St. John's Law Review

Volume 70
Number 2 *Volume 70, Spring 1996, Number 2*

Article 8

March 2012

Family Court, Queens County, Holds That Posthumous DNA Tests on a Decedent's Frozen Blood Samples Are Admissable in a Paternity Proceeding Where the Decedent's Blood Was Already Drawn and Available

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Family Court, Queens County, holds that posthumous DNA tests on a decedent's frozen blood samples are admissible in a paternity proceeding where the decedent's blood was already drawn and available

Statutory classifications that restrict the ability of illegitimate children to prove paternity[1] are not subject to "strict scrutiny."[2] Courts, however, may hold these classifications violative of the Equal Protection Clause of the Fourteenth Amendment[3] under a less stringent standard of review: whether they are sub-

[1] Many states impose such a high burden of proof upon illegitimate children that the difficulty in proving paternity effectively bars such actions. *See, e.g.*, ARK. CODE ANN. § 28-9-209(d) (Michie 1988) (requiring satisfaction of any of following in order for child to inherit real or personal property from father: adjudication of paternity, father's written acknowledgment of paternity, father's consent to his name appearing on child's birth certificate, mother and father marrying prior to child's birth, or father's written voluntary promise or court order to support child); CONN. GEN. STAT. ANN. § 45a-438(b)(1)-(4) (West 1996) (requiring adjudication, father's acknowledgment in writing and under oath, or clear and convincing evidence of both father's written acknowledgment and his openly treating child as own in order for illegitimate child to inherit equally with father's other children); N.C. GEN. STAT. § 29-19(b)(2) (1984) (stating that father's acknowledgment of child must be in writing before certifying officer and filed with clerk of superior court for purposes of intestate succession). *See generally* Charles Nelson Le Ray, Note, *Implications of DNA Technology on Posthumous Paternity Determination: Deciding the Facts When Daddy Can't Give His Opinion*, 35 B.C. L. REV. 747 (1994) (comparing illegitimate children's burdens of proof under various state statutes to prove paternity). Supporters of statutes requiring higher standards of proof for illegitimate children to prove paternity argue that such statutes: 1) discourage sexual relations outside of marriage by causing individuals to consider the unfair treatment their illegitimate children could encounter; 2) encourage marriages and protect existing families by preserving the social stigma of illegitimacy; and 3) minimize the danger of spurious and fraudulent claims by rendering it difficult to prove paternity. *Id.* at 757-58.

[2] In order to determine whether statutory classifications are subject to strict scrutiny: 1) the classification must be justified by a compelling government interest; and 2) the means chosen by the state to effectuate its purpose must be necessary and narrowly tailored to the achievement of that goal. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986).

[3] "No State shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

stantially related to a legitimate state interest.[4] Illegitimate

[4] The Supreme Court formally adopted the "intermediate standard" of review in Clark v. Jeter, 486 U.S. 456, 460 (1988). Prior to *Jeter*, the Supreme Court's standard of review used to analyze statutory classifications based on illegitimacy had been tremulous. In Levy v. Louisiana, 391 U.S. 68, 76 (1968), the Court found that a statute which denied unacknowledged non-marital children the right to recover for the wrongful death of their mother violated the guarantee of equal protection. Justice Douglas' majority opinion, hinting at a test of both rational review and heightened scrutiny, stated that "the test ... is whether the line drawn is a rational one ... [but] we have been extremely sensitive when it comes to basic civil rights and have not hesitated to strike down an invidious classification even though it had history and tradition on its side." *Id.* at 71.

Three years later, however, in Labine v. Vincent, 401 U.S. 532 (1971), the Court upheld an intestate succession provision which subordinated the rights of acknowledged non-marital children to those of other relatives of the parent. Justice Black, suggesting a minimum rationality review, stated that "[a]bsent a specific constitutional guarantee, it is for [the] legislature, not the life-tenured judges of this Court, to select from among possible laws." *Id.* at 538-39. In Matthews v. Lucas, 427 U.S. 495, 506 (1976), the Court sustained a Social Security Act provision discriminating against non-marital children, explicitly declining to apply "strict scrutiny."

