Albany Law Review [Vol. 69, Issue 4]

POSTHUMOUS PATERNITY TESTING: A PROPOSAL TO AMEND EPTL 4-1.2(a)(2)(D)

*Ilene Sherwyn Cooper**

The rights of children born out of wedlock have been of critical importance to the New York State legislature and judiciary since the early 1900's.[1] Taking guidance from their federal counterparts, each of these branches of government have pursued an active role in enhancing the rights of non-marital children in order to ensure that they are treated in *pari materia* with children born in wedlock.[2]

Within the area of trusts and estates, the rights of non-marital children have progressed significantly from the days when they were classified as illegitimates and were forced to suffer for the "sinful" acts of their parents.[3] For example, the provisions of what is now section 3-3.3 of the N.Y. Estates, Powers and Trusts Law ("EPTL") include illegitimate children as "issue" for purposes of the anti-lapse statute.[4] Additionally, in 1990, the provisions of section 2-1.3 of the EPTL were amended to include non-marital children within a class disposition under a will, trust, or other instrument.[5] Further, in 1975, a new provision was added to section 5-4.5 of the EPTL in order to entitle non-marital children to participate in wrongful death actions as paternal distributees.[6] Non-marital children have also been included by judicial fiat within the class of

*The author is a partner with Farrell Fritz P.C. where she concentrates in the field of Trusts and Estates. In addition, she is an Adjunct Professor of Law at Touro College, Jacob D. Fuchsberg Law Center where she teaches Trusts and Estates.

[1] *See* Will of Hoffman, 385 N.Y.S.2d 49, 51 (App. Div. 1976).

[2] *See id.* at 50.

[3] Levy v. Louisiana, 391 U.S. 68, 70–72 (1968); Jill T. Phillips, Comment, *Who is My Daddy? Using DNA to Help Resolve Post-Death Paternity Cases*, 8 ALB. L.J. SCI. & TECH. 151, 152–53 (1997).

[4] N.Y. EST. POWERS & TRUSTS LAW § 3-3.3(b) (McKinney 2006).

[5] *Id.* § 2-1.3 (a)(3).

[6] *Id.* § 5-4.5.

COOPER.FINAL.JERRY-8-13-06.DOC 9/1/2006 1:06:48 PM

after-born children protected by the provisions of section 5-3.2 of the EPTL.[7]

A common thread running through each of these legal advances for the non-marital class is the requirement that the paternity of the child first be established pursuant to the provisions of section 4-1.2 of the EPTL, commonly referred to by estate practitioners as the "paternity statute."[8] While this threshold burden is

[7] *See In re* Estate of Wilkins, 691 N.Y.S.2d 878, 882 (Sur. Ct. 1999).

[8] N.Y. EST. POWERS & TRUSTS LAW § 4-1.2. Inheritance by non-marital children:

(a) For the purposes of this article:

(1) A non-marital child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.

(2) A non-marital child is the legitimate child of his father so that he and his issue inherit from his father and his paternal kindred if:

(A) a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity or the mother and father of the child have executed an acknowledgement of paternity pursuant to section four thousand one hundred thirty-five-b of the public health law, which has been filed with the registrar of the district in which the birth certificate has been filed or;

(B) the father of the child has signed an instrument acknowledging paternity, provided that

(i) such instrument is acknowledged or executed or proved in the form required to entitle a deed to be recorded in the presence of one or more witnesses and acknowledged by such witness or witnesses, in either case, before a notary public or other officer authorized to take proof of deeds and

(ii) such instrument is filed within sixty days from the making thereof with the putative father registry established by the state department of social services pursuant to section three hundred seventy-two-c of the social services law, as added by chapter six hundred sixty-five of the laws of nineteen hundred seventy-six and

(iii) the department of social services shall, within seven days of the filing of the instrument, send written notice by registered mail to the mother and other legal guardian of such child, notifying them that an acknowledgment of paternity instrument acknowledged or executed by such father has been duly filed or;

(C) paternity has been established by clear and convincing evidence and the father of the child has openly and notoriously acknowledged the child as his own; or

(D) a blood genetic marker test had been administered to the father which together with other evidence establishes paternity by clear and convincing evidence.

(3) The existence of an agreement obligating the father to support the non-marital child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made or acknowledgment of paternity as prescribed by subparagraph (2).

(4) A motion for relief from an order of filiation may be made only by the father and a motion for relief from an acknowledgement of paternity may be made by the father, mother or other legal guardian of such child, or the child, provided however, such motion must be made within one year from the entry of such order or from the date of written notice as provided for in subparagraph (2).

(b) If a non-marital child dies, his surviving spouse, issue, mother, maternal kindred, father and paternal kindred inherit and are entitled to letters of administration as if the decedent were legitimate, provided that the father and paternal kindred may inherit or obtain such letters only if the paternity of the non-marital child has been established pursuant to provisions of clause (A) of subparagraph (2) of paragraph (a) or the father has signed an instrument acknowledging paternity and filed the same in accordance with the provisions of clause (B) of subparagraph (2) of paragraph (a) or paternity has

understandable, its end-result vis-à-vis New York's aims of promoting parity between non-marital children and their marital counterparts has been disappointing, if not counterproductive.

Most significantly, this is apparent within the context of applications to determine paternity through use of DNA blood testing pursuant to the provisions of section 4-1.2(a)(2)(D) of the EPTL. Based upon antiquated notions relative to the reliability of DNA test results, this section precludes the use of such evidence for purposes of establishing paternity when the testing is performed, or the results are obtained, posthumously.[9] The ill-effects of the statute upon the rights of non-marital children have been dramatic, depriving some of inheritance rights even under circumstances where scientific testing has established paternity within the range of 99.19% to 99.89%.[10] In other instances, courts have invoked the statute to deny applications to obtain posthumous blood and/or

tissue samples, as in the case where exhumation of a decedent's body was sought for purposes of testing.[11] These decisions were made despite the equities which revealed that, absent proof of paternity, the party seeking exhumation would lose fundamental personal and property rights.

Significantly, the provisions of the New York Family Court Act ("FCA") and the New York Civil Practice Law and Rules ("CPLR") are less archaic than those of the EPTL when it comes to recognizing the evidentiary use of DNA in proving paternity.[12] Indeed, as compared to the provisions of section 4-1.2(a)(2)(D) of the EPTL, there is nothing in the provisions of section 532 of the FCA that prohibits the admission of post-death blood results into evidence, thereby foreseeably affording greater opportunity for non-marital children to prove paternity in the Family Court than in the Surrogate's Court.[13]

---

been established by clear and convincing evidence and the father of the child has openly and notoriously acknowledged the child as his own.

