MOTHER'S BABY, FATHER'S MAYBE!—INTESTATE SUCCESSION: WHEN SHOULD A CHILD BORN OUT OF WEDLOCK HAVE A RIGHT TO INHERIT FROM OR THROUGH HIS OR HER BIOLOGICAL FATHER?

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Abstract

When the renowned chess genius Bobby Fischer died, his body was exhumed in order to determine whether his genetic samples matched samples from a child whose mother claimed he fathered outside of a marital union. Bobby Fischer was domiciled in Iceland and under Icelandic law, if there had been a genetic connection, the child would have been the sole legal heir of his intestate estate. The law is not so clear in the United States. Each state has enacted laws of intestate succession. While the laws in all fifty states provide that a child born out of wedlock is automatically his or her mother's legal child, state statutes vary substantially as to when that same child is entitled to an intestate inheritance from or through his or her genetic father.

If Fischer, the Chicago native, had been domiciled in North Carolina at his death, even if DNA had established a genetic relationship between Fisher and the child, the child would still have been precluded from inheriting her father's estate. In North Carolina, a biological or genetic connection is not enough to constitute a paternal legal heir without strict compliance with statutory formalities. In contrast, if Fischer had been domiciled in Georgia, and through clear and convincing evidence a genetic relationship was established, the child would inherit from her father's estate as his legal child. As one can see, in the United States, paternal inheritance depends on the state of the father's

domicile. As such, when we discuss the out of wedlock child and his or her right to inherit family wealth through intestate succession, the old adage "Mother's baby, father's maybe" comes to mind.

In this paper, I suggest that each of the fifty states should, like Georgia and other similarly situated states, follow the trend of Icelandic law in the area of intestate succession. Specifically, where clear and convincing evidence (either before or after a father's death) determines that a father is the genetic parent of a child, and there has been no formal adoption of the child, such child should be entitled to an intestate share of his or her father's estate in the same manner as a child born to a married parents.

INTRODUCTION

The renowned chess genius Bobby Fischer died intestate in 2008.[1] The Chicago native had renounced his American citizenship and at his death he was buried in Iceland.[2] During the summer of 2010, officials exhumed his body to remove DNA samples.[3] Why? The mother of a nine-year-old child in the Philippines claimed that her daughter was Fischer's biological child.[4] His genetic samples were

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1. Michael Sheridan, *Bobby Fischer's Body Exhumed for Paternity Test; Filipina Woman Claims He Fathered Her Daughter*, N.Y. DAILY NEWS, July 5, 2010, *available at* http://www.nydailynews.com/news/world/2010/07/05/2010-07-05_bobby_fischers_body_exhumed_for_paternity_test_filipina_woman_claims_he_fathered.html.

2. *Id.*

3. *Id.*

4. *Id.*

> tested against samples taken from the child and her mother in order to determine the child's paternity.[5] Evidence suggested that Fischer had transferred money to the child's mother in 2006, 2007, and just before he died in 2008.[6] As such, Iceland's Supreme Court ruled that Fisher's body could be exhumed to collect genetic samples.[7] The exhumation was "professional" and attended by a physician, priest, and other officials.[8] After the exhumation, the remains were tested and it was determined that Fischer was not the child's father.[9]

The Bobby Fischer story generated heated discussions on the Internet.[10] If DNA had determined that Fischer was the child's father, she would have inherited his entire estate as his sole legal heir under Icelandic law.[11] While some individuals

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5. Aliyah Shahid, *Bobby Fischer, Exhumed Chess Icon, Is Not Dad of 9-year-old Girl, Jinky Young, DNA Tests Reveal*, N.Y. DAILY NEWS, Aug. 18, 2010, *available at* http://www.nydailynews.com/news/national/2010/08/18/2010-08-18_bobby_fischer_exhumed_chess_icon_is_not_dad_of_9y earold_girl_jinky_young_dna_tes.html.

6. Andrew Hough, *Bobby Fischer: Chess Legend's Body to be Exhumed 'After Bitter Love Child Legal Row'*, TELEGRAPH, June 17, 2010, *available at* http://www.telegraph.co.uk/culture/chess/7835243/Bobby-Fischer-chess-legends-body-to-be-exhumed-after-bitter-love-child-legal-row.html.

7. Sheridan, *supra* note 1.

8. *Id.*

9 David Gura, *After DNA Test on Exhumed Remains, Bobby Fischer Cleared in Paternity Case*, NPR: THE TWO-WAY, Aug. 18, 2010, http://www.npr.org/blogs/thetwo-way/2010/08/18/129273914/after-exhumation-dna-test-bobby-fischer-paternity-case-closed.

10. *E.g. Bobby Fischer to be Exhumed in Paternity Case*, MSNBC.COM (June 17, 2010 5:31 PM), http://www.msnbc.msn.com/id/37760170/.

11. *Id.*

believed that the child should inherit from her biological father,[12] others suggested that "gold diggers" should not be rewarded.[13]

Icelandic law states that if the child is determined to be her father's genetic child, then she is his legal heir and she is entitled to inherit his intestate estate.[14] The law in the United States is not so settled for children born out of wedlock. In the United States, the laws of intestate succession are determined on a state level and each state has enacted intestate distribution statutes.[15]

The laws of intestate succession in all fifty states provide that a child born out of wedlock is automatically his or her mother's legal child.[16] Therefore, the child is eligible to inherit from or through his or her mother through intestate succession in the same manner as a child born into a marital union.[17] However, state statutes vary substantially as to when that same child is

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12. One commenter stated, "If it's really his daughter then she deserves the money." bklynj, Comment to *Bobby Fischer to be Exhumed in Paternity Case*, MSNBC.COM (June 17, 2010, 10:20 PM), http://www.msnbc.msn.com/id/37760170/. Another stated, "A 9 year old child isn't being 'greedy' (or even 'gready')—if he was her father, she's entitled to her share of his estate, if not all of it. He left no will, so if she can prove she's his only heir, then good for her. Seems iffy, though—I would have thought the mother would have asked for child support before Fischer died. Should be interesting." Marysia, Comment to *Bobby Fischer to be Exhumed in Paternity Case*, MSNBC.COM (June 17, 2010 7:08 PM), http://www.msnbc.msn.com/id/37760170/.

13. One commenter merely posted "GREED." Dano-417914, Comment to *Bobby Fischer to be Exhumed in Paternity Case*, MSNBC.COM (June 17, 2010 5:07 PM), http://www.msnbc.msn.com/id/37760170/.

14. Hough, *supra* note 6.

15. Brownc Lewis, *Children of Men: Balancing the Inheritance Rights of Marital and Nonmarital Children*, 39 U. TOL. L. REV. 1, 3 (2007).

16. *Id.* at 4.

17. Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 87 (2003).

entitled to an intestate inheritance from or through his or her genetic father.[18]

In most jurisdictions, a child born out of wedlock does not have an automatic right to an intestate share of his or her father's estate.[19] The child's right to an inheritance may hinge on some required action of the father during the father's lifetime. For example, the father may be required to acknowledge his child during his lifetime, sign a written acknowledgment in the presence of a notary, file a document with the clerk of court, or perform some other deliberate act to establish a legal relationship and thus enable the child to inherit from or through him through intestate succession.

Currently, it is possible that an individual may be considered the child of his or her father in one state but not in another.[20] The variations among states can be seen when we compare the North Carolina and Georgia statutes. These state statutes represent two extremes. In North Carolina, an out-of-wedlock child may inherit from his or her father only if such child has been legitimized.[21] A child is legitimized when the parents subsequently marry, when there has been a formal adjudication, or when there is a writing signed by the father and

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[18] *See generally* Courtney Wheeler, *Who's Your Daddy? Exhumation to Establish Paternity Must Be Reigned In By a Uniform Procedure*, 2 EST. PLAN. COMMUNITY PROP. L.J. 249, 254 (2009) (stating that an analysis of the laws in Pennsylvania, New York, Texas, Maine, and Alabama "highlight the inequities between each state and the detrimental impact a lack of uniformity has on equality between marital children and nonmarital children.").

[19] Lewis, *supra* note 15, at 4.

[20] *See generally* Phillips v. Ledford, 590 S.E.2d 280 (N.C. Ct. App. 2004) (The court held that in North Carolina, a father would need to file a formal written instrument acknowledging paternity of an out-of-wedlock child with the clerk of the superior court, regardless of the results of DNA testing. However, in Georgia, DNA testing satisfies the "clear and convincing evidence" requirement in order to establish paternity. Thus, if the father died in Georgia and Georgia law applied, the out-of-wedlock child would be his father's legal child. It is also possible that the child may inherit from his father or father's relatives even though the father may not be eligible to inherit from the child. This issue is not addressed in this paper.).

[21] *See generally* N.C. GEN. STAT. ANN. § 29-19 (West 2011).

acknowledged and recorded in the superior court of the county where the father or child is located.[22] Even if a parent-child relationship existed while the father was alive, if the statutory requirements are not met, the child is ineligible to inherit from his or her father or father's family through intestacy. And even if DNA established paternity during the father's lifetime, the child is still ineligible to inherit from the biological father if the statutory requirements are not met. In contrast, Georgia allows an individual who can prove paternity by clear and convincing evidence to inherit from his or her father.[23] A DNA test (even after the death of the father) is enough to provide such evidence even if there was no parent-child relationship between the individual and his or her biological father.[24]

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In this Article, I suggest that each of the fifty states should, like Georgia and other similarly situated states, follow the trend of Icelandic law in the area of intestate succession. Specifically, where clear and convincing evidence (either before or after a father's death) determines that a father is the genetic parent of a child, and where there has been no formal adoption of the

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22. *Id.*

23. *See generally* GA. CODE ANN. §53-2-3 (West 2011).

24. *See* GA. CODE ANN. §53-2-3(B)(ii) (West 2011).

child,"[25] such child should be entitled to an intestate share of his or her father's estate in the same manner as a child born in a marital union. I see no valid reason why there are still distinctions between children born out of wedlock and those born in a marital union. Specifically, I call on North Carolina and other jurisdictions with strict legitimation requirements to revise their statutes so as not to penalize the children of fathers who have not strictly complied with statutory requirements for legal parentage.[26] Strict legitimation requirements may violate the Equal Protection Clause of the Fourteenth Amendment. Further, I ask why jurisdictions such as New York require open acknowledgment during the father's lifetime in order for an out-of-wedlock child to inherit as a legal child. These states hold on to outdated notions of fatherhood and paternity that may not be warranted for intestate succession. Ultimately, if paternity can be established to a degree of certainty within a set period of time, I see no legally valid reason to exclude a biological child from his or her father's estate.

Part I defines the out-of-wedlock child. This section discusses the history of illegitimacy, the purpose of intestacy statutes, and the historical inheritance rights of the child born out of wedlock. The issue of illegitimacy requires each of us to "call upon what we know in general about mothers, fathers, families, male-female relationships, [and] power relationships . . . ."[27] This issue is not just about money; it is about "[r]ecognition of family."[28] The "distribution of property following the death of a

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[25] Whether or not formal adoption should prohibit inheritance from paternal relatives is an issue for a later paper.

[26] *See* LA. CIV. CODE ANN. art. 179 (2011). *See also* Evelyn L. Wilson, Paternity Presumptions in Louisiana (July 2010) (unpublished manuscript) (on file with author) (Some states use the term "filiation" to define the legal relationship between a child and his parent; Louisiana is one such jurisdiction.).

[27] ANNETTE GORDON-REED, THE HEMINGSES OF MONTICELLO: AN AMERICAN FAMILY 32 (2008).

[28] Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 L. INEQ. 1, 12 (2000).

family member carries with it not only economic benefits, but also, and perhaps as important, psychological benefits."

Part II questions whether all out-of-wedlock children should be treated the same when determining whether a child should inherit from or through his or her father. In other words, should paternal inheritance be based on a bright line genetic relationship or are other factors important. To help answer the question, I present various scenarios of out-of-wedlock births. In Part III, I discuss how the Supreme Court of the United States has analyzed the issue of inheritance and the out-of-wedlock child. I also look at North Carolina's statutory law and how North Carolina courts have required strict adherence to the statutory language, and I question whether North Carolina's statutes and similar statutes in other jurisdictions violate the Equal Protection Clause of the Fourteenth Amendment. Part IV discusses various state legislative models and the Uniform Probate Code. I also opine on the concept of equitable legitimation. Part V concludes with my opinion that there is no reason to discriminate against a child based on the marital status of his or her parents.

I. Who is the Out-of-Wedlock Child?

A. The History of Illegitimacy

In this paper, I use the term out-of-wedlock to describe the child born to a nonmarital union; however, not so long ago, the accepted terms to describe such a child were "illegitimate" or "bastard." In fact, some state statutes still use these harsh labels to describe the out-of-wedlock child.[29] The labels are reminders that, historically, society has condemned the child for the sins of his or her parents.

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[29] *Facts About Single People*, AM. ASS'N FOR SINGLE PEOPLE, http://www.unmarriedamerica.org/stigma-statutes.htm (last visited Oct. 20, 2011) (Alabama, Mississippi, Delaware, Maine, New Jersey, North Carolina, Rhode Island, Tennessee, Vermont, and West Virginia statutes use the term *bastard*.).

