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NONMARITAL CHILDREN AND POST-DEATH PARENTAGE: A DIFFERENT PATH FOR INHERITANCE LAW?

Paula A. Monopoli

I. INTRODUCTION

The number of children born out of wedlock in this country has increased dramatically since the first half of the twentieth century. In 1940, there were 89,500 out-of-wedlock births, while by 2005, that number had increased to more than 1.5 million. Children born out of wedlock (hereinafter “nonmarital children”) were originally barred

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3. Martin et al., supra note 1, at 2.

4. The law has evolved from using the term “bastard” for such children to using the phrase “illegitimate,” then to “out-of-wedlock,” and most recently “nonmarital.” See Ralph C. Brashier, Children and Inheritance in the Nontraditional Family, 1996 UTAH L. REV. 93, 112 n.64 (1996) (discussing the Supreme Court's use of the term “children born out of wedlock” instead of “illegitimates” in Reed v. Campbell, 476 U.S. 852, 856 (1986)); see id. (citing N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 supp. practice cmts. (McKinney Supp. 2008), which noted the “evolution of statutory language from ‘child born out of

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from inheriting from or through either parent.\textsuperscript{5} American jurisprudence evolved over time to give nonmarital children greater rights, in part due to constitutional concerns about treating such children differently from children born in wedlock.\textsuperscript{6}

The American system is still predominantly a status-based system of inheritance and establishing a parent-child link is at the core of this system.\textsuperscript{7} Behavior is not generally a criterion.\textsuperscript{8} While there are some exceptions to this rule,\textsuperscript{9} behavior-based models of inheritance raise efficiency and administrative concerns, even though they tend to maximize fairness.\textsuperscript{10} As noted, there are more than a million American children born out of wedlock each year.\textsuperscript{11} American jurisprudence has grown to embrace these children.\textsuperscript{12}

\begin{itemize}
  \item \textsuperscript{5} MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS 24-26 (1994).
  \item \textsuperscript{6} See Brashier, supra note 4, at 105-12.
  \item \textsuperscript{7} See Paula A. Monopoli, Deadbeat Dads: Should Support and Inheritance be Linked?, 49 U. MIAMI L. REV. 257, 259 (1994).
  \item \textsuperscript{9} The most common exception to the rule is the Slayer Rule, which bars murderers from inheriting from their victims. See, e.g., CAL. PROB. CODE § 250 (West 2008); FLA. STAT. ANN. § 732.802 (West 2008); 20 PA. CONS. STAT. ANN. § 8802 (West 2005); VA. CODE. ANN. § 55-402 (2008). Currently, "[forty-eight] states and the District of Columbia have such statutes, although there is terrific variation between them." See also Linda Kelly Hill, No-Fault Death: Wedding Inheritance Rights to Family Values, 94 KY. L.J. 319, 322 n.16 (2005-2006) (listing additional state slayer statutes).
  \item \textsuperscript{10} See Monopoli, supra note 7, at 273-91 (analyzing a behavior-based system of inheritance).
  \item \textsuperscript{11} See Martin et al., supra note 1, at 2 (citing 2005 statistics of 1,527,034 nonmarital births in the United States).
  \item \textsuperscript{12} See Lili Mostofi, Legitimizing the Bastard: The Supreme Court's
The significant demographic shift in the number of nonmarital births makes the issues surrounding nonmarital children critical ones for society and inheritance law.13 Most of these children do not stand to inherit vast fortunes. They are often born into middle income and low-income families.14 Their parents and grandparents are the least likely segment of the population to seek estate planning services and to opt out of the default system of intestacy to draft an inclusive will. This is the very reason why the rules of intestacy—the default or off-the-rack rules of inheritance law—should be streamlined to make it as easy for nonmarital children to inherit as possible. The impact of what might appear to be a small inheritance often proves very significant in the lives of nonmarital children, both as minors and adults.

This article first explores how the United States Supreme Court’s analysis in this area has been weakened in the face of scientific advances in paternity testing.15 Secondly, it suggests that surrogate rules—rules which use concepts like “open and notorious recognition”16 to establish parentage post-death—are less efficient and reliable than genetic testing17 and should be reduced to presumptions,18 if


14. See Musick & Mare, supra note 13, at 472; Saul D. Hoffmann & Michael E. Foster, Economic Correlates of Nonmarital Childbearing Among Adult Women, 29 FAM. PLAN. PERSP. 137 (1997) (observing that nonmarital children born to adult mothers—a growing segment of nonmarital children—are even worse off financially than those born to teens).


16. See MD. CODE ANN., EST. & TRUSTS § 1-208(b) (LexisNexis 2008).

17. As used in this article, genetic testing means DNA testing. See Jill T. Phillips, Comment, Who Is My Daddy?: Using DNA to Help Resolve Post-Death
not repealed altogether. Finally, this article suggests that
more expansive family law regimes for establishing the
parent-child relationship, while appropriate during life, may
not be the optimal approach for inheritance law in post-death
cases since inheritance and family law have distinctly
different policy concerns and goals. Those who draft and
enact intestacy statutes should consider taking a separate
path when creating a simplified model to determine legal
parentage in post-death cases.

II. SCIENTIFIC ADVANCES AND THE COURT'S ANALYSIS IN THE
NONMARITAL INHERITANCE CASES

The United States Supreme Court and the federal courts
have applied the Fourteenth Amendment's equal protection
analysis to cases involving discrimination on the basis of
illegitimacy in a number of areas, including inheritance law. In
Levy v. Louisiana, the Court found a violation of equal
protection in a statute permitting only legitimate children to
bring wrongful death suits. The Court also used equal
protection as the basis to review statutes that implicated
nonmarital children in Trimble v. Gordon, Fiallo v. Bell,
Lalli v. Lalli, and Caban v. Mohammed. In Parham v. Hughes,
the Court used rational basis review to uphold a statute that barred the fathers of nonmarital children from

Paternity Cases, 8 ALB. L.J. SCI. & TECH. 151, 159-63 (1997) (describing the
restriction fragment length polymorphism (RFLP) and polymerase chain
reaction (PCR) methods of analyzing and matching DNA samples).
18. For an example of a similar pre-death presumption see UNIF.
19. Other scholars have alluded to the effects of this distinction on the
evolution of the law: "Perhaps because individuals can opt out of the intestacy
system change in this area of the law has lagged behind changes in other areas.
In family law, children and their parents cannot opt out of rules that determine
results in custody and visitation disputes based on definition of family status."
Susan Gary, The Parent-Child Relationship Under Intestacy Statutes, 32 U.
20. See Nikki Ahrenholz, Comment, Miller v. Albright: Continuing to
Discriminate on the Basis of Gender and Illegitimacy, 76 DENV. U. L. REV. 281,
22. See id. at 71.
The next important illegitimacy discrimination case was \textit{Clark v. Jeter}, in which the Court first expressly applied intermediate scrutiny to such cases. \textsuperscript{29} "[T]he Supreme Court has recognized for several decades that classifications treating illegitimate children more harshly than legitimate children violate \textit{Equal Protection} Clause of the Fourteenth Amendment." \textsuperscript{31}

\section*{A. Trimble v. Gordon}

In \textit{Trimble}, the Supreme Court held unconstitutional an Illinois statute that prevented a nonmarital child from inheriting from the child's father unless the child's mother and father had later married. \textsuperscript{32} The state’s purported rationales for this statute included promoting two parent families and enhancing the orderly disposition of estates. \textsuperscript{33} Justice Powell stated that the Court was using a "not . . . toothless" \textsuperscript{34} intermediate standard of scrutiny and that the state statute at issue had no more than an "attenuated relationship to the asserted goal." \textsuperscript{35} A review of the facts of \textit{Trimble} illustrates that the Court’s view of the purpose of this particular parentage statute was to remedy the injustice suffered by nonmarital children as opposed to replicating decedent’s intent, one of the purposes behind intestacy provisions generally. \textsuperscript{36}