[9] Will of Janis, 600 N.Y.S.2d 416, 418–19 (Sur. Ct. 1993).

[10] Estate of DeLuca, N.Y.L.J., Jan. 15, 1998, at 37 (Sur. Ct.); *see also In re* Johnson, N.Y.L.J., Oct. 15, 1997, at 37 (Sur. Ct.) (holding that it was precluded from determining paternity under section 4-1.2(a)(2)(D) of the EPTL despite the evidence in the record which established a 99.93% probability that the decedent was the father on the ground that "any blood genetic marker or DNA test administered [pursuant to this section] to the child's father must have been administered during the father's lifetime").

[11] *See Will of Janis*, 600 N.Y.S.2d at 417–19; *see In re* Estate of Sekanic, 653 N.Y.S.2d 449, 450 (App. Div. 1997).

[12] *See* N.Y. C.P.L.R. 4518(c) (McKinney 2006); N.Y. JUD. CT. ACTS § 532 (McKinney 2006).

[13] *See* Anne R. v. Estate of Francis C., 634 N.Y.S.2d 339, 341 (Fam. Ct. 1995), *aff'd*, 651 N.Y.S.2d 539 (App. Div 1996).

To rectify this incongruity, and in an effort to advance the rights of non-marital children otherwise accorded under New York law, the Trusts and Estates Law Section of the New York State Bar Association proposed legislation that "would allow posthumous testing of blood and tissue samples to determine paternity."[14] As originally drafted, the bill specifically referred to the provisions of Article 15 of the Not-for-Profit Corporation Law authorizing exhumations and would have amended that statute to confer jurisdiction upon the Surrogate's Court as well as the county and supreme courts to hear and determine such applications.[15]

This legislation and the history underlying its proposal was the subject of an article by this author written in 1999.[16] Unfortunately, however, as herein discussed, since its writing six years ago, the proposed bill has made relatively minor progress in the New York State legislature, leaving New York law still unchanged with respect to recognizing posthumous DNA test results as a means of proving paternity, and well behind the nation, and the current views of many of its surrogates, in its perspective. Change is required.

I. THE PENDING LEGISLATION

Since its initial proposal by the Trusts and Estates Law Section in 1998, the suggested amendment of section 4-1.2(a)(2)(D) of the

EPTL was endorsed by the House of Delegates of the New York State Bar Association and was introduced in the New York State Senate and Assembly at the start of the 1999–2000 legislative session. The bill was subsequently amended by the Assembly (A2850-A) in order to accommodate fears by legislative members that the proposed statute would precipitate an increase in exhumation requests. The bill, which was thereafter passed, in its amended form, by the Senate in 2004 (S. 6990) now reads as follows:

> Section 1. Item (D) of subparagraph 2 of paragraph (a) of section 4-1.2 of the estates, powers and trusts law, as added by chapter 434 of the laws of 1987, is amended to read as follows:
>
> (D) a [~~blood~~] genetic marker test [~~had been~~] administered

[14] Ilene Sherwyn Cooper, *Advances in DNA Techniques Present Opportunity to Amend EPTL to Permit Paternity Testing*, 71 N.Y. ST. B.J. 34, 34 (1999).

[15] *Proposed Amendments to EPTL 4-1.2(a)(2)(D) and N-PCL § 1510(e), reprinted in* 71 N.Y. ST. B.J 34, 39 (1999).

[16] *See* Cooper, *supra* note 14.

> to the father <u>during his lifetime or posthumously</u>, which together with other evidence establishes paternity by clear and convincing evidence. <u>Posthumous testing to determine paternity shall be permitted where the party seeking such testing bears the expense, unless otherwise provided by the court where (i) paternity is established; or (ii) such costs are sought by a guardian-ad-litem, a committee, a conservator, or a guardian appointed pursuant to the provisions of article eighty-one of the mental hygiene law.</u>
>
> § 2. This act shall take effect immediately and shall apply to estates of decedents dying on or after such date.[17]

Since 2004, the legislature has remained silent in its endorsement of the bill, apparently continuing to languish in its unsubstantiated concerns that the proposed statutory amendment would increase the number of exhumations in New York.[18] Thus, New York maintains the status quo of years past, as the rest of the country moves proactively toward recognizing posthumous genetic testing as a means of establishing paternity.

II. THE NATIONAL TREND

A. The Uniform Parentage Act

The status of the non-marital child received significant support through the adoption of the Uniform Parentage Act (UPA). As defined in the Preamble, the purpose of the UPA was to accord equal rights to all children without regard to the marital status of the parents.[19] Its drafters intended the UPA to replace those state laws that were unconstitutional or under constitutional scrutiny.[20]

First passed by the National Conference of Commissioners on Uniform State Laws in 1973, the Act was thereafter withdrawn and

reenacted in 2000, and amended in 2002, in part, as a result of scientific advances in parentage testing. The UPA is in effect in nineteen states,[21] with many other states having enacted

[17] S. 6990, 2004 Leg., Reg. Sess. (N.Y. 2004).

[18] Despite legislative comment that such an amendment would increase the number of exhumations in New York, there is no proof that this would necessarily result, particularly in view of the statutory requirements for exhumation.

[19] UNIF. PARENTAGE ACT, prefatory cmt. (1973), 9B U.L.A. 378 (1973).

[20] *Id.*

[21] Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, Texas,

substantial portions of it or recognizing the principles for which it stands.

Among the many important provisions of the UPA in its present form are those contained in Article 5, *Genetic Testing*. In addition to establishing the requirements for genetic testing and the use of genetic test results, section 509 of the Article provides for the genetic testing of a deceased individual, as follows: "For good cause shown, the court may order genetic testing of a deceased individual."[22]

Significantly, the statute contemplates disinterment for this purpose, as the Comment to the section reads: "In some States, the court with jurisdiction to adjudicate parentage may lack authority to order disinterment of a deceased individual. If so, that authority is provided by this section."[23]

B. The National Perspective

In accord with the foregoing purposes of the UPA, the national trend has been to liberalize the requirements for posthumous paternity testing, even to the extent of authorizing exhumation for this purpose.