Children born out of wedlock have been around from "time immemorial."[30] Scholars from many different fields in several countries have discussed this so-called moral and social problem for several generations.[31] Throughout history, the treatment of the child has been hypocritical. Prominent fathers have escaped judgment while their biological children suffered as social and legal outcasts. For example, King Henry VIII of England had four children within his marital unions, but he fathered at least one (and possibly four) children out of wedlock.[32] Additionally, several American Presidents are rumored to have fathered children outside of a marital union. President Harding's only child is supposedly the product of an extramarital affair.[33] DNA tests suggest that President Jefferson fathered at least one child with Sally Hemings, his mixed-race slave who was also his

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[30] BASTARDY AND ITS COMPARATIVE HISTORY: STUDIES IN THE HISTORY OF ILLEGITIMACY AND MARITAL NONCONFORMISM IN BRITAIN, FRANCE, GERMANY, SWEDEN, NORTH AMERICA, JAMAICA, AND JAPAN 1 (Peter Laslett et al. eds., 1980) [hereinafter BASTARDY AND ITS COMPARATIVE HISTORY] ("Illegitimacy has been called a social problem for the last two centuries and a moral problem from time immemorial.").

[31] *Id.*

[32] *See* BEVERLEY A. MURPHY, BASTARD PRINCE: HENRY VIII'S LOST SON (2004); *see also* Bill Ryan, *The Royal Family Tree Sprouts Unofficial Limbs*, N.Y. TIMES, Jan. 3, 1993, *available at* www.nytimes.com/1993/01/03/nyregion/the-royal-family-tree-sprouts-unofficial-limbs.html.

[33] *U.S. President Warren G. Harding*, HOME OF HEROES, http://www.homeofheroes.com/presidents/29_harding.html (last visited Oct. 9, 2010).

concubine after his wife's death.[34] And President Cleveland allegedly fathered a child while he was still a bachelor. Though he was unsure of the child's paternity, he allegedly supported both mother and child.[35] While these fathers may have been high profile individuals, their children were social outcasts.

"Both English common law and American law defined the child's legal relationship to his or her parents in the context of the parents' marital relationship to each other at the time of the

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34. *See generally* SHANNON LANIER JANE FELDMAN, JEFFERSON'S CHILDREN: THE STORY OF ONE AMERICAN FAMILY 33 (2000) (Sally Hemings was the mixed-race concubine of Thomas Jefferson. Her father, John Wayles, was a lawyer and a slave trader. His daughter, Martha Wayles, was Thomas Jefferson's wife. When John Wayles died, Martha and Thomas Jefferson inherited Betty Hemings and her children. Sally Hemings was the daughter of Betty Hemings and John Wayles. Sally Hemings was the half-sister of Thomas Jefferson's wife Martha. *Id.* at 33. Martha died in 1782 of complications due to childbirth. *Id.* Shortly after her death, President Washington sent Jefferson to Paris to represent the new government. His daughter Patsy and slave James Hemings accompanied Jefferson to Paris. *Id.* James was a mixed race slave who was to be trained as a chef. He was the half-brother of Jefferson's wife. *Id.* Thomas left his younger children in the United States. However, when he heard that his daughter Lucy had died, he sent for his remaining child, Maria, to join him. *Id.* at 33. Because Sally Hemings was responsible for Maria's care, she traveled to Paris with Jefferson's daughter. *Id.* at 33–34. At some point during the stay, Jefferson took Sally as his concubine and when they returned to the United States, Sally was with child. *Id.* at 34–36. The child was known as Thomas Jefferson Hemings, and "[i]n 1802, journalist James Thompson Callender published articles about a slave boy at Monticello who looked so much like Jefferson that it caused local gossip. When Jefferson's political enemies got wind, they made up songs about the slave children of Sally Hemings." *Id.* at 36–37. Arrangements were made for Thomas to live on another farm and he took the name Thomas Woodson. *Id.* at 37. Sally and Jefferson had at least four other children: Beverley, Harriet, Madison, and Eston. *Id.* Jefferson was elected President in spite of his relationship with Sally. Beverley and Harriet gained freedom by being permitted to "run away." *Id.* They married into the white world and "were white enough to pass as white." *Id.* When Jefferson died, he freed Eston and Madison Hemings, his sons with Sally, in his will. *Id.* Eston once said to "neighbors [who] compared his profile to a bronze likeness of Thomas Jefferson . . . . Well, my mother, whose name I bear, belonged to Mr. Jefferson, and she never married." *Id.* at 39).

35. *Elections: 1884 Overview*, HARPWEEK.COM, http://elections.harpweek.com/1884/Overview-1884-3.htm (last visited Oct. 9, 2010).

child's birth or conception."[36] A child was "'legitimate' if at the child's birth or conception his or her parents were married to each other, but 'illegitimate' if they were not."[37] At common law, this child was known as "filius nullius—the child of no one."[38] The child was often "subjected to intense persecution and humiliation."[39]

> The bastard, like the prostitute, thief, and beggar, belong[ed] to that motley crowd of disreputable social types which society has generally resented, always endured. He [was] a living symbol of social irregularity, an undeniable evidence of contramoral forces; in short, a problem—a problem as old and unsolved as human existence itself.[40]

English common law provided no method to legitimize an illegitimate child.[41] Subsequent marriage of the child's mother and father did not legitimize the child.[42] Paternal acknowledgement could not legitimize the child.[43] An

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36. Laurence C. Nolan, *"Unwed Children" and Their Parents Before the United States Supreme Court from* Levy *to* Michael H.*: Unlikely Participants in Constitutional Jurisprudence*, 28 CAP. U. L. REV. 1, 6 (1999).

37. *Id.*

38. Susan E. Satava, *Discrimination Against the Unacknowledged Illegitimate Child and the Wrongful Death Statute*, 25 CAP. U. L. REV. 933, 934 (1996).

39. *Id.* at 933.

40. Stacey Scriven Bernstein, *Washington's 2002 Parentage Act: A Step Backward for the Rights of Nonmarital Children*, 30 SEATTLE U. L. REV. 195, 202 (2006) (quoting Kingsley Davis, *Illegitimacy and the Social Structure*, 45 AM. J. SOC. 215 (1939)).

41. Satava, *supra* note 38, at 937.

42. *Id.*

43. *Id.*

illegitimate child, "[e]ven if one or both parents had wealth," had "no guarantee of security."[44]

> [T]he law operated to deprive [that child] of the rights that derived from a traditional familial relationship. While the legitimate child had a right to his family name, a right to support from his family, and a right to inherit from his family, the common law denied the illegitimate child all of these rights.[45]

In the United States, the law complicated the issue of illegitimacy because certain children could never be legitimate because of their race.[46] It is no secret that slave owners had access to their slaves' bodies and "were often the fathers of [the slaves'] babies."[47] These mulatto offspring of the slave master were not his legitimate family. "From classical times slave children have been illegitimate in our cultural tradition."[48]

Although the labels used to describe out-of-wedlock children have softened, discrimination against the child based on the actions (or inactions) of the parents still exists today. A child may still be affected negatively because of the marital status of his or her parents. Disparities still exist between out-of-wedlock

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[44] Stephanie Coontz, *How Dannielynn Can Be Called Lucky*, PHILA. INQUIRER, Mar. 11, 2007, *available at* http://articles.philly.com/2007-03-11/news/25236557_1_unwed-mothers-dead-infants-babies.

[45] Satava, *supra* note 38, at 937. *See also* GORDON-REED, *supra* note 27, at 79-80 ("In European culture surnames signal the paternity of those born in wedlock and those born out of wedlock whose fathers acknowledge them. Children of unmarried women typically carry their mother's name, which in most instances would have been the woman's father's last name. Enslaved women had no legal marriages, and fathers had no rights to their children.").

[46] Mitchell F. Crusto, *Blackness as Property: Sex, Race, Status, and Wealth*, 1 STAN. J. C.R. C.L. 51, 94 (2005).

[47] Pamela D. Bridgewater, *Ain't I A Slave: Slavery, Reproductive Abuse, and Reparations*, 14 UCLA WOMEN'S L.J. 89, 118 (2005). *See also supra* note 35 and accompanying text.

[48] BASTARDY AND ITS COMPARATIVE HISTORY, *supra* note 30, at 7.

children and children born to a marital union when it comes to the right to inherit a father's property.

As early as 1966, Professor Harry D. Krause, a preeminent scholar on illegitimacy, recognized that while "our law has tangled with the problem of illegitimacy [it has] not solved it."[49] He suggested that there was no excuse "to continue the disabilities and moral prejudices of another day at the expense of today's children and to perpetuate the ancient double standard by force of law."[50] Professor Krause stated that "[s]uch efforts should be statutory, not only because progress would be more rapid in this manner, but also because only broad, coordinated legislation can assure the uniformity that should be an incidental objective in order to eliminate the conflict of laws quagmire."[51]

Professor Krause proposed a Uniform Act on Legitimacy. He further stated that analyzing the actual relationship that the father and child had was too much of a burden to place on a court and that the illegitimate child "should be in the same position vis-à-vis his grandparents and other relatives as he occupies vis-à-vis his parents."[52] I agree with Professor Krause's reasoning made over forty years ago. Even if disparate treatment was valid at one time because of proof of paternity issues, such reasons are no longer valid. The time has come to eliminate the disparity between children born out of wedlock and those born into a marital union.

B. Illegitimacy and Intestate Distribution

Although any individual with legal and mental capacity has the ability to draft a will or will substitute, statistics suggest that

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[49] Harry D. Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829, 859 (1966).

[50] *Id.*

[51] *Id.*

[52] *Id.* at 856.

most individuals do not draft these documents.[53] When an individual dies without a will, his or her estate passes through intestate succession. While there is no natural or absolute right to an inheritance, all fifty states have statutes that outline the distribution of a decedent's estate through intestate succession when an individual does not create a will.[54] The state distribution schemes purport to represent how most individuals would have distributed their estate had they taken the time to draft a will. A decedent's estate is distributed to the presumed natural object of his or her bounty.[55]

"Intestacy and elective shares ensure that spouses and children retain a state-sanctioned share of the decedent's estate."[56] In all fifty states, a decedent's spouse and children take property to the exclusion of other relatives.[57] In all fifty states, the intestacy statutes provide that when a decedent dies without a surviving spouse or surviving parents, his or her children

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53. *See generally* Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36 (2009). Professor DiRusso "engaged a fee-paid market research company" to survey "over 300 subjects, from all across the country and from a wide range of demographic groups." *Id.* at 37–38. Of the 321 individuals surveyed, "only 66 (20%) had a will drafted by an attorney, with an additional 37 (11%) relying upon a self-drafted will. The overwhelming majority, 219 people (68%), [had no will and] would [] die intestate." *Id.* at 41.

54. *Id.* Intestacy statutes apply not only when an individual does not have a will or will substitute, but also often when an individual does have a will or will substitute but such document is void, incomplete, or uses class distributions.

55. *See generally* UNIF. PROBATE CODE §§ 2-101 Intestate Estate, 2-103 Share of Heirs Other than Surviving Spouse, 2-105 No Taker (amended 2008).

56. Kevin Noble Maillard, *The Color of Testamentary Freedom*, 62 SMU L. REV. 1783, 1792 (2009).

57. *See generally* LA. CIV. CODE ANN. art. 1493 (2003) ("Forced heirs are descendants of the first degree who, at the time of the death of the decedent, are twenty-three years of age or younger or descendants of the first degree of any age who, because of mental incapacity or physical infirmity, are permanently incapable of taking care of their persons or administering their estates at the time of the death of the decedent."). *See also* Intestate Succession, 0160 SURVEYS 1 (West 2011) [hereinafter Intestate Succession] (surveying intestate succession among states, many of which require that some small amount be left to a widow).

inherit the estate in entirety.[58] But just who constitutes a decedent's child is not so clear-cut. The child born of out wedlock may be negatively affected when it comes to the definition of "child" for purposes of intestate succession. In North Carolina, even when DNA has established a biological connection and there has been a parent-child relationship, the child is not his or her father's legal child unless the father takes formal steps required under the statutes. If the father does not take appropriate action, the biological child is not eligible to inherit from his estate as his legal child.[59] Additionally, several other states require that the father openly acknowledge his child during his lifetime in order for the child to inherit from his biological father's estate. I believe that these intestate succession statutes that require a father to take formal steps to acknowledge or legitimize a child before that child can legally inherit from him are remnants of the days of slavery and anti-miscegenation laws, when "fictions and presumptions about bastardy and marriage served definite purposes in a legal system seeking easy ways to determine who was eligible to inherit property."[60] There is no place for such strict requirements in modern law.

How did we arrive at this requirement that a father must affirm his biological child in order for the child to be his legal offspring? In both Europe and the United States, the legal family is a social construct. One theory as to why southern states in the United States required such action by the father is as follows: During the period of slavery in early American history, white master-fathers had legitimate families and illegitimate families. Nonwhite women bore the master-father's illegitimate or non-legal offspring.[61] The master-father simply added those children

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[58] Intestate Succession, *supra* note 57.

[59] *See* Phillips v. Ledford, 590 S.E.2d 280, 281 (N.C. Ct. App. 2004).

[60] GORDON-REED, *supra* note 27, at 83.

