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Gomez v. Perez

Lewis F. Powell Jr.

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6/19/72 CEP

Note & set with 71-6078

Duty of father of illegitimate child to support.

No. 71-575

Gomez v. Perez

DISCUSS

Appeal from the Texas Court of Civil Appeals

ILLEGITIMATES/EQUAL PROTECTION CASE

Appellant, an unwed mother, brought this action on behalf of herself and her illegitimate child in a Texas state court to have appellee declared the natural father of her child and to require appellee to pay a reasonable sum for the support and maintenance of the child during the child's minority. The trial court found appellee to be the father of the illegitimate child, but concluded that under Texas law there was no civil liability on the part of a father to support an illegitimate child. Texas law imposes on fathers an obligation to support their legitimate children. The Texas Court of ~~XXXXXXXXXXXXXXX~~ Civil Appeals affirmed, and the Texas Supreme Court refused a writ of error.

Appellant contends that the Texas law which permits a legitimate child to require his father to support him and which ~~XXXXXXXXXXXXXXXXXXX~~ denies an illegitimate child the right to require his father to support him deprives illegitimate children of the equal protection of the laws.

The Court has set No. 71-6078, Linda R. S. v. Richard D., for argument next Term, and has postponed the question of jurisdiction to consideration of the merits. No. 71-6078 involves the same Texas law, but the case is complicated by peripheral issues. The insant case is uncomplicated by such issues.

Appellee has not filed a response, but the State of Texas has filed a response on appellee's behalf as amicus curiae.

Appellant has moved to consolidate this case with No. 71-6078.

NOTE PROBABLE JURISDICTION AND GRANT MOTION TO CONSOLIDATE WITH No. 71-6078.

CEP

Conf 6/22/72

Court Texas Ct. Civil Appls., 4th Sup. Jud. Dist. | Voted on ...., 19...

Argued ...., 19... | Assigned ...., 19... | No. 71-575

Submitted ...., 19... | Announced ...., 19...

LINDA GOMEZ, INDIVIDUALLY AND AS NEXT FRIEND OF ZORAIDA GOMEZ, Appellant

vs.

FRANCISCO OCASIO PEREZ

10/23/71 Appeal filed.

Note (argue with Linda 71-6078

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
Rehnquist, J				✓										
Powell, J				✓										
Blackmun, J				✓										
Marshall, J				✓										
White, J				✓										
Stewart, J				✓										
Brennan, J				✓										
Douglas, J				✓										
Burger, Ch. J				✓										

No. 71575 Gomez v. Perez

Conf. 12/8/72

DOUGLAS, J. Reverse On Levy line of cases	MARSHALL, J. Reverse
BRENNAN, J. Reverse Agrees with Douglas	BLACKMUN, J. D I G
STEWART, J. D I G Statute not considered by Tex. Cts.	POWELL, J. D I G
WHITE, J. Reverse	REHNQUIST, J. D I G

MEMO: C. J. D I G (Treat as Cert)

Wright (for appellant) (argument confused & not helpful)

J. Stewart raised some jurisdictional question which Bill Kelly & I have discussed.

Wright acknowledged that he really was attacking Texas common law.

Confer with Potter Stewart

Wright asks us to treat this as Cert. if there is no appeal juris.

Wright is not now asking us to hold 402 unconst. He asks us to deal only with the com. law of Texas - treating this as Cert pet. He cited Shelly v Kramer as auth. for our ~~action~~ holding a com. law rule of a state unconst.

Jaworski

4.02 applies only to spouses — legimate spouses.

4.02 was not mentioned in any of briefs in Texas Courts. But Jaworski thinks 4.02 was considered.

Assuming existence of juris in this Ct., he made the substantive argument set forth in his brief.

Rational purpose: To avoid difficult problems of proof in paternity suits; & to minimize fraud *

48 other states have similar laws — but these have not been successful.

Inconclusiveness of paternity.

Test is "rational relationship" — not "suspect" classification test

Dandridge case is controlling

In response to Q by Stewart, Jaworski said that Texas law requires the custodian of a child to support it — ~~Ste~~ even if custodian is the illegimate father. Stewart commented that if this is true, the E/P issue evaporates.