For example, in Arkansas, the Court of Appeals in *Brothers v. Berg* affirmed a judgment of paternity by the trial court based upon blood samples taken from the decedent after his death which showed a 99.99% probability of paternity.[24]

In *In re Estate of Stowers*,[25] the Supreme Court of Mississippi reversed the trial court's holding which ordered exhumation of the decedent's body for purposes of an autopsy, "but denied exhumation for DNA paternity testing,"[26] upon the decedent's remains when such testing was available and was the best evidence. The case was remanded to the lower court for a correct genetic marker testing to be performed on the child.[27]

Additionally, in Wisconsin, courts will recognize use of posthumously obtained genetic material to prove paternity for inheritance purposes. For example, in *In re Estate of Bays*,[28] the

Washington, and Wyoming. *See generally* UNIF. PARENTAGE ACT 9B U.L.A. 377 (2005).

[22] UNIF. PARENTAGE ACT § 509, 9B U.L.A. 335 (2000).

[23] *Id.* § 509 cmt.

[24] No. CA 96-1108, 1997 WL 286294, at *2, *7, *12, *15 (Ark. Ct. App. May 28, 1997).

[25] 678 So. 2d 660 (Miss. 1996).

[26] *Id.* at 661, 663.
[27] *Id.* at 663.
[28] No. 03-1120-FT, 2003 WL 22093479 (Wis. Ct. App. Sept. 9, 2003).

court reversed the trial court's order that had denied the putative child's request to have a posthumous blood sample from the deceased released for DNA testing to establish that he was the decedent's sole heir. In reaching this result, the appellate court drew the narrow distinction between "actions" to determine paternity and "motions" within a probate proceeding to establish heirship for purposes of intestate succession[29] and held that the limitations period for establishing paternity does not apply to probate proceedings.[30]

Similarly, in *In re Estate of Majeski*,[31] a Wisconsin court invoked principles of judicial estoppel to bar the personal representative from contesting the status of an alleged child of the decedent which had been established as a result of posthumous DNA testing conducted pursuant to agreement of the parties.[32] The court further concluded that even though the statute governing the inheritance rights of non-marital children would have otherwise precluded the use of genetic test results for this purpose, "parties may agree to something which may not be allowed by statute."[33]

In Michigan, the courts have also recognized posthumous paternity testing for inheritance purposes as evidenced by the decision of the Michigan Court of Appeals in *In re Estate of Jones*.[34] Here, the court directed that the parties be given the opportunity to determine paternity pursuant to the state's Paternity Act,[35] utilizing a DNA profile of the "child's tissue and the tissue of either decedent or decedent's mother."[36] In reaching this conclusion, the court opined that "[s]uch a judicial determination of paternity would then be sufficient for [the child] to inherit from the intestate decedent's estate."[37]

Similarly, in *Brady v. Smith*,[38] the Court of Appeals of Tennessee recognized posthumous paternity test results when it held that the defendants had "established that [d]ecedent was their biological father" as a result of posthumous testing performed on the

[29] *Id.* at *2.
[30] *Id.* at *1–*2.
[31] No. 02-1560, 2003 WL 21077424 (Wis. Ct. App. May 14, 2003).
[32] *Id.* at *1–*2.
[33] *Id.* at *3.
[34] 525 N.W.2d 493, 497 (Mich. Ct. App. 1994).
[35] *Id.* (referring to MICH. COMP. LAWS ANN. § 722.711–730 (West 2006)).
[36] *Id.*
[37] *Id.*
[38] 56 S.W.3d 523 (Tenn. Ct. App. 2001).

decedent's DNA.[39]

In Vermont, the court in *In re Estate of Murcury*[40] also recognized the availability of posthumous DNA testing to prove paternity in a contested administration proceeding involving a dispute between the decedent's sisters and putative child.[41] Although the putative child's claims were dismissed on the basis of the statute of limitations,[42] the case is significant for its acknowledgment that genetic testing of a deceased is available to establish parentage, even if disinterment is required for this purpose.[43]

Connecticut courts have also ordered exhumation in order to posthumously obtain DNA samples to establish paternity. For example, in *Hornbeck v. Simmons*, the court ordered exhumation of the decedent's body along with DNA testing upon application by the decedent's mother, who sought to prove that her former husband was not the decedent's biological father.[44] The court reasoned that because it was "a court of equity where truth is always a major goal," the plaintiff's request should be approved.[45]

The result in *Hornbeck* was followed three years later in *Lach v. Welch*,[46] where exhumation of the decedent was ordered to perform paternity tests,[47] and in *Brancato v. Moriscato*,[48] where the Superior Court of Connecticut ordered exhumation of the decedent's body for DNA testing after a hearing at which time the alleged child established that she had a reasonable belief that the decedent was her father.[49] Significantly, the trial court rejected the estate's claim that genetic test results were inadmissible in probate court, concluding that it was "without merit, particularly in view of the progress which has been made in the file of DNA testing and its general acceptance in every field of endeavor."[50]

In *Child Support Enforcement Agency, Hawaii v. Doe*,[51] an appeal was taken to the Intermediate Court of Appeals of Hawaii by the executor of the decedent's estate from a circuit court decision which

---

[39] *Id.* at 525.
[40] 868 A.2d 680 (Vt. 2004).
[41] *Id.* at 680–81, 684.
[42] *Id.* at 686.
[43] *See id.* at 685.
[44] No. 705309, 1994 WL 506620, at *1, *5 (Conn. Super. Ct. Sept. 6, 1994).
[45] *Id.* at *5.
[46] FA 930063955, 1997 WL 536330 (Conn. Super. Ct. Aug. 15, 1997).
[47] *Id.* at *22.
[48] CV030472496S, 2003 WL 1090596 (Conn. Super. Ct. Feb. 27, 2003).
[49] *Id.* at *2, *4.
[50] *Id.* at *4.
[51] 53 P.3d 277 (Haw. Ct. App. 2002).

found paternity based upon the testimony of the alleged child's mother, and DNA testing that had been performed on blood samples obtained posthumously from the decedent upon consent of the parties, as well as samples drawn from the mother and child.[52] The circuit court subsequently denied an application by the estate to set aside the paternity judgment on the grounds of newly discovered evidence which made the blood samples drawn from the decedent suspect and concluded instead that even if the blood samples were

disregarded, the mother's testimony, albeit uncorroborated, was sufficient in itself to establish paternity.[53] The appellate court reversed and remanded the matter for further proceedings on the estate's motion.[54] In reaching this result, the court held that while paternity could be determined posthumously, the uncorroborated testimony of the mother was insufficient for the finding of a paternal relationship.[55] Significantly, the court, in remanding the matter, offered no opinion as to whether the paternity judgment had to be set aside on the basis of the DNA evidence obtained.[56]

