

INHERITANCE BY ILLEGITIMATES IN MISSISSIPPI

MAPL March 13, 2017

Watts C. Ueltschey

“Mater semper certa est” is Latin for the mother is always certain. The corollary is the father is not always certain. Under Roman law intestate inheritance through the father was to his “legal” heirs, or the children born of his marriage. The Romans recognized different types of marriage based on class. Illegitimates had no standing to inherit from the father unless adopted. By the second century inheritance by illegitimates through the mother was recognized. *See Illegitimacy and Inheritance Disputes in the Late Roman Empire*, Judith Evans-Grubbs 6/8/2014; *Illegitimacy in Rome*, Emily Kittrell-Queller 10/15/2015. At common law illegitimates could not inherit real property. *Legitimacy, Wikipedia*.

At common law they [illegitimates] were the children of nobody, not even their own mother, and had no kindred. They could inherit nothing, nor could any one inherit from them, save their own legitimate offspring. They were the beginning of their race; not even kin to human kind; monsters, so to speak, conceived in sin, and born in iniquity, with no rights, no name and no people. *Illinois Cent. R.Co. v. Johnson* (Miss. 1900), 28 So.753,754.

Mississippi caught up to the second century Romans in 1857 when illegitimates were allowed to inherit from their mother and her kindred. *See Encyclopedia of Mississippi Law, Section 1:10 Illegitimates*, Robert A. Weems, for an in depth analysis of the rights of illegitimates.

In 1981, the legislature passed Section 91-1-15 MCA which recognized the rights of the illegitimate to inherit from their mother and kindred and the right of the mother and kindred to inherit from the illegitimate. Also illegitimates were allowed to inherit from and through their fathers (and the father and his kindred to inherit from and through the illegitimate) if:

- a) The natural parents participated in a marriage ceremony before the birth of the child, even though the marriage was subsequently declared null and void or dissolved by a court; or
- b) There has been an adjudication of paternity or legitimacy before the death of the intestate; or
- c) Paternity has been judicially established after the death of the intestate, based upon clear and convincing evidence, in an heirship proceeding under Sections 91-1-27 and 91-1-29 within one (1) year of the date of his death (or ninety (90) days after first publication of notice to creditors if the estate is administered.)

Basically the same requirements must be met for an adjudication of paternity made by an out of state court after the death of the intestate. A three year statute of limitations was established for claims existing on July 1, 1981. This statute would have run on July 1, 1984. Based on a case

discussed below, it does not appear that this limitations period is any longer subject to constitutional challenge.

Section 91-1-15 MCA was amended by *Chapter 339, General Laws of 1983*. The preamble to the bill states in part:

WHEREAS, the Legislature recognized that the decisions and statutes of this state existing prior to said amendment [91-1-15] placed an insurmountable barrier to inheritance by illegitimates...in violation of equal protection under the law; and...

WHEREAS, the Legislature recognized that at the time it was considering said amendment [91-1-15], that by creating said remedy the Legislature was opening the door to the possible litigation of stale or fraudulent claims and that a further effect of bestowing said remedy upon all illegitimates would possibly be to create a certain amount of confusion and uncertainty as the status of titles to real property; however, the Legislature intended to bestow upon illegitimates a new and additional remedy whereby such illegitimates could maintain their rights of inheritance notwithstanding such interests of the state in preventing stale and fraudulent claims and avoiding uncertainty as to the titles of real property and, accordingly, the Legislature enacted appropriate periods of limitation within which illegitimates could bring their claims...

The amendment added certain definitions and the additional provision:

The remedy created herein is separate, complete and distinct, but cumulative with the remedies afforded illegitimates as provided by the Mississippi Uniform Law on Paternity; provided, however, the failure of an illegitimate to seek or obtain relief under the Mississippi Uniform Law on Paternity shall not diminish or abate the remedy created herein.

In *Estate of Thomas v. Thomas*, 883 So. 2d 1173 (Miss. 2004) the Mississippi Supreme Court held that the administratrix has a duty to provide notice to potential heirs, and failure to provide notice tolls the 90-day statutory time period. In apparent response to *Thomas*, the Mississippi Legislature amended Section 91-1-15 (*Chapter 543, General Laws of 2005*) by adding the following concerning the statute of limitations:

This one-year limitation shall be self-executing and may not be tolled for any reason, including lack of notice.