[61] Crusto, *supra* note 46, at 94.

to the plantation labor force.[62] In contrast, "white women bore white children to continue the master's legacy."[63]

Since "[nonwhite women] were defined in statutes as chattel or real estate,"[64] their children were also property. The slave child bore the status of his or her mother. Since slaves were not recognized as persons in courts of law, the slave child, despite being the child of the master, could not be recognized as his or her biological father's legal heir. In spite of the biological or genetic relationship between the master-father and his mixed race child, the law denied these mixed-race children a legal right to their biological father's inheritable bloodline.[65] "Rather than being recognized as beneficiaries or recipients as heirs at law of their [master-fathers], [the children] were deeded, leased, and devised in the same manner as real property."[66] A nineteenth-century case in Kentucky clarified this point when a judge in an inheritance case wrote, "[T]he father of a slave is unknown to our law . . . ."[67] Even after slavery, the law :

> [C]urtailed the transfer of property across racial lines. By declaring marriages between blacks and whites illegal, the law thwarted a secure interest of black and mulatto beneficiaries in the estate of white testators. Without the protective status that marriage

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62. Bridgewater, *supra* note 47, at 118–19.

63. Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 226 (1995) (arguing that "however important the biological bond is as a basis for family relationships, it need not be the exclusive bond." *Id.* at 214).

64. GORDON-REED, *supra* note 27, at 38.

65. Crusto, *supra* note 46, at 94.

66. Helen Bishop Jenkins, *DNA and the Slave-Descendant Nexus: A Theoretical Challenge to Traditional Notions of Heirship Jurisprudence*, 16 HARV. BLACKLETTER J. 211, 226 (2000).

67. Bridgewater, *supra* note 47, at 119 n.140 (quoting Frazier v. Spear, 5 Ky. (2 Bibb) 385, 385–86 (1811)).

> conferred, courts viewed interracial families as inherently illegitimate . . . .[68]

Similarly, in North Carolina, if a man is not willing to take formal steps to acknowledge his out-of-wedlock child in a writing filed in court or through an adjudicatory process, then he is not the legal father of the child, and the child may not inherit his intestate estate. Like the child of the slave woman, a child born out-of-wedlock in North Carolina is fatherless unless the father follows deliberate requirements to establish that he is indeed the father. There is no room for such legal gymnastics in today's society. No state should allow an individual to "hide behind the protections that law and legal fictions afforded."[69]

Scholars have argued for decades that children born out of wedlock should have the same rights as those who were born to a marital union. Some suggest that both classes of children are similarly situated but those born out of wedlock are being treated in a substantially different manner.[70] One of the traditional policy reasons for the different treatment had to do with issues of "morality and marriage."[71] Children were punished in order to punish the immorality of the parents.[72]

The law has progressed is some areas. "Modern intestacy statutes are generally more protective of nonmarital children than intestacy statutes in the past."[73] In all fifty states, a child is his or her mother's legal child regardless of whether the child

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[68] Maillard, *supra* note 56, at 1792–93.

[69] GORDON-REED, *supra* note 27, at 85.

[70] Wheeler, *supra* note 18, at 252.

[71] Nolan, *supra* note 36, at 7.

[72] *Id.*

[73] Andra J. Hedrick, *Decedents' Estates*—Bilbrey v. Smithers: *Limitations on Post-Death Paternity Claims for Purposes of Intestate Succession in Tennessee*, 27 U. MEM. L. REV. 517, 524 (1997) ("This trend is largely due to a series of successful equal protection challenges to statutes which discriminated on the basis of legitimacy. [Such cases] . . . have narrowed the gap between the rights afforded marital and nonmarital children.").

was born into a marital union. Virginia was one of the first states to adopt legislation that allowed a child born out of wedlock:

> [T]o inherit from his [or her] mother and to transmit property by succession to his [or her] mother and collateral kindred on his [or her] maternal side. It removed the stigma of bastardy from the innocent issue of void marriages, as well as the issue born out of wedlock whose parents afterwards intermarried, provided such issue was recognized by the father as his child before or after marriage.[74]

Other states followed—"legitimizing" children if their parents subsequently married and allowing for maternal family intestate inheritance. But, even with the progression from the English common law rule and the Colonial-era statutes, there are still disparities between children born to a marital union and those born outside of a marital union in the area of paternal inheritance. The law of intestate succession "sorts and ranks relationships."[75] Therefore, remnants from the past have not been completely shattered. While a genetic relationship is enough to establish a legal relationship between a child and his mother, "[t]he genetic tie does not necessarily determine legal parentage" between a child and his or her father.[76] Without legal recognition, a child born out of wedlock may be barred from his or her paternal inheritance through intestate succession.[77]

The most common rationale for expanding maternal rights to the out-of-wedlock child had to do with the certainty of establishing motherhood. Since a child's relationship to "his [or

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[74] Withrow v. Edwards, 25 S.E.2d 343, 350–51 (Va. 1943).

[75] Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221, 225 (1999).

[76] Roberts, *supra* note 63, at 252.

[77] Legal recognition varies from state to state. North Carolina requires that a biological father legally recognize his out-of-wedlock child. *See* N.C. GEN. STAT. ANN. § 29-19 (West 2011).

her] mother is beyond doubt,"[78] a child born out of wedlock is treated the same as his or her in-wedlock sisters and brothers when a mother's estate is distributed through intestate succession.

As rights were extended for maternal relationships, one reason given for not automatically allowing paternal rights had to do with the difficulty of proving paternity. "Since it is necessary that the heir should be one whose right could be ascertained, therefore marriage, an act capable of proof, could be relied upon as determining the heir."[79]

Now, with scientific advances, paternal relationships can also be determined with near-certainty. States such as Georgia have legislated that clear and convincing evidence of a biological relationship warrants a child recovering a share from the father's intestate estate. The reasoning makes sense. DNA has been used in criminal cases to acquit individuals[80] and to obligate fathers in child support cases.[81] Should it not apply to the transfer of wealth? Several states say no. For example, North Carolina states that DNA evidence alone is not enough to allow the biological child the right to an intestate share of his or her father's estate.[82]

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78. Krause, *supra* note 49, at 854.

79. Joseph Cullen Ayer, Jr., *Legitimacy and Marriage*, 16 HARV. L. REV. 22, 23 (1902).

80. *See generally About Us: FAQs*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/How_often_do_DNA_tests_prove_innocence_in_your_cases_Does_testing_ever_prove_guilt.php (last visited Oct. 20, 2011) (noting that "over a five-year period, DNA testing proved innocence in about 43% of cases").

81. Linda D. Elrod, *Child Support Reassessed: Federalization of Enforcement Nears Completion*, U. ILL. L. REV. 695, 701–02 (1997). In response to the increase of out-of-wedlock births, Congress set new federal standards for establishing paternity. *Id.* at 698. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 was one such example. *Id.* at 695. "As a general rule, if a man can be shown to be the biological father of a child, he has a support obligation, even if the man is still legally a child himself." *Id.* at 701–02.

82. *See* N.C. GEN. STAT. ANN. § 29-19 (West 2011); Phillips v. Ledford, 590 S.E.2d 280 (N.C. Ct. App. 2004).

Why have states not extended such intestate succession rights to out-of-wedlock children and their paternal relatives?[83] Are the requirements such as a writing filed in court or before a certifying officer prior to the father's death still warranted? Should it matter whether an individual claimed to be the father of the child during his lifetime?

I.Should All of A Father's Children be Treated the Same?

I believe that all children, whether born in or out of wedlock, should be treated the same when it comes to inheriting from or through their father's estate. I believe that each state should enact a bright-line rule for inheritance of children born out of wedlock to inherit from and though their fathers in the same way that each state has adopted such bright line rule for children born out of wedlock to inherit from and through their mothers. I maintain that when states do otherwise, they violate the Equal Protection Clause of the Fourteenth Amendment.

Others disagree with me. Some opine that only under certain circumstances should an out-of-wedlock child inherit from his or her father. Others suggest that even if the child has a

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[83] Is this perpetuating the legacy of slavery where a slave's children had no father and automatically took on the status of slave through the mother? *See generally* GORDON-REED, *supra* note 27, at 46 ("That exact situation was at issue in 1655, when a mulatto woman, Elizabeth Key, who later married her lawyer, successfully sued for her freedom on the basis of the fact that her father was English. This case, and probably others that never made it to court but would have been part of the social knowledge of the community, caught the burgesses' attention, and they acted to close this possible escape route out of slavery for one potentially large category of people of African origin: the children of white fathers and enslaved mothers. The law passed in the wake of Key's case actually had two components—the new rule determining status through the mother and a provision for doubling the fine for mixed-race couples who engaged in sex over those levied against unmarried same-race couples.").

right to inherit from the father, the child should not inherit through the father.[84]

Consider the following scenarios. Each involves a child born out of wedlock. As you read each scenario, ask yourself whether you think the child should be able to inherit from his or her biological father through intestate succession. Try to articulate the reasons for your decision.

SCENARIO ONE

Essie Mae was born in 1925. As an infant and toddler, Essie Mae lived up north with her African American aunt and uncle. She thought they were her parents. However, as a young girl, her aunt introduced Essie to her biological mother who happened to be the aunt's sister. On one occasion, as a young girl, Essie travelled south with her mother and aunt, and her mother introduced her to her father, a prominent white man who later became a United States Senator. Essie and her father met on various occasions throughout his lifetime. Essie learned that her mother was a maid for her father's family. Although her father contributed financially until she married, Essie was never formally legitimized. Her father, a staunch segregationist, never publicly acknowledged her. After his death, she confirmed what many already knew: that the prominent white politician was her

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[84] This Author poses this question to her Decedents' Estates students each year and the answers vary from the need for a bright-line rule to the fact that the father must acknowledge the child during his lifetime. Some suggest that the minor child is "more deserving" than a child who has reached the age of majority. Several students claim that the intent of the testator would go against the newly-discovered child claiming an intestate share after paternity is established after death. I leave the issue of whether the father and his relatives should inherit from or through the child for another paper.

father.[85] *Should she be able to inherit from his estate as one of his children?*[86]

SCENARIO TWO

LaRhonda was born in 1961. Her father, a famous musician, picked her mother out of a crowd during one of his shows. She became his girlfriend. Her father and mother "broke up" when her mother became pregnant. When LaRhonda was a child, her mother often pointed to the famous musician on the television and she would tell LaRhonda the he was her father. Although LaRhonda met the musician at concerts and spoke to him on the phone, he never acknowledged her during his lifetime. When her mother died, the musician informed her that he was not her father and asked what she wanted from him. When he died, a DNA test confirmed what her mother had told her—there was a 99.9 percent probability that the musician was

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85. ESSIE MAE WASHINGTON-WILLIAMS WILLIAM STADIEM, DEAR SENATOR: A MEMOIR BY THE DAUGHTER OF STROM THURMOND (2005).

86. *Id.* (After Senator Thurmond's death, the Thurmond family acknowledged Essie Mae as Strom's daughter. *Id.* at 218. In embracing her family roots, Essie Mae "applied for membership in both the National Society Daughters of the American Revolution (NSDAR) and the United Daughters of the Confederacy (UDC), to which [she is] entitled to join through [her] father's lineage." *Id.* at 221–22.).

her father.[87] *Should she be able to inherit from his estate as one of his children?*[88]

SCENARIO THREE

Shiloh was born in 2006, and she lives with her mother and father. Although her parents have never married, they live together and are in a committed relationship. Together they have three biological children and three adopted children. Shiloh and her father have been featured in pictures and magazines all over the world. Shiloh's father is a "hands-on" dad, so there is no need for any court-ordered child support.[89] *Is their biological connection enough or should there be any additional*

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87. *See* David Segal, *Soul Survivors: James Brown's Children Are in Court*, WASH. POST, Aug. 11, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/08/07/AR2008080703055.html; *The Buzz: Pappa's Got a Brand New Child*, SUN HERALD (BILOXI), Aug. 5, 2007.

88. *Judge OKs Settlement Over James Brown Estate: Charitable Trust, Wife and Son, Adult Children Each Get a Share*, MSNBC.COM (May 26, 2009 5:33 PM), http://today.msnbc.msn.com/id/30944505/ns/today-entertainment/t/judge-oks-settlement-over-james-brown-estate/

The estate of James Brown settled out of court. LaRhonda and the other out-of-wedlock children of James Brown did not receive an inheritance. James III, who was born after James Brown had a vasectomy, did receive an inheritance under the settlement. His mother Tommie Raye Hymie was allegedly married to James Brown. However, the validity of the marriage was questionable because she was married to someone else at the time she married James Brown. She claimed that her first marriage was invalid because she married her first husband so that he could obtain a green card. Since the first marriage was fraudulent then second marriage was not invalid. Ms. Hymie received a spousal share and her son received an afterborn child share.