The tide turned again in the late 1970's when the Supreme Court, in Trimble v. Gordon, 430 U.S. 762 (1977), struck down an Illinois statute that barred inheritance by non-marital children from their fathers. Justice Powell addressed the State's interest in the promotion of legitimate family relationships, explaining that "the Equal Protection Clause requires more than the mere incantation of a proper state purpose." *Id.* at 769. He noted that since *Labine*, "we have expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships." *Id.* The State further justified the legislation upon "the difficulty of proving paternity and the related danger of spurious claims." *Id.* at 770. Justice Powell, however, emphasized that a law relating to illegitimacy must be "carefully tuned to alternative considerations." *Id.* at 772. He reasoned that the "[d]ifficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate." *Id.*

The heightened scrutiny of *Trimble*, however, did not last long. In Lalli v. Lalli, 439 U.S. 259 (1978), the Supreme Court upheld a New York statute forbidding non-marital children from inheriting from their fathers unless there was a judicial finding of paternity during the father's lifetime. Justice Powell, writing for the majority, explained that most statutory classifications produce inequitable results, but noted that the "inquiry under the Equal Protection Clause does not focus on the abstract 'fairness' of a state law, but on whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment." *Id.* at 273. The Court found that the New York law was substantially related to the important state interests of providing for accurate and orderly disposition of property at death, in light of the difficult problems of proving paternity. *Id.* at 274.

Despite *Lalli*, and the fluctuating decisions of the Supreme Court in the 1970's, the Court continued to accord illegitimacy classifications a degree of heightened scrutiny into the 1980's. In Mills v. Habluetzel, 456 U.S. 91 (1982), the Court struck down a Texas law that required a paternity suit by an illegitimate child to be brought before the child was one year old. Justice Rehnquist explained that the "support opportunity provided by the State to illegitimate children must be more

children who can establish their father's paternity are entitled to benefits similar to those of children born in wedlock.[5] Many states, however, hinder the ability of illegitimate children to establish paternity through the introduction of genetic evidence after their putative father's death.[6] Recent advances in DNA tech-

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than illusory." *Id.* at 97. Such a period must be sufficiently long to permit those who have an interest in bringing such an action on behalf of the child to do so, considering the difficult personal, family and financial circumstances that surround the birth of an illegitimate child. *Id.* A year later, in Pickett v. Brown, 462 U.S. 1 (1983), the Court struck down a Tennessee law similar to the law in *Mills.* The Court reasoned that the Tennessee law's two year statute of limitations did not guarantee a sufficient opportunity for illegitimate children to obtain support. *Id.*

Finally, five years later, in Clark v. Jeter, 486 U.S. 456 (1988), a unanimous Court agreed that an intermediate level of scrutiny was appropriate for illegitimacy classifications. The Court held that Pennsylvania's six-year statute of limitations for non-marital children to bring a support action did not "withstand heightened scrutiny under the Equal Protection Clause." *Id.* at 465. Justice O'Connor explained that "[t]o withstand intermediate scrutiny a statutory classification must be substantially related to an important governmental objective." *Id.* at 461.

[5] Upon a finding of paternity, most states will hold a father responsible for the economic support of his illegitimate children. Harry D. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 478 (1967). Depending upon the individual state's statute, an illegitimate child may also be entitled to intestate succession. *Id.* at 479.

Illegitimate children who prove paternity may also qualify for benefits under state and federal welfare statutes if the father is covered by the legislation. *Id.* at 480. Federal statutes use varying methods to determine whether an illegitimate child is entitled to receive certain benefits. *See* Note, *The Rights of Illegitimates Under Federal Statutes*, 76 HARV. L. REV. 337, 339-50 (1962). For example, the Social Security Act requires that courts analyze the applicable state law on intestate inheritance to determine whether an applicant is the child of an insured individual. *See* 42 U.S.C. § 416(h)(2)(A) (1988); *see also* Timothy G. Barrett, *Is Discrimination Against Illegitimate Children Worthy of Stricter Scrutiny Under the Constitution? - The Relationship Between State Intestate Succession Statutes and the Social Security Act in Claims for Child Benefits for Illegitimate Children*, 33 U. OF LOUISVILLE J. FAM. L. 79, 82-84 (1995). Some federal statutes provide detailed provisions to determine whether an illegitimate child is eligible for benefits. *See, e.g.*, 10 U.S.C. § 1477(b)(5) (1996) (including illegitimate children among eligible survivors for purpose of receiving death gratuity under Armed Forces General Military Law governing personnel death benefits, where these children "have been acknowledged in writing signed by decedent; have been judicially determined, before the decedent's death, to be his children; who have been otherwise proved, by evidence satisfactory to the Secretary of Veteran's Affairs, to be the children of, decedent; or to whose support the decedent had been judicially ordered to contribute."); 33 U.S.C. § 902(14) (1994) (defining "child" under Longshoremen and Harbor Worker's Compensation Act to include "acknowledged illegitimate child dependent on the deceased").

