on the absence of surviving issue. Thus, if a man died leaving an illegitimate son and two aged parents, his entire estate would go to the

53. UPC § 2-103 provides:
The part of the intestate estate not passing to the surviving spouse under Section 2-102, or the entire intestate estate if there is no surviving spouse, passes as follows:
(1) to the issue of the decedent; if they are all of the same degree of kinship to the decedent they take equally, but if of unequal degree, then those of more remote degree take by representation;
(2) if there is no surviving issue, to his parent or parents equally;
(3) if there is no surviving issue or parent, to the brothers and sisters and the issue of each deceased brother or sister by representation; if there is no surviving brother or sister, the issue of brothers and sisters take equally if they are all of the same degree of kinship to the decedent, but if of unequal degree then those of more remote degree take by representation;
(4) if there is no surviving issue, parent or issue of a parent, but the decedent is survived by one or more grandparents or issue of grandparents, half of the estate passes to the paternal grandparents if both survive, or to the surviving paternal grandparent, or to the issue of the paternal grandparents if both are deceased, the issue taking equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation; and the other half passes to the maternal relatives in the same manner; but if there be no surviving grandparent or issue of grandparent on either the paternal or the maternal side, the entire estate passes to the relatives on the other side in the same manner as the half.
illegitimate son. In much the same manner, treating an illegitimate as an heir may prevent escheat under section 2-105. Draftsmen must be especially wary of section 2-103 since the existence of illegitimate heirs may cause distribution of the intestate estate contrary to the wishes or expectations of many decedents with illegitimate offspring. It is now necessary to advise such persons to write a will rather than rely on the intestacy laws.

Treating illegitimates as heirs of the father also has an important effect on section 2-108 relating to afterborn heirs. Under that provision, illegitimates who are conceived before a decedent’s death but born thereafter will be heirs as if they were born during the lifetime of the decedent. Thus, the juxtaposition of sections 2-108 and 2-109 could give rise to a spate of fraudulent claims by pregnant “gold diggers.” In such cases the “clear and convincing” proof requirement for establishing paternity under section 2-109 should prove its usefulness.

Section 2-109 also has an important impact on section 2-110 relating to advancements. Under section 2-110 an illegitimate, as an heir, is subject to having receipts treated as advancements in certain cases. The provision is sufficiently clear that support payments, for instance, would not be treated as advancements unless a writing to that effect can be produced. It should be noted, however, that an astute draftsman could make good use of section 2-110, since a father who is supporting illegitimate children in another household may wish to designate such support payments as advancements in order to make what he feels to be an equitable distribution of his estate. Section 2-110 would seem to allow him to make such a designation.

The effect of section 2-109 on section 2-112 dealing with alienage could also prove to be important and lead to some difficulties, since alien illegitimates would be entitled to take as heirs under that provision. In light of the number of American servicemen and travelers going abroad each year, it is not unlikely that

54. UPC § 2-105 provides: "If there is no taker under the provisions of this Article, the intestate estate passes to the [state]."

55. UPC § 2-108 provides: "Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent."

56. UPC § 2-110 provides:

If a person dies intestate as to all his estate, property which he gave in his lifetime to an heir is treated as an advancement against the latter’s share of the estate only if declared in a contemporaneous writing by the decedent or acknowledged in writing by the heir to be an advancement. For this purpose the property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever first occurs. If the recipient of the property fails to survive the decedent, the property is not taken into account in computing the intestate share to be received by the recipient’s issue, unless the declaration or acknowledgment provides otherwise.

57. UPC § 2-112 provides: "No person is disqualified to take as an heir because he or a person through whom he claims is or has been an alien."
such servicemen and travelers father a number of alien illegitimate children.\textsuperscript{58} However, it seems doubtful that many alien illegitimates will be able to sustain the “clear and convincing” proof burden of section 2-109(2)(ii). Moreover, international conflict-of-laws problems could arise in this area regarding choice of law, and could be especially troublesome if the child is born in a country that does not recognize paternity actions.

It should be noted that section 2-109 will also affect provisions of the Code other than those dealing strictly with intestate succession, since on the basis of that section, illegitimates may be able to take against a valid will in certain instances. For example, an illegitimate child could be a pretermitted heir under section 2-302\textsuperscript{59} just as a legitimate child could be. Section 2-302 could present the draftsman with substantial problems since that section not only presumes the existence of a will but further presumes that the omission of an afterborn illegitimate child in that will was unintentional, except in enumerated circumstances. If an afterborn illegitimate child is deemed to be a pretermitted heir, he is entitled to take against the will the value which he would have received if the testator had died intestate. Furthermore, under section 2-302(b) an illegitimate child is entitled to a like share if the testator omitted him from his will in the belief that the child was dead. It may be that, in light of the relationship between sections 2-109 and 2-302, draftsmen will insert in many wills a provision to the effect that afterborn illegitimate children are purposely excluded from the testator’s will, in order to make certain the circle of heirs in a given estate plan. This procedure would also provide a solution to the pregnant “gold digger” problem, alluded to earlier,\textsuperscript{60} which might arise in this context as well.