89. Stephen M. Silverman, *Angelina Jolie: How Brad Pitt I Fell In Love*, PEOPLE.COM, Dec. 12, 2006, http://www.people.com/people/article/0,,20004139,00.html.

requirements for Shiloh to be able to inherit through intestate succession from her father?[90]

SCENARIO FOUR

Gwen was born in 1972. When her father died, he was not married, was not survived by parents, and had no other children other than Gwen, who was his natural and biological daughter. Gwen and her father had a close and loving relationship. Gwen's father publicly acknowledged that she was his daughter to his family, friends, and the general public. During his lifetime, Gwen and her father were tested by a DNA genetic paternity testing laboratory and it was determined to a greater than 99 percent level of certainty that he could not be excluded as her father. Gwen's father never went through formal written procedures to acknowledge Gwen as his daughter. At her father's death, should Gwen inherit his estate?[91]

SCENARIO FIVE

Diane was born in 1943. Her mother was raped by a distant relative. When she asked about her father, she received only vague answers. Diane learned her father's name when she was in her thirties and spoke to him on two occasions. When her father died, she was his only child, and he had no surviving spouse. A court order allowed her to exhume her father's body, and a subsequent DNA test showed a 99.9 percent probability

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90. *Brangelina*, WIKIPEDIA.ORG, http://en.wikipedia.org/wiki/Brangelina (last visited Oct. 20, 2011). Brad Pitt and Angelina Jolie are the natural parents of three children and the adoptive parents of three children. *Id.* Brad's legally adopted children are his lineal descendants because he has taken formal steps to adopt them. However, Brad may or may not have taken the necessary steps to make sure that his natural children are his legal children. Many "Brads" assume that if they are doing what they are supposed to be doing—taking care of their children and living in the home with their children—that nothing more is necessary. Should a child be penalized if his or her father wrongly assumes that since there is no doubt about his paternity, he does not need to formally intervene?

91. Phillips v. Ledford, 590 S.E.2d 280 (N.C. Ct. App. 2004).

that he was her father.[92] *Should Diane inherit her father's estate?*[93]

At common law, none of the children in the scenarios above would be able to inherit from anyone.[94] Further, "[u]ntil just over a century ago, Anglo-American law held that an illegitimate child was not entitled to support from either parent."[95] Currently, in the United States, all of the children in the above scenarios are automatically the legal children of their mothers. They can automatically inherit from, by, and through their mothers in the same manner as a child born in a marital union. But jurisdictions vary as to whether each of the above mentioned relationships result in the biological child's right to

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92. *Born Out of Wedlock, Woman Aids Fatherless Children*, ST. LOUIS POST-DISPATCH, Jan. 8, 1995 (Diane Burkhard's mother, Genevieve Lowery Rindfield, "won a probate case that led to a new inheritance law in Michigan." Her "mother, a live-in housemaid in Adrian, Mich. . . . was raped by her employer, John Brooks, an uncle by marriage. She was 18.").

93. *Id.* (A Michigan court allowed the child to inherit the father's estate.) *See also* MICH. COMP. LAWS § 700-2114 (2009):

> (1) Except as provided in subsections (2), (3), and (4), for purposes of intestate succession by, through, or from an individual, an individual is the child of his or her natural parents, regardless of their marital status. The parent and child relationship may be established in any of the following manners:
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> . . . .
>
> (b) If a child is born out of wedlock or if a child is born or conceived during a marriage but is not the issue of that marriage, a man is considered to be the child's natural father for purposes of intestate succession if any of the following occur:
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> . . . .
>
> (v) Regardless of the child's age or whether or not the alleged father has died, the court with jurisdiction over probate proceedings relating to the decedent's estate determines that the man is the child's father, using the standards and procedures established under the paternity act, 1956 PA 205, MCL 722.711 to 722.730.

94. Satava, *supra* note 38, at 934.

95. Coontz, *supra* note 44.

inherit from his or her father's estate. Is DNA testing sufficient? Is DNA testing necessary? Is formal acknowledgment necessary?

We can see from the above scenarios that there is no stereotypical out-of-wedlock child. Mainstream media remind us daily that "[t]he traditional ideal of a 'nuclear family,' made up of a married couple raising their children, is fading, down from 40 percent of all households in 1970 to less than a quarter by 2000."[96] "Marriage, long exalted as 'the foundation of the family and of society,' is no longer the unquestioned gateway to family creation."[97] "In America, at least one out of every three babies born is a non-marital child."[98] The percentages are even higher among racial and ethnic minorities."[99] "U.S. women under 30 who become pregnant for the first time are now more likely to be unmarried than married."[100] Children are born out of wedlock for many reasons, "including rapes, seductions, adultery, failed courtships, and long-term cohabitation."[101] The only commonality between the children is that the child's parents were not married at the time of the child's birth.

The Uniform Parentage Act "provides illegitimate children with a comprehensive statutory scheme through which they may

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96. Neta Sazonov, *Expanding the Statutory Definition of "Child" in Intestacy Law: A Just Solution for the Inheritance Difficulties Grandparent Caregivers' Grandchildren Currently Face*, 17 ELDER L.J. 401, 421 (2010) (quoting David D. Meyer, *Parenthood in a Time of Transition: Tensions between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 132 (2006)).

97. Meyer, *supra* note 96, at 125.

98. Lewis, *supra* note 15, at 1–2.

99. Marcia J. Carlson, Sara S. McLanahan, Jeanne Brooks-Gunn, *Coparenting and Nonresident Fathers' Involvement with Young Children after a Nonmarital Birth*, 45 DEMOGRAPHY 461, 461 (2008).

100. *Unmarried Motherhood*, FUTURIST, Mar. 1, 2000 (citing 2000 U.S. Census findings).

101. Ginger Frost, *"The Black Lamb of the Black Sheep": Illegitimacy in the English Working Class, 1850–1939*, 37 J. SOC. HIST. 293, 295 (2003).

enforce their right to support against the natural father."[102] Yet when it comes to issues of inheritance, in many jurisdictions the default rule is that an out-of-wedlock child is not entitled to an intestate inheritance unless the father takes formal steps. This perpetuates the assumption that such a child is "not usually part of a parent's family unit, and, hence, that the protection of [his or her] interests is somehow less important to society. The basis of this assumption is highly doubtful: many illegitimate children are treated as equal members of the family . . . ."[103]

State statutes that place a greater burden on the out-of-wedlock child's right to inherit from his father than from his mother are based on gender stereotypes. Many fathers participate in the lives of their children. Why do we assume that biology means a relationship when it comes to the mother but not for a father?

> The government's decision to impose a greater burden on unmarried fathers than unmarried mothers perpetuates the stereotype that unmarried fathers always have less meaningful relationships with their children than unmarried mothers. . . . If the stereotype that unmarried fathers are always absent and uninvolved were ever true, it is not true today. And that stereotype cannot justify treating fathers who have taken steps to establish a relationship with their children differently from mothers.[104]

I believe that the laws of intestate succession in every state should be changed so that, if the genetic parent-child connection can be established by clear and convincing evidence (either

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[102] Carlotta P. Wells, *Statutes of Limitations in Paternity Proceedings: Barring an "Illegitimate's" Right to Support*, 32 AM. U. L. REV. 567, 609 (1983).

[103] John C. Gray, Jr. David Rudovsky, *The Court Acknowledges the Illegitimate:* Levy v. Louisiana *and* Glona v. American Guarantee Liability Insurance Co., 118 U. PA. L. REV. 1, 13 (1969).

[104] Brief for the National Women's Law Center et al. as Amici Curiae Supporting Petitioner, Flores-Villar v. United States, 130 S. Ct. 2428 (No. 09-5801), 2010 WL 2602010.

before or after the death of the father), then each child in the above-mentioned scenarios should be able to inherit from or through his or her father's estate. If, in the above scenarios, the father had had a will or a trust that devised a class gift to children or issue, then the out-of-wedlock child in each scenario should be considered a child for purposes of the class distribution. If the father had a previously drafted will or trust prior to the birth of the out-of-wedlock child, then the child should inherit as a pretermitted or afterborn child in the same manner as a child born into a marital union. I would even go so far to say that even if the paternal grandmother of the out-of-wedlock child devised a class gift to her grandchildren or issue, the out-of-wedlock child should count as any other of the grandmother's issue.[105]

III. The Supreme Court Has Weighed in On the Issue of Inheritance and the Out-of-Wedlock Child; North Carolina and Similar State Statutes Violate the Equal Protection Clause of the Fourteenth Amendment

A. The Supreme Court Weighs In On Out-of-Wedlock Paternal Intestate Inheritance

The Supreme Court of the United States supports my proposition that children should not be treated differently because of the marital status of their parents. Although "[t]he matter of legitimation of children is peculiarly the creature of legislation, and its existence is solely dependent upon the law and policy of each particular state,"[106] the United States Supreme Court "has held that the Equal Protection and Due Process Clauses of the Fourteenth and Fifth Amendments apply to state and federal illegitimacy law. As a consequence, constitutional law has superseded an area of state law to which the federal judiciary has traditionally given great deference."[107]

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[105] If it is the child who dies, should the father and his relative's inherit from the child? This issue is not the focus of this paper. At first glance, there seems to be no reason to say no. After all, the maternal relatives inherit from such an out-of-wedlock child in most (if not all) jurisdictions.

[106] 41 AM. JUR. 2D Illegitimate Children § 132 (2011).

[107] Nolan, *supra* note 36, at 9–10.

As early as 1968, the Court condemned classifications based on the marital status of a child's parents.[108] The Court recognized that it had "invoked equal protection principles to protect other minority groups from arbitrary governmental action, and discriminations based on status of birth [were] closely analogous to those predicated on race and ancestry."[109] It therefore determined that "[s]ince illegitimacy is a status which attaches to a person at birth as the result of conduct of other persons, due process should preclude the denial of rights otherwise available to him on that basis."[110] The Supreme Court's most recent reasoning on the issue of the out-of-wedlock child's right to inherit from his father's intestate estate can be seen in *Trimble v. Gordon*[111] and *Lalli v. Lalli*.[112]

In *Trimble*, the appellants, Deta Mona Trimble and her mother, challenged a portion of the Illinois Probate Act that allowed children born out of wedlock to inherit only from their mother through intestate succession. The appellants alleged that the statute violated the Equal Protection Clause of the Fourteenth Amendment. The appellees' argument was that "Illinois has a legitimate interest in satisfying the 'presumed intent' of decedents who die intestate and that the state furthers that interest by excluding all illegitimate children from intestate succession from their fathers."[113]

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[108] *See generally* Levy v. Louisiana, 391 U.S. 68 (1968); Glona v. Am. Guar. Liab. Ins. Co., 391 U.S. 73 (1968).

[109] Gray, *supra* note 103, at 5.

[110] *Id.* at 9.

[111] Trimble v. Gordon, 430 U.S. 762 (1977).

[112] Lalli v. Lalli, 439 U.S. 259 (1978).

[113] Reply Brief of Appellant at 7, Trimble v. Gordon, 430 U.S. 762 (1977) (No. 75-5952), 1976 WL 181303 (citing Brief of Appellee at 16–18, Trimble v. Gordon, 430 U.S. 762 (1977), 1976 WL 181302).

Deta Mona Trimble was the only child of Sherman Gordon.[114] Gordon was killed at the age of twenty-eight during a Chicago homicide, and he died intestate. Though Gordon and Deta's mother never married, they were living together when Deta was born. Additionally, Gordon had legally acknowledged Deta, and a court had ordered him to pay weekly child support payments. If Deta Mona had been born into a marital union, there would have been no lawsuit. She would have inherited Gordon's estate as his only surviving child. However, at Gordon's death, Deta was not included as his heir because of the language in Chapter 12 of the Illinois Probate Act. The Act stated that when a person dies intestate, "[a]n illegitimate child is heir of his mother and of any maternal ancestor, and of any person from whom his mother might have inherited, if living."[115] Further, "[a] child who was illegitimate whose parents intermarry and who is acknowledged by the father as the father's child is legitimate."[116] Thus, Deta could not inherit from her father's estate because she was born outside of a marital union, and her parents never later married.

The United States Supreme Court reversed the Illinois Supreme Court that favored the appellees and remanded the case "for further proceedings not inconsistent with [the] opinion."[117] The Court determined that the Illinois statute violated the Equal Protection Clause of the Constitution. With Justice Powell writing for the majority, the Court stated that while strict scrutiny does not apply to classifications based on legitimacy, "[i]n a case like this, the Equal Protection Clause requires more than the mere incantation of a proper state purpose."[118] A state may classify children as born out of wedlock or in wedlock. However, when a state discriminates against the children based

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114. *Trimble*, 430 U.S. at 763–74 (Her mother Jessie Trimble was also a part of the litigation, probably as next of friend of her daughter.).

115. *Trimble*, 430 U.S. at 764 (quoting Probate Act of 1975, 755 ILL. COMP. STAT. 5).

116. *Id.* at 765.

117. *Id.* at 776.

118. *Id.* at 769.

on the classification, such discrimination "depends upon the character of the discrimination and its relation to legitimate legislative aims."[119]

The Court reasoned that the Illinois statute was too broad and there was no legitimate state purpose. The Court rejected the notion that discouraging out-of-wedlock births was a legitimate state interest and suggested that it was not proper to punish children for the sins of their parents because a child cannot control his or her birth status. "Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual as well as an unjust way of deterring the parent."[120] The Court reasoned that if the proper state objective was "assuring accuracy and efficiency in the disposition of property at death", the Illinois statute was constitutionally flawed.[121]

With the 1977 ruling in *Trimble v. Gordon* that declared the Illinois statute unconstitutional, the United States Supreme Court reversed earlier Court positions.[122] However, the next year in *Lalli v. Lalli*, the Court sustained a New York statute that treated children born out of wedlock differently than their brethren born to a marital union.[123]. Justice Powell, the only justice to be in the majority for both *Trimble* and *Lalli*, wrote the opinion for the plurality in *Lalli*. Justices Blackmun and Rehnquist each wrote separate concurring opinions that affirmed the majority ruling. The Court upheld a New York statute that "conditioned an illegitimate child's right to inherit from his father on having paternity judicially determined during the life of his father although there was no doubt as to the child's paternity."[124]

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119. *Id.* (citing Mathews v. Lucas, 427 U.S. 495, 504 (1976)).