[6] *See* N.C. GEN. STAT. § 49-14(c) (1994) (stating that no judgment establishing paternity may be entered after death of putative father); LA. CIV. CODE ANN. art. 919 (West 1952) (requiring both acknowledgment of paternity by father and absence of any descendants, ascendants, collateral relatives, or wife for illegitimate child to inherit); *cf.* UNIFORM ACT ON PATERNITY § 7 (1960); UNIFORM PARENTAGE ACT § 9

nology ensure reliable and accurate paternity testing, even after the putative father's death.[7] New York, under section 519(c) of the Family Court Act ("F.C.A."), requires that a blood genetic marker test be administered to the putative father before his death to allow a petitioner to commence or continue a paternity proceeding.[8] Recently, however, in *Anne R. v. Francis C.*,[9] the

(1973) (providing provisions to prove paternity only when putative father is alive).

[7] *See* Batcheldor v. Boyd, 423 S.E.2d 810, 812 (N.C. Ct. App. 1992) (discussing feasibility of valid testing, analysis, and reporting comparing DNA obtained from dead human body and from body of living human); Alexander v. Alexander, 537 N.E.2d 1310, 1311 (Franklin County, Ohio P. Ct. 1988) (explaining that, because accuracy and reliability of modern DNA testing have increased, illegitimate children should no longer be deprived of ability to prove paternity through introduction of genetic marker testing evidence).

DNA typing can conclusively establish whether an individual is the biological father of a child. ANDRE A. MOENSSENS ET AL., SCIENTIFIC EVIDENCE IN CIVIL AND CRIMINAL CASES 933 (4th ed. 1995). In the nuclei of every cell, except mature red blood cells, the DNA molecule is composed of a double helix formed by two strands of nucleotide units, one from each parent, which are connected to form a twisted ladder. *Id.* at 881-83. DNA typing represents the portion of a person's DNA as genetic codes that may be compared with those of other individuals. *Id.* at 885. Paternity is then determined by comparing the DNA typing of the child, mother and putative father. *Id.* at 933.

DNA is first extracted from blood or other tissues of the mother, child, and putative father. *Id.* at 890. Restriction enzymes are then used to cut the DNA into fragments of various length. MOENSSENS ET AL., *supra*, at 887-88. Some of the resulting fragments are polymorphic, in that they vary in length between individuals. *Id.* at 888. These fragments are then sorted according to length and placed on a cell of agarose gel, where they are affixed to a nylon membrane. *Id.* at 892-93. Next, DNA probes locate polymorphic segments among the DNA fragments on the membrane. *Id.* at 894-95. Finally, the exposure of this membrane photographic film generates a pattern of elongated bands known as a DNA fingerprint. *Id.* at 895.

The matching of these DNA fingerprints is the final step in DNA-based paternity testing. *Id.* at 933. For example, multi-locus probes, one of a number of matching techniques, compare the number of bands assigned to the putative father with those of the child. *Id.* Where half of the child's bands match the mother's and the other half matches the father's, the putative father's relationship to the child is established, since all possibilities except the biological parent will be excluded. *Id.*

Where posthumous actions to prove paternity are permitted, the burden of proof varies greatly among the states. A number of states require proof by a preponderance of the evidence. *See* DEL. CODE ANN. tit. 12, § 508(2)(b) (1987). Other states require proof by clear and convincing evidence. *See* ALASKA STAT. § 13.11.045(2)(B) (Michie 1985). Still other states require even a higher burden of proof. *See* IOWA CODE ANN. § 633.222 (West 1994) (requiring general, notorious, or written acknowledgment of paternity during putative father's lifetime).