Pennsylvania courts have taken a notably progressive view of posthumous paternity testing as early as 1991. For example, in *In re Estate of Greenwood*,[57] the Superior Court of Pennsylvania ordered the release of the decedent's blood and tissue samples in order to perform genetic testing to determine whether the petitioner was the decedent's daughter.[58] In reaching this conclusion, the court noted how the law regarding the rights of non-marital children to inherit by intestate succession had changed over the years. While acknowledging that a state has an interest in the "accurate and efficient disposition of the decedent's property," it found that the case before it did not present such a danger to the state's interest.[59]

Three years after the decision in *Greenwood*, the Superior Court of Pennsylvania in *Wawrykow v. Simonich*[60] held that exhumation would be allowed for purposes of DNA testing upon a showing of

---

[52] *Id.* at 278–79.
[53] *Id.* at 278.
[54] *Id.*
[55] *Id.* at 296.
[56] *Id.* The decision by the Intermediate Court of Appeals was vacated by the Supreme Court of Hawaii because the motion brought by the deceased putative father's mother was untimely. Child Support Enforcement Agency v. Doe, 51 P.3d 366, 371–72 (Haw. 2002).
[57] 587 A.2d 749 (Pa. Super. Ct. 1991).
[58] *Id.* at 756–57.
[59] *Id.* at 756.
[60] 652 A.2d 843 (Pa. Super. Ct. 1994).

reasonable cause to believe that such exhumation would present conclusive evidence concerning paternity.[61] The court, although noting that this case was one of first impression, nevertheless found "guidance" in the opinion of the court in *Greenwood* which recognized the right of a child out of wedlock to prove paternity even after the death of the putative father.[62] In furtherance of this right, the court construed both Pennsylvania state statutes and case law as requiring consideration of tests performed upon a decedent's blood sample, if available for testing, to the extent the results "might conclusively eliminate him as the father or be used as some evidence of paternity."[63]

Most significantly, with regard to the issue of whether a blood sample "was available" for testing, the court determined that exhumation was not an impediment to such a finding so long as reasonable cause for the exhumation was shown. In reaching this conclusion, the court held:

> Albeit DNA test results "are but one of the fibers which go into making the pattern of evidence either proving or disproving paternity[,] and [even though] . . . it is within the province of the trier-of-fact to believe all, some or none of the evidence presented", that does not discount the relevancy/materiality of the evidence sought by one attempting to establish paternity via DNA testing. A party seeking DNA testing as a vehicle to supplement his/her arsenal of evidence to prove paternity should not be denied access to such potentially probative evidence, provided, as is the case here, the petitioner satisfies the "reasonable cause" criterion to warrant exhumation.[64]

Moreover, exhumation, stated the court, will best effectuate the truth-finding process and the interests of minimizing "the sting of illegitimacy and societal opprobrium which attaches to a child born out of wedlock by allowing him to prove his lineage, and, if such is shown by clear and convincing evidence, to inherit from his father's estate."[65]

While the majority of the states recognize the scientific accuracy

---

[61] *Id.* at 845, 847 n.3.
[62] *Id.* at 844 (citing *Estate of Greenwood*, 587 A.2d 749).
[63] *Id.* at 845.
[64] *Id.* at 847 (citation omitted).
[65] *Id. See also* Estate of Martignacco, 689 N.W.2d 262, 265 (Minn. Ct. App. 2004) (determining that the genetic blood testing of the decedent performed posthumously after the body was exhumed provided conclusive proof of paternity for purposes of intestate succession).

of posthumous DNA testing for the purpose of proving paternity, with some authorizing exhumation in certain instances,[66] several states have rejected this perspective adhering to antiquated notions and social views that recognition of posthumously obtained DNA test results will promote "stale or fraudulent claims."[67]

Clearly, New York stands in the minority with its view. However, change is afoot in New York as evidenced by the following recent opinions of New York surrogates.

II. RECENT NEW YORK DECISIONS—A PROSPECTIVE VIEW

As compared to the legislative constituent, New York surrogates have modernized their view of posthumously obtained DNA evidence in order to remain current with the scientific advances in DNA testing since the provisions of section 4-1.2(a)(2)(D) of the EPTL were first enacted.

The decision by the New York County Surrogate's Court in *In re Estate of Bonanno*[68] served as the springboard for this approach and provided the analytical framework for the evidentiary use of posthumous DNA test results in determining paternity.

Before the court was a proceeding instituted by a putative son of the decedent who sought his intestate share of his alleged father's estate and the revocation of letters of administration issued to the decedent's sister. The decedent's sister moved to dismiss the

proceeding on the grounds that there was no proof that the petitioner was the decedent's biological child.[69]

To support his claim, the petitioner requested the court to consider permitting a DNA test to be performed upon samples

[66] *See, e.g.*, Connecticut (Hornbeck v. Simmons, No. 705309, 1994 WL 506620, at *1, *5 (Conn. Super. Ct. Sept. 6, 1994); *see supra* note 44–45 and accompanying text); Delaware (DEL. CODE ANN. tit. 13, § 8-509 (permitting genetic testing on a deceased person)); Maryland (Taxiera v. Malkus, 578 A.2d 761, 766 (Md. 1990) (holding that the provisions of the relevant statute permit posthumous determinations of paternity)); Minnesota (*Estate of Martignacco,* 689 N.W.2d 262; *see supra* note 65 and accompanying text); North Carolina (Batcheldor v. Boyd, 423 S.E.2d 810, 814 (N.C. Ct. App. 1992) (holding that the trial court did not err in permitting posthumous DNA testing)); Ohio (Alexander v. Alexander, 42 Ohio Misc. 2d 30, 34 (Prob. Ct., Ohio 1988) (court ordered exhumation to permit DNA tests to determine paternity of the decedent for inheritance purposes)); Pennsylvania (Wawrykow v. Simonich, 652 A.2d 843 (Pa. Super. Ct. 1994); see discussion *supra* Part II.B).

[67] *See, e.g.*, Pace v. State, 648 So.2d 1302, 1310 (La. 1995) (holding that illegitimate children have a right to posthumous paternity testing, although the court recognizes the state's interest in "preventing the prosecution of stale or fraudulent claims").