Deta Mona Trimble was born out of wedlock to Jessie Trimble and Sherman Gordon. \textsuperscript{37} Deta Mona lived with Trimble and Gordon from 1970 until Gordon died in 1974. \textsuperscript{38} During that time, the circuit court entered a paternity order finding Gordon to be the legal father of Deta Mona and

\begin{itemize}
  \item \textsuperscript{28} Ahrenholz, \textit{supra} note 20, at 286 n.56 (discussing \textit{Parham}, 441 U.S. at 348-49).
  \item \textsuperscript{29} Clark v. Jeter, 486 U.S. 456 (1988).
  \item \textsuperscript{30} Ahrenholz, \textit{supra} note 20, at 287.
  \item \textsuperscript{31} \textit{Id.} at 303; see also \textit{Caban}, 441 U.S. at 388-89; Levy v. Louisiana, 391 U.S. 68, 70 (1968).
  \item \textsuperscript{32} Trimble v. Gordon, 430 U.S. 762, 776 (1977).
  \item \textsuperscript{33} \textit{Id.} at 769-70.
  \item \textsuperscript{34} \textit{Id.} at 767 (quoting the Court's description of the less than strict scrutiny applied to classifications based on illegitimacy in \textit{Mathews v. Lucas}, 427 U.S. 495, 510 (1976)).
  \item \textsuperscript{35} \textit{Id.} at 768.
  \item \textsuperscript{36} \textit{Id.} at 775 n.16.
  \item \textsuperscript{37} \textit{Id.} at 763-64.
  \item \textsuperscript{38} Trimble v. Gordon, 430 U.S. 762, 764 (1977).
\end{itemize}
ordered him to pay child support. Gordon did in fact support Deta Mona and he openly acknowledged her as his daughter. Gordon died intestate in 1974. Deta Mona’s mother, Jesse Trimble, filed a petition in the probate court asking that the court declare that because Deta Mona was Gordon’s daughter, she was also his heir for purposes of inheriting in intestacy. The probate court refused to make such a declaration and instead named Gordon’s father, mother and siblings as Gordon’s heirs. The probate court did so under the intestacy statute in Illinois at the time (hereinafter “section 12”), which provided that:

An 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; and the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if living. A child who was illegitimate whose parents inter-marry and who is acknowledged by the father as the father’s child is legitimate.

As the Court noted, “[i]f Deta Mona had been a legitimate child, she would have inherited her father’s entire estate under Illinois law. In rejecting Deta Mona’s claim of heirship, the [probate] court sustained the constitutionality of section 12.”

Subsequently, the Illinois Supreme Court upheld section 12 against all constitutional challenges in In re Estate of Karas. The Illinois Supreme Court handed down a final judgment in Trimble on October 15, 1975, in essence affirming the earlier decision in Karas and denying relief to Deta Mona. The United States Supreme Court granted certiorari and held section 12 unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment

39. Id.
40. Id.
41. Id.
42. Id.
43. Id.
45. Id. at 765.
47. Trimble, 430 U.S. at 765.
by "invidiously discriminating on the basis of illegitimacy."\textsuperscript{48}

\textbf{B. Lalli v. Lalli}

One year later in \textit{Lalli}, Justice Powell again wrote for the Court in a five-to-four decision that upheld a New York statute allowing a nonmarital child to inherit if paternity was established by adjudication.\textsuperscript{49} The New York statute was arguably broader than the Illinois statute struck down in \textit{Trimble} because later marriage plus acknowledgment was not the sole mechanism by which the nonmarital child could establish his right to inherit.\textsuperscript{50} The state again argued that its interest in the orderly disposition of estates and the prevention of fraudulent claims was enough to justify the disparate treatment of nonmarital children.\textsuperscript{51} This time the Court agreed with the state and, using the new intermediate scrutiny test established in \textit{Trimble}, held the statute constitutional.\textsuperscript{52} A review of the facts in \textit{Lalli} illustrates the current weakness in the Court's analysis, given the more recent developments in establishing paternity through DNA testing with nearly one-hundred percent accuracy.

Robert Lalli claimed to be the son of Mario Lalli, who died intestate in 1973.\textsuperscript{53} Robert's mother, who died in 1968, had not been married to Mario.\textsuperscript{54} Robert filed a petition in the probate court, asserting that he and his sister, Maureen, were entitled to inherit from Mario because they were his children.\textsuperscript{55} Rosamond Lalli, Mario's widow and administrator of his estate, opposed Robert's petition.\textsuperscript{56} She argued that even if Robert and Maureen were Mario's biological children, they should not take as heirs from his estate under the New York intestacy statute,\textsuperscript{57} which provided in pertinent part

\begin{itemize}
  \item \textsuperscript{48} \textit{Id.} at 765-66.
  \item \textsuperscript{49} \textit{Lalli v. Lalli}, 439 U.S. 259, 261, 275-76 (1978).
  \item \textsuperscript{50} \textit{Compare} N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (McKinney 2008), \textit{with} 755 ILL. COMP. STAT. 5/2-2 (2008).
  \item \textsuperscript{51} \textit{Lalli}, 439 U.S. at 268, 271.
  \item \textsuperscript{52} \textit{Id.} at 275-76.
  \item \textsuperscript{53} \textit{Id.} at 261.
  \item \textsuperscript{54} \textit{Id.}
  \item \textsuperscript{55} \textit{Id.}
  \item \textsuperscript{56} \textit{Id.}
  \item \textsuperscript{57} \textit{Lalli v. Lalli}, 439 U.S. 259, 261 (1978). The Court included the statute: Section 4-1.2 in its entirety provides:
    \begin{itemize}
      \item (a) For the purposes of this article:
        \begin{itemize}
          \item (1) An illegitimate child is the legitimate child of his mother so
that:

An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, 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. 58

Robert acknowledged that no order of filiation had been entered during Mario’s lifetime. 59 However, Robert challenged the constitutionality of the statute, arguing that it violated the Equal Protection Clause of the Fourteenth Amendment. 60 In lieu of an order of filiation, Robert submitted a notarized document in which Mario, consenting to Robert’s marriage, referred to Robert as “my son,” and affidavits to establish that people had often heard Mario openly acknowledge both Robert and Maureen as his children. 61

The probate court noted that the statute at issue had been upheld against constitutional challenges in previous cases. 62 It finally ruled that Robert and Maureen were not

that he and his issue inherit from his mother and from his maternal kindred.

(2) An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, 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.

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

(4) A motion for relief from an order of filiation may be made only by the father, and such motion must be made within one year from the entry of such order.

(b) If an illegitimate child dies, his surviving spouse, issue, mother, maternal kindred and father inherit and are entitled to letters of administration as if the decedent were legitimate, provided that the father may inherit or obtain such letters only if an order of filiation has been made in accordance with the provisions of subparagraph (2).

Id. (quoting N.Y. EST., POWERS & TRUSTS LAW § 4-1.2 (McKinney 2008)).
heirs, given the requirements of the statute. The New York Court of Appeals affirmed. The Court of Appeals used the lowest standard possible by finding that the state merely had to establish that "there is a rational basis for the means chosen by the Legislature for the accomplishment of a permissible State objective." Given the difficulties in establishing paternity as opposed to maternity, "the State was constitutionally entitled to require a judicial decree during the father's lifetime as the exclusive form of proof of paternity."

Robert appealed. After Robert appealed, but before his appeal was heard, the United States Supreme Court decided Trimble. Given its decision in Trimble, the Court vacated and remanded Lalli to allow the New York Court of Appeals to reconsider its decision in light of Trimble. On remand, the New York Court of Appeals affirmed its original decision. While Trimble "contemplated a standard of judicial review demanding more than 'a mere finding of some remote rational relationship between the statute and a legitimate State purpose,' though less than strictest scrutiny," they still found the statute at issue constitutional. The Court of Appeals distinguished the New York statute from the statute found unconstitutional in Trimble and found that the New York statute 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 of equal protection." The United States Supreme Court agreed and affirmed, thus denying Robert Lalli the right to inherit from his father, Mario.

