

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

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**CASE NO. 2009-CA-149**

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**IN THE MATTER OF THE ESTATE OF  
THELMA M. McCULLOUGH, DECEASED**

**ARLEAN MORANT LEACH, ET AL.**

Appellants

**VERSUS**

**GERALDINE YATES, ADMINISTRATRIX and  
JIM HOOD, ATTORNEY GENERAL OF MISSISSIPPI**

Appellees

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**BRIEF OF APPELLEE, JIM HOOD  
ATTORNEY GENERAL OF MISSISSIPPI**

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**On Appeal from the Chancery Court of the First Judicial  
District of Hinds County, the Honorable Patricia D. Wise**

**Oral Argument Not Requested**

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## STATEMENT OF THE ISSUES

1. Appellants have failed to show that Mississippi Code § 91-1-15 violates the Equal Protection Clause of the Fourteenth Amendment. As set forth in *Lalli v. Lalli*, 439 U.S. 259 (1978), statutes that require a judicial determination of paternity in order for an illegitimate child to inherit from his or her father's intestate estate do not violate the Equal Protection Clause.

2. Appellants have failed to demonstrate that Mississippi Code § 91-1-15 violates the Due Process Clause of the Fourteenth Amendment because it withstands scrutiny under the Equal Protection Clause and because it provides constitutionally adequate notice to illegitimate children and an opportunity to be heard.

## **STATEMENT OF THE CASE**

On February 12, 2007, the Appellants filed an Amended Petition Requesting Reconsideration of Prior Order; Determination and Adjudication of Heirship in Petitioners; or Alternatively , Contesting the Constitutionality of Statute ("Amended Petition"). In their Amended Petition, the Appellants argued that Mississippi Code § 91-1-15 violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. The Attorney General of the State of Mississippi, pursuant to Mississippi Rule of Civil Procedure 24(d) and Mississippi Code § 7-5-1, filed a Response to the Appellants' constitutional challenge, arguing that § 91-1-15 did not violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Chancellor Patricia Wise entered a Final Judgment upholding the constitutionality of § 91-1-15. (R. 227-37.) Aggrieved by the result, the Appellants filed this appeal.

## **SUMMARY OF THE ARGUMENT**

Mississippi Code § 91-1-15 does not violate the Equal Protection Clause because the United States Supreme Court has held that a statute which requires a judicial determination of paternity before the father's death in order for an illegitimate child to inherit from his or her father's intestate estate does not violate the Equal Protection Clause. Moreover, this Court has stated that § 91-1-15 affords illegitimate children equal protection under the law. Mississippi Code § 91-1-15 does not violate the Due Process Clause because it passes scrutiny under the Equal Protection Clause and because it provides illegitimate children constitutionally adequate notice and opportunity to be heard.

## ARGUMENT

- I. Mississippi Code § 91-1-15 does not violate the Equal Protection Clause because the requirement that there be an adjudication of paternity in order for an illegitimate to inherit from his or her natural father or his kindred is substantially related to the important state interests the statute was designed to promote.**

Mississippi Code § 91-1-15(3) provides that illegitimate children shall not inherit by intestate distribution from their natural fathers and his kindred unless (1) the child's natural parents get married, (2) "there has been an adjudication of paternity or legitimacy" before the death of their natural father, or (3) "there has been an adjudication of paternity after the death of the intestate, base upon clear and convincing evidence, in an heirship proceeding . . . ." Miss. Code Ann. § 91-1-15(3)(a)-(c). If there has not been an adjudication of paternity before the death of the natural father, no "claim of inheritance shall be recognized unless [an] action seeking an adjudication of paternity is filed within one (1) year after the death of the intestate or within ninety (90) days after the first publication of notice to creditors to present their claims, whichever is less . . . ." Miss. Code Ann. § 91-1-15(3)(c). The statute further provides that the one-year limitation "may not be tolled for any reason, including lack of notice." *Id.*