---

* Wholesale perjury & corruption are widespread in paternity suits. See 16, 17 of Brief — Lie detector tests

Jaworski (cont)

See proposed new law in Texas - set forth in appendix to Brief.

Sec 42 of Probate Code provides that a subsequent marriage will legitimize the child

Joe Jaworski

Call tomorrow

File brief in support of judgment of lower court in No. 71-575 Gomez v. Perez Will pay expenses coming to Washington in the fall and the cost of printing brief. No fee. Noted probable jurisdiction in case on June 26. Perez's is somewhere in service and cannot be located.

write Joe Jaworski
I have his address

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 23, 1972

No. 71-575 -- Gomez v. Perez

Dear Lewis:

This will confirm assignment to you of appointment of counsel in the above case.

You are not confined to 5th Circuit. Circuit Justices sometimes appoint a Washington lawyer.

Regards,

WEB

Mr. Justice Powell

June 27, 1972

Re: No. 71-575 Gomez v. Perez

Dear Mike:

I have talked to Mr. Jaworski, who is delighted to be appointed by the Court to defend the judgment in the above case. His name and address are:

Joseph Jaworski, Esquire
Bracewell & Patterson
1808 First City National Bank Building
Houston, Texas 77002

I have advised him that the Court would pay the cost of printing the brief, and his travel expenses to Washington for the argument, but that there would be no fee for his services.

I further advised Mr. Jaworski that you would send him the necessary documents, and that he should communicate with you if he has any questions. Mr. Jaworski is a member of the bar of this Court.

Sincerely,

Mr. Michael Rodak, Jr.

No. 71-575 Gomez v. Perez November 27, 1972

This case involves the same Texas statutues - which preclude compelling a father to support an illegitimate child - that are involved in No. 71-6078 Linda R. S. v. Richard D. See my memorandum as to that case.

Appeal from State Court

Appellant sued, on behalf of her illegitimate child, in the Texas State Court for a declaration that appellee was the father of her child, and that he be required to support him. The trial court entered judgment declaring appellee to be the father of the child, but held that there is no civil liability on the part of a father to support his illegitimate children in Texas.

The Court of Civil Appeals of Texas affirmed on the grounds that neither Texas common nor statutory law provides a right of action by which an illegitimate child can recover support from his father. The Supreme Court of Texas refused to review the case, and we noted probable jurisdiction to decide the constitutional question involved.

Question Presented

The ultimate question is whether Texas law, which denies to illegitimate children a right to parental support while granting such right to

legitimate children, violates the equal protection clause.

The briefs on behalf of appellant, and by the various amici supporting appellant, rely heavily - as would be expected - on Levi and Weber.

Position of Texas

This case is in a somewhat curious posture resulting from the fact that appellee (the alleged father) was not represented by counsel at the trial on the merits, the appellant (the mother and plaintiff) was not cross-examined, and all of the findings of fact were based solely on her testimony. The father is not represented before this court. Accordingly, we invited Joseph Jaworski to file a brief amicus in support of the decision of the Texas court.

Joe Jaworski's brief is based primarily on the argument that Texas has a valid state interest in its statutory scheme, namely, the desire to avoid the flood of "paternity litigation" which may result from allowing illegitimates (and their mothers) to select a "father," allege paternity and seek support. It is argued that such suits "offend personal dignity" and often "damage blameless citizens;" that they promote blackmail and encourage perjury.

I must say that there is a good deal in this argument. On the other hand, the argument does not give much weight to the interest of the illegitimate child who is not supported.

A further argument made by Jaworski, in an effort to distinguish Levi and Weber, is that an illegitimate child has other means of obtaining support;

it may be voluntary, marriage may occur, or there may be a common law marriage.

The State of Texas has now also filed a brief amicus in support of its laws.