Illegitimates may also be able to take the homestead allowance, exempt-property allowance, and family allowance against a will.

\textsuperscript{58} See, e.g., V. Saario, supra note 26, at 15.

\textsuperscript{59} UPC § 2-302 provides:

(a) If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless:

(1) it appears from the will that the omission was intentional;

(2) when the will was executed the testator had one or more children and devised substantially all his estate to the other parent of the omitted child; or

(3) the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(b) If at the time of execution of the will the testator fails to provide in his will for a living child solely because he believes the child to be dead, the child receives a share in the estate equal in value to that which he would have received if the testator had died intestate.

(c) In satisfying a share provided by this section, the devises made by the will abate as provided in Section 3-902.

\textsuperscript{60} See text following note 55 supra.
pursuant to sections 2-401, 2-402, and 2-403 respectively. Under section 2-401, if there is no surviving spouse, the minor or dependent illegitimate children have a right to share the homestead allowance of 5,000 dollars with other legitimate minor or dependent children. Thus, illegitimate children may be entitled to a homestead allowance when there otherwise would be none, as in the case in which a single man who was the father of a minor illegitimate child disposed of his entire estate by will. Similarly, under section 2-402 an illegitimate child is entitled to share in the exempt-property allowance for an estate up to a total of 3,500 dollars if there is no surviving spouse. In contrast to the homestead allowance, in order to be entitled to the exempt-property allowance illegitimates need not be minors or dependent on the decedent. Fur-

61. UPC § 2-401 provides:

A surviving spouse of a decedent who was domiciled in this state is entitled to a homestead allowance of $5,000. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to (5,000) divided by the number of minor and dependent children of the decedent. The homestead allowance is exempt from and has priority over all claims against the estate. Homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by the will of the decedent unless otherwise provided, by intestate succession or by way of elective share.

62. UPC § 2-402 provides:

In addition to the homestead allowance, the surviving spouse of a decedent who was domiciled in this state is entitled from the estate to value not exceeding $3,500 in excess of any security interests therein in household furniture, automobiles, furnishings, appliances and personal effects. If there is no surviving spouse, children of the decedent are entitled jointly to the same value. If encumbered chattels are selected and if the value in excess of security interests, plus that of other exempt property, is less than $3,500, or if there is not $3,500 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the $3,500 value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, except that the right to any assets to make up a deficiency of exempt property shall abate as necessary to permit prior payment of homestead allowance and family allowance. These rights are in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share.

63. UPC § 2-403 provides:

In addition to the right to homestead allowance and exempt property, if the decedent was domiciled in this state, the surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by him are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments. It is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children; otherwise to the children, or persons having their care and custody; but in case any minor child or dependent child is not living with the surviving spouse, the allowance may be made partially to the child or his guardian or other person having his care and custody, and partially to the spouse, as their needs may appear. The family allowance is exempt from and has priority over all claims but not over the homestead allowance. The family allowance is not chargeable against any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share. The death of any person entitled to family allowance terminates his right to allowances not yet paid.
thermore, illegitimates would be able to take advantage of the family-allowance provision of section 2-403 up to a total of 6,000 dollars during the period of administration of the estate. If the spouse survives, the family allowance is paid to her (or him) for the care of herself and the children living with her. But if the minor or dependent illegitimate child is not living with the surviving spouse, the allowance is apportioned between such spouse and such child. This situation would be fairly common in cases in which the parents of the illegitimate child do not live together. If no spouse survives, the family allowance is paid directly to children who qualify. It should be noted that the homestead, exempt-property, and family allowances all are created by statute and, as such, entitle qualified persons to take against the will regardless of a testator's contrary intent.

From this brief survey of other relevant Code sections to which section 2-109 relates, it is clear that the repercussions of treating illegitimates as heirs of the natural parents whenever possible can have a profound effect on the distribution of estates. Thus, estate planners must be alert to the implications of section 2-109 in order to develop secure estate plans. Section 2-109 assures that if a testator wishes to discriminate against his illegitimate offspring, the law will not accomplish that task for him.

III. The Illegitimate and the Class Gift to Children Under the Uniform Probate Code

Part 6 of article 2 of the Code deals with rules of construction for wills and contains the other crucial Code provision dealing with illegitimates—section 2-611. As the general comment to part 6 suggests, “all of the ‘rules’ set forth yield to a contrary intent expressed in the will and are therefore merely presumptions.” Nonetheless, rules of construction are an important aspect of inheritance law, for all too often testators fail to make clear their intentions in a will, and courts need some guidance in the form of legal presumptions in construing wills. Section 2-611 is that rule of construction which defines “child” in a class-gift terminology. That section provides that:

Halfbloods, adopted persons, and persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules for determining relationships for purposes of intestate succession, but a person born out of wedlock is not treated as the child of the father unless the person is openly and notoriously so treated by the father.65

64. UPC art. 2, pt. 6, general comment.
65. UPC § 2-611.
Thus, section 2-611 adopts the basic formula of section 2-109 and adds another condition that the illegitimate must fulfill before he can be presumed to take under a bequest to children. The import of the provision is clear: the illegitimate child will always be included in a bequest to "children" by the mother; on the other hand, the same illegitimate child will only be included in a bequest to "children" by the father if the illegitimate can first establish paternity under section 2-109 and if the father openly and notoriously treats the child as his own. Section 2-611 by its terms only requires that an illegitimate be treated openly and notoriously as the child of the father in order to be included under a class gift to children. But the definition of "child" as used in section 2-611 comes from section 1-201(3) which extends the section 2-109 definition of "child" throughout the Code. Thus, it seems that an illegitimate must satisfy requirements of both sections 2-109 and 2-611 in order to be included in a class gift to children.