64. Id.
65. Id. (quoting In re Estate of Lalli, 340 N.E.2d 721 (N.Y. 1975)).
66. Id.
67. Id.
71. Id. (quoting In re Estate of Lalli, 371 N.E.2d 481, 482 (N.Y. 1977)).
72. Id. (quoting Estate of Lalli, 371 N.E.2d at 482-83).
73. Id.
C. The Legacy of Trimble and Lalli

Trimble and Lalli involved intestacy statutes—the default rules used to reallocate property at death when individuals choose not to opt out of this system by drafting a dispositive instrument. Since American inheritance law allows for freedom of testation, and it has little in the way of forced heirship (unlike civil law countries), individuals may use a custom-tailored instrument like a will or trust to alter the default inheritance scheme embodied in the intestacy statutes.

Trimble and Lalli provided the contours of the statutory proof barriers the Court would find constitutional, given the substantial state interest in the orderly disposition of estates and the prevention of fraudulent claims. Trimble established that a statute allowing a nonmarital child to inherit only if there has been a subsequent marriage plus acknowledgement was too narrowly drawn and not constitutionally sound. Lalli provided that a statute allowing for additional or alternative means of proving that a man was the nonmarital child's father—an adjudication of paternity pre-death—was sufficient to meet constitutional muster.

After Trimble and Lalli, the Court decided Reed v. Campbell in 1986. In Reed, the Court reiterated the applicability of its ruling in Trimble: that it is "unconstitutional for a state statute to make the child's inheritance rights dependent upon the marriage of her parents." The facts of Reed are as follows: Prince Ricker, Delynda Reed's father, died intestate in 1976. The applicable portion of the Texas Probate Code provided that a decedent's estate should descend to "his children and their descendants," but section 42 of that statute required that in order for a nonmarital child to take, her parents must have

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80. Reed, 476 U.S. at 852.
Although Prince Ricker and Delynda’s mother went through a marriage ceremony, it was held invalid. Delynda was born a year after that ceremony. Delynda’s father was married three times, in addition to his relationship with Delynda’s mother. Thus, upon his death he left five marital children in addition to Delynda.

One marital child was named the administrator of Ricker’s estate. Delynda notified the administrator that Delynda was claiming a one-sixth share of her father’s estate as his daughter. The court found that because Delynda’s parents were never married, she was not entitled to take as an heir.

Delynda appealed this decision, challenging the constitutionality of section 42 of the Texas statute. Unfortunately, the Court of Appeals disagreed with Delynda. It found that the statute was still viable, even in light of the United States Supreme Court’s decision in Trimble, because Trimble did not apply retroactively. The Texas Supreme Court refused to hear Delynda’s appeal, noting “no reversible error.” The United States Supreme Court granted certiorari and reversed:

Although the question presented in this case is framed in terms of “retroactivity,” its answer is governed by a rather clear distinction that has emerged from our cases considering the constitutionality of statutory provisions that impose special burdens on illegitimate children. In

81. See Tex. Prob. Code Ann. § 42 (Vernon 1956) (“For the purpose of inheritance to, through, and from an illegitimate child, such child shall be treated the same as if he were the legitimate child of his mother, so that he and his issue shall inherit from his mother and from his maternal kindred, both descendants, ascendants, and collaterals in all degrees, and they may inherit from him.”) (emphasis added).
82. Reed, 476 U.S. at 853.
83. Id.
84. Id.
85. Id. at 853-54.
86. Id. at 854.
87. Id.
89. Id.
90. Id.
91. Id. at 853 (citing Reed v. Campbell, 682 S.W.2d 697, 700 (Tex. Ct. App. 1984)).
92. Id.
these cases, we have unambiguously concluded that a State may not justify discriminatory treatment of illegitimates in order to express its disapproval of their parents’ misconduct. We have, however, also recognized that there is a permissible basis for some “distinctions made in part on the basis of legitimacy”; specifically, we have upheld statutory provisions that have an evident and substantial relation to the State’s interest in providing for the orderly and just distribution of a decedent’s property at death.\(^9\)

III. THE POLICY GOALS OF INTESTACY LAW AND POST-DEATH PARENTAGE DETERMINATIONS

A. The Policy Goals

A closer look at both the policy goals of intestacy law and the Court’s language in these cases is instructive in thinking about amending post-death parentage statutes.

1. Replicating Decedent’s Intent

The first goal often articulated in drafting intestacy statutes is to replicate the presumed intent of decedents. Such intent would presumably be to benefit persons with whom the decedent had some natural affinity. But a close look at *Trimble* reveals that the Court did not believe that the legislature had this goal in mind when it drafted the statutory section aimed at defining the parent-child relationship for purposes of inheritance. The Comment to the Restatement (Third) of Property notes that in *Trimble*, “[t]he state argued that the statute served its interest in promoting family relationships, assuring accurate and efficient disposition of property at death, and mirroring the presumed intentions of its citizens.”\(^{94}\) The Court “refused to address ‘the question of whether presumed intent alone can ever justify discrimination against nonmarital children,’ because it did not believe that the state enacted the statute for that purpose.”\(^{95}\) The majority in *Trimble* noted that:

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\(^{93}\) *Id.* at 854 (footnote omitted).

\(^{94}\) RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.5 reporter’s note 1, cmt. a (1999).

\(^{95}\) *Id.*
To the extent that other policies are not considered more important, legislators enacting state intestate succession laws probably are influenced by the desire to reflect the natural affinities of decedents in the allocation of estates among the categories of heirs. . . . The difference in § 12 between the rights of illegitimate children in the estates of their fathers and mothers, however, is more convincingly explained by the other factors mentioned by the court below. . . . [W]e find in §12 a primary purpose to provide a system of intestate succession more just to illegitimate children than the prior law, a purpose tempered by a secondary interest in protecting against spurious claims of paternity. . . . [W]e will not hypothesize an additional state purpose . . . .

So, while replicating decedent's intent is an oft-articulated goal of intestacy laws generally, the Court in *Trimble* pointed out that it is not the primary purpose behind these statutes, which tried to provide some avenue by which a nonmarital child may establish his right to inherit from his father.

2. *Support of Children*

Another goal of intestacy law is to ensure that the state is not left with the obligation of supporting the decedent's dependents. Facilitating the support of nonmarital children furthers this goal. It furthers the economic enfranchisement of these children and reduces the state's need to support them. This is consistent with the new federal focus on requiring mothers seeking aid to establish paternity. The goal of that federal policy is to find some father who will be responsible to support the child if possible, thus presumably reducing the burden on the state. Expanding the number of nonmarital children who can inherit from their fathers serves a similar policy goal.

3. *Rewarding Family Members for Contributions*

Another oft-articulated goal of inheritance law is to reward family members for their economic or other types of

contributions to the decedent's accumulation of assets and even caretaking of the decedent. In this regard, spousal claims seem more justified than claims by children because children are less likely to have made such contributions, especially minor children. The claim of a nonmarital child on this basis presumably depends on whether the child had a relationship with the father during life. The nonmarital child who appears on the scene for the first time after his father's death will clearly not have contributed to family wealth or have cared for his father. But this seems be a less significant goal of intestacy statutes with regard to children generally and should not weigh as heavily in the analysis of nonmarital children and inheritance.