L. F. P., Jr.

LFP, Jr.:pls

Notes on No. 71-575, Gomez v. Perez, &
No. 71-6078, Linda R.S. v. Richard D. and Texas
WCK
December 5, 1972

Imp. Memo. (Keep in File 71-575

I share your feeling that on the merits, both Texas statutes are unconstitutional. Accordingly, I will address this memo only to more technical problems.

I.

Gomez, the state court case, was not a challenge to the criminal non-support statute, but was simply an effort to obtain civil support. As a threshold matter, it is not clear whether the constitutionality of the Texas civil support statute is properly before this Court. While the statute was passed on May 14, 1969, several months before the present action was commenced on September 18, 1969, it was not mentioned in petitioner's complaint. The effective date of the act was January 1, 1970, several months before the trial(March 23) but was not mentioned in the trial court's opinion dated April 23, nor was it mentioned in either of the appellate court opinions.

Potter Stewart raised

An argument can be made that the statute is no more than a codification of the common law. Under the common law as applied in Texas, the mother of an illegitimate had a civil duty of support, but the father did not. The child was deprived of support from his father as part of a whole scheme of disabilities the child suffered--all presumably to show society's moral outrage.

But, in defending its statute, Texas has become more sophisticated. It relies now on the specter of a "torrent of litigation to establish paternity where matters of proof or disproof are significantly difficult and

uncertain." Br. at 19. While this justification was perhaps not wholly irrelevant to the common law, I doubt that it was of much importance. In short, the law of civil support has a new form and a new justification, suggesting that the case should be diged of remanded.

On the other side, the changes in form and justification took place before trial in this case even if after the filing of the complaint, and I should think that it would be the responsibility of the state court to take judicial notice of a new, governing statute rather than treat the case as if it were a pre-statute case. Even so, however, the civil case is in a sloppy, uncertain condition. While the Court might decide to disregard the unsatisfactory condition of the case on the basis of the practical recognition (1) that the lower courts (at least the court of appeals) probably knew of the statute and chose to ignore it because it did not change the law; (2) that explicit consideration of the statute would not have changed the result below; and (3) that in this Court Texas treats this case as if the constitutionality of the statute had been litigated below; it would be hard to ignore a dissent which relied on the proposition that the constitutionality of the statute is not squarely presented.

Two other points are worth mentioning. First, there is also a sex discrimination argument buried in this case-- at common law, and presumably under the statute, the mother but not the father has a duty of support. But again, the

argument was not squarely presented and we are therefore without a clear indication whether under the statute the mother continues to have a duty of support. Second, the three-judge court in the federal case remanded to a single judge the question of the constitutionality of the civil support statute. The single judge ruled it constitutional on June 8. It might be useful to ask at argument or to have the clerk's office check to see whether that decision was appealed. If so, the Court could grant cert on that case.

II.

As you know, the three-judge court held that a mother and her illegitimate child do not have standing to challenge the constitutionality of the criminal non-support statute. The court below reasoned that since neither of them can be prosecuted for violation of the statute, neither has sufficient interest to challenge it. I am inclined to disagree.

It is true that neither can be prosecuted, and it is also true that, so far as I can tell, this Court has never conferred standing to challenge a criminal statute on a person not subject to prosecution, although the Court is about to do so in Doe v. Bolton, where standing will be conferred upon the mother even though she is not subject to prosecution for performing an abortion. But, in one sense at least, Doe is an easier case in this respect because the mother will benefit directly if the statute is ruled unconstitutional.

It seems to me to be crucial that this is an equal protection challenge. As afar as I know, there have only been two equal protection challenges to criminal statutes which have reached this court. In McLaughlin v. Florida, 379 U.S. 184(1964), the Court struck down a statute providing a criminal penalty for interracial cohabitation. The relief granted was simply to throw out the statute altogether. In Skinner v. Oklahoma, 316 U.S. 535(1942), the Court struck down a statute arbitrarily selecting a limited class of special offenders for sterilization. The case was remanded to the state court for a determination whether the statute should be extended to cover all habitual offenders or eliminated. Both cases reached this court on appeals from criminal convictions.