120. *Id.* at 770 (citing *Mathews*, 427 U.S. at 505).

121. *Trimble*, 430 U.S. at 770.

122. *Id.* at 767 n.11. (*Trimble* was the twelfth time since 1968 that the Court had spoken to the issue.).

123. Nolan, *supra* note 36, at 18.

124. *Id.*

New York, at that time, allowed a child born out of wedlock to inherit from his intestate father only "if a court of competent jurisdiction ha[d], during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child."[125] Appellant was the out-of-wedlock child of the deceased Mario Lalli. At his father's death, Appellant petitioned the estate with evidence of paternity and claimed that he was entitled to an inheritance.[126] "Appellant contend[ed] that [New York statute] §4-1.2, like the statute at issue in *Trimble*, exclude[ed] 'significant categories of illegitimate children' who could be allowed to inherit 'without jeopardizing the orderly settlement' of their intestate fathers' estates."[127] However,

> Finding §4-1.2 to be 'significantly and determinatively different' from the statute overturned in *Trimble*, the court ruled that the New York law was sufficiently related to the State's interest in 'the orderly settlement of estates and the dependability of titles to property passing under intestacy laws,' to meet the requirements for equal protection.[128]

As such, the Court upheld the rulings of the New York Surrogate Court and New York Court of Appeals.

Although the Court did not overrule *Trimble*, the Court plurality distinguished the two situations and stated that the *Lalli* statute merely required evidentiary proof of paternity. The Court restated the rule that while strict scrutiny is not applicable, there must be a substantial relationship to a legitimate or permissible state interest in order to justify the classification of children born

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125. *Lalli*, 439 U.S. at 261 n.2 (citing N.Y. EST. POWERS TRUSTS LAW § 4-1.2 (McKinney 1967)). New York has since amended its statutes. N.Y. EST. POWERS TRUSTS § 4-1.2(a)(2) (McKinney 2011).

126. *Lalli*, 239 U.S. at 261.

127. *Id.* at 272.

128. *Id.* at 264.

out of wedlock. Unlike the statute in *Trimble*, where the statute that required parental marriage was found unconstitutional because there was no legitimate state interest, the statute in *Lalli* was upheld through the Court's reasoning that "the just and orderly disposition of a decedent's property where paternal inheritance by illegitimate children is concerned, [is] an area involving unique and difficult problems of proof."[129] According to the Court, "Section 4-1.2 represent[ed] a carefully considered legislative judgment on how best to 'grant to illegitimates in so far as practicable rights of inheritance on a par with those enjoyed by legitimate children,' while protecting the important state interest in the just and orderly disposition of decedents' estates."[130] Unlike the Illinois legislature, the New York legislature did not require parents to marry; as a result, the legitimate state interest was in the "orderly disposition of decedents' estates."[131]

The last time that the Supreme Court spoke to the issue of the constitutionality of state statutes that restrict paternal intestate inheritance from children born out of wedlock (as of this Article's publication) was in *Lalli*. The *Lalli* majority stated that the marital status of the parents is not relevant when it comes to paternal intestate inheritance. "The single requirement at issue here is an evidentiary one—that the paternity of the father be declared in a judicial proceeding sometime before his death."[132] "When the illegitimate child establishes his paternity during the lifetime of the father, fraudulent claims against the estate will be minimized, estate administration will be more efficient, and a purported father will be able to defend himself against claims of paternity."[133]

It appears that the Supreme Court accepted the burdensome proof requirements only because they were necessary to protect

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129. *Id.* at 260.

130. *Id.*

131. *Id.*

132. *Lalli*, 439 U.S. at 267.

133. Satava, *supra* note 38, at 957.

the state's interest in orderly estate administration. Proof of paternity can now be accomplished without the additional formal hurdles of judicial proceedings during the father's lifetime. While an authority may be necessary to read the test results and determine whether the DNA test results are indeed valid, the proceeding can take place at any time—including after the death of the father—and even if a father did not acknowledge his child while he was alive. In my opinion, the *Lalli* reasoning is stale.

With the advent of DNA testing and the accuracy of such tests, many states have changed their paternal intestacy statutes since 1977.[134] Even New York has revised its statutes since *Lalli*: New York now allows an out-of-wedlock child to be the legitimate child of his father if there is clear and convincing evidence of paternity, and either the father has openly and notoriously acknowledged the child as his own or a blood genetic marker test administered to the father along with other evidence establishes paternity by clear and convincing

[134] New York, New Jersey, Virginia, Montana, Georgia, Arizonia, Hawaii, Colorado and Kansas represent states that modified that paternal inheritance qualifications after 1977. *See generally* N.Y. EST. POWERS TRUSTS § 4-1.2(a)(2) (McKinney 2011); GA. CODE ANN. §53-2-3 (West 2011); N.J. STAT. ANN. § 3A-2A-41 (West 2011); VA. CODE ANN. § 64.1-51 (2011); MONT. CODE ANN. § 72-124 (2011); ARIZ. REV. STAT. ANN. § 14-2114 (2011); HAW. REV. STAT. § 560-2-114 (2011); COLO. REV. STAT. § 15-11-114 (2011); KAN. STAT. ANN. § 59-501 (2011). One of the most common changes is to allow for some use of DNA testing to establish paternity.

evidence.[135] While I am not convinced that the open and notorious acknowledgment is necessary, New York has taken a step in the right direction. In contrast, North Carolina has not yet updated its statutory language. The United States Supreme Court recognized a legitimate state interest in 1977 because of its concerns with the accuracy of paternity decisions.

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135. *See* N.Y. EST. POWERS TRUSTS § 4-1.2(a)(2) (McKinney 2011):

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 acknowledgment 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.).

> Accuracy is enhanced by placing paternity disputes in a judicial forum during the lifetime of the father, which (in addition to permitting a man to defend his reputation against unjust paternity claims) helps to forestall fraudulent assertions of paternity. Estate administration is facilitated, and delay and uncertainty minimized, where the entitlement of an illegitimate child is a matter of judicial record before administration commences."[136]

Much has changed since this Court decision that would suggest that in the twenty-first century, a statute similar to the 1977 New York statute would not be substantially related to any legitimate state purpose and would violate the Equal Protection Clause. DNA testing can now produce the accuracy that concerned the Court in *Lalli*. It is now time for states to change their statutes. While inheritance laws are controlled by the jurisdiction of each individual state, such statutes must serve a legitimate purpose.

B. North Carolina Statutory Law Violates the Constitution

In North Carolina, none of the children mentioned in the scenarios in Part II would be able to inherit from their biological father under the state intestate succession statutes. I contend that the North Carolina statute violates the Equal Protection Clause of the Fourteenth Amendment, which "prohibits a state from granting rights to one class of citizens that are denied to another class of citizens."[137] "The definition of discrimination can be reduced to the idea that one person can have something [that] another person cannot have, and the only difference between the two is a specific characteristic."[138] Children born in wedlock have an automatic right to inheritance from their paternal

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[136] *Lalli*, 439 U.S. at 260.

[137] Charles Patrick Schwartz, *Thy Will Not Be Done: Why States Should Amend their Probate Codes to Allow an Intestate Share for Unmarried Homosexual Couples*, 7 CONN. PUB. INT. L.J. 289, 292 (2008).

[138] *Id.* at 297.

relatives; children born out of wedlock do not. Thus, North Carolina discriminates against children born out of wedlock.

Section 29-19 of the North Carolina General Statutes outlines the necessary requirements for legitimizing a child born outside of a marital union. In North Carolina, a child born out of wedlock may inherit from, through, or by his or her father only under certain circumstances—namely, the biological parents of the child must marry each other, there must be a formal adjudication through a civil or criminal proceeding, or the father must execute a written acknowledgment before a certifying officer and file it in the office of the clerk of superior court of the county where either he or the child resides.[139] North Carolina has stated that voluntary paternity is not the same as legitimization; therefore, North Carolina penalizes the out-of-wedlock child whose father acknowledges him or her without court intervention. Because "legitimacy" relates to a legal relationship rather than a biological relationship, a father could conceivably be doing "all of the right things" as a father but his biological child would not be able to inherit his estate through intestate statutes unless certain paperwork were completed. The state discriminates against the child for reasons that the child did not cause and cannot control. A "child has no control over the marital status of his or her parents"[140] or their court filings.

When analyzing an Equal Protection challenge, the court must determine the level of scrutiny and whether the government interest withstands that scrutiny. Courts that have interpreted the Fourteenth Amendment and parallel clauses in state constitutions have held that "legislation may discriminate among classes as long as the burden imposed on the affected class is justifiable."[141] Although the distinction between "illegitimate" and "legitimate" children does not rise to the level of strict scrutiny, the United States Supreme Court used the standard of intermediate scrutiny in *Trimble* and *Lalli* and stated that intestate statutes that discriminate between children born in

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139. *See* N.C. GEN. STAT. ANN. §29-19 (West 2011).

140. Nolan, *supra* note 36, at 48–49.

141. Schwartz, *supra* note 137, at 293 (quoting Standhardt v. Jeanes, 77 P. 3d 451, 464 (Ariz. Ct. App. 2003)).

wedlock and out of wedlock must bear some substantial relationship to a legitimate state interest. This is a higher standard than the rational-relationship standard.

Because the United States Supreme Court has not spoken to the issue in more than thirty years, the rules stated in *Trimble* and *Lalli* are still good law. However, the reasoning used in *Lalli* is no longer valid. When the Court upheld the New York statute in *Lalli*, it stated that a state statute that differentiates between children born in wedlock and children born out of wedlock must bear a substantial relationship to the state's interest in "provid[ing] for the just and orderly disposition of property at death."[142] "[A] statute that imposes a substantially greater burden on illegitimate children cannot be written broadly to deprive illegitimate children of inheritance rights in situations that do not promote permissible state interests."[143] The North Carolina statute bears no substantial relationship to a legitimate state interest.

> The United States Supreme Court has held that denial of rights to illegitimate children based on their parents' "morals," as a way of discouraging [parents from] bringing children into the world out of wedlock, was a form of invidious discrimination against the children and clearly violated the Equal Protection Clause.[144]

While the Court stated that the New York statute "ensured the accurate resolution of claims of paternity and...minimized the potential for disruption of estate administration,"[145] such is not the case with the North Carolina statute.

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[142] *Lalli*, 439 U.S. at 268.

[143] David E. Webb, *The Prodigal Father: Intestate Succession of Illegitimate Children in North Carolina Under Section 29-19*, 63 N.C. L. REV. 1274, 1278 (1985).

[144] 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, 757–58 (1994).

[145] Nolan, *supra* note 36, at 18 (quoting *Lalli*, 439 U.S. at 271).

C. The Rigid Application of North Carolina Statutes Has Produced Absurd Results

The absurdity of the North Carolina statute can be seen in the cases discussed below. On several occasions, North Carolina courts have ruled against paternal inheritance by the out-of-wedlock child because the statutory requirements had not been met. North Carolina has denied an intestate inheritance to out-of-wedlock children when the father has paid for the child's birth, the father's name has appeared on the child's birth certificate, the father has taken out life insurance policies on the child, where father and child have submitted to genetic testing and the evidence established paternity beyond a reasonable doubt, and where the decedent held the child out as his own during his lifetime.[146] North Carolina has also chosen to ignore legitimation in another jurisdiction when the legitimation occurred after the father's death.[147] Strict statutory compliance has led to harsh results.

In *Herndon v. Robinson*,[148] the North Carolina Court of Appeals concluded that even though the father had acknowledged his out-of-wedlock child by paying for the child's birth, taking out life insurance policies on the child, and listing the child on an employment application, he had not complied with the provisions of N.C. Gen. Stat. Section 29-19 and, as a result, the child was not eligible to inherit as his legitimate heir. Further, the Court concluded that in spite of all of the acts of the father, the father had not shown that he intended the out-of-wedlock child to inherit from him.[149]

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[146] Herndon v. Robinson, 291 S.E.2d 305 (N.C. Ct. App. 1982), *cert. denied*, 294 S.E.2d 223 (N.C. 1982); Hayes v. Dixon, 348 S.E.2d 609 (N.C. Ct. App. 1986); Phillips v. Ledford, 590 S.E.2d 280 (N.C. Ct. App. 2004).

[147] Helms v. Young-Woodard, 411 S.E.2d 184 (N.C. Ct. App. 1991).

[148] *Herndon*, 291 S.E.2d at 305.