4. **Accurate and Efficient Disposition of Estates**

A final goal of the intestacy statutes—and I would argue one that is on a par with presumed intent—is to facilitate the accurate and efficient reallocation of property at death. It is essential from a societal point of view that creditors quickly be made whole so that the decedent's remaining assets can be distributed within a reasonable time to heirs. The Court in *Trimble* was skeptical about the state's argument that the goal of the statute was to promote family relationships, noting that "the difference in the rights of illegitimate children in the estates of their mothers and their fathers appears to be unrelated to the purpose of promoting family relationships." In fact, these kinds of statutes were aimed at "proving paternity and the related danger of spurious claims." To buttress this, the Court notes that "the more favorable treatment of illegitimate children claiming from their mothers' estates was justified because 'proof of a lineal relationship is more readily ascertainable when dealing with maternal ancestors.'" The Court was troubled by the relationship of the statute to the "[s]tate's proper objective of assuring accuracy and efficiency in the disposition of property at death," and found it too narrow in that regard. I would argue that the Court is, in fact, concerned with establishing paternity in the genetic sense and that is what it meant by

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99. *Id.* at 770.
100. *Id.* (quoting *In re Estate of Karas*, 329 N.E.2d 234, 240 (Ill. 1975)).
101. *Id.* at 770.
“accuracy.” In fact, the Court notes that it would have a different case—and presumably a constitutional one—“if the state statute were carefully tailored to eliminate imprecise and unduly burdensome methods of establishing paternity.”

In Lalli, the Court focused on the state’s substantial interest in dealing with the proof and notice problems triggered by the inclusion of nonmarital children in the group of children eligible to inherit from their fathers. The means the state chose in Lalli was “designed to ensure the accurate resolution of claims of paternity and to minimize the potential for disruption of estate administration.” The Court went on to note that the “availability [of the putative father] should be a substantial factor contributing to the reliability of the fact-finding process,” while allowing the putative father to defend himself was a secondary purpose. Thus, limiting the inquiry to the father’s lifetime was justified because “fraudulent assertions of paternity will be much less likely to succeed . . . when the putative father is available to respond, rather than first brought to light when the distribution of the assets of an estate is in the offing.”

The Court noted that any formal method of proof, other than a judicial decree, would be sufficient to satisfy the state’s interests. Thus, a more streamlined process which includes DNA testing for determining post-death parentage would be consistent with the goal of accurate and efficient disposition of estates.

B. Reconciling Surrogate Rules with Policy Goals in Post-Death Parentage Proceedings

The question then becomes what should be done with statutes, like the one in Maryland, that effectively preclude a nonmarital child from inheriting if he cannot prove either written acknowledgement of parentage or open and notorious

102. Id. at 772 n.14.
104. Id. at 271.
105. Id. (quoting In re Estate of Lalli, 340 N.E.2d 721, 724 (1975)) (alteration in original).
106. Id.
107. Id. at 271-72.
108. Id. at 272 n.8.
recognition during the father's lifetime because the child did not have a relationship with his father? Under current statutes like the one in Maryland, such a child would have to establish that his father acknowledged him in writing or open and notoriously recognized the child out as his own if an adjudication did not occur during his father's life. Should, and if so, how should, the putative father's paternity be established at that point simply for purposes of reallocating the father's property after death? This post-death proceeding is not going to determine who should care for the child during life. What should be the focus? Does it make more sense to focus on the father's presumed intent or the son's ability to take a share of inheritance that will help establish him economically and enfranchise him?

With the advent of new methods of DNA testing, it is clear that the limited type of statute in Lalli should no longer be upheld under the intermediate scrutiny standard articulated by Justice Powell in Trimble. Limiting the inquiry about paternity to pre-death adjudication (to allow the father to defend himself) is no longer as substantial a concern since DNA testing is far less intrusive and can be done post-death with tissue samples or by testing relatives. The state's substantial interest in the orderly administration of estates and the prevention of fraudulent claims can clearly be met by a statutory scheme that allows a nonmarital child to request testing in a context far less arduous than an adjudication of paternity. Children or their mothers may well not want to bring a hostile paternity suit during the father's

110. See supra notes 34-35 and accompanying text.
111. See Karen A. Hauser, Comment, Inheritance Rights for Extramarital Children: New Science Plus Old Intermediate Scrutiny Add up to the Need for Change, 65 U. CIN. L. REV. 891, 959 (1997) (“Quite simply, with new, accurate testing that can meet the legitimate state concerns about stale and fraudulent claims against a man wrongly alleged to be the biological father of an extramarital child, states will be hard pressed to define even a rational reason for inheritance discrimination against extramarital children.”).
112. Some courts have been willing to exhume a body to do such testing. See In re Estate of Michael Dennis Tytanic, 61 P.3d 249 (Okla. 2002). In that case, the court found decedent's brother as personal representative had standing to seek DNA testing to determine the putative son's paternity. This article proposes a statutory regime which explicitly denies anyone other than the putative son standing to request genetic testing for the policy reasons described infra.
life if he has not acknowledged the child per se, but is a presence of some sort in their child's life.\textsuperscript{113} The advent of easy and almost foolproof genetic testing raises the question of whether any statutory barriers would now withstand the intermediate scrutiny test applied to nonmarital children under the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{114} There is simply no longer an argument that the state can somehow more efficiently and accurately—the acceptable goals embraced by the Court in \textit{Trimble} and \textit{Lalli}—establish parentage post-death by means other than ordering a DNA test.\textsuperscript{115}

As a result of the Court's decisions in \textit{Trimble} and \textit{Lalli}, states can and do have two different inheritance statutes for marital and nonmarital children (and two different statutes for inheriting from mothers versus fathers).\textsuperscript{116} This outcome was grounded in the state's substantial interest in the orderly disposition of estates and the prevention of fraudulent claims. As long as the statutes are tailored narrowly enough, they will pass constitutional muster. So, for example, the Maryland statute provides that a nonmarital child may inherit from his or her mother in the same manner as a marital child.\textsuperscript{117} On the other hand, a marital child may inherit from his or her father simply by virtue of the parents being married at the time of the child's birth, the so-called marital presumption.\textsuperscript{118} However, in order for a nonmarital child to inherit from his or her father, the child will be considered to be the child of his father only if the father:

(1) Has been judicially determined to be the father in an

\textsuperscript{113} For one reason this might be true, see \textit{infra} note 201 and accompanying text.
\textsuperscript{114} Hauser, \textit{supra} note 111, at 892.
\textsuperscript{115} \textit{Id.} at 951 n.477.
\textsuperscript{117} MD. CODE ANN., EST. & TRUSTS § 1-208(a) (LexisNexis 2008).
\textsuperscript{118} \textit{Id.} § 1-206; see Donald C. Hubin, \textit{Daddy Dilemmas: Untangling the Puzzles of Paternity}, 13 CORNELL J.L. & PUB. POLY 29, 47 (2003) ("The 'marital presumption' (sometimes referred to as the 'presumption of legitimacy') . . . which has its roots in Roman law, held that the husband of a mother was presumed to be the father of the child, unless the husband was sterile, impotent, or had no access to his wife during the period when conception occurred. This presumption is sometimes referred to as 'Lord Mansfield's Rule'. . . ").
action brought under the statutes relating to paternity proceedings;

(2) Has acknowledged himself, in writing, to be the father;

(3) Has openly and notoriously recognized the child to be his child; or

(4) Has subsequently married the mother and has acknowledged himself, orally or in writing, to be the father.119

Today, the scientific community has seen the advent of readily available genetic testing in the form of DNA matching.120 As one court noted, “[d]ramatic advances in genetic testing have made it possible to determine paternity with nearly one-hundred percent accuracy.”121 There are even take-home kits for DNA testing that can establish a genetic link between a parent and a child.122 The Comment to the Restatement cites several courts grappling with the post-death determination of paternity,123 which I would argue is uniquely in the realm of inheritance law since inheritance is the primary reason paternity is sought to be established post-death. For example, in Alexander v. Alexander, the court ordered disinterment of the father’s body noting that:

The bottom line to denying an illegitimate child equal inheritance rights is that there is a substantial problem of proof of paternity, especially after the alleged father is dead. Today, however we are entering into a new era. Science has developed a means to irrefutably prove the identity of an illegitimate child’s father. No longer are we dependent upon fallible testimony, nor are we concerned that the decedent cannot be present to defend himself. The accuracy and infallibility of the DNA test are nothing short of remarkable. We live in a modern and scientific society, and the law must keep pace with these developments.124

119. Id. § 1-208(b).
120. See supra note 15.
121. In re Estate of Michael Dennis Tytanic, 61 P.3d 249, 253 (Okla. 2002).
123. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.5 reporter’s note 1, cmt. b, at 140-42 (1999).
124. Id. (quoting Alexander v. Alexander, 537 N.E.2d 1310, 1314 (1988)).
And in *Anne R. v. Estate of Francis C.*, the court discussed the utility of DNA testing in post-death cases where the alternative evidence of paternity falls short of meeting the required evidentiary standard. The court stated:

The existing statutes offer little guidance on how to utilize DNA evidence most effectively in post-death proceedings. . . . The legislature is urged to review all relevant provisions of post-death paternity proceedings . . . . Until such time as the legislature acts, this area will be meshed in a quagmire of remedial and possibly conflicting judicial responses.

The advent of such readily available testing weakens the *Trimble/Lalli* analytical framework that permitted states to maintain separate inheritance statutes for marital and nonmarital children. The statutes imposed a higher burden on nonmarital children and utilized objective behaviors on the part of the father, e.g., open and notorious recognition to establish either—depending on your perspective—that the father thought he was the father or actually was the genetic father. The Court's endorsement of a separate and more burdensome statutory scheme for nonmarital children was grounded in protecting the state's interest in preventing fraud and the orderly disposition of estates. Now, the state's interest in preventing fraudulent claims may be readily accommodated with an inheritance scheme that does not differentiate between marital and nonmarital children. If the state wants to protect those interests, it may easily require the probate court to simply order a DNA test.

Using DNA testing to determine parentage post-death is both efficient and reliable. It is far more cost-effective than evidentiary tests based on behaviors that require hearing and testimony. It stands as an efficient baseline for establishing the parent-child link when such a link has not been established during life. Fathers, mothers and their relatives who do not want nonmarital children included may readily

126. *Id.* (citing *Anne R.*, 634 N.Y.S.2d at 343) (alteration in original).
127. *See supra* notes 52 and accompanying text.
avail themselves of the opt-out we provide under our inheritance law.\textsuperscript{129} In other words, they may write a will. However, if they do not opt out and the child post-death can establish a genetic link, he should be able to inherit.

\textbf{C. Genetic Linkage and Post-Death Parentage}

Statutes that provide for alternative or surrogate forms of establishing fatherhood\textsuperscript{130} raise interesting policy questions now that reliable DNA testing is readily available.\textsuperscript{131} “Surrogate rules” include rules like the one in the revised Uniform Parentage Act\textsuperscript{132} (UPA) that state a presumption of paternity arises if a man lives in the same household as the child for the first two years of the child’s life and openly held the child out as his own.\textsuperscript{133} The Maryland statute provides that the nonmarital child will be considered the child of his father only if the father has openly and notoriously recognized the child to be his child.\textsuperscript{134} The latter is more than a presumption—it establishes paternity. The presumption arising under the UPA is subject to challenge by the father but becomes conclusive if not challenged within the time allotted.\textsuperscript{135} The Maryland statute has no clear time lines and

\textsuperscript{129}See supra note 75.
\textsuperscript{130}See, e.g., MD. CODE ANN., EST. & TRUSTS § 1-208(b) (LexisNexis 2008) (allowing for an adjudication of paternity, a written acknowledgement, open and notorious holding out, or subsequent marriage with acknowledgement).
\textsuperscript{131}For a comprehensive list of all of these statutes, see Hill, supra note 116, 131-33 n.14-21.

In order for the out-of-wedlock child or child’s kindred to inherit “from or through” his deceased father, paternity must be established. States are typically satisfied that the parent-child relationship has been established prior to the father's death by such events as the father's marriage to the mother after the child is born, adoption, voluntary acknowledgment of paternity or a legal adjudication of paternity. In addition, most states also allow paternity to be established after the father dies. In order to establish the parent-child relationship after the alleged father dies, however, the evidentiary standard is often statutorily raised to a “clear and convincing” test. In addition to raising the evidentiary standard, a number of states also statutorily limit the type of evidence which can be used to establish a man's fatherhood after his death. Fourteen states require that the man publicly held himself out as the child’s father prior to his death.

\underline{Id.} at 131-33 (footnotes omitted).
\textsuperscript{133}§ 204(a)(5), 9B U.L.A. 16-17.
\textsuperscript{134}MD. CODE ANN., EST. & TRUSTS § 1-208(b)(3) (LexisNexis 2008).
\textsuperscript{135}UNIF. PARENTAGE ACT § 607(a) (amended 2002), 9B U.L.A. 37 (Supp.}
presumably requires a hearing post-death. Recognition is less likely to confirm a genetic link and it imposes systemic costs in the form of evidentiary hearings where testimony must be taken and judicial discretion exercised. Such a rule was necessary in years past because there were less reliable means of determining paternity. It still makes sense if the recognition becomes conclusive during the father’s life in the UPA regime because the father had a chance to rebut. Given the state of paternity testing today, open and notorious recognition makes less sense as a post-death method of determining parentage in statutes like the Maryland statute if the original purpose of the recognition rule was to determine a genetic link between father and child.

If the purpose of the open and notorious recognition rule was to include nonmarital children who are not genetically linked, but who the father either mistakenly thought were linked or felt affection for, such rules might still make sense. However, this does not seem a likely purpose given the discussion in *Trimble* and *Lalli*. The Court noted the purpose of these particular intestacy statutes was to remedy injustice visited upon nonmarital children while ensuring accurate proof of what I would argue was genetic paternity.

Retaining open and notorious recognition (“holding-out” rules) poses procedural problems if these statutes are expanded to include post-death genetic testing as a simple route to establishing paternity. Even under the revised UPA, a voluntary acknowledgement is meant to be an acknowledgement of genetic paternity and to retain such rules raises the possibility of circumventing adoption laws (as the UPA drafters pointed out.136) So the question is whether such statutes should still allow for what we might call “false positives”—a child who was held out by a decedent as his child but who in fact turns out not to be genetically linked? Allowing “false positives” to take under intestacy would arguably be inconsistent with cases that forbid a child to inherit if he was raised by the decedent but was never legally adopted and cannot meet the higher burden of the equitable

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adoption doctrine.

If we use the Lalli facts as a hypothetical, there are two possible scenarios if Robert Lalli were allowed to establish paternity post-death through a simple DNA test. Such a test might establish, with virtual certainty, that Robert was Mario's genetic child. This would be consistent with the fact that Mario Lalli said Robert was his son in legal documents, like his consent to Robert's marriage. On the other hand, such a test might establish that Mario was mistaken and that Robert was not his genetic child. In that scenario, we might say that a surrogate rule like acknowledgement or open and notorious holding out would yield a "false positive."

I would argue that if the goal of such statutes is to establish a reliable means to prove paternity in an efficient and accurate way—as articulated by the Court in Trimble and Lalli—then it is clear that we should now include in such statutes a provision whereby Robert can opt to establish his paternity post-death with DNA testing. But should we still provide an option for him to establish it through surrogate means as well? And if we do so, should that effort be open to challenge by other relatives? The better policy is not to allow a conclusive adjudication or voluntary acknowledgement during life to be challenged by other relatives. But, if a formal determination of parentage has not occurred during life, is it fair to allow Robert to rely solely on a surrogate rule and not opt for DNA testing post-death?