One conclusion which I draw from the paucity of cases is that legislatures rarely draw distinctions(in criminal statutes) of the sort which are conventionally challenged on equal protection grounds. Commonly, statutory distinctions in the area of criminal law are drawn in terms of intent, degree of violence, amount of money, or age. This seems to me to be an argument for the position that, when such a distintion is drawn, the Court should not be too niggardly about conferring standing.

It may be useful to back off for a minute to look at the law of standing in civil equal protection. In particular,

this Court at least implicitly conferred standing in _Levy_, _Glona_, _Labine_, and _Weber_ on persons who under a state statutory or common law scheme were _not_ entitled to recover damages or workmen's compensation or a share of the inheritance. Standing was conferred on the recognition that at base the state's purpose was to provide damages or whatever to children, not to impose liabilities on certain persons.

Standing should, by analogy, be recognized here. The purpose of the non-support statute was to provide support for children, who cannot support themselves. Petitioners are challenging the fact that Texas has created an unconstitutional exception to that policy. The only difference between _Levy_ and this case is that while in _Levy_ et al the Court could easily and simply extent the scope of the satte statute to cover illegitimates, it is less easy for the Court to extend the scope of a criminal statute to persons other than those whom the state desired to punsih. At a minimum, the Court would have to make an expenstion prospective only to avoid due process problems, But perhaps more importantly, it is not for a federal court to create state crimes. But, in my view, this is not so much an argument that petitioners do not have standing as an argument that this Court must fashion its relief carefully. The Court could, for example, throw the ball back to the state legislature(following the example of the _Skinner_ Court, which threw it back to the state court). The mandate

could, for example, state that the statute is unconstitutional and that if the state legislature does not take action to extend it to the parents of illegitimates by the end of its next session, the law would be thrown out altogether.

Thus, it seems to me appropriate to confer standing on petitioners. The state law was intended to benefit children and would benefit petitioners but for the unconstitutional exception. To deny standing only because this Court has less remedial freedom when dealing with a state criminal law than when dealing with a state civil law would be to take too narrow a view.

If you doubt the foregoing, perhaps a stronger hypothetical will persuade you: consider the statute which provides that murder of a white man is punishable by death but murder of a black man is a tort. It would seem to me foolish to allow only a man who murdered a white man to challenge the criminal statute. Murder laws serve the general purpose of preventing killing, and a state would not lightly repeal all of its murder laws in order to insure that no one who killed a black man would be punished. Furthermore, the absurdity of the hypothetical bears out what I said above--that state rarely pass criminal statutes which are subject to conventional equal protection challenges. The conferral of standing in this case would not have wide-ranging effects.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 13, 1972

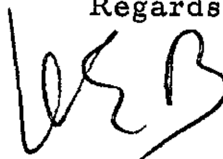
Re: 71-575 - Gomez v. Perez

MEMORANDUM TO THE CONFERENCE:

My records show there were five (5) votes to Dismiss as Improvidently Granted.

If anyone proposes to dissent, please advise.

Regards,



9 voted to D/G

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 14, 1972

Re: No. 71-575 - Gomez v. Perez

Dear Chief:

I shall have a few words to say in dissent.

Sincerely,

The Chief Justice

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

December 15, 1972

Dear Byron:

Please join me in your dissent in 71-575, Gomez v. Perez.

William O. Douglas

Mr. Justice White

cc: Conference
Law Clerks

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

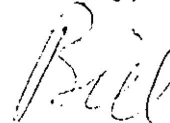
December 15, 1972

RE: No. 71-575 - Gomez v. Perez.

Dear Byron:

Please join me in your dissent in the above.

Sincerely,



Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 18, 1972

Re: No. 71-575 - Gomez v. Perez

Dear Byron:

Please join me.

Sincerely,

T.M.

Mr. Justice White

cc: The Conference

Bell Kelly & notes

12/19

Gomez v. Perez

→ || ≡ May not have prop. "appeal" — but should be before us in cont.

Whites op. says com. law is properly before it.

Bell says that this is wrong — he thinks statute is before even tho not mentioned.

As practical matter, statute was before Court.

Not a class action — just one petitioner.