[149] *Id.*

In *Hayes v. Dixon*,[150] the North Carolina Supreme Court affirmed a trial court's summary judgment when the statutory requirements of N.C. Gen. Stat. Section 29-19 had not been met. The decedent, Kyrl Houston Jeffries, died intestate. His out-of-wedlock daughter, Zelma Hayes, brought the suit to establish her rights to inherit from her father through intestate succession. Although Kyrl had listed Zelma as a beneficiary of his federal employees group life insurance policy and purchased savings bonds payable to her, the North Carolina Court of Appeals held that she was not entitled to an intestate share of his estate. The defendants were collateral heirs, and they admitted that the plaintiff was the daughter of the decedent. The pleadings even stated that Kyrl was listed as Zelma's father on her birth certificate. Nevertheless, the trial court granted summary judgment in favor of the defendants because the statutory requirements of N.C. Gen. Stat. Section 29-19 had not been met. The plaintiff appealed, and the judgment was affirmed, the North Carolina Supreme Court recognizing that statutory mandates sometimes cause harsh results.[151]

In the case of *Phillips v. Ledford*,[152] the North Carolina Court of Appeals held that a daughter born out of wedlock could not inherit her father's estate because she had not met the North Carolina statutory requirements for inheritance by a child born out of wedlock. Gwen Phillips was the only child of the decedent, Mr. Owenby. When Mr. Owenby died, his surviving siblings and the children of his deceased siblings were named in the application of letters of administration as his heirs and those persons entitled to share in his estate. Gwen Phillips was the undisputed daughter of the decedent; however, Mr. Owenby and Gwen's mother never married. Gwen Phillips was of majority age when she connected with her father. Ms. Phillips and Mr. Owenby submitted to DNA testing, which revealed with 99 percent certainty that he could not be excluded as her father. He then acknowledged her publicly as his daughter. However, there was never any signed acknowledgement before a certifying

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150. *Hayes*, 348 S.E.2d at 609.

151. *Id.*

152. *Phillips*, 590 S.E.2d at 280.

officer filed in a superior court where either of them resided, as required by statute. Like Deta Mona Trimble, had Ms. Phillips been born to a marital union, she would have been her father's sole heir under intestate succession. However, because of her status as a child born out of wedlock, she was prevented from inheriting anything from him, even though there was little if any question that the decedent was her biological father.

Ms. Phillips sued, and the trial court granted the defendants' motion to dismiss. Ms. Phillips appealed on the grounds that N.C. Gen. Stat. Section 29-19 violated equal protection and due process under the United States and North Carolina Constitutions. The North Carolina Court of Appeals affirmed the trial court's decision and stated that it would not address the constitutional issues presented in the appeal. It stated that the plaintiff's complaint did not state a claim upon which relief could be granted, so there was no need to address the constitutional issues. "The courts of this State will avoid constitutional questions, even if properly presented, where a case may be resolved on other grounds."[153] The plaintiff's request for discretionary review by the North Carolina Supreme Court was subsequently denied.[154] The Court stated that any revision to the statute was an issue for the legislature, not the courts.

In *Helms v. Young-Woodard*,[155] the North Carolina Court of Appeals denied a paternal intestate share to the out-of-wedlock child who was legitimated in another jurisdiction after the father's death. North Carolina has been clear that legitimation, whether domestic or foreign, cannot be established after the putative father's death.[156] H. Parks Helms was the administrator

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153. *Id.* at 282 (quoting Anderson v. Assimos, 572 S.E.2d 101, 102 (2002) (per curiam)).

154. *Phillips*, 597 S.E.2d 133.

155. *Helms*, 411 S.E.2d 184.

156. *Id.* ("The Court of Appeals, Lewis, J., held that: (1) legitimation action, either foreign or domestic, must be reduced to judgment prior to death of putative father in order for illegitimate child to inherit under intestate succession, and (2) this result does not violate equal protection or the full faith and credit clause.").

of the intestate estate of Jesse Hogan Jackson.[157] Four individuals claimed to be the decedent's lawful heirs. The defendant-appellants Phyllis Young-Woodard and Marcella Baker were his legitimate heirs. Defendant-appellees Linda and Caroline Alexander claimed to have been legitimated.[158] They were domiciled in New York and "obtained default orders of filiation from the New York Family Court . . . six months after" the death of the decedent.[159] While North Carolina has statutory language that states,

> A child born an illegitimate who shall have been legitimated in accordance with G.S. 4910 or 4912 or in accordance with the applicable law of any other jurisdiction, and the heirs of such child, are entitled by succession to property by, through and from his father and mother and their heirs the same as if born in lawful wedlock; and if he dies intestate, his property shall descend and be distributed as if he had been born in lawful wedlock . . . .[160]

The Mecklenburg County Superior Court "reasoned that North Carolina determines inheritance rights at the date of death."[161] Since the Alexanders were not legitimated at the time of the death of the decedent, they were not entitled to an inheritance.

In 1985, David E. Webb suggested that the North Carolina legislature reform its "illegitimacy" intestate statutes to at least

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157. *Id.* at 185.

158. *Id.*

159. *Id.*

160. *See* N.C. GEN. STAT. § 29-18 (2009).

161. *Id.*

protect the "illegitimate minor."[162] While the formalities of N.C. Gen. Stat. Section 29-19(b) "assure that the decedent intended that the illegitimate child share in [the father's] estate,"[163] there should be balance between the rights of the child and the state interest. The North Carolina legislature should follow the direction of other states and amend its intestate distribution statute.[164] There is no substantial reason to deny inheritance to a child similarly situated to Gwen Phillips or Zelma Hayes. When North Carolina discriminates against Gwen Phillips, Zelma Hayes, and others like them, the state is taking children who are identically situated and then discriminating against one group due to no fault of their own.

> Traditional equal protection analysis asks whether this statutory differentiation on the basis of illegitimacy is justified by the promotion of recognized state objectives. If the law cannot be sustained on this analysis, it is not clear how it can be saved by the absence of an insurmountable barrier to inheritance under other and hypothetical circumstances.[165]

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[162] Webb, *supra* note 143, at 1283–84. (Webb suggested that "[t]he rights of illegitimate minors who are entitled to their fathers' support must be afforded greater protection. Children under eighteen should be granted a one year grace period from the date of their father's death to establish paternity. This amendment would benefit both informally acknowledged children and those who had not been supported by their father. In addition, an illegitimate minor will benefit from a rebuttable presumption of paternity if he can show that the alleged father was known to have lived with the mother at the time of conception or that the minor lived with the father immediately after birth. Although these changes would reduce the certainty of the disposition of estates, they are warranted because of the compelling needs of dependent children. Further, the inheritance rights of the heirs of a father who acknowledges and provides for his illegitimate child in his duly probated will should be granted as they pose no danger of fraudulent claims on the illegitimate child's estate.").

[163] Herndon v. Robinson, 291 S.E.2d 305, 307 (N.C. Ct. App. 1982).

[164] Suggested language is in Part IV of this paper. Some options discussed in Part IV are the openly and notoriously recognized child; mutually acknowledged relationship of parent and child; and clear and convincing evidence. *See generally* MINN. STAT. ANN. § 257.55 (West 2011); GA. CODE ANN. § 53-2-3 (West 2011).

[165] Wheeler, *supra* note 19, at 251.

And, while a state does have an interest in establishing a method of property distribution, the North Carolina statute does not appear to bear a substantial (or even rational) relationship to this interest.

I maintain that North Carolina's requirement of a written acknowledgement signed in the presence of a notary (or other certifying officer) and filed in a court is overly burdensome.[166] Consider Angelina Jolie and Brad Pitt's relationship and their children—three biological and three adopted. Even without a marital union, there is no question that Brad Pitt has publicly acknowledged all of his children. His name is on the birth certificate of his biological children. Photographs of Pitt with his children grace the covers of national magazines and the Internet as he often dotes about how fatherhood has changed his life. Should Brad have to file a formal acknowledgment in court when he has publicly acknowledged his children? The current North Carolina statute would require a formal adjudication or writing signed by the father and filed in superior court in order for the biological children to inherit from their father.[167] Absent that writing, Brad's adopted children are legally entitled to an inheritance, but his biological children are not. More likely than not, this outcome would not be what Brad desired. Further, the not-so-famous Brads of North Carolina likely have no idea that this is the law.

Brad Pitt's situation is a clear example of the child who should not be excluded from his paternal intestate inheritance. A signature in the presence of a notary public suggests formality and may cut down on the prospects of litigation, but is such clarity necessary if the father has not denied his children?[168] I think that it is inequitable to block the inheritance rights of a child simply because the father and courts have given no formal recognition of the fact that she is indeed her father's child.

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166. *See* N.C. GEN. STAT. ANN. § 29-19 (West 2011).

167. *Id.*

168. *See* ME. REV. STAT. ANN. § 18-2-109 (West 2011) (in front of notary); CONN. GEN. STAT. ANN. §45a-438 (West 2011) (under oath); VA. CODE ANN. § 64.1-5.1 (West 2011) (either writing under oath or requesting that the birth record be updated); IND. CODE ANN. § 29-1-2-7 (West 2011) (paternity affidavit).

Once upon a time, the difficulty of proving paternity necessitated demanding statutory requirements. Legislatures were justified in wanting to eliminate the danger of spurious claims. Now, however, the advances in genetic paternity tests have removed the problems of proof that once justified discrimination against individuals based on the marital status of their parents. "The problems of proof which have been the basis of denying inheritance rights to illegitimate children have been removed by the advent of this new genetic (DNA) testing. Therefore, this court can no longer be a participant in denying the opportunity to an illegitimate child to prove his paternity . . ."[169] When North Carolina chooses to deny inheritance simply because of the marital status of the child's parents, it is thrusting outdated notions of fatherhood to the forefront and perpetuating gender-based stereotypes. Children born out of wedlock should not be "unjustly deprived of their inheritance."[170]

The additional requirement of a formal judicial proceeding during the father's lifetime or a document filed in court during the father's lifetime should not be necessary for the child to receive a paternal intestate inheritance. This requirement unnecessarily punishes the child for the inaction of the parent. If an individual does not take steps to draft a will, then there is a high probability that he will not think to take steps to file a writing asserting his relationship to a child that he has never denied.

If the very essence of intestacy statutes is to replicate the intent of the decedent, then under even the most conservative analysis, at least some of the children in the Part II scenarios should be entitled to intestate inheritance. When North Carolina chooses to deny such children a paternal inheritance, the state is reflecting the "archaic stereotypes and a medieval system of punishing innocent illegitimate children for the perceived sins of

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169. Le Ray, *supra* note 144, at 766 (quoting Alexander v. Alexander, 537 N.E.2d 1310, 1314 (Franklin County, Ohio C.P. 1988)).

170. Webb, *supra* note 143, at 1281.

their parents"[171] that the United States Supreme Court admonished in *Trimble* over thirty years ago.

When states such as North Carolina deny intestate inheritance to children born out of wedlock, especially when the father has acknowledged the child during his lifetime, the state is substituting its intent for the decedent's intent. To suggest that the decedent would rather his property escheat to the state than pass to his acknowledged out-of-wedlock child is ridiculous. As the number of cohabiting couples increases, the marital unit is not synonymous with a parent-child relationship. North Carolina and other states should not continue the outdated assumption that a father who produces a child outside of a marital union does not intend to provide for that child.

IV. Legislation or Alternatives to Legislation—A Look at Some of the Variations

If North Carolina's and other state's similar statutes are to be revised, what should the revisions look like? Currently, there is no uniformity with respect to out-of-wedlock paternal inheritance rights. We have discussed North Carolina, which requires strict statutory compliance of adjudication or a writing signed by the father and filed in a superior court. Several jurisdictions, while not as strict as North Carolina, require that the father acknowledge the child during his lifetime. And finally, the most lenient jurisdictions such as Georgia allow paternity (for inheritance purposes) to be proven even after the death of the father. This section will review various statutory language models.

A. Father Acknowledges or Holds Child Out As His Own During His Lifetime.

Several jurisdictions recognize an out-of-wedlock child as his or her father's legal child for inheritance purposes if the father has acknowledged or held the child out as his own during

[171] Reply Brief of Appellant at 12, *Trimble*, 430 U.S. 762 (No. 75-5952).

his lifetime.[172] Jurisdictions that follow this approach probably believe it to be a reasonable one because it follows one of the stated objectives of intestacy law—"to carry out the probable intent of the average intestate decedent."[173] If a father acknowledges a child during his lifetime, that child, whether born in or out of wedlock, should be eligible to inherit from his father through intestate succession.

Such language accepts the current trend that regardless of their marital status, men are often concerned about the women they impregnate and their offspring:

> [Current] [s]ociological research . . . indicates that fathers of illegitimate children often have long relationships with the mother, and demonstrate concern for both mother and child. A significant proportion of the children actually live with their fathers rather than their mothers, and a far greater percentage of children live with both parents . . . or have fathers who demonstrate concern.[174]

These fathers live with, or spend substantial time with, their children.

The flaw with legislative language is whether acknowledgment needs to be defined. Currently, jurisdictions require different levels of acknowledgement by state statute. Should paternal intestate inheritance depend on whether the acknowledgment was public or private? "The words 'public

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[172] *See generally* COLO. REV. STAT. ANN. § 19-4-105 (West 2011); MASS. GEN. LAWS ANN. ch. 190, § 7 (West 2011); MD. CODE ANN., EST. TRUSTS § 1-208 (West 2011); MICH. COMP. LAWS ANN. § 700.2114 (West 2011); N.Y. EST. POWERS TRUSTS LAW § 4-1.2 (McKinney 2011); 20 PA. STAT. ANN. § 2107 (West 2011).