The Appellants argue that § 91-1-15 violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution because it impermissibly treats illegitimate children differently from legitimate children by imposing requirements on illegitimate children for them to inherit from their natural fathers (when they die intestate) to which legitimate children are not subject. (Appellants' Br. at pp. 9-13.) It appears that the Appellants are making a facial

challenge to § 91-1-15 rather than an as-applied challenge.<sup>1</sup>

There is a strong presumption of validity when reviewing the constitutionality of a legislative enactment. *Richmond v. City of Corinth*, 816 So.2d 373, 375 (Miss. 2002). A party making a challenge to the constitutionality of a statute must prove the unconstitutionality of the statute beyond a reasonable doubt. *Id.* Courts must make every effort to construe statutes as to uphold their constitutionality. *Id.* See also *I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg & Const. Trades Council*, 485 U.S. 568, 575 (1988). “The party challenging the statute must overcome a presumption ‘that the legislature considered the effect of the statute, and that it acted with constitutional provisions and a desire to be fair and equitable.’” *Phipps v. Irby Const. Co.*, 636 So.2d 353, 363 (Miss. 1993) (quoting *Miss. State Tax Comm’n v. Tenn. Gas Transmission Co.*, 239 Miss. 191, 198-99, 116 So.2d 550, 553 (1959)). The facial validity of a statute will be upheld unless the challenging party can establish that there exists no set of circumstances under which the statute would be valid. *U.S. v. Salerno*, 481 U.S. 739, 745 (1987). Moreover, if the particular facts of a case make it possible to resolve the matter without reaching the constitutional issue, then it is incumbent upon the court to do so. See *Western Line Consol. School Dist. v. Greenville Mun. Separate School Dist.*, 433 So.2d 954, 957 (Miss. 1983) (“if it is not necessary to rule upon the constitutionality of a statute, it is necessary that a court not rule on it”).

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<sup>1</sup>The Appellants make the following argument: “If however that result is not this Court’s conclusion and the constitutional issue becomes the central focus, it is incumbent upon the Petitioners [sic] to establish that § 91-1-15 presents a set of circumstances that cannot be considered valid, as required by *U.S. v. Salerno*, 481 U.S. 739, 745 (1987).” (Appellants’ Br. at pp. 9-10.) In *Salerno*, the Supreme Court discussed the difficulty of prevailing on a facial constitutional challenge to a statute: “A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.” *U.S. v. Salerno*, 481 U.S. 739, 745 (1987).



In *Trimble v. Gordon*, 430 U.S. 762 (1977), the United States Supreme Court struck down on equal protection grounds an Illinois statute which provided that illegitimates could not inherit from their natural fathers (when they died intestate) if they were not legitimated by the subsequent marriage of their parents. *Id.* at 776. The Court held that the Illinois statute violated the Equal Protection Clause because its discriminatory treatment of illegitimates was not substantially related to permissible state interests. *Id.* at 767-73. The state argued that the statute fostered two interests: (1) “the promotion of legitimate family relationships” and (2) the “orderly distribution of property at death.” *Id.* at 769, 771. With respect to the first interest, the Court held that the statute “b[ore] only the most attenuated relationship to the asserted goal” because penalizing illegitimate children for being born out of wedlock would not deter unmarried people from having children: “The parents have the ability to conform their conduct to societal norms, but their illegitimate children can affect neither their parents’ conduct nor their own status.” *Id.* at 768, 770. The Court further held that the second interest advanced by the state was more substantial but that this interest could be promoted by means other than completely disinheriting illegitimate children if their natural parents did not marry each other:

We think, however, that the Illinois Supreme Court gave inadequate consideration to the relation between § 12 and the State's proper objective of assuring accuracy and efficiency in the disposition of property at death. The court failed to consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity. For at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws. Because it excludes those categories of illegitimate children unnecessarily, § 12 is constitutionally flawed.

*Id.* at 770-71.