[68] 745 N.Y.S.2d 813 (Sur. Ct. 2002).

[69] *Id.* at 814.

collected during an autopsy on the decedent.[70] The court granted the request over objection by the respondent who maintained that posthumously obtained DNA test results could not be utilized to support a claim of paternity. Unfortunately for the petitioner, the DNA test results demonstrated a 0% probability that the decedent was his biological father, causing him to reverse his position and request a hearing before the paternity issue was determined.[71]

The court disagreed, despite the provisions of section 4-1.2(a)(2)(D) of the EPTL, finding that the accuracy of DNA testing in determining paternity could not be ignored.[72] Drawing from dicta in *Will of Janis*, the court reconciled the tension between the limitations of the statute and scientific advancements in the field of genetic testing by relying upon the provisions of section 4-1.2(a)(2)(C) of the EPTL.[73] This was done in order to consider the results of posthumous DNA tests performed upon the decedent's genetic material as part of the category of "clear and convincing" evidence.[74] The court opined that "[t]here is no basis in law or logic to exclude the results of posthumously conducted DNA tests on a decedent's genetic material . . . [n]either the parties *nor the courts* need be blind to scientific reality."[75]

Subsequent to *Bonnano*, the court in *Estate of Santos*[76] went one step further and urged the legislature to amend the provisions of section 4-1.2(a)(2)(D) of the EPTL in order to bring them into conformity with scientific developments in the field of DNA. The issue of paternity in *Santos* arose during the course of a kinship hearing involving the estate of a deceased child. The child's putative father was the administrator of his estate. The child's maternal grandmother moved the court for DNA testing of blood samples available from the infant in order to determine whether the putative father was indeed the father of the child for purposes of inheritance pursuant to section 4-1.2(a)(2)(C) of the EPTL. The infant's grandmother sought to disprove paternity of the putative

[70] *Id.*
[71] *Id.*
[72] *Id.* at 815.
[73] The provisions of section 4-1.2(a)(2)(C) of the EPTL will permit a non-marital child to inherit from his or her father if a two-prong test is satisfied: "paternity has been established by clear and convincing evidence and the father of the child has openly and notoriously acknowledged the child as his own."
[74] *Bonanno*, 745 N.Y.S.2d at 815.
[75] *Id.* (emphasis added) (citation omitted).
[76] N.Y.L.J., July 28, 2003, at 22 (Sur. Ct.).

father through the DNA test results.[77]

In ordering the tests to be performed, the court emphasized the need for legislative reform of both section 4-1.2(a)(2)(C) of the EPTL and section 4-1.2(a)(2)(D) of the EPTL so as to allow DNA evidence to be admitted and relied upon as the exclusive basis for proving paternity:

> Technology has advanced to the point where DNA testing is almost 100 percent proof or disproof of paternity. Therefore, when DNA is available, the second prong of the either 'open and notorious' under EPTL 4-1.2(a)(2)(C) and other evidence of EPTL 4-1.2(a)(2)(D) should be eliminated allowing DNA evidence to be admitted as 'clear and convincing evidence' without more. . . .
>
> . . . [Furthermore, a]dvances in DNA technology, together with its acceptability in the legal and scientific communities, provide a useful tool in post-death paternity proceedings, especially where evidence does not satisfy the burden of proof.[78]

Two years after *Santos*, the Surrogate of Rockland County, in *In re Michael R.*,[79] followed suit, holding that the petitioner had established that he was the son and sole heir of the deceased pursuant to the provisions of section 4-1.2(a)(2)(C) of the EPTL, based upon nuclear and mitochondrial DNA testing performed upon samples obtained from the decedent's toothbrush.[80] The court concluded that the mitochondrial DNA analysis was acceptable as evidence in view of its established reliability in the scientific community.[81]

In a 2005 decision, the Appellate Division, Fourth Department, addressed the issue of posthumous DNA testing when it affirmed the opinion of the Surrogate's Court, Erie County, which granted a motion to compel the production of available blood and/or tissue samples of the decedent for the purposes of DNA testing.[82] Citing the decisions in *In re Bonnano* and *In re Estate of Thayer*,[83] the court held that the results of DNA testing could be used to satisfy the burden of establishing paternity, pursuant to section 4-

[77] *Id.*
[78] *Id.* (citation omitted).
[79] 793 N.Y.S.2d 710 (Sur. Ct. 2004).
[80] *Id.* at 711.
[81] *Id.*
[82] *In re* Estate of Morningstar, 794 N.Y.S.2d 205–06 (App. Div. 2005).

[83] 769 N.Y.S.2d 863 (Sur. Ct. 2003).

1.2(a)(2)(C) of the EPTL, and that a preliminary showing that the decedent openly and notoriously acknowledged the alleged child as his own was not required before DNA testing could proceed.[84] To the contrary, *In re Davis*[85] held that such open and notorious acknowledgment was necessary. If it is proven that decedent "openly and notoriously acknowledged the petitioner as his son . . . [petitioner's] motion for DNA testing should be granted."[86]

The majority of the foregoing decisions indicate a movement by the New York surrogates to recognize the evidentiary use of DNA testing in proving paternity, even posthumously. Indeed, while the legislature lingers and hesitates in reaching this end-result through an amendment of section 4-1.2(a)(2)(D) of the EPTL, the courts have relied upon the provisions of section 4-1.2(a)(2)(C) of the EPTL in order to achieve, indirectly, what legislative inaction has precluded them from doing directly.[87]

As a result, one has to necessarily conclude that such judicial machinations would be eliminated with a legislative amendment to section 4-1.2(a)(2)(D) of the EPTL reflective of the well-documented advances in DNA technology and its indisputable accuracy in establishing paternity. Clearly, if New York is to keep pace with scientific reality, the need for legislative action is imperative.

III. A BASIS FOR AMENDING SECTION 4-1.2(a)(2)(D) OF THE EPTL

As evidenced by the foregoing, amendment of section 4-1.2(a)(2)(D) of the EPTL would support New York's established policy of promoting the rights of non-marital children, based upon what surrogates now realize is reliable scientific data. The result would have little or no impact upon the number of exhumations ordered and would bring New York law current with most of the

[84] *Estate of Morningstar*, 794 N.Y.S.2d at 205–06; *cf. In re* Estate of Seekins, 755 N.Y.S.2d 557, 559 (Sur. Ct. 2002) (denying petitioner's motion to obtain existing blood samples of decedent in order to conduct a DNA test for purposes of establishing paternity because there is "conflicting factual issues as to whether decedent 'openly and notoriously acknowledged' petitioners as his sons").