[173] Sazonov, *supra* note 96, at 412 (quoting Michelle Harris, *Why a Limited Family Maintenance System Could Help American "Grandfamilies": A Response to Kristine Knaplund's Article on Intestacy Laws and Their Implications for Grandparents Raising Grandchildren*, 3 NAELA J. 239, 248 (2007)).

[174] Reply Brief of Appellant at 13, *Trimble*, 430 U.S. 762 (No. 75-5952).

acknowledgment,' as used in statutes providing for legitimation by the father, mean disclosing the facts of paternity to relatives, friends, acquaintances and others—a holding out of the child as his own."[175] For Massachusetts and West Virginia, this is enough to establish paternity.[176] But if public acknowledgement requires something in writing, what kind of writing ought to be sufficient? Some have suggested that,

> Public acknowledgment has been evidenced by a birth certificate in which the father's name appeared as parent and by federal and state income tax returns in which the child was listed, respectively, as a dependent and as an adopted child.[177] In one case the court stated that there could be no more public an acknowledgment than by signing the child's birth certificate in a manner designating the signer as the father.[178] In another case, statements of the father, regarding paternity of the child, to the physician attending the birth of the child, from which the physician filed a certificate of birth naming the father, were held to be competent evidence of a public acknowledgment.[179]

And is this written evidence necessary? To be clear, even if some documentation was required in each of the North Carolina cases mentioned in Part III, the father had taken some affirmative step to claim his child.

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[175] 14 AM. JUR. PROOF OF FACTS 2D 727 § 3 (1977) (citing 10 AM. JUR. 2D *Bastards* § 53).

[176] *See generally* MASS. GEN. LAWS ANN. ch. 190, § 7 (West 2011) and W. VA. CODE ANN. § 41-1-5 (West 2011).

[177] 14 AM. JUR. PROOF OF FACTS 2D, *supra* note 175 (citing Estate of Skinner, 151 P.2d 31 (Cal. Dist. Ct. App. 1944)).

[178] *Id.* (citing *In re* McNamara's Estate, 183 P. 552, 558 (Cal. 1919)).

[179] *Id.* (citing *In re* Estate of Baird, 160 P. 1078, 1078 (Cal. 1916)).

Currently, many jurisdictions require more than a written document.[180] In addition to the strict requirements in North Carolina, in some jurisdictions Paternity Affidavits or Certificates of Parentage are among the requirements necessary to establish paternity.[181] The documents may be on file with the department of vital statistics, health department, or human services department.[182] I maintain that there are still reasons why men may not sign such affidavits or certificates, and their children should not be penalized for their inactions. These are the fathers who may be married to other women or involved in circumstances where they do not want to jeopardize their reputation. Under the formal definition of 'acknowledge,' "they own or admit knowledge of the fact of paternity."[183] They just don't do so publicly. The relationship that Senator Strom Thurmond had with Essie Mae Washington Williams was such a relationship. A father need not acknowledge his child to anyone other than the child. Should private meetings between the father, child, and the mother be enough to entitle the child to his paternal inheritance? Strom Thurmond, a staunch segregationist, saw his biracial daughter on sporadic occasions and, while he never announced his relationship to her publicly, there appear to have been some financial contributions.[184] Though nothing formal was filed in a court, the interested parties—mother, father, and child—knew the genetic ties. Unlike the Jolie-Pitt children, Essie Mae did not carry the Thurmond name and Strom Thurmond was not listed as her father on her birth certificate. Should she have been able to inherit as his child?

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[180] *See* ARIZ. REV. STAT. ANN. § 25-812 (2011); ARK. CODE ANN. §28-9-209 (West 2011); COLO. REV. STAT. ANN. § 19-4-105 (West 2011); GA. CODE ANN. § 53-2-3 (West 2011); MONT. CODE ANN. § 40-6-105 (2011).

[181] *See* IND. CODE ANN. § 29-1-2-7 (West 2011); MINN. STAT. ANN. § 524.2-114 (West 2011); OR. REV. STAT. ANN. § 112.105(1) (West 2011).

[182] *See* COLO. REV. STAT. ANN. § 19-4-105 (West 2011); HAW. REV. STAT. ANN. § 584-4 (West 2011); OR. REV. STAT. ANN. § 112.105 (West 2011).

[183] 14 AM. JUR. PROOF OF FACTS 2D 727 § 3 (1977) (citing Blythe v. Ayres, 31 P. 915 (Cal. 1892)).

[184] *See generally* WASHINGTON-WILLIAMS STADIEM, *supra* note 85.

I suggest that acknowledgement should not be a defined term. If we don't define acknowledgment, then the issue will be left to the courts when there is a dispute. When a father has publicly acknowledged or held a child out as his own, and when there is available proof, no further evidence should be necessary for the child to be entitled to an intestate inheritance.

But what evidence supports a private acknowledgment? The child is the only person who can speak to the issue; the father is now deceased. While it is easy to say that the child should receive an intestate inheritance, statutory language should not create ambiguity that would hinder the orderly distribution of an estate. Where there has been a private acknowledgement, perhaps DNA (or genetic) proof may be necessary to inherit from the father's estate. The privately acknowledged child (whether adult or minor) should have a period of time after the death of her father to prove paternity through genetic testing. This way, the genetic testing assures that the estate is administered fairly and orderly.

The 2008 Uniform Probate Code uses the parent-child relationship to determine whether "the parent is a parent of the child and the child is a child of the parent for the purpose of

intestate succession."[185] After carving out exceptions for children who are adopted, assisted reproductive technology, and a parent who gives up parental rights, the Uniform Probate Code makes no distinction between marital and nonmarital children

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[185] UNIF. PROBATE CODE §2-116 (amended 2008). *See also* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 14.5 (Tentative Draft No. 4, 2004) (The comment section defines "Functioned as a Parent of the Child." The term "functioned as a parent of the child" is derived from the RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS. RESTATEMENT (THIRD) OF PROP.:WILLS AND OTHER DONATIVE TRANSFERS § 14.3 cmt. 4 lists the following parental functions:

Custodial responsibility refers to physical custodianship and supervision of a child. It usually includes, but does not necessarily require, residential or overnight responsibility.

> *Decisionmaking responsibility* refers to authority for making significant life decisions on behalf of the child, including decisions about the child's education, spiritual guidance, and health care.
>
> *Caretaking functions* are tasks that involve interaction with the child or that direct, arrange, and supervise the interaction and care provided by others. Caretaking functions include but are not limited to all of the following:
>
> > (a) satisfying the nutritional needs of the child, managing the child's bedtime and wake-up routines, caring for the child when sick or injured, being attentive to the child's personal hygiene needs including washing, grooming, and dressing, playing with the child and arranging for recreation, protecting the child's physical safety, and providing transportation;
> >
> > (b) directing the child's various developmental needs, including the acquisition of motor and language skills, toilet training, self-confidence, and maturation;
> >
> > (c) providing discipline, giving instruction in manners, assigning and supervising chores, and performing other tasks that attend to the child's needs for behavioral control and self-restraint;
> >
> > (d) arranging for the child's education, including remedial or special services appropriate to the child's needs and interests, communicating with teachers and counselors, and supervising homework;
> >
> > (e) helping the child to develop and maintain appropriate interpersonal relationships with peers, siblings, and other family members;
> >
> > (f) arranging for health-care providers, medical follow-up, and home health care;
> >
> > (g) providing moral and ethical guidance;
> >
> > (h) arranging alternative care by a family member, babysitter, or other child-care provider or facility, including investigation of alternatives, communication with providers, and supervision of care.
>
> *Parenting functions* are tasks that serve the needs of the child or the child's residential family. Parenting functions include caretaking functions, as defined [above], and all of the following additional functions:
>
> > (a) providing economic support;
> >
> > (b) participating in decisionmaking regarding the child's welfare;
> >
> > (c) maintaining or improving the family residence, including yard work, and house cleaning;
> >
> > (d) doing and arranging for financial planning and organization, car repair and maintenance, food and clothing purchases, laundry and dry cleaning, and other tasks supporting the consumption and savings needs of the household;
> >
> > (e) performing any other functions that are customarily performed by a parent or guardian and that are important to a child's welfare and development.

See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §2.03(3), (4), (5), and (6) (2004). Ideally, a parent would perform all of the above functions throughout the child's minority. In cases falling short of the ideal, the trier of fact must balance both time and conduct. The question is, did the individual perform sufficient parenting functions over a sufficient period of time to justify concluding that the individual functioned as a parent of the child? Clearly, insubstantial conduct, such as an occasional gift or social contact, would be insufficient. RESTATEMENT (THIRD) OF PROP.: WILLS DONATIVE TRANSFERS § 14.5 cmt. f (Tentative Draft No. 4, 2004). Moreover, merely obeying a child support order would not, by itself, satisfy the requirement. Involuntarily providing support is inconsistent with functioning as a parent of the child.

The context in which the question arises is also relevant. If the question is whether the individual claiming to have functioned as a parent of the child inherits from the child, the court might require more substantial conduct over a more substantial period of time than if the question is whether a child inherits from an individual whom the child claims functioned as his or her parent.).

and their right to inherit from their genetic parents.[186] This is similar to the public acknowledgment requirement.

B. Father Does Not Acknowledge Child During His Lifetime But DNA Evidence Shows a Biological Connection.

If genetic evidence can be used to support a private acknowledgement, should it be available to prove paternity if there was no acknowledgement at all? Of course this means that we have gone beyond the notion that intestate statutes mirror generally what a decedent would have done had he drafted a will. Consider James Brown, the Godfather of Soul. Genetic testing administered after James Brown's death revealed at least three biological children that he had not acknowledged during his lifetime. There had been no parent-child relationship while he was alive but there was a genetic tie that was proven after his death. Assuming that we account for children of sperm donors and those who have been formally adopted, should a child who can prove paternity by clear and convincing evidence be entitled to paternal intestate inheritance?

Several jurisdictions allow for out-of-wedlock paternal intestate inheritance when there is clear and convincing proof of paternity.[187] A generation ago, "clear and convincing evidence" of paternity was a difficult standard and generally some evidence of the de facto parent-child relationship was necessary. Courts were reluctant to rely on:

> The inadequacies of older [genetic] testing methods when the putative father was deceased [because it] reduced posthumous paternity suits to little more than swearing

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186. UNIF. PROBATE CODE §2-117 (amended 2008) ("Except as otherwise provided in Sections 2-114, 2-119, 2-120, or 2-121, a parent-child relationship exists between a child and the child's genetic parents, regardless of the parents' marital status.").

187. *See* N.Y. EST. POWERS TRUSTS LAW § 4-1.2 (McKinney 2011); VA. CODE ANN. § 64.1-5.1 (West 2011); MONT. CODE ANN. § 40-6-105; ARIZ. REV. STAT. ANN. § 25-812; HAW. REV. STAT. ANN. § 584-4 (West 2011); ALASKA STAT. ANN. § 25.20.050 (West 2011); COLO. REV. STAT. ANN. §19-4-105 (West 2011); GA. CODE ANN. § 53-2-3 (West 2011).

> contests, in which the alleged father was unable to participate. To avoid these problems of proof, many states required public acknowledgment by the father before an illegitimate child could inherit by intestate succession.[188]

But now, "paternity through DNA testing is 'virtually foolproof' and 'perhaps the most persuasive [proof] that a claimant can present."[189] "Indeed, 'DNA testing often produces paternity indices well above 99.99%—as near to an absolute determination as is possible."[190] Since DNA or genetic testing now provides proof of paternity with near certainty, when the statute requires proof by clear and convincing evidence, even when the father has not acknowledged the child during his lifetime, the child may still be able to inherit as an intestate heir. I think this is the correct result. Georgia is an example of a jurisdiction that uses this approach:

> The use of DNA testing has made proof of fatherhood so positive, leaving so little doubt, that the old rules of law founded in antiquity which distinguish between mother and father in determining parentage of a child born out of wedlock must be discarded.[191]

Prior to the mid-1980s, Georgia's intestate statutes were similar to those in North Carolina. A child born out of wedlock could not inherit from his biological father unless the parents

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188. Le Ray, *supra* note 144, at 787–88.

189. Jenkins, *supra* note 66, at 212 (quoting Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 141).

190. *Id.* (quoting Le Ray, *supra* note 144, at 748).

191. Petition for Writ of Certiorari, Rushford v. Caines, 534 U.S. 1081 (2002) (No. 01-650), 2001 WL 34116043, at *7.

married or there was a formal adjudication of paternity.[192] In 1986, the Georgia Supreme Court recognized the concept of equitable legitimation (or legitimization) in the case of *Prince v. Black*.[193] The court held that an out-of-wedlock child could inherit from his father through intestate statutes if "clear and convincing evidence [existed] that the child [wa]s the natural child of the father and that the father intended for the child to share in his intestate estate, in the same manner that the child would have shared if he had been formally legitimated."[194]

> In that case, the plaintiff was conceived while his mother was living with the decedent, and the decedent was 'the only father that [the plaintiff] ever knew.' When the plaintiff was six years old, his mother gave complete control and custody of him to the decedent. The decedent registered him in school using the decedent's surname, held the boy out as his son, and named him as beneficiary on his life insurance. On an application for Social Security retirement benefits, the decedent swore twice under penalty of perjury that the plaintiff was his son. When the decedent died intestate, the decedent's sister asked to qualify the defendant as administrator of the decedent's estate. The son, the plaintiff in the case, filed a caveat, which was dismissed by the probate court. He then appealed to the superior court, and a jury found that he was the decedent's son and lawful heir. The Georgia Court of Appeals reversed the jury verdict, holding that the statutory requirements for inheritance had not been met.
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> On appeal to the Georgia Supreme Court, the plaintiff argued that the jury verdict could be

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[192] *See generally* 1980 Ga. Laws 1432, S 1 (formerly found at GA. CODE ANN. §§ 53-4-4(c)(1)(A) to (B), -5(b)(1)(A) to (B) (West 1995)).