[8] N.Y. FAM. CT. ACT § 519(c) (McKinney Supp. 1996). The legislative intent of requiring a blood genetic marker test to be administered prior to the putative father's death was to discourage fraudulent claims. *See* Comm'r of Social Serv. v. William C., 147 Misc. 2d 974, 978, 559 N.Y.S.2d 88, 91 (Fam. Ct. N.Y. County 1990). Several statutes in New York provide for the admissibility of DNA testing in paternity proceedings. *See* N.Y. FAM. CT. ACT § 418(a) (McKinney 1983 & Supp. 1996);

Queens Family Court held that post-death DNA tests on a decedent's frozen blood samples were reasonable and admissible in a paternity proceeding where the decedent's blood was drawn and available prior to his death.[10]

On October 29, 1982, Anne R., an unmarried woman, gave birth to Megan R.[11] Ten years later, Anne R. filed a petition which alleged that Francis C., then deceased, was the father of Megan R. and requested the entry of a posthumous order of filiation.[12] Petitioner further requested that the court order genetic marker tests on Francis C.'s frozen blood samples.[13]

At the paternity trial, Mrs. C., the decedent's widow, contended that the results of the court-ordered DNA tests were inadmissible because they were conducted after the putative father's death.[14] Mrs. C. relied on *In re Sidney Janis*,[15] where the court held that a non-marital child was not entitled to exhume a decedent's body and conduct DNA tests to prove a decedent's paternity for the purpose of conducting DNA testing to prove decedent was her father in order to establish standing to contest the admission of a will into probate under section 4-1.2(a)(2)(D) of the New York Estate Powers and Trusts Law ("EPTL").[16] In

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N.Y. FAM. CT. ACT § 532(a) (McKinney 1983 & Supp. 1996); N.Y. CIV. PRAC. L. & R. § 4518(e) (McKinney 1992 & Supp. 1996).

[9] 167 Misc. 2d 343, 634 N.Y.S.2d 339 (Fam. Ct. Queens County 1995).

[10] *Id.* at 347, 634 N.Y.S.2d at 341.

[11] *Id.* at 344, 634 N.Y.S.2d at 340.

[12] *Id.* at 344, 634 N.Y.S.2d at 340. Determining that the decedent's widow would be in best position to contest the petitioner's claim, the court ordered the action to be brought against Mrs. C. *See* Henry v. Rodd, 95 Misc. 2d 996, 998, 408 N.Y.S.2d 745, 747 (Fam. Ct. Queens County 1978) (explaining that paternity action against decedent must be directed to personal representative of decedent); *cf.* Voss v. Duerscherl, 425 N.W.2d 828, 831 (Minn. 1988) (holding that underlying paternity action did not survive putative father's death due to lack of any personal representative for deceased's estate).

[13] *Anne R.*, 167 Misc. 2d at 344, 634 N.Y.S.2d at 340. Since Francis C. was the victim of a homicide, the Suffolk County Medical Examiner's Office had drawn and frozen blood samples from him. *Id.* at 344, 634 N.Y.S.2d at 340. It is interesting to note that Mrs. C. did not initially oppose a court order permitting DNA testing because the results could have excluded the decedent. *Id.* at 346, 634 N.Y.S.2d 341.

[14] *Id.* at 347, 634 N.Y.S.2d at 341.

[15] 157 Misc. 2d 999, 600 N.Y.S.2d 416 (Sur. Ct. N.Y. County 1993), *aff'd*, 210 A.D.2d 101, 620 N.Y.S.2d 342 (1st Dep't 1994).

[16] A non-marital child is a legitimate child for the purposes of inheritance if "a blood genetic marker test *had been* administered to the father which together with other evidence establishes paternity by clear and convincing evidence." N.Y. EST. POWERS & TRUSTS § 4-1.2(a)(2)(D) (McKinney Supp. 1996) (emphasis added). In contrast to § 519(c) of the F.C.A., for the purposes of inheritance the EPTL does not expressly require that the blood genetic marker test be performed prior to the puta-

Janis, Surrogate Roth reasoned that section 4-1.2(a)(2)(D) must be construed consistently with section 519(c) of the F.C.A.,[17] which explicitly provides that a paternity proceeding may be commenced where "a blood genetic marker test had been administered to the putative father prior to his death."[18]