(Linda case has not been appealed)

December 21, 1972

No. 71-575 Gomez v. Perez

Dear Chief:

I am having some trouble with our decision to DIG the above case. After reading Byron's draft of a dissent (in which three other Justices have joined) I have spent a couple of hours going back over the briefs and my notes on the oral argument. I voted to DIG on the assumption that the Texas statute (§ 4.02) was not involved in this case. I now have doubt whether this assumption is necessarily correct.

It is true that counsel for appellant conceded in oral argument that he was attacking Texas common law, * and that he is not asking to hold 4.02 unconstitutional. It is also true that the Texas Court of Appeals did not specifically mention 4.02. Yet, upon further reflection, and in light of the time sequences involved, it is difficult to believe that the statute was not in fact before the Court. It was passed on May 4, 1969, several months before this action was commenced on September 18, 1969. The statute was not mentioned in petitioner's complaint, possibly because it did not become effective until January 1, 1970. But the trial took place March 23, 1970, after the effective date of the statute, and the court may be presumed to have taken judicial knowledge of its existence.

Moreover, Joe Jaworski (appointed by us to support the judgment below) states in his brief that: "The issue here is the constitutionality of Tex. Fam. Code § 402 (1969)."

*Byron assumes this and thinks it makes no difference whether the statute is before us.

During oral argument, Jaworski disagreed with counsel for appellant. He expressed the view that § 4.02 was considered by the Texas courts, although not specifically mentioned.

In sum, I now ask myself whether we are not entitled to assume that the court below, construed § 4.02 as comporting with the common law - which also is expressly adopted by statute in Texas. (Article I, Vernon's Annotated Texas Statutes).

My guess is that we would all agree that 4.02, as so construed, violates the equal protection clause. I consider that Weber (which I wrote last term) is controlling on this point.

I wonder whether those of us who voted to DIG should not consider joining a court opinion - which could be almost as brief as Byron's - holding the Texas statute is before us and that it is unconstitutional.

I am sending this note only to you at this time, as I relied at the Conference primarily on views expressed by you and Potter to the effect that there was really nothing properly before us.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 21, 1972

PERSONAL

Re: No. 71-575 - Gomez v. Perez

Dear Lewis:

With four dissents I am very reluctant to DIG any case. That process is one to be used with care as is so flagrantly illustrated in our current Toolco case.

I will memo the conference to this effect and perhaps a brief Per Curiam along Byron's lines will do.

Regards,

WEB

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

December 21, 1972

Re: No. 71-575 - Gomez v. Perez

Dear Byron:

There are four firm dissents to DIG in the above and I am reluctant to DIG a writ in that posture.

If you are willing to cast your dissent into a Per Curiam, you might pick up a few "new members" since on the merits there will be support for that result.

Regards,

WEB

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

December 27, 1972

Re. No. 71-575 - Gomez v. Perez

Dear Potter:

Please join me in your memorandum.

Sincerely,

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 2, 1973

Re: No. 71-575 - Gomez v. Perez

Dear Potter:

As little as I like a DIG with four dissents I am prepared to join your disposition of the case.

Regards,

Mr. Justice Stewart

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 5, 1973

Re: No. 71-575 - Gomez v. Perez

Dear Potter:

I would be willing to join your memorandum proposed for this case.

Sincerely,

H. A. B.

Mr. Justice Stewart

Copies to the Conference

January 7, 1973

Re: No. 71-575 Gomez v. Perez

Dear Byron:

Please join me.

Sincerely,

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 8, 1973

RE: No. 71-575 Gomez v. Perez

Dear Byron:

I agree with the *Per Curiam* you have prepared in the above.

Sincerely,

Bill

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 8, 1973

Re: No. 71-575 - Gomez v. Perez

Dear Byron:

Your proposed *per curiam*, circulated late Friday, convinces me, and I would now like to join it and to withdraw my tentative vote to DIG.

Sincerely,

H. A. B.

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

January 8, 1973

Re: No. 71=575 - Gomez v. Perez

Dear Byron:

I think your revised approach is a sound one and I join you.