[193] Prince v. Black, 344 S.E.2d 411 (Ga. 1986).

[194] *Id.* at 412.

> upheld by the doctrine of equitable adoption.[195]

Even though the court found that equitable adoption was inapplicable, the court found another remedy.[196] This new remedy was equitable legitimization. The court held that these actions showed that the father clearly intended to allow the son to share in his estate as if the child had been formally legitimated.[197] In other words, if a de facto relationship existed prior to the decedent's death, his out-of-wedlock child could inherit his intestate estate. Unlike adoption, legitimation requires a blood connection between father and child.

Georgia then revised its statutes to codify the concept of equitable legitimation. However, issues arose as to what constitutes "clear and convincing evidence of intent." This caused the legislature to look at why it had adopted equitable legitimation in the first place. Concluding that "the purpose of the doctrine was to promote an inheritance system that was both fair and efficient,"[198] Georgia recognized that intent was not necessary. In its current form, the Georgia statute allows for the following,

> The child may inherit from and through the father if a court order established legitimacy or paternity, the father signed a sworn statement of paternity or the child's birth certificate, there is clear and convincing evidence that the child is the father's child and a de facto parent-child relationship existed, or genetic tests established a 97% probability of paternity that

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195. James R. Robinson, Comment, *Untangling the Loose Threads: Equitable Adoption, Equitable Legitimation, and Inheritance in Extralegal Family Arrangements*, 48 EMORY L.J. 943, 969–70 (1999).

196. *Id.* at 970.

197. *Prince*, 344 S.E.2d at 413.

198. Mary F. Radford F. Skip Sugarman, *Georgia's New Probate Code*, 13 GA. ST. U. L. REV. 605, 633 (1997).

> has not been rebutted by clear and convincing evidence.[199]

Furthermore, the father or his relatives may inherit "from and through the child if a court order established legitimacy or paternity, the father signed a sworn statement of paternity or the child's birth certificate, or genetic tests established a 97% probability of paternity that has not been rebutted by clear and convincing evidence."[200] The paternal relations may not inherit from or through the child born out of wedlock if the father has refused support or refused to treat the child as his own.[201] The genetic testing may be done after the death of the father. Under Georgia's statute, all of the children in the Part I scenarios would be eligible for paternal inheritance.

I agree with the Georgia legislature. While the intent of the testator does not necessarily support benefiting such children, I see no valid reason why such children should be treated differently from any of the decedent's other children. The fact that the child did not know his or her biological father is usually not his or her fault. We may have a situation where a father did not even know that a child had been born. Information is withheld for various reasons. The biological father may be married with another family or the mother may be married to someone other than the biological father. Or, the circumstances surrounding the pregnancy may have been negative—perhaps a rape or a one-night fling. While some would argue that no support or acknowledgment during life should negate inheritance at death, there is no requirement for support for inheritance from a biological mother in order to inherit from her. Further, support is not a requirement for inheritance for children born in a marital union.[202] What would be the reason for treating paternal intestate inheritance by out-of-wedlock children differently? Even if the father's intent is not for the children to

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199. *Id.* at 634.

200. *Id.* at 634–35.

201. *Id.* at 635.

202. Gray, *supra* note 103, at 10 ("[S]ince the legitimate child does not need to prove actual dependency to recover, neither should the illegitimate one.").

inherit from his estate, one should ask the following question: "[Is] the presumed intent of intestate decedents an unacceptable justification for a decision by the state which the state would otherwise be unable to justify"?[203] I think the answer is no. After all, a mother's intent is not questioned if the biological connection is present.

One of the issues with expanding a statute to include this group of individuals is the issue of finality. "[Can we] achieve finality of decree in [an] estate when there always exists the possibility, however remote, of a secret illegitimate lurking in the buried past of a parent or an ancestor of a class of beneficiaries?"[204] Perhaps the solution is to allow inheritance from the father but not from other paternal relatives. Or, maybe the solution is to impose timeframes, similar to those imposed on creditors to make a claim against an estate.[205]

C. The Social Connection and the Parent-Child Relationship.

Under North Carolina statutes, a child may be precluded from inheriting from his or her biological father because such child was born out of wedlock and his or her father did not meet the statutory requirements. The child may also be precluded from inheriting from his or her de facto father because North Carolina does not recognize inheritance by, from, or through a stepparent who has not formally adopted his or her stepchild. Consider the following: Suppose an out-of-wedlock child's biological father abandoned her mother when he found out that she was pregnant. The child has never met him, and he has never supported the child. The child's mother then marries and has one or more children with her new husband. The first child was raised along with her other siblings, but their biological father

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[203] Eskra v. Morton, 524 F.2d 9, 14 (7th Cir. 1975).

[204] Everage v. Gibson, 372 So.2d 829, 832 (Ala. 1979) (quoting Justice Powell in *In re* Flemm, 381 N.Y.S.2d 573, 575–76 (Sur. Ct. 1975)).

[205] *See generally* LA. CIVIL CODE ANN. art. 197 (West 2011) (A child has one year to claim from the father's estate.).

did not formally adopt her. Supermodel Heidi Klum and her husband, the singer Seal, are representative of this scenario. In North Carolina, Heidi's daughter, the out-of-wedlock child, is precluded from inheriting from her biological father because she is an unacknowledged out-of-wedlock child. She is precluded from inheriting from her de facto father because there has been no formal adoption. Is this the correct result? Shouldn't she be entitled to inherit from one or the other, or both? If intestacy statutes purport to outline the decedent's intent, then the de facto father more likely than not would want the out-of-wedlock child to inherit along with her other siblings. If formal acknowledgement from their fathers is required only because of the need for an orderly administration of an estate, then there is no reason to deny out-of-wedlock children's inheritance from their natural fathers. But should she be able to inherit from both, or neither?

I contend that she should at least inherit from her biological father, **and** there is a strong argument for why she should inherit from her de facto father as well. Support comes from the Supreme Court of California that has said that "a man who has lived with a child, treating it as his son or daughter, has developed a relationship with the child that should not be lightly dissolved . . . [.] This social relationship is much more important, to the child at least, than a biological relationship of actual paternity."[206]

Suppose an out-of-wedlock child's mother was married to another individual at the time of his birth. The law presumes that such child is not "illegitimate." Rather, he is the child of the married couple. Suppose at the death of her spouse, the mother informs her child that someone else is his biological father. Should such child be able to inherit from both decedents? Those who focus on the unfairness of "double-dipping" are using an improper analysis. The Uniform Probate Code allows a child adopted by a stepparent to inherit from both the adoptive parent as well as the biological parent. I see no reason why the same reasoning should not apply to the out-of-wedlock child.

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[206] Sazonov, *supra* note 96, at 422 (quoting *In re* Nicholas H., 46 P.3d 938 (Cal. 2002)).

In *Estate of Slaughter*,[207] the Georgia Court of Appeals allowed Cynthia Boggs, the out-of-wedlock child, to inherit the decedent's estate. Cynthia was born while her mother was married to another man. Although there is a presumption that she was born during wedlock and thus a "legitimate" child of the marriage, the biological mother presented evidence to rebut the presumption. Since the decedent acknowledged Cynthia as his child and Cynthia's child as his grandchild, the Court of Appeals upheld the trial court's determination that Cynthia was his child and entitled to inherit as the decedent's heir.[208] Should Cynthia also be able to inherit from her mother's husband, especially if there had been a period of time where there was a parent-child relationship?[209]

D. Equitable Legitimation May be An Alternative to the Strict Statutory Requirements.

North Carolina courts stated that the issue of paternal intestate inheritance for the out-of-wedlock child is a legislative issue.[210] Although I have advocated for statutory changes in this paper, I do not think courts are unable to act. For example, since North Carolina courts have already adopted equitable adoption, they should now expand that reasoning to the concept of equitable legitimation. The equitable legitimation theory was raised first in Texas. Although Texas declined to adopt the theory, Georgia adopted it in *Prince v. Black*.

North Carolina recognizes equitable adoption. Like legitimacy, adoption is a "creature of statute."[211] "The estoppel theory revolves around the notion that, because the child has performed his or her part of the bargain, the equitably adoptive

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[207] *Estate of Slaughter*, 540 S.E.2d 269 (Ga. Ct. App. 2000).

[208] *Id.*

[209] I think the answer is yes, but the circumstances are beyond the scope of this paper. This might occur in the same way that a child who has been adopted by a stepparent may inherit from the deceased natural parent's family as well as from the new adopted family.

[210] Phillips v. Ledford, 590 S.E.2d 280 (N.C. Ct. App. 2004).

[211] Robinson, *supra* note 195, at 954.

parent—or, more accurately, the equitably adoptive parent's estate—will be estopped from denying the status of the child as heir.[212] In *Lankford v. Wright*,[213] a biological mom gave her daughter to a married couple who were her neighbors. The couple raised the child as their own. The North Carolina Supreme Court said the following criteria were necessary to allow equitable adoption:

> (1) an express or implied agreement to adopt the child, (2) reliance on that agreement, (3) performance by the natural parents of the child in giving up custody, (4) performance by the child in living in the home of the foster parents and acting as their child, (5) partial performance by the foster parents in taking the child into their home and treating the child as their own, and (6) the intestacy of the foster parents.[214]

Like adoption, legitimation is purely a creature of statute. Equitable adoption is a remedy to 'protect the interest of a person who was supposed to have been adopted as a child but whose adoptive parents failed to undertake the legal steps necessary to formally accomplish the adoption.' The doctrine is applied in an intestate estate to 'give effect to the intent of the decedent to adopt and provide for the child.'[215]

"[E]quitable adoption is designed to protect the inheritance rights of an individual who, believing himself to be the child (whether biological or adopted) of the decedent, nonetheless lacks the legal status of 'child' as defined in the intestate

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212. *Id.* at 956.

213. Lankford v. Wright, 489 S.E.2d 604 (N.C. 1997).

214. *Id.* at 606–07.

215. *Id.* at 606 (quoting Gardner v. Hancock, 924 S.W.2d 857, 858 (Mo. Ct. App. 1996)).

succession statutes."[216] Those same issues arise with blood relationships.

Some critics of equitable legitimation suggest that it "will destroy the predictability that current intestacy statutes provide."[217] While that may be possible, it has not been the case with equitable adoption. Further, equitable legitimization has not been framed "to allow wealth to move up the family tree."[218]

CONCLUSION

In this Article, I have advocated for the right of a child born out of wedlock to inherit through intestate succession from both of his or her biological parents. Specifically, where clear and convincing evidence can establish a genetic connection between a child and his or her father, absent adoption or a contractual agreement such as a donor sperm, such child should be entitled to an intestate share of his or her father's estate.

I advocate for statutory change because the traditional family is no longer the norm. Further, our society is nomadic. As families move between states, there should be some consistency as to rights of inheritance when parents are not married. Issues of inheritance should not be addressed on an ad hoc basis through the court system. Although any individual can write a will to dispose of his or her estate, data suggests that a majority of individuals in the United States die intestate. If intestacy statutes are a state's solution when an individual does not draft a will, then the statutes should be modified to reflect a change in our society.

The reasons for distinguishing between children born in wedlock and out of wedlock are no longer valid. We have seen some statutory changes. Children who are born out of wedlock are no longer "no one's child." Further, since motherhood can

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216. Sazonov, *supra* note 96, at 423 (quoting Michael J. Higdon, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine*, 43 WAKE FOREST L. REV. 223, 256 (2008)).

217. *Id.* at 426.

218. Robinson, *supra* note 195, at 973.

be determined with certainty, the law recognizes that a child, whether born in wedlock or out of wedlock, is the legal child of his or her mother. Such child is entitled to an intestate inheritance as if he or she were born into a marital union. However, most states require some affirmation or action on the part of a nonmarital father before an out-of-wedlock child may inherit from such father. While such actions may have once been necessary, they are no longer necessary. Paternity can now be determined with near certainty through the use of DNA. With such certainty, there is no reason to discriminate against a child because of marital status of his or her parents.

I favor a bright-line rule. A child, whether born into a marital union or out of wedlock, should inherit from or through his or her father if paternity can be established through clear and convincing evidence within a reasonable period of time after the death of the father. The only exceptions are children who are legally adopted into another family or who are the product of a sperm or egg donor.[219] Such a bright-line rule recognizes the need for the orderly and timely administration of an estate. Yet it also recognizes that a child should not be discriminated against because of the circumstances under which he or she was born.

[219] The issues are not addressed in this Article.