The Queens Family Court distinguished the *Janis* case, explaining that the petitioner in *Anne R.*, at a separate hearing, had already established standing to bring the paternity action[19] by presenting evidence that the decedent had "openly and notoriously acknowledged the child as his own."[20] At the hearing, a priest testified that at Megan's baptism the decedent introduced himself as Megan's father and stood where the father traditionally stands during the ceremony.[21] In addition, the petitioner established that the decedent attended Megan's First Holy Communion.[22] Although the court deemed this evidence sufficient to establish petitioner's standing, the court held that such meager testimony did not rise to the level of proving paternity by "clear, convincing and satisfactory proof" and that "paternity was not established to the point of entire satisfaction."[23]

The question of whether DNA testing should be permitted on a decedent's frozen blood samples to determine paternity was an issue of first impression in New York.[24] In ordering the DNA blood tests, Judge Fitzmaurice noted that section 532 of the F.C.A.,[25] which addresses the question of the admissibility of

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tive father's death.

[17] *In re* Sidney Janis, 157 Misc. 2d at 1001-03, 600 N.Y.S.2d at 418-19. Surrogate Roth explained that it was unlikely that the legislature would make provisions for paternity proceedings in the Surrogate Court inconsistent with similar proceedings in the Family Court. *Id.*, 600 N.Y.S.2d at 418.

[18] N.Y. FAM. CT. ACT § 519(c) (McKinney Supp. 1996).

[19] *Anne R.*, 167 Misc. 2d at 347, 634 N.Y.S.2d at 341. Judge Fitzmaurice explained that since Family Court is a statutory court and its powers are limited to those specifically granted by statute, the court could not, pursuant to § 519(c) of the F.C.A., order a post-death DNA test to give petitioner standing to commence the paternity proceeding. *Id.* at 345, 634 N.Y.S.2d at 340 (citing Corbett v. Corbett, 100 Misc. 2d 270, 418 N.Y.S.2d 981 (Fam. Ct. Queens County 1979)).

[20] N.Y. FAM. CT. ACT. § 519(d) (McKinney Supp. 1996).

[21] *Anne R.*, 167 Misc. 2d at 345-46, 634 N.Y.S.2d at 340.

[22] *Id.* at 346, 634 N.Y.S.2d at 340.

[23] *Id.* at 346, 634 N.Y.S.2d at 340-41. In New York, paternity must be established by "clear, convincing and entirely satisfactory evidence." Janet K. v. Joseph M., 89 A.D.2d 870, 870, 453 N.Y.S.2d 238, 239 (2d Dep't 1982).

[24] *Anne R.*, 167 Misc. 2d at 346, 634 N.Y.S.2d at 341.

[25] "The results of *any* such blood genetic marker or DNA test may be received in evidence..." N.Y. FAM. CT. ACT § 532(a) (McKinney 1983 & Supp. 1996) (emphasis

blood genetic marker tests in paternity proceedings, did not expressly prohibit the admission of post-death blood results into evidence.[26] Further, she reasoned that the *Janis* court left the issue of post-death testing under more reasonable circumstances open.[27] Consequently, Judge Fitzmaurice concluded that in the present case, where the decedent's blood was already drawn and available, the ordering of DNA testing was reasonable.[28]

It is submitted that *Anne R.* was decided correctly in accordance with equal protection and equal rights for illegitimate children. There is no longer any rational basis for limiting the right of illegitimate children to use posthumous DNA blood tests as evidence to establish paternity.[29] The United States Supreme Court has stated that a state's interest in protecting family relationships is not effectuated by a statute minimizing the rights of illegitimate children.[30] Additionally, protection of the traditional

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added).

[26] *Anne R.*, 167 Misc. 2d at 347, 634 N.Y.S.2d at 341. Because this was the first time in New York State that an order for DNA testing of a decedent's frozen blood sample had been issued, it took many months for Roche Biomedical Laboratories to coordinate the drawing, transportation and analysis of the parties' blood samples. *Id.* at 346, 634 N.Y.S.2d at 341. The results of the DNA tests indicated the probability of paternity to be 96.61%. *Id.*, 634 N.Y.S.2d at 341. In New York, a test result of 95% probability creates a rebuttable presumption of paternity. N.Y. FAM. CT. ACT § 532(a) (McKinney 1983 & Supp. 1996).