Regards,

WEB

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 9, 1973

Re: No. 71-575 - Gomez v. Perez

Dear Byron:

Please join me in your *per curiam* of 1-5-73.

Sincerely,

T.M.

Mr. Justice White

cc: Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Stewart, J.

Circulated: DEC 22 1972

Recirculated: ___________

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-575

Linda Gomez, Individually and as Next Friend of Zoraida Gomez, Appellant, *v.* Francisco Ocasio Perez.	On Appeal from the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

[January —, 1973]

Reviewed. 12/26/72

I'm inclined to join Byron in a P.C.

Memorandum of MR. JUSTICE STEWART.

This case came here as an appeal, on the representation that the Texas courts had sustained the constitutionality of § 4.02, c. 4, of the Texas Family Code and Articles 602 and 602a of the Texas Penal Code, over a challenge to those statutes under the Equal Protection Clause of the Fourteenth Amendment. We noted probable jurisdiction, 408 U. S. 920, to consider whether the alleged discrimination between legitimate and illegitimate children in terms of the support obligations of their biological fathers denied equal protection to illegitimate children under the principles of *Weber* v. *Aetna Cas. & Surety Co.*, 406 U. S. 164, *Glona* v. *American Guarantee and Liability Insurance Co.*, 391 U. S. 73, and *Levy* v. *Louisiana*, 391 U. S. 68.

Upon the submission of briefs and oral argument, it became clear that neither statute had been the actual subject of litigation in the courts of Texas. Hence this is not properly an appeal under 28 U. S. C. § 1257 (2), and I would, therefore, dismiss the appeal for want of jurisdiction, and treat "the papers whereon the appeal was taken" as a petition for writ of certiorari. 28 U. S. C. § 2103.

The parties were not prepared to submit this case as one challenging the common law treatment of illegiti-

mates in Texas, and failed to provide this Court with a sufficient understanding of Texas law with respect to such matters as custodial versus noncustodial support obligations, legitimation, common law marriage, and the effect of a Texas statute, § 4.02 of the Family Code, which became law after this litigation had begun. With the issues so vaguely drawn and the alleged discriminations so imprecise, I would dismiss the writ of certiorari as improvidently granted.

Sally - I think I've joined this.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
✓Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: 1-5-73

Recirculated: ____________

If not circulate a join

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71-575

Linda Gomez, Individually and as Next Friend of Zoraida Gomez, Appellant, v. Francisco Ocasio Perez. | On Appeal from the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas.

[January —, 1973]

PER CURIAM.

The issue presented by this appeal is whether the laws of Texas may constitutionally grant legitimate children a judicially enforceable right to support from their natural fathers and at the same time deny that right to illegitimate children.

In 1969, appellant filed a petition in Texas District Court seeking support from appellee on behalf of her minor child. After a hearing, the state trial judge found that appellee is "the biological father" of the child, and that the child "needs the support and maintenance of her father," but concluded that because the child was illegitimate "there is no legal obligation to support the child and the Plaintiff take nothing." The Court of Civil Appeals affirmed this ruling over the objection that this illegitimate child was being denied equal protection of law. 466 S. W. 2d 41. We noted probable jurisdiction. 408 U. S. 920.

In Texas, both at common law and under the statutes of the State, the natural father has a continuing and primary duty to support his legitimate children. See *Lane* v. *Phillips*, 6 S. W. 610, 611 (Tex. 1887); Vernon's