[85] 812 N.Y.S.2d 543 (App. Div. 2006) (affirming the legislative history of section 4-1.2(a)(2)(C) of the EPTL "which indicates [the provision] was enacted, not to create rights for all nonmarital children, but to insure the rights of nonmarital children known to the decedent and openly acknowledged by the decedent during his lifetime").

[86] *Id.*

[87] Notably, although the courts in *Will of Janis*, 600 N.Y.S.2d 416 (Sur. Ct. 1993), and *In re Estate of Sandler*, 612 N.Y.S.2d 756 (Sur. Ct. 1994), denied use of posthumously obtained DNA evidence in proving paternity under section 4-1.2(a)(2)(D) of the EPTL, they each recognized that post-death genetic marker test results might be admissible under clause (C) of section 4-1.2 of the EPTL.

nation in recognizing posthumous DNA testing as a means of proving paternity.

A. Exhumation

The provisions of New York's Not-for-Profit Corporation Law § 1510(e) control exhumation of bodies from cemeteries upon the consent of the decedent's surviving spouse, adult children, and parents, and the corporation of the cemetery where the body is interred.[88] Court intervention is necessary only where consent is not unanimous.[89]

Section 1510 of the Not-For-Profit Corporation Law has a history which dates back approximately 100 years, when it was known as the Membership Corporation Law.[90] Specifically, section 1510(e), governing removals, was derived from section 89 (formerly section 71) of the law, and reads much the same today as it did in years past.[91] As defined by case law dating as far back as 1908, the "evident purpose [of the provision] was to settle a question long mooted as to the right of cemetery corporations to allow disinterments, and of the rights of relatives of deceased persons to cause such disinterments to be made."[92]

Historically, the statute has been invoked in criminal matters and in civil matters attendant to family wishes or religious convictions. While there are no apparent statistics available by which to

---

[88] It should be noted that under the statute, jurisdiction is usually limited to the county court of the county, or the supreme court of the district, where the cemetery is located. In *Will of Janis*, though the cemetery was located outside the court's jurisdiction, it heard the matter inasmuch as the cemetery had appeared and did not object to the court's deciding the matter. *Will of Janis*, 600 N.Y.S.2d at 418.

[89] Article 15 of the Not-for-Profit Corporation Law deals with public cemeteries. N.Y. NOT-FOR-PROFIT CORP. LAW § 1510 (McKinney 1998). Article 14 of the Not-for-Profit Corporation Law deals with "Special Not-for-Profit Corporations," i.e. private and family cemetery corporations. N.Y. NOT-FOR-PROFIT CORP. LAW § 1401 (McKinney 1998).

[90] N.Y. MEMBERSHIP CORP. LAW § 71 (Consol. 1909).

[91] Section 1510(e) reads as follows:

> (e) Removals. A body interred in a lot in a cemetery owned or operated by a corporation incorporated by or under a general or special law may be removed therefrom, with the consent of the corporation, and the written consent of the owners of the lot, and of the surviving wife, husband, children, if of full age, and parents of the deceased. If the consent of any such person or of the corporation can not be obtained, permission by the county court of the county, or, by the supreme court in the district, where the cemetery is situated, shall be sufficient. Notice of application for such permission must be given, at least eight days prior thereto, personally, or, at least sixteen days prior thereto, by mail, to the corporation or to the persons not consenting, and to every other person or corporation on whom service of notice may be required by the court.

N.Y. NOT-FOR-PROFIT CORP. LAW § 1510(e) (McKinney 2005).

[92] *In re* Ackermann, 109 N.Y.S. 228, 229 (App. Div. 1908).

determine the number of exhumations that have taken place statewide, the fact that there are relatively few reported cases dealing with this subject suggests that exhumation is a rare occurrence, most assuredly due to the statutory safeguards in place when intervention from the courts is required.[93]

Where judicial intervention is required, exhumation rests within the court's sound discretion based upon an assessment of the facts

and circumstances. In *Ackermann*, the court set the standard for disinterment when it held that disturbance of a gravesite may be necessitated by many circumstances and should be authorized upon a showing that such circumstances affect a public policy concern or a "superior private right."[94] In *Will of Janis*, the court held that in a civil case this standard required proof of "[g]ood and substantial reasons" for the disinterment.[95] In *Frost v. St. Paul's Cemetery Ass'n*,[96] the court recapitulated the guidelines to be used as follows:

> Where judicial sanction is sought to disturb the quiet of the grave, there must be considered (a) The deceased's wishes to which deceased may have given expression during his lifetime. (b) The religious convictions of the deceased. (c) By whose direction the choice of situs of burial was made. (d) The desires and motives of those of close kin, especially of a spouse prompting a change in location. (e) The sanctity of sepulture.[97]

These guidelines were rendered within the context of a decision where the request was to exhume the body of the deceased and re-intern it elsewhere. Presumably, not all of these factors, if any, are of concern where relocation of a body to another gravesite is not at issue. Rather, under such circumstances, it is the equities of the situation, cast with an eye towards public and private policy considerations and interests, which are dispositive. Hence, when exhumation is sought in a criminal case, "actual need" or a "real and

---

[93] Given this history, it is a fallacy for the legislature to consider the proposed legislation as creating a mechanism for exhumation that never before existed. Moreover, given the standards imposed when judicial intervention is required there seems to be no rational basis for legislative hesitancy in passing the proposed bill attributable to fears of increased exhumations. *See supra* Part II.

[94] 109 N.Y.S. at 229. A "superior private right" is arguably one that is guaranteed by or embedded within the United States Constitution as a fundamental right accorded every citizen. *See infra* Part II.C (discussing establishment of the parent-child relationship as a fundamental right).

[95] *See* Will of Janis, 600 N.Y.S.2d 416, 419 (Sur. Ct. 1993) (quoting Currier v. Woodlawn Cemetery, 90 N.E.2d 18, 19 (N.Y. 1949)).

[96] 254 N.Y.S.2d 316 (Oneida County Ct. 1964).