But the Court did note that the “problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their fathers’ estates than that required either for illegitimate children claiming under their mothers’ estates or for legitimate children generally.” *Id.* at 770. It also acknowledged that “[t]he orderly disposition of property at death requires an appropriate legal framework, the structuring of which is a matter particularly within the competence of the individual States.” *Id.* at 771. For this reason, the Court stated that “courts should accord substantial deference to a State’s statutory scheme of inheritance.” *Id.*

One year later, the Court again addressed the constitutionality of a state statute that affected the intestate succession rights of illegitimate children. In *Lalli v. Lalli*, 439 U.S. 259 (1978),<sup>2</sup> the Court upheld a New York statute that required a judicial determination of paternity before the father’s death in order for an illegitimate child to inherit from his or her father’s intestate estate. *Id.* at 275-76. It held that the statute did not violate the Equal Protection Clause because the requirement of a paternity adjudication was “substantially related to the important state interests the statute is intended to promote.” *Id.* The Court found that requiring paternity disputes to be settled during the natural father’s lifetime served the following substantial interests: (1) improving the reliability of the fact-finding process, (2) promoting the fair and final administration and settlement of estates by minimizing the possibility of delay and uncertainty; and (3) reducing fraudulent paternity claims. *Id.* at 270-72. In the view of the Court, the statute struck the proper balance between protecting the inheritance rights of illegitimate children and advancing the just and orderly disposition of property in intestate estates. *Id.* at 274.

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<sup>2</sup>Amazingly, the Appellants do not cite *Lalli* in their brief. It is clear that *Lalli* is controlling authority on the issue of whether § 91-1-15 passes muster under the Equal Protection Clause.

Following the Supreme Court decisions in *Trimble* and *Lalli*, in 1981 the Mississippi Legislature revised § 91-1-15 to remove the barrier to inheritance by children born out of wedlock who were not legitimized through marriage of their natural parents. See *Larsen v. Kimble*, 447 So. 2d 1278, 1279 (Miss. 2004). A 1983 amendment made no substantive changes to § 91-1-15 but clarified the Legislature's intent that the 1981 amendment afford illegitimate children equal protection under the law, that the amendment should be applied retroactively, and that the time limitations were enacted to guard against stale or fraudulent claims. *Id.* at 1280-81. Shortly after the 1981 and 1983 amendments, this Court handed down its opinion in *Larsen v. Kimble*, where it stated that § 91-1-15, as amended, did not violate the Equal Protection Clause:

The 1981 amendment and the 1983 clarification thereof clearly eliminated the "unsurmountable" statutory barrier condemned in *Trimble v. Gordon*, supra, while at the same time shortened the limitation period within which to bring a claim and increased the standard of proof to sustain such a claim. In doing so we believe that the amendment in 1981 and clarification amendment in 1983 will effectively afford the illegitimates equal protection of the law, while at the same time accomplish the legitimate state interest of (1) avoiding the litigation of stale or fraudulent claims, (2) the fair and just disposal of an intestate decedent's property; and (3) the repose of titles to real property. *Estate of Kidd v. Kidd*, supra. Justice will thereby prevail wherein all may take comfort, legitimates and illegitimates alike, that they will be treated equally under the laws of the State of Mississippi.

*Id.* at 1283. The Court also observed that the burdens imposed by § 91-1-15 on illegitimate children trying to inherit from their natural fathers who died intestate were much lighter than the ones imposed by the New York statute at issue in *Lalli*, notes that § 91-1-15 allows for an adjudication of paternity after the intestate's death. *Id.* at 1279 n. 1.

This Court has also passed on the constitutionality of § 91-1-15 in another case. In *Leflore ex rel. Primer v. Coleman*, 521 So.2d 863 (Miss. 1988), the Court stated that § 91-1-15 passes constitutional muster: "Plaintiffs in their brief ask this court to strike down the 90 day

limitation of Section 91-1-15 as unconstitutional and particularly when applied to the Mississippi Wrongful Death Statute. The court is of the opinion that the statute is constitutional with reference to inheritance by illegitimates.” *Id.* at 866 (citing *Lalli*, 439 U.S. at 275-76).