Suppose Robert did not have a relationship with Mario Lalli during life, but that his mother struggled to raise him alone. If Robert discovers that his putative father has died and appears in the probate court post-death to establish paternity, should we not, given the spirit of Trimble and Lalli to include nonmarital children as fully as possible in inheritance, grant him the opportunity to inherit? Is the lack of knowledge on his father's part, and the chance that establishing such a fact might upset Mario's existing family, sufficient to deny Robert the chance to inherit? I would argue it is not. The Court in Trimble and Lalli clearly held that the

138. This is clearly detrimental to both the best interests of the child and raises concerns about fairness and finality of judgments.
state’s interest in preserving two-parent, or “legitimate,” families was an insufficient justification to deny a nonmarital child a reasonable chance to establish paternity. Although, in Lalli, the Court found that limiting a nonmarital child’s opportunity to establish paternity to the lifetime of the father was constitutional, that conclusion was grounded in the state’s interest in accuracy. The father’s testimony would yield a more accurate determination of paternity. That is no longer a great concern because almost perfect accuracy can now be established by DNA testing post-death.

The benefits of biological paternity in the context of the family law goal of establishing parentage with the best interests of the child as the dominant goal have been discussed by June Carbone and Naomi Cahn in their article, Which Ties Bind? In fact, they suggest a mandatory and universal paternity testing regime at birth, which would also resolve the issue of post-death determination for inheritance purposes. The issue of biology has been central in inheritance law with its historic focus on consanguinity. Of even greater relevance is the existing focus on biology inherent in many state statutes that conclusively establish that the mother of the child is the mother for purposes of inheritance simply by giving birth to the child. Some may argue that legislatures adopt such a stance because the birth tie signifies the presumed intent of the mother to include the child. Others might argue that the biological link is the salient factor sought by the state in concluding that the nonmarital child “deserves” to inherit from his mother without any other proof barriers. I would tend to agree

140. Lalli, 439 U.S. at 271.
142. Id. at 1069.
144. See Jennifer Seidman, Comment, Functional Families and Dysfunctional Laws: Committed Partners and Intestate Succession, 75 U. COLO. L. REV. 211, 211 (2004) (noting that one purpose of intestacy laws is to give effect to the presumed intent of the donor).
145. See Timothy Hughes, Comment, Intestate Succession and Stepparent
with the latter group—that the rationale for such a conclusive determination of maternity is more grounded in old notions of consanguinity than in presumed intent, though both rationales may co-exist.

D. Reconciling the Marital Presumption and Policy Goals

The availability of DNA testing also raises the question of whether the presumption that the husband of a married couple is the father of a child born during the marriage (the marital presumption) should continue to stand. Some scholars have correctly pointed out that the utility of presumptions in an age of readily available genetic testing is greatly reduced since such presumptions are so easily rebuttable. The marital presumption has been assailed as a matter of male privilege in the past, and arguments that it is an incentive to marriage seem insufficient to sustain it under constitutional scrutiny. Justice Powell rejected furthering two-parent families as a substantial interest that justifies treating nonmarital children differently from marital children in the context of inheritance. If, as a matter of social policy, the legislature chooses to encourage marriage, it should arguably privilege the spousal relationship rather than impose burdens on the parent-child relationship. But the goals of inheritance law include efficiency of administration and, viewed in light of that goal, the marital presumption comports very well with inheritance law. The next section explores a simplified post-death regime for establishing parentage that retains the marital presumption.


146. See generally Gunderson, supra note 128. But see Singer, supra note 15.


148. Historically, some inheritance law scholars have argued that the rule which grants children to a married couple unassailable legitimacy was a rule that privileged men. Mary Louise Fellows cogently lays out the rationale for Lord Mansfield’s rule which excluded any testimony challenging the legitimacy of a child born to a married man and women. Mary Louise Fellows, A Feminist Interpretation of the Law and Legitimacy, 7 TEX. J. WOMEN & L. 195 (1998).

149. Trimble v. Gordon, 430 U.S. 762, 769 (1977) (rejecting the argument that a State may “influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships”).

150. See BRASHIER, supra note 79, at 6.
as a starting point and then minimizes the barriers for nonmarital children who must establish paternity post-death in order to inherit.

IV. A SIMPLIFIED POST-DEATH PARENTAGE REGIME FOR INHERITANCE LAW

Embracing a simplified regime in this area begins with thinking about first principles. Biology has always played a fundamental role in inheritance law not only because of the historic emphasis on consanguinity, but also because the American system of inheritance allows for such easy opting out and disinheritance of any child—marital or nonmarital. The goals of intestacy statutes include replicating the decedent's presumed intent as well as, "the continued support of the decedent's family, rewarding or compensating family members for contributions to the wealth accumulated by the decedent or to the decedent's well-being, and ease of administration of the probate system."151

The linchpin of inheritance by or through a child in a status-based system like ours is establishing that the child is linked to the parent by either blood or adoption. Once that link is established, the child may inherit in intestacy. The Uniform Probate Code (UPC) endorses states' use of the Uniform Parentage Act (UPA) as a mechanism to establish the parent-child relationship. For example, it suggests that if a state has adopted the UPA, it should incorporate the UPA by reference to determine parentage. If not, the UPC

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151. See Jan Ellen Rein, Relatives by Blood, Adoption, and Association: Who Should Get What and Why, 37 VAND. L. REV. 711, 713 (1984) ("Progress in this direction has been slow because of the common-law reverence for blood as the basis of succession. Following the maxim 'Solus Deus facit haerdem, non homo' (God alone makes the heir, not man), our succession law started with the assumption that inheritance rights are based on consanguinity and that any deviation from this principle requires express authorization either by legislation or by a private dispositive instrument.") (footnotes omitted); see also E. Gary Spitko, The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-parenting of Her Child, 48 ARIZ. L. REV. 97 (2006) (analyzing the constitutional significance of biology in defining a father's parental rights).
152. Gary, supra note 19, at 651-52.
153. Eighteen states have adopted the UPC, "in some cases with significant modifications." See Legal Information Institute, Cornell University, Uniform Probate Code Locator, http://www.law.cornell.edu/uniform/probate.html (last visited Apr. 6, 2008).
154. UNIF. PROBATE CODE § 2-114(a) (amended 1997), 8(I) U.L.A. 91.
provides that a state may incorporate its own statutory rules to determine parentage. A number of states have adopted the UPA to make parentage determinations while others, like Maryland, have their own regimes.

The 2000 UPA (as amended in 2002) establishes a complex system of presumptions and evidentiary rules regarding relevance and reliability. The drafters of the revised UPA spent many years fleshing out these rules, and then engaged in a protracted negotiation about the rules after bringing them to the ABA House of Delegates for approval and encountering into opposition. The rules in the revised