[97] *Id.* at 318 (citations omitted).

legitimate basis" for exhumation must be shown.[98]

The court in *Will of Janis* held that the criminal standard for exhumation was applicable in the proceeding, inasmuch as the petitioner was seeking evidence to be utilized at trial and held that the petitioner had not satisfactorily established the scientific grounds for exhumation.[99]

Given the ever-progressive view of New York courts towards non-marital children and posthumous DNA test results, it is questionable whether the result in *Will of Janis* would be the same if it was before the court today. Indeed, in view of the basic fundamental rights at issue in a determination of paternity,[100] the state's interest as *parens patriae* in establishing the parent-child relationship,[101] and the current technology available for the use of DNA testing posthumously, a petitioner's request for exhumation in

order to conduct posthumous DNA testing should not be met with the same judicial or legislative resistance as in years past.[102]

B. The Reliability of DNA Testing

Given the scientific advances in the field of genetics and DNA testing since section 4-1.2(a)(2)(D) of the EPTL was first enacted, any concerns of fraud which once existed in respect to posthumous paternity claims should serve as no deterrent to the proposed statutory amendment.

Although DNA evidence was first introduced in United States criminal courts in 1986, it was not until 1998 that all United States jurisdictions allowed DNA evidence.[103] Recognizing the significant evidentiary value of DNA testing, all fifty states have incorporated its use into their statutory schemes, and state and federal governments have integrated it as an essential tool in criminal investigations.[104]

Perhaps the reason DNA testing has become so widely used is

---

[98] *See* People v. Radtke, 578 N.Y.S.2d 827, 830 (Sup. Ct. 1991).

[99] *Will of Janis*, 600 N.Y.S.2d at 419.

[100] *See infra* note 129 and accompanying text.

[101] *See infra* note 114 and accompanying text.

[102] This position is supported under the civil standard expressed in *In re Ackermann*, 109 N.Y.S. 228, 229 (App. Div. 1908), as well as the criminal standard expressed in *Will of Janis*, 600 N.Y.S.2d at 419.

[103] Cynthia Bryant, Note, *When One Man's DNA is Another Man's Exonerating Evidence: Compelling Consensual Sexual Partners of Rape Victims to Provide DNA Samples to Postconviction Petitioners*, 33 COLUM. J.L. & SOC. PROBS. 113, 117–18 (2000).

[104] Holly Schaffter, Note, *Postconviction DNA Evidence: A 500 Pound Gorilla in State Courts*, 50 DRAKE L. REV. 695, 696–97 (2002).

---

because of its unmatched ability to accurately identify individuals. With the exception of identical twins, each individual's DNA is unique.[105] The chance of two unrelated individuals having the same DNA profile is about thirty billion to one.[106] Thus, DNA typing "differentiate[s] human beings from one another by examining human variability at the level of genetic makeup."[107]

> This differentiation takes place through a process in which "[s]cientists can extract DNA from a number of biological materials, including semen, blood, tissue, and saliva. Because the composition of DNA does not vary from cell to cell, scientists can compare DNA profiles extracted from different biological materials . . . . After DNA is extracted from the two samples, the DNA from each sample is prepared for an analysis in which specific DNA sequences are located within the molecules. Finally, scientists compare and interpret the test results from each sample."[108]

Today, there are several different DNA technologies available for purposes of testing, "the most precise and reliable of which is called Polymerase Chain Reaction ('PCR') and Short Tandem Repeats ('STR') (hereinafter 'PCR/STR')."[109] Distinguishing this method from others is the fact that it "requires only a minimal amount of genetic material in order to obtain reliable results."[110] Additionally, it

"allows damaged and contaminated DNA samples to be analyzed, meaning that almost any DNA sample . . . will likely be testable."[111] Moreover, as compared to the traditional blood grouping tests of years passed, or even the restriction fragment length polymorphism tests (RFLP) performed during the period 1985–1995, "the age of the biological sample does not present an obstacle" to the PCR/STR test, thus ensuring the accuracy of the result long after the sample first becomes available.[112]

Based upon the foregoing, it stands to reason that DNA testing,

[105] Daina Borteck, Note, *Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty*, 25 CARDOZO L. REV. 1429, 1450 (2004).

[106] 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, 759 (1994).

[107] Bryant, *supra* note 103, at 118.

[108] *Id.* at 118–19 (citations omitted).

[109] Borteck, *supra* note 105, at 1451.

[110] *Id.*

[111] *Id.*

[112] Schaffter, *supra* note 104, at 700–01.

since the decision in *Will of Janis*, is considered by New York courts and jurisdictions nationwide to be an invaluable tool in achieving an accurate determination of paternity posthumously. Indeed, with stability of the sample, and reliability of the result unequivocally fixed, there is no longer a basis for depriving a child of his fundamental right to know, even posthumously, his parentage.

C. State and Social Interests

The legitimization of children born out of wedlock serves the interests of both the putative child and the State. In *Hall v. Lalli*,[113] the Supreme Court of Arizona recognized that "[t]he '[e]stablishment of the parent-child relationship is the most fundamental right a child possesses to be equated in importance with . . . the most basic constitutional rights.'"[114] Citing precedent nationwide,[115] the court characterized a child's interest in a paternity determination as "broader than all others,"[116] entitling the child to support during minority, inheritance rights, medical support, and such other benefits provided to dependents, including employee death benefits, social security survivor benefits, and in some instances, the proceeds of life insurance policies.[117]

Apart from financial benefits, a determination of paternity will also provide a child with the intangible psychological and emotional benefits inherent in both establishing a familial bond and learning cultural heritage.[118] Indeed, an individual's sense of identity is often linked to an awareness of parentage and family history.[119] Consider, for example, the growing number of adoptees who request access to information pertaining to the identity of their genetic

[113] 977 P.2d 776 (Ariz. 1999).

[114] *Id.* at 780–81 (citations omitted).

[115] *Id.* at 781 (citing Johnson v. Hunter, 447 N.W.2d 871 (Minn. 1989); Ruddock v. Ohls, 154 Cal. Rptr. 87 (Ct. App. 1979); Marsh v. Rodgers, 659 N.E.2d 171 (Ind. Ct. App. 1995)).

[116] *Hall*, 977 P.2d at 781.

[117] People *ex rel.* M.C., 895 P.2d 1098, 1101 (Colo. Ct. App. 1994) (discussing custody, inheritance, and medical history); Lavertue v. Niman, 493 A.2d 213, 217 (Conn. 1985) (discussing "sociological and psychological ramifications"); *Marsh*, 659 N.E.2d at 173; Dep't of Human Servs. *ex rel.* Boulanger v. Comeau, 663 A.2d 46, 48 (Me. 1995) (discussing inheritance, identity, and relationship); *Johnson*, 447 N.W.2d at 875; Settle v. Beasley, 308 S.E.2d 288, 291 (N.C. 1983) (discussing inheritance, custody, medical history, and relationship).