Since a statutory presumption such as that found in section 2-611 constitutes state action no less than judicial enforcement of a restrictive covenant, such a presumption must stand up to constitutional scrutiny under the fourteenth amendment. Section 2-611 poses no due process problems since it creates only a rebuttable presumption. It may, however, be constitutionally suspect under the equal protection clause. The rationale behind the presumption in section 2-611 seems to be the "family-unit" theory, which assumes that a testator normally wishes his bounty to pass to those within his family unit. As a general rule, the family-unit theory may be factually supportable, and may form a good basis for attempting to discern the actual intent of most testators. But unfortunately the "open and notorious" requirement of section 2-611 represents an imprecise application of the family-unit doctrine in that it requires too heavy a burden of proof from too small a group of people. One problem with section 2-611 is that only illegitimates need show open and notorious treatment by the father. If the provision is meant to foster the family-unit theory, why should not such a showing be required from all of a testator's children, legitimate and illegitimate alike? If a testator deserts both legitimate and illegitimate children, it would not be reasonable to allow only the legitimate children to take under a bequest to "children" when neither group actually has been treated as children by the father. On the other hand, a showing that the testator deserted

66. See also UPC § 3-101 which provides that the UPC will apply to wills drafted before the UPC becomes effective.

67. See note 21 supra and accompanying text.

68. See text accompanying note 43 supra.

69. See note 34 supra.

70. See Gray & Rudovsky, supra note 9.
all his children may be sufficient to rebut the presumption in section 2-611 against the illegitimate children. Thus, in large measure, the constitutionality and desirability of section 2-611 turns on the type and quantum of evidence that is required by a court to rebut the presumption contained therein.

Assuming that section 2-611 is neither undesirable nor unconstitutional even though it discriminates on the basis of legitimacy, one further problem remains with the formulation of that section. The requirement that the father treat the illegitimate as his child "openly and notoriously" in order for the child to be deemed an heir under a bequest to children may be challenged from the standpoint of desirability, not on the basis of any discrimination, but rather on its face as too strict a standard. It is arguable that such a requirement may be unrealistic since the imposition of that requirement may assume that the social stigma attached to bastardy has disappeared to a greater extent than it actually has. In today's world it does not seem unlikely that a father might love and willingly support an illegitimate child and still not treat him as his own "openly and notoriously." Social convention is still too potent a force for many people openly to admit paternity of a bastard. Thus, a lesser showing of family unity than "open and notorious" treatment as a child would probably be more desirable under section 2-611. Clearly some recognition by the father of the parent-child relationship should be required. However, since the facts of each case are likely to be quite varied, it would be preferable to treat this issue on a case-by-case basis in order to determine the actual intent of the father, rather than to impose a strict per se standard such as the "open and notorious" requirement. Moreover, it must be remembered that since section 2-611 raises only a rebuttable presumption, testators are free explicitly to define "children" in their wills to include or exclude illegitimates as they see fit.

Thus it appears that although section 2-611 does create a classification based on illegitimacy, the discrimination it fosters is probably not so unreasonable as to violate the equal protection clause. Insofar as the presumption of section 2-611 has a factual basis, allows a court to discern the testator's actual intent in each case, and is rebuttable, it should be upheld in the courts. On the other hand, the standard of the presumption could be improved by modifying the "open and notorious" requirement to one which recognizes that many fathers may be unwilling, for a variety of social reasons, openly to acknowledge illegitimate children. Alternatively, the "open and notorious" requirement or a modification thereof could be applied to legitimate children as well in order to extend the family-unit theory to its logical limit.

71. See V. SASSO, supra note 26, at 143-47.
IV. CONCLUSION

Illegitimacy has always been a fact of life in civilized society. So, too, has bastardy carried with it a special social stigma. But modern society has been gradually eliminating its outworn taboos. At the same time, the number of illegitimate births continues to rise as illegitimacy proves to be more socially acceptable. In light of the large number of illegitimate children born in the United States every year, American law, including inheritance law, can no longer afford to treat the bastard as filius nullius solely on account of an accident of birth. The bastard must be welcomed into society on a level of parity with his legitimate brothers. The provisions of the Uniform Probate Code dealing with illegitimates make a solid attempt to achieve that level of parity in the field of inheritance law. With only minor modifications necessary to avoid possible constitutional problems, the provisions of the Code appear to establish an appropriate model for reform in this important area, whether they be adopted in conjunction with the rest of the Uniform Probate Code or grafted onto an existing state probate system.


73. In 1963 there were 259,400 illegitimate live births in the United States. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 47, 51 (1965).