In light of the decisions of the United States Supreme Court – namely, *Lalli*, which is directly on point – and this Court, § 91-1-15 clearly does not violate the Equal Protection Clause. Most importantly, the means accorded to illegitimate children to establish paternity and thus inherit from their natural fathers (when they die intestate) are much broader than those provided by the New York statute upheld in *Lalli*. See *Larsen*, 447 So. 2d at 1279 n. 1. Accordingly, § 91-1-15's requirement of a paternity adjudication in order for an illegitimate child to inherit from his or her father's intestate estate is “substantially related to the important state interests the statute is intended to promote.” *Lalli*, 439 U.S. at 275-76.

The Appellants contend that because social mores have changed since *Lalli* was decided, the constitutionality of § 91-1-15 is now suspect: “The question herein becomes whether or not it is constitutional for the Petitioners [sic] to be denied their inheritance, strictly because their parents were never married. In today's climate, this issue is ripe for review, as more and more couples are having children without marriage [sic].” (Appellants' Br. at p. 10.) Although social mores may have changed somewhat in the last thirty years, no court in this country in the last twenty years has held, let alone expressed doubt, that statutes similar to § 91-1-15 violate the Equal Protection Clause.<sup>3</sup> Accordingly, the Appellants cannot establish that there exists no set of

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<sup>3</sup> See, e.g., *Prudential Ins. Co. of Amer. v. Moorhead*, 916 F.2d 261, 264-66 (5th Cir. 1990) (upholding based on *Lalli* requirement that paternity be established before father's death in order illegitimate child to be eligible beneficiary under military personnel life insurance policy; advent of DNA analysis does not alleviate need for paternity testing during father's lifetime); *Estate of Sanders v. Sanders*, 3 Cal. Rptr. 2d 536, 544-45 (Cal. Ct. App. 1992) (upholding statute requiring paternity to be established during the lifetime of the natural father against equal protection challenge, despite scientific advances such as DNA testing); *S.V. v. Estate of Bellamy*, 579 N.E.2d 144,

circumstances under which §91-1-15 would be valid and thus cannot overcome the strong presumption of validity that it is constitutional. For the foregoing reasons, this Court should uphold the constitutionality of § 91-1-15 and affirm the Chancellor's Final Judgment, insofar as she held that § 91-1-15 affords illegitimate children equal protection under the law.

**II. Mississippi Code § 91-1-15 does not violate the Due Process Clause of the Fourteenth Amendment because it does not violate the Equal Protection Clause and it provides constitutionally adequate notice to illegitimate children and an opportunity to be heard.**

First, the Appellants did not brief this issue, much less offer any authority for their argument. Therefore, this Court should not consider this issue. *E.g., Caracci v. Int'l Paper Co.*, 699 So. 2d 546, 558 (Miss. 1997). Notwithstanding the Appellants failure to brief this issue, the Attorney General will address this argument. It is unclear if the Appellants are asserting a substantive due process right violated by the statute in question. However, to the extent that the Appellants might be able to establish a substantive right protected by the Due Process Clause, that challenge must also fail because the statute satisfies the above-described intermediate scrutiny. *See Harris v. Miss. Valley State Univ.*, 873 So.2d 970, 984-85 (Miss. 2004) (statute survives substantive due process claim if government deprivation of property interest or non-fundamental liberty interest is reasonably related to legitimate state interest).