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155. Id.
156. See Legal Information Institute, supra note 153, for current information.
   (a) A man is presumed to be the father of a child if:
      (1) he and the mother of the child are married to each other and the child is born during the marriage;
      (2) he and the mother of the child were married to each other and the child is born within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce [or after a decree of separation];
      (3) before the birth of the child, he and the mother of the child married each other in apparent compliance with law, even if the attempted marriage is or could be declared invalid, and the child is born during the invalid marriage or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce [or after a decree of separation];
      (4) after the birth of the child, he and the mother of the child married each other in apparent compliance with law, whether or not the marriage is or could be declared invalid, and he voluntarily asserted his paternity of the child, and:
         (A) the assertion is in a record filed with [state agency maintaining birth records];
         (B) he agreed to be and is named as the child's father on the child's birth certificate; or
         (C) he promised in a record to support the child as his own; or
      (5) for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own.
   (b) A presumption of paternity established under this section may be rebutted only by an adjudication under [Article] 6.
158. See UNIF. PARENTAGE ACT § 204 cmt. (amended 2002), 9B U.L.A. 17 (Supp. 2007) (noting the “objection” of the ABA IRR section). A network of presumptions was established by UPA (1973) for application to cases in which proof of external circumstances indicate a particular man to be the probable father. The simplest of these is also the best known-birth of a child during the marriage between the mother and a man. When promulgated in 1973, the contemporaneous commentary noted that:
   While perhaps no one state now includes all these presumptions in its
UPA reflect the underlying family law policy concerns about continuity and care giving for children, as well as financial support during minority, embodied in the traditional “best interests of the child” standard, as do the expansive definitions of parentage included in the American Law Institute’s Principles of the Law of Family Dissolution, which provide for parentage by estoppel and de facto parentage, in additional to legal parentage.\footnote{159} Given the policy concerns for the best interest of the child in raising the child in the family law context, this makes sense. But inheritance law is concerned less with caregiving and more with the transfer of capital, which translates into economic power, from one generation to the next. If reducing the stigma and societal disability associated with children born out of wedlock is an

important policy goal, then making sure nonmarital children share in the economic power that wealth transfer brings is a tangible means of achieving this goal. Such economic disenfranchisement mirrors the inability of women to inherit in certain countries, which poses serious barriers to their economic and social equality.\textsuperscript{160} Similarly, nonmarital children will continue to face inequality in the form of economic disenfranchisement if the rules about establishing post-death parentage in states that have not adopted the UPA, which allows for post-death testing, are not amended to include DNA testing.

The policy goals of efficiency and administrative convenience are dominant concerns in probate. Requiring a simple DNA test to establish whether a nonmarital child is actually the child of the decedent father reduces transaction costs—systemic costs expressed as court time and lawyers’ fees.\textsuperscript{161} Simplifying the process whereby nonmarital children may inherit is efficient because it increases the size of the societal pie and the individual estate by reducing costs that the estate would otherwise have to pay. Using DNA testing is more administratively convenient than requiring evidentiary hearings with testimony about whether the putative father “held out” a child as his own because he sent three Christmas cards or four.\textsuperscript{162}

\textsuperscript{160} See generally Tamr Ezer, Inheritance Law in Tanzania: The Impoverishment of Widows and Daughters, 7 GEO. J. GENDER & L. 599 (2006).

\textsuperscript{161} E.g., Sorenson Genomics, Identigene DNA Paternity Test: Legal, http://www.dnatesting.com/paternity/legalPaternity.php (last visited Mar. 12, 2008) (listing the price of a paternity test kit that will “provide airtight evidence” and “[t]he proof that’s absolutely necessary” as $399. “Home DNA tests” are even less expensive).

\textsuperscript{162} Note that even the new 2000 as amended in 2002 UPA acknowledges that the advent of reliable genetic testing must, by necessity, alter some of the old presumptions about paternity.

Finally, subsection (b) is a complete rewrite of UPA (1973) § 4(b). The requirement that a presumption “may be rebutted... only by clear and convincing evidence” was eliminated from the Act. The same fate was accorded the statement that: “If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls.” Nowadays the existence of modern genetic testing obviates this old approach to the problem of conflicting presumptions when a court is to determine paternity. Nowadays, genetic testing makes it possible in most cases to resolve competing claims to paternity. Moreover, courts may use the estoppel principles in § 608 in appropriate circumstances to deny requests for genetic testing in the interests of preserving a child’s ties.
When considering this simplified regime post-death, one must continue to be cognizant of the expressive dimension of inheritance law. Some may argue that requiring a genetic link in cases where legal parentage has not been assigned during life by other means is regressive and diminishes the status of those individuals who are not included in the traditional family. Inheritance law does have an important function in society in terms of how society thinks about who makes up a family. However, a revised statutory scheme that focuses on genetic testing as the primary means of determining parenthood in post-death cases would actually reduce barriers to nonmarital children attempting to establish that they are entitled to take from their fathers. It would thus enhance their symbolic or social status as members of a family and enhance their financial well-being through an economic transfer in probate. In the paradigm proposed herein, there would be uniformity among states in the area of inheritance law rather than uniformity between family law and inheritance law in establishing the parent-child relationship. The proposed regime would only affect a child whose parent had not gone through a paternity adjudication during life or for whom a presumption of parentage had not become conclusive during life. Thus, if a non-genetic parent wanted to establish legal parentage during life, that determination would be dispositive and the child could take from that parent post-death. The final adjudication by a court or presumption which became conclusive would then be binding on the probate court after that parent died.

In one sense, biology is regressive since it harkens back to bloodlines and rules like primogeniture. But, in another

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to the presumed or acknowledged father who openly held himself out as the child's father regardless of whether he is in fact the genetic father.


sense, it is progressive because, given the reliability and accessibility of DNA testing, if we use biology as a primary means of establishing legal parentage for inheritance purposes in post-death cases, more nonmarital children will be able to take in intestacy. The reliability and ease of DNA testing create a more efficient and administratively convenient disposition for the probate system, which is concerned less with naming a parent for caretaking purposes than deciding to whom capital will be distributed. Since one-third of all children are now born outside of marriage, it is time for us to ensure that they will share equally in the economic power that comes with inheritance. What we should be doing is providing a default system that quickly and reliably determines who is a child based on either a marriage certificate, a genetic determination, or an adoption certificate, and move capital to that child.

Family law and inheritance law often have different goals. For example, the policy goals underlying the question of who should be legal parents are very different in family law than they are in inheritance law. As an illustration, in an early draft of what eventually became the 2000 UPA, the initial draft contained an absolute rule that no posthumously conceived child could ever be a child of the decedent. There was no opt-in provision for fathers who wanted to indicate their intent to have these children be legal children. This omission was, in part, due to the fact that the dominant concern of the drafters was a family law concern—continued post-death child support obligations. The drafters were family law experts who, unlike their trusts and estates colleagues, were less concerned with the ability of the child to inherit, which was linked to a post-death determination of

165. See supra note 1 (citing nonmarital birth statistics).
(d) A donor who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the donor’s egg or sperm, is not a parent of the resulting child.
Id. § 305(d).
167. Id.
168. For example, the ABA Advisor to the Committee was an expert in divorce and custody, not trusts and estates. See Unif. Parentage Act (amended 2002), 9B U.L.A. 4 (Supp. 2007) (listing Nina Vitek as the ABA Advisor).
legal fatherhood. When trusts and estates experts noted that the draft should include an opt-in provision, such a provision was incorporated.

This embrace of the genetic link as a default position is motivated in large part by the default nature of American inheritance rules. American law provides an easy opt-out from the default rules of intestacy law. If a father or one of his relatives does not want his nonmarital child to inherit from or through the father, such person can simply draft a will. This is very different from parentage decisions made in the context of family law and regimes established primarily for determining parentage during life, like the UPA. For purposes of caretaking during life, one may not opt into being a custodial parent or opt out of child support obligations. But in terms of being parent for purposes of passing on wealth, one can and often does opt in and out of that relationship. Americans often disinherit their children for a variety of reasons, even if only because they leave their entire estate to their surviving spouse. In addition, American inheritance law already relies exclusively on biology to establish the parent-child relationship with mothers.

A mother is the parent of a child—marital or nonmarital—for inheritance law.

169. Id.
170. See id. § 707, 9B U.L.A. 53:

Parental Status of Deceased Individual.
If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.

Id.

Absent consent in a record, the death of an individual whose genetic material is subsequently used either in conceiving an embryo or in implanting an already existing embryo into a womb ends the potential legal parenthood of the deceased. This section is designed primarily to avoid the problems of intestate succession which could arise if the posthumous use of a person's genetic material leads to the deceased being determined to be a parent. Of course, an individual who wants to explicitly provide for such children in his or her will may do so.