[27] *Anne R.*, 167 Misc. 2d at 347, 634 N.Y.S.2d at 341. The Appellate Division, First Department, affirming *Janis*, stated that "[e]ven if [EPTL 4-1.2(a)(2)(D)] did contemplate post-death testing, the request for exhumation was *unreasonable* as a matter of law." *In re* Sidney Janis, 210 A.D.2d at 101, 620 N.Y.S.2d at 343 (emphasis added).

[28] *Anne R.*, 167 Misc. 2d at 347, 634 N.Y.S.2d at 341.

[29] *See generally* Le Ray, *supra* note 1 (discussing that accuracy and advances in DNA testing, and increased protection for illegitimate children eliminate justifications for refusing posthumous testing).

[30] Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972) (holding that Louisiana's workmen's compensation law, which denied equal recovery rights to illegitimate children, violated Equal Protection Clause of Fourteenth Amendment). The Court stated:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as unjust—way of deterring the parent.

Id.; *see also Trimble*, 430 U.S. at 769-70 (explaining that penalizing illegitimate children cannot affect parents' conduct nor change their own status). *But see supra* note 1 (discussing justifications for higher standards of proof and restrictions on il-

family structure by preserving the father's wealth and sparing his wife from recognizing the illegitimate children of her husband also fails as a justification for limiting the rights of illegitimate children in a modern society where divorce, alimony, remarriage, and stepchildren are common.[31] Furthermore, and most importantly, the accuracy of DNA technology has diminished fears of inadequate proof and fraudulent claims.[32] DNA testing after the putative father's death can accurately establish paternity since DNA testing utilizes molecules that remain stable and testable long after the donor's death.[33]

In a case factually similar to *Anne R., In re Estate of Greenwood*,[34] the Superior Court of Pennsylvania ordered the release of blood samples taken from a deceased putative father for the purpose of performing posthumous genetic testing to determine paternity.[35] The court, interpreting a Pennsylvania statute which

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legitimate children to prove paternity).

[31] *See* Krause, *supra* note 5, at 492-94 (explaining that traditional family structure is vanishing in society where second marriages, alimony to previous wives, and stepchildren being counted as members of family unit is increasingly common).

[32] Le Ray, *supra* note 1, at 784; *see also* MOENSSENS ET AL., *supra* note 7, at 933-35 (explaining that DNA typing can establish parentage of biological father to probability of 99 to 99.75 percent in majority of cases).

[33] MOENSSENS ET AL., *supra* note 7, at 935 ("DNA molecule is much more stable than other genetic markers."); *see also* Steven Connor & Michael Sheridan, *British Scientist Ends the Long Search for Josef Mengele*, THE INDEPENDENT (London), Apr. 5, 1992, at 10 (explaining that DNA test identified man who died and was buried in 1979 as Waffen-SS officer Josef Mengele); Nigel Hawkes, *DNA Test Identifies Tsarina's Bones*, TIMES (London), Dec. 11, 1992, at Home News Section (explaining that DNA tests identified bodies unearthed in Russia as members of Russian imperial family executed by Bolsheviks in 1918).

Many courts, including the New York Court of Appeals, have recognized the validity of DNA tests to prove the identity of an illegitimate child's father. *See* People v. Wesley, 83 N.Y.2d 417, 633 N.E.2d 451, 611 N.Y.S.2d 97 (1994) (recognizing DNA profiling as generally accepted by relevant scientific community). Courts should no longer be concerned that the decedent cannot be present to defend himself. *See In re* Erbe, 457 N.W.2d 867, 872 (S.D. 1990) (Wuest, C.J., dissenting) ("The accuracy and infallibility of the DNA test are nothing short of remarkable." (quoting Alexander v. Alexander, 537 N.E.2d 1310, 1314 (P. Ct. Ohio 1988))). Society, through legislation, must keep pace with the extraordinary developments in DNA testing. *Id.*

[34] 587 A.2d 749 (Pa. Super. Ct.), *appeal denied*, 600 A.2d 953 (Pa. 1991).