To the extent Appellants argue that the time limits in § 91-1-15 operate as a denial of

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146-48 (Ind. App. 1991) (five-month statute of limitations for illegitimate child to bring posthumous paternity action to inherit from father's estate did not violate equal protection); *Sudwischer v. Estate of Hoffpauir*, 692 So. 2d 590, 594-95 (La. Ct. App. 1997) (holding that statute which required illegitimate child to prove filiation as to alleged deceased parent by clear and convincing evidence did not violate equal protection); *Wingate v. Estate of Ryan*, 676 A.2d 144, 150-51 (N.J. Sup. Ct. App. Div. 1996), *overruled on other grounds by* 693 A.2d 457 (N.J. 1997) (holding that statute which prohibits paternity actions brought more than five years after child attains age of majority does not violate equal protection); *In re Estate of Murcury*, 868 A.2d 680, 683-84 (Vt. 2004) (holding statute that required illegitimate children to establish paternity in order to inherit did not violate equal protection).

procedural due process, although the Mississippi Legislature recently amended the statute to bar tolling of the time limitation due to lack of notice, this Court has addressed the notice requirements necessary to satisfy Fourteenth Amendment concerns in previous cases. See *In re Estate of Thomas*, 883 So.2d 1173, 1179 (Miss. 2004) (due process demands notice of the administration of their father's estate be given to known children born out of wedlock; lack of notice tolls applicable limitations period); *Smith ex rel. Young v. Estate of King*, 579 So.2d 1250, 1253-54 (Miss. 1991) (due process required administratrix to provide actual notice to known or reasonably ascertainable children born out of wedlock who were potential heirs and whose claims would be barred by the running of the ninety-day period). Thus, this Court's analysis and application of §91-1-15, when read *in pari materia*, with the other statutes governing descent and distribution, provides children born out of wedlock adequate notice and opportunity to be heard. The State is not required to provide a tolling provision for minors in order to satisfy the due process guarantee of a meaningful opportunity to be heard. See *Barbour v. Williams*, 196 Miss. 409, 17 So. 604, 606 (1944) (minority does not per se bestow immunity from statute of limitations); *Murray v. City of Milford, Conn.*, 380 F.2d 468, 473 (2nd Cir. 1967) (quoting *Vance v. Vance*, 108 U.S. 514, 521 (1883) (minors have no special constitutional rights beyond others requiring tolling of statute of limitations, but such provision is left to legislature); *Vogel v. Linde*, 23 F.3d 78, 80 (4th Cir. 1994) (same); *Douglas v. Stallings*, 870 F.2d 1242, 1250 (7th Cir. 1989) (upholding Indiana's medical malpractice statute of limitations). Further, the Appellants do not claim that they lacked notice of their father's estate such that they could not have timely sought an adjudication of paternity at the time of his death.

Because the Appellants have not shown that there exists no set of circumstances under

which § 91-1-15 would be valid, they cannot overcome the strong presumption of validity, and this Court should uphold the constitutionality of the statute. Alternatively, to the extent this Court should determine that any portion of § 91-1-15 is unconstitutional, the statute is presumed severable, *see* Miss. Code Ann. §1-3-77, and the remainder of the statute should be left in full force and effect. *See Lewis v. State*, 765 So.2d 493, 500 (Miss. 2000).

### CONCLUSION

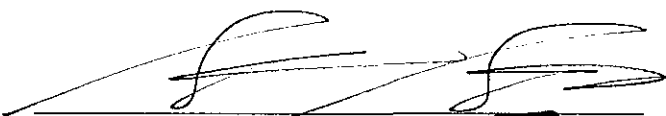
For the above reasons, the Attorney General respectfully requests that the Final Judgment of Chancellor Patricia Wise, to the extent that it upheld the constitutionality of § 91-1-15, be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL OF MISSISSIPPI,  
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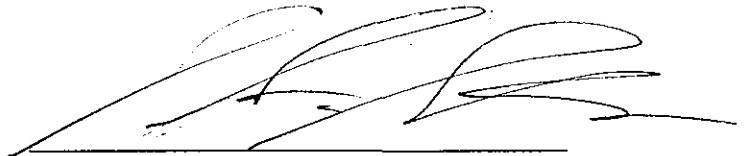
This is to certify that I, Shawn S. Shurden, Special Assistant Attorney General for the State of Mississippi, have this date mailed via United States mail, postage fully prepaid, a true and correct copy of the foregoing *Brief of Appellee, Jim Hood, Attorney General of Mississippi* to the following:

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