The most recent amendment to Section 91-1-15 MCA is *Chapter 388, General Laws of 2008*. This amendment added an additional provision regarding notice:

If an administrator is appointed for the estate of the intestate and notice to creditors is given, then the limitation period shall be reduced to ninety (90) days after the first publication of notice, if less than one (1) year from the date of the intestate's death; provided actual, written notice is given to all potential illegitimate heirs who could be located with reasonable diligence.

The effect of notice to "all potential illegitimate heirs who could be located with reasonable diligence" is problematic. How is the administrator to undertake reasonable diligence to investigate illegimates? Publication? Ultimately, you will need to rely on the one year limitation rather than the 90 day limitation or upon determination of heirship under Sections 91-1-27 and 91-1-29 MCA.

The 2008 also amended Section 91-1-15 to add the following:

Nothing in this section shall preclude the establishment of paternity solely for the purpose of the illegitimate receiving social security benefits on behalf of the illegitimate's natural father after one (1) year following the natural father's death.

Section 91-1-15 does present me with a problem of construction:

... However, if an illegitimate shall die unmarried and without issue, and shall also predecease the natural father, the natural mother or her kindred shall not inherit any part of the natural father's estate from or through the illegitimate. In the event of the death of an illegitimate, unmarried and without issue, any part of the illegitimate's estate inherited from the natural father shall be inherited according to the statutes of descent and distribution.
Section 91-1-15(2)

I construe this provision to mean that property of the illegitimate coming through the father shall be only inherited by the father's side, ignoring the mother's side for inheritance purposes. A like provision prohibiting inheritance by the natural father of the mother's estate through a predeceased illegitimate is set out in Section 91-1-15(d)(ii).

Estate of McCoy v. McCoy, 988 So.2d 929 (Miss. Ct. App. 2008), denied a natural father's inheritance of his illegitimate daughter's judgment in the wrongful death suit settled after her death. While Section 91-1-15(3) MCA states that the natural father of an illegitimate and his kindred inherit from and through the illegitimate if (a) the natural parents had a marriage ceremony before the birth of the child; or (b) there has been adjudication of paternity or legitimacy before death of the intestate; or (c) there has been adjudication of paternity after death of the intestate in an heirship proceeding. However, the court held that due to the father neglecting and/or refusing to support his illegitimate daughter during her lifetime, he was not entitled to share in the wrongful death benefits.

Mississippi Code § 91-1-15 authorizes inheritance by an illegitimate through the natural father if there is an adjudication of paternity filed within one year after the death of the intestate or within ninety (90) days after first publication of notice to creditors, whichever is less. In *Estate of McCullough v. Yates*, 32 So. 3d 403 (Miss. 2009), an illegitimate attempted to claim heirship by representation upon the intestate death of the sister of her putative father who died over twenty (20) years earlier. The Supreme Court held that the relief sought by the illegitimate niece was time barred for failure of a determination of paternity within the time restraints posed by § 91-1-15 at the time of the death of her putative father over twenty (20) years earlier. The court rejected constitutional claims under the Equal Protection and Due Process Clauses of the 14th Amendment of the United States Constitution. In order for the illegitimate to inherit from her putative aunt, through representation, she first had to establish paternity through her putative father who had died long ago and the illegitimate was therefore time barred.

The rights of illegitimates are also governed by the Mississippi Uniform Law of Paternity in Sections 93-9-1 through 93-9-49 MCA. The father of an illegitimate is liable for support and maintenance to the same extent as the father of a legitimate child (Section 93-9-7). Paternity may be determined upon the petition by the mother, father, child or public authority charged with the support of the child and must be made only upon clear and convincing evidence (Section 93-9-9). Recovery may be had from the father's estate (Section 93-9-13). The court may order genetic tests (Section 93-9-21). Mississippi will give full faith and credit to determinations of paternity (administrative or judicial) in foreign jurisdictions (Section 93-9-20). This last section appears to be at odds with Section 91-1-15(c):

...No claim of inheritance based on an adjudication of paternity, after death of the intestate, by a court outside the State of Mississippi shall be recognized unless:

- (i) Such court was in the state of residence of the intestate at the time of the intestate's death;
- (ii) The action adjudicating paternity was filed within ninety (90) days after the death of the intestate;
- (iii) All known heirs were made parties to the action; and
- (iv) Paternity or legitimacy was established by clear and convincing evidence.

It is not unusual to find determinations of heirship filed by the Department of Human Services filed in the Chancery Court Docket.