[118] *Hall*, 977 P.2d at 781; *see also M.C.*, 895 P.2d at 1102; *Marsh*, 659 N.E.2d at 173; *Boulanger*, 663 A.2d at 48; Jeffrey A. Parness, *Old Fashioned Pregnancy, Newly-Fashioned Paternity*, 53 SYRACUSE L. REV. 57, 59–60 (2003).

[119] Donald C. Hubin, *Daddy Dilemmas: Untangling the Puzzles of Paternity*, 13 CORNELL J.L. & PUB. POL'Y 29, 37–40 (2003).

parents. Additionally, "[i]ndividuals produced by artificial insemination by a donor are also challenging laws that prevent them from learning the identity of their genetic fathers."[120]

Furthermore, establishment of paternity can provide a child with often critical information pertaining to family medical history relative to genetically based or influenced diseases. "Individuals who lack the medical history of both parents are at a disadvantage in the diagnosis and treatment of a variety of diseases compared to those who possess such information."[121]

Even absent its role in understanding genetic diseases, the availability of genetic information also provides a child with an available pool of potential organ donors in the event a transplant is required.[122] Indeed, how often do we hear today that a parent serves as a donor to a child, or a child as a donor for a parent?

In *Johnson v. Hunter*, the Supreme Court of Minnesota equated the importance of a child's stake in a paternity determination with the constitutional right to personal liberty, a right that was "inherent and inalienable,"[123] and held that "[d]epriving [the child] of the basic right to establish parental relations . . . would not comport with the constitutional protection granted illegitimate children."[124]

In conformity with the foregoing decisions, the trend in New York has also been one reflecting increased sensitization to, and recognition of, the rights of non-marital children. In *In re Estate of Wilkins*,[125] a case involving the rights of non-marital children under section 5-3.2 of the EPTL, the court discussed the New York perspective stating that since 1970 "the trend in the law [has been] to recognize 'changes in societal attitudes' demanding 'aboli[tion of] the unchosen birthgiven shackles of illegitimacy and . . . filial equality wherever possible.'"[126] As a consequence, the court in *Wilkins* held "that a non-marital child who establishes his or her status under EPTL 4-1.2(a)(2)(C) should also be recognized as an

[120] *Id.* at 39.

[121] *Id.* at 32–33.

[122] *Id.* at 33.

[123] 447 N.W.2d 871, 876 (Minn. 1989) (citing Thiede v. Scandia Valley, 14 N.W.2d 400, 405 (Minn. 1944)).

[124] *Id.* (citing Gomez v. Perez, 409 U.S. 535, 538 (1973) (holding that a "state law denying

right of paternal support to illegitimate children while granting right to legitimate children violates equal protection")).

[125] 691 N.Y.S.2d 878 (Sur. Ct. 1999).

[126] *Id.* at 881 (citations omitted).

after-born child under EPTL 5-3.2."[127]

Further, as with other states, the New York State legislature has long recognized the importance of a non-marital child's right to determine his birthright and family identity, and to be treated *in pari materia* with a child born in wedlock.[128] Indeed, the state as *parens patriae* shares the child's interest in accurately identifying paternity, as well as a distinct economic interest in reducing the number of children subject to its fiscal charge and responsibility.[129] Studies have, in fact, shown a correlation between "[t]he absence of fathers from their children's lives [and] a variety of behavioral problems that impose significant social costs."[130]

In view of the foregoing, there is no sound basis in either law or policy that warrants depriving a non-marital child with the right to legitimization through posthumous paternity testing. Indeed, given the fundamental interests of both the child and the state in establishing the parent-child relationship, the accuracy and reliability of DNA testing, and the historic use of exhumation as a means of accommodating a "superior private right," it is clear that anything short of a statutory amendment of section 4-1.2(a)(2)(D) of the EPTL to allow for posthumous DNA test results as proof of paternity would not bear constitutional scrutiny.

[127] *Id.* at 882; *see also* Will of Hoffman, 385 N.Y.S.2d 49, 56 (App. Div. 1976) (construing the term "issue" in the will of the decedent to include "legitimate and illegitimate descendants alike in the absence of an express qualification [to the contrary] by the testatrix"); Prudential Ins. Co. of Am. v. Hernandez, 314 N.Y.S.2d 188, 190 (Sup. Ct. 1970) (stating that "the distinction between parents described by EPTL 4-1.2 is without a rational purpose in excluding illegitimate children from inheriting from an intestate father"); *In re* Estate of Ortiz, 303 N.Y.S.2d 806, 813 (Sur. Ct. 1969) (holding that "EPTL 5-4.4 denies equal protection under the State and Federal Constitutions in excluding illegitimate children . . . from sharing in the proceeds of an action for the wrongful death of their putative father.").

[128] *See*, *e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 1-2.10 (McKinney 1998) (defining "issue," notwithstanding a contrary intention, as "descendants in any degree from a common ancestor"); *Id.* § 2-1.3(4) (including non-marital children within the class of those taking as heirs of decedent); *Id.* § 3-3.3(b) (including non-marital children within the anti-lapse provisions related to "issue"); *Id.* § 5-4.5 (including a non-marital child as a distributee of his father for distributions, among which fall those associated with wrongful death actions under § 5-4.4); *see also Will of Hoffman*, 385 N.Y.S.2d at 53–54 n.7 (listing state and federal statutes, reflecting increased legislative recognition for the rights of non-marital children).

[129] Hall v. Lalli, 977 P.2d 776, 781 (Ariz. 1999); Lavertue v. Niman, 493 A.2d 213, 215–16 (Conn. 1985); *see also* Mills v. Habluetzel, 456 U.S. 91, 103 (1982) ("The State's interest stems not only from a desire to see that 'justice is done,' but also from a desire to reduce the number of individuals forced to enter the welfare rolls.").

[130] Hubin, *supra* note 119, at 45. Hubin continues by stating that "[w]hile social science research seldom speaks unequivocally and conclusively, especially where significant policy issues are at stake, there is overwhelming evidence that children who grow up without their fathers are more likely to commit crimes, to engage in early sexual relationships, to fail in school, and so forth." *Id.* at 45–46.