Tex. Codes Ann., Family Code § 4.02 (1970) (husband's duty).[1] That duty extends even beyond dissolution of the marriage, Vernon's Tex. Civ. Stat., Art. 4639a; *Hooten* v. *Hooten*, 15 S. W. 2d 141 (Tex. Civ. App. 1929), and is enforceable on the child's behalf in civil proceedings and, further, is the subject of criminal sanctions. Tex. Penal Code § 602. The duty to support exists despite the fact that the father may not have custody of the child. *Hooten* v. *Hooten, supra.* The Court of Civil Appeals has held in this case that nowhere in this elaborate statutory scheme does the State recognize any enforceable duty on the part of the biological father to support his illegitimate children and that absent a statutory duty to support, the controlling law is the Texas common law rule that illegitimate children, unlike legitimate children, have no legal right to support from their fathers, see also *Home of the Holy Infancy* v. *Kaska*, 397 S. W. 2d 208 (Tex. 1965); *Lane* v. *Phillips, supra*, at 611; *Bjorgo* v. *Bjorgo*, 391 S. W. 2d 528 (Tex. Civ. App. 1965), ~~and~~ It is also true that fathers may set up illegitimacy as a defense to prosecutions for criminal nonsupport of their children. See *Curtin* v. *State*, 238 S. W. 2d 187 (Tex. Crim. App. 1951); *Beaver* v. *State*, 256 S. W. 929 (Tex. Crim. App. 1923).

In this context, appellant's claim, on behalf of her daughter, that the child has been denied equal protection of the law is unmistakably presented. Indeed, at argument here, the attorney for the State of Texas, appearing as *amicus curiae*, conceded that but for the fact that

[1] Section 4.02 became effective after the commencement of appellant's suit, but the provision is identical (except for punctuation) to its predecessor, Tex. Civ. Stat., Husband and Wife, Art. 4614, in 1 Tex. Gen. & Special Laws, c. 309, at 736 (60th Legislature, Reg. Sess. 1967). Section 4.02 was enacted as part of a codification of Texas family laws.

this child is illegitimate she would be entitled to support from appellee under the laws of Texas.[2]

We have held that under the Equal Protection Clause of the Fourteenth Amendment a State may not create a right of action in favor of children for the wrongful death of a parent and exclude illegitimate children from the benefit of such a right. *Levy* v. *Louisiana,* 391 U. S. 68 (1968). Similarly, we have held that illegitimate children may not be excluded from sharing equally with other children in the recovery of workmen's compensation benefits for the death of their parent. *Weber* v. *Aetna Casualty & Surety Co.,* 406 U. S. 164 (1972).[3] Under these decisions, a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right

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[2] Tr. of Oral Arg., at 24. There was some question at argument whether the statutory scheme relating to paternal support of children was properly drawn into question in the state courts. In the circumstances of this case, we need not resolve the question. First, the State of Texas asserts no prejudice from appellant's apparent failure to explicitly draw attention to the individual statutes that make up the so-called Texas rule regarding support of legitimate and illegitimate children. On the contrary, the State asserted here that it was prepared to meet appellant's constitutional attack on its statutes on the merits. Tr. of Oral Arg., at 28. Second, under our cases, "the unrestricted notation of probable jurisdiction is to be understood as a grant of the writ" of certiorari on "nonappealable" issues presented in the case. *Mishkin* v. *New York,* 383 U. S. 502, 512 (1966). Appellant's federal claim, which was rejected in the state courts, that her child was being denied equal protection of law, is, therefore, properly before us in any event.

[3] See also *Davis* v. *Richardson,* 342 F. Supp. 588 (Conn.), aff'd, 409 U. S. — (1972); *Griffin* v. *Richardson,* 346 F. Supp. 1226 (Md.), aff'd, 409 U. S. — (1972).

to a child simply because her natural father has not married her mother. For a State to do so is "illogical and unjust." *Weber* v. *Aetna Casualty & Surety Co.*, *supra,* at 175. We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination. *Stanley* v. *Illinois,* 405 U. S. 645, 656–657 (1972); *Carrington* v. *Rash,* 380 U. S. 89 (1965).

The judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
mem to BRW 12/21/72 work PC opinion for court	join BRW 12/15/72	join BRW 12/15/72	memo 12/22/72	dissent 1st draft 12/15/72 2nd draft 12/16/72	join BRW 12/18/72			join PS 12/27/72
join PS 1/2/73				3rd draft 12/18/72 Per Curiam 1st draft		~~join PS 1/5/73~~		
join BRW 1/8/73		join BRW 1/8/73		1/5/73 2nd draft 1/13/73	join BRW 1/9/73	join BRW 1/8/73	join BRW 1/8/73	

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