[35] *In re Greenwood*, 587 A.2d at 757. In *Greenwood*, the plaintiff notified the deceased's estate that she intended to claim an intestate share of the estate as the deceased's illegitimate daughter. *Id.* at 750. The administratrix, wife of the deceased, refused to accept a birth certificate and affidavits from the decedent's family and friends attesting to the decedent's acknowledgment that he was the plaintiff's father. *Id.* The administratrix indicated that blood testing was the only evidence of paternity she was prepared to accept. *Id.* When the plaintiff discovered that the county coroner had blood and tissue samples of the decedent, the administratrix re-

provides that paternity may be proven by clear and convincing evidence "that the man *was* the father of the child,"[36] concluded that the use of the past tense was indicative of the legislature's intent to permit paternity to be established "after" the putative father's death.[37] The court reasoned that prior judicial concern that the accurate, efficient, and final disposition of decedent's property would be jeopardized by problems of proof in posthumous paternity claims, was considerably reduced with the advent of sophisticated blood and tissue matching procedures.[38] In addition, the court concluded that the admission of posthumous genetic blood testing was one way of furthering the public policy

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fused to authorize the release of the samples to test for parentage. *Greenwood*, 587 A.2d at 750. After oral arguments, the Orphans' Court ordered the administratrix to authorize the release of the decedent's blood for genetic testing. *Id.* On appeal to the Superior Court, the administratrix argued that the plaintiff, having reached the age of 18, was barred from demanding testing of the decedent's blood by an 18-year statute of limitations. *Id.* at 752. The court held that there was no statute of limitations for bringing a posthumous paternity action to determine rights of inheritance. *Id.*; *cf. In re* Estate of Smith, No. 84, 385, 84, 386, 1995 WL 689549, at *3 (Fla., Nov. 22, 1995) (rejecting *Greenwood* rationale with respect to statute of limitations).

[36] 20 PA. CONS. STAT. ANN. § 2107(c)(3) (Supp. 1996) (emphasis added).

[37] *Greenwood*, 587 A.2d at 751-52. The use of the past tense ("was") rather than the present tense ("is") in § 2107 disclosed a legislative intent to authorize a court to enter an order of posthumous paternity. *Id.* at 752 n.3; *accord* Wawrykow v. Simonich, 652 A.2d 843, 845 (Pa. Super. Ct. 1994).

[38] *Greenwood*, 587 A.2d at 755 (citing Nichols v. Horn, 525 A.2d 1242, 1245 (Pa. Super. Ct. 1987)). The court acknowledged that Human Leucocyte Antigen (HLA) blood grouping tests can establish as high as 99.99% probability that the person tested is the biological father of the illegitimate child. *Id*; *see also Wawrykow*, 652 A.2d at 845 (explaining that where decedent's blood sample is available for testing, and testing might conclusively eliminate him as father or be used as some evidence of paternity, it is "relevant" factor which should not be withheld). *But see* Le Fevre v. Sullivan, 785 F. Supp. 1402, 1407 (C.D. Cal. 1991) (holding that results of DNA blood testing prior to putative father's death, absent finding that putative father openly acknowledged paternity, are insufficient to establish parent-child relationship under Social Security Act).

One way for an illegitimate child to establish entitlement to benefits under the Social Security Act is to prove entitlement to inherit from the insured under the laws of the state of the insured's domicile. *Id.* at 1404 n.1. Under California law, a right to intestate succession depends upon the existence of a proven parent-child relationship. CAL PROB. CODE § 6408 (West 1991), *superseded by* §§ 6450-55 (West Supp. 1995). This relationship can be established by a presumption of paternity at law that is not rebutted or by seeking a declaration of paternity through a civil action. *Le Fevre*, 785 F. Supp. at 1405-06. Under California law, there is no express provision for the use of DNA testing to preemptively establish paternity. *Id.* at 1406-07. *But see* N.C. GEN. STAT. § 49-14 (1994) (stating that proof of paternity brought after death of putative father shall not be established without evidence from blood or genetic marker test).

of eliminating the stigma of illegitimacy.[39]

The validity of posthumous genetic testing to prove paternity was reaffirmed when the North Carolina Court of Appeals, in *Batcheldor v. Boyd*,[40] upheld an exhumation order for the purposes of DNA testing.[41] The appellate court concluded that DNA testing to determine paternity was a reliable procedure under North Carolina law and should be utilized even when the putative father is deceased.[42] The court accepted the trial court's finding that the just and orderly disposition of a decedent's property constituted a legitimate state interest which outweighed the importance of the proper respect for the dead.[43] Finally, the court concluded that the possibility of fraudulent or meritless claims should not deter the court from its search for the truth when there is sufficient evidence to indicate that paternity exists.[44]

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[39] *Greenwood*, 587 A.2d at 755-56. The court was distressed by the fact that the administratrix conceded the value of the blood tests, yet sought to withhold the admission of such tests to avoid the plaintiff establishing "convincing" proof of paternity. *Id.* The court concluded that public policy counseled against allowing such behavior. *Id.* at 756.

[40] 423 S.E.2d 810 (N.C. Ct. App. 1992), *review denied*, 426 S.E.2d 700 (N.C. 1993).

[41] *Id.* at 814. In *Batcheldor*, the defendant filed a complaint stating that he intended to bring a declaratory judgment action to determine his inheritance rights. *Id.* at 811. Plaintiffs, alleged heirs of the deceased, responded by commencing a declaratory judgment action, seeking a determination of whether the defendant was the son of the deceased. *Id.* The defendant countered by filing a motion to exhume the deceased's body for DNA testing. *Id.* After an extensive hearing, the trial court ordered the exhumation and subsequent DNA testing. *Batcheldor*, 423 S.E.2d at 812. Plaintiffs obtained a stay of the exhumation order and appealed the trial court's decision to the Court of Appeals. *Id.* at 812-13; *cf. Wawrykow*, 652 A.2d at 847 (discussing that probate judge, acting in interests of justice, can order exhumation if petitioner presents sufficient evidence of paternity so that probate judge believes exhumation and DNA testing would resolve issue of heirship); *Alexander*, 537 N.E.2d at 1314 (upholding court order for exhumation of putative father so that DNA testing could be performed). *But see supra* note 17 and accompanying text for a discussion of *In re* Sidney Janis, where Surrogate Roth held that a non-marital child was not entitled to exhume decedent's body and conduct DNA testing to prove decedent was her father and establish standing to contest admission of a will into probate under § 4-1.2(a)(2)(D) of the EPTL.

[42] *Batcheldor*, 423 S.E.2d at 813; *see also Alexander*, 537 N.E.2d at 1314 ("Science has developed a means to irrefutably prove the identity of an illegitimate child's father. No longer are we dependent upon fallible testimony, nor are we concerned that the decedent cannot be present to defend himself. The accuracy and infallibility of the DNA test are nothing short of remarkable.").

[43] *Batcheldor*, 423 S.E.2d at 812.

[44] *Id.* at 814.

It is asserted that the language of section 519(c) of the F.C.A., which denies illegitimate children the opportunity to use posthumous DNA tests as evidence to establish paternity, should be considered violative of the Equal Protection Clause of the Fourteenth Amendment. The accuracy, reliability, and advances in DNA technology justify an order to test a deceased putative father's genetic material, through exhumation or other available sources.[45] Accordingly, it is submitted that the New York legislature should amend sections 519(c) and 532 of the F.C.A. to specifically grant authority to conduct posthumous DNA tests on the motion of any party or the court.[46] Until such statutory authority is granted, courts should utilize the holding and rationale of *Anne R.* to permit posthumous DNA testing to determine paternity. It is further submitted that the legislature should review all relevant provisions of post-death paternity proceedings, including section 4-1.2(a)(2) of the EPTL, to avoid the possibility of future conflicting judicial responses as in *Anne R.* and *Sidney Janis*.

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[45] *Id.* at 813-14 (exhumation); Anne R. v. Estate of Francis C., 167 Misc. 2d 343, 347, 634 N.Y.S.2d 339, 341 (Fam. Ct. Queens County 1995) (coroner's blood samples); *Alexander*, 537 N.E.2d at 1314 (exhumation); *Greenwood*, 587 A.2d at 757 (coroner's blood and tissue samples).

[46] By liberalizing the statutes the legislature could detail specific parameters and circumstances under which the moving party could prevail. *See Anne R.*, 167 Misc. 2d at 350, 634 N.Y.S.2d at 343 (positing that such parameters could include whether petitioner has standing and whether order is practicable and not unreasonable); *cf. Wawrykow*, 652 A.2d at 847 (holding that movant must establish "reasonable cause" as well as "good possibility" that exhumation will provide sufficient blood and/or tissue samples for testing to be entitled to exhumation for purpose of conducting DNA testing).