Id. § 707 cmt.
171. See supra notes 74-75 and accompanying text.
purposes simply because she gave birth to the child.175

Admittedly, this suggested approach is a departure from some inheritance law scholars who would expand behavior based decision-making in intestacy and give courts discretion to provide for inheritance apart from consanguinity or adoption.176 But when considering post-death parentage determinations, which are made primarily for the purposes of qualifying for an inheritance—not for purposes of determining who may be the optimal parent for purposes of caretaking—inheritance law scholars might err on the side of maximizing efficient disposition and the number of nonmarital children who eventually inherit.177 Discretionary regimes may maximize fairness to some but they slow the reallocation process. The following proposals are aimed at reducing some of the discretionary decisions that probate courts must make under the current regime and easing the burden on nonmarital children.

V. STATUTORY REFORMS

So if one were to revise existing state statutes, what changes would be implemented that might differ from the

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175. See Md. Code Ann., Est. & Trusts § 1-208(a) (LexisNexis 2001): “A child born to parents who have not participated in a marriage ceremony with each other shall be considered to be the child of his mother.” (Meaning the woman who gave birth to him) Although the UPA (2000 as amended 2002) includes many more ways in which to establish motherhood, most state statutes still assign motherhood based simply on birth. The UPA provides in § 201:

(a) The mother-child relationship is established between a woman and a child by:

(1) the woman's having given birth to the child [, except as otherwise provided in [Article 8];
(2) an adjudication of the woman's maternity; [or]
(3) adoption of the child by the woman [, or
(4) an adjudication confirming the woman as a parent of a child born to a gestational mother if the agreement was validated under [Article 8 or is enforceable under other law].


176. See Foster, Family Paradigm, supra note 8; Foster, New Model from China, supra note 8; Foster, Chinese Experiment, supra note 8; see also Carissa R. Trast, Note, You Can't Choose Your Parents: Why Children Raised by Same-Sex Couples Are Entitled to Inheritance Rights from Both Their Parents, 35 Hofstra L. Rev. 857 (2006); Browne Lewis, Children of Men: Balancing the Inheritance Rights of Marital and Non-Marital Children, 39 U. Tol. L. Rev. 1 (2007) (suggesting a more discretionary approach for probate courts in allocating the estate between marital and nonmarital children).

177. See, e.g., supra note 176.
current statutory regimes for establishing the parent-child relationship between nonmarital children and their fathers? If we look at the Maryland statute, for example, it provides that a child is the child of the father and mother if they have participated in a valid marriage ceremony.\textsuperscript{178} However, if they have not, the child will be considered to be the child of his father only if the father:

1) Has been judicially determined to be the father in an action brought under the statutes relating to paternity proceedings;
2) Has acknowledged himself, in writing, to be the father;
3) Has openly and notoriously recognized the child to be his child; or
4) Has subsequently married the mother and has acknowledged himself, orally or in writing, to be the father.\textsuperscript{179}

When thinking about what a simplified regime would look like, it is useful to consider which provisions best reconcile, if possible, the goals that underlie intestacy statutes. As discussed above,\textsuperscript{180} these goals include replicating the decedent's presumed intent as well as, "the continued support of the decedent's family, rewarding or compensating family members for contributions to the wealth accumulated by the decedent or to the decedent's well-being, and ease of administration of the probate system."\textsuperscript{181} It could be that there is irresolvable conflict between some of these goals in the context of post-death determinations of parentage. But when deciding which goal should prevail, when it is impossible to resolve such conflict, thinking about which goals are paramount becomes a useful touchstone. Thus, the following analysis of the existing provisions measures the choices against the goals of intestacy law as a mechanism for selecting a simplified regime of post-death determinations of legal parentage.

\textsuperscript{178} MD. CODE ANN., EST. & TRUSTS § 1-206 (LexisNexis 2008).
\textsuperscript{179} Id. § 1-208(b).
\textsuperscript{180} See supra Part III.
\textsuperscript{181} Gary, supra note 19, at 651-52.
A. Should the Marital Presumption be Preserved?

As noted above, the marital presumption has been criticized for privileging marital children over nonmarital children and by feminist scholars as preserving the vestiges of patriarchy. Encouraging marriage by punishing the children of those who engaged in reproduction outside of marriage was not an acceptable reason to discriminate against nonmarital children under Trimble. The Court felt that such social incentivizing should not be visited upon the heads of children. It would be very consistent to defer completely to a genetic link for all children, marital and nonmarital, by arguing that everyone should now be tested for paternity within and outside of marriage to avoid any problems of later efforts to disestablish paternity. But the marital presumption, with all its faults, is efficient. It cuts down tremendously on the number of cases where a separate determination of legal fatherhood would have to be made. Thus, because the efficient disposition of estates post-death is such an important goal of intestacy law, it should be preserved as a means of establishing legal fatherhood where such a determination has not been made during life. However, nonmarital children may argue that the presumption is violative of the Fourteenth Amendment, now that DNA testing is readily available. To withstand such a

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182. See supra Part III.A4.

183. Historically, some inheritance law scholars have argued that the rule which grants children to a married couple unassailable legitimacy was a rule that privileged men. Mary Louise Fellows cogently lays out the rationale for Lord Mansfield's rule which excluded any testimony challenging the legitimacy of a child born to a married man and women. Fellows, supra note 148, at 198; see also BRASHIER, supra note 79, at 125 ("Until recent decades male-dominated legislatures continued to favor laws preventing a nonmarital child from bringing a[n] . . . inheritance claim against the putative father's estate."). But see Jana Singer, supra note 15 at 256-257 (discussing how an important purpose of the marital presumption was to protect children); see also Katharine K. Baker, Bargaining or Biology? The History and Future of Paternity Law and Paternal Status, 14 CORNELL J.L. & PUB. POL'Y 1, 13-14 (2004) (defending the marital presumption as protective of children born into a marriage, noting that "preferencing stability over information in this way may make it more likely that the child will be adequately supported").


185. Id. at 769.

186. See supra note 1 (stating that the percentage of children born into marriage was over sixty percent in 2005).

187. See Trimble, 430 U.S. at 766.

188. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS
challenge, the state would presumably have to argue that the marital presumption is grounded in the state's substantial interest in encouraging marriage because it is in the best interests of children.189

B. Should Surrogate Rules be Preserved?

The proposed UPA amendments in 2000 had deleted the alternative that allowed for parentage to be based on a father’s holding out the child as his own.190 This alternative is a classic surrogate rule. After the intense opposition of the ABA Individual Rights and Responsibilities Section and the Committee on the Unmet Legal Needs of Children,191 the drafters restored this rule with some changes.192 Essentially, the 2000 amendments would have limited the UPA presumption of paternity to marital children only.193 After the negotiated agreement, the presumption again applied to nonmarital children, if their fathers held them out as their own.194

The Maryland statute currently provides not just a presumption through open and notorious recognition or holding out, but the establishment of paternity itself.195 The UPA approach makes sense since it is a presumption that becomes conclusive upon the passage of years if the putative father has not opted to challenge the presumption.196 The UPA is striving for certainty and security for the nonmarital child through its use of the holding-out presumption. However, the use of such behavior to determine inheritance

§ 2.5 reporter’s note 1, cmt. b, at 140-42 (1999).

189. See Trimble, 430 U.S. at 767 (discussing the standard that would be applied, i.e., a “not... toothless” intermediate standard of scrutiny).

190. Nat'l Conference of Comm'rs on Unif. State Laws, Uniform Parentage Act (2000), with Prefatory Note and Comments (and with Unofficial Comments by John J. Sampson, Reporter), 35 FAM. L.Q. 83, 108 (2001) (“Former subsection 4(4) created a presumption of paternity if a man ‘receives the child into his home and openly holds out the child as his natural child . . . .’ This presumption was not carried forward because genetic testing is a far better means of determining paternity.”).

191. Sampson, supra note 159, at 1-2.

192. Id. at 3.


194. See Sampson, supra note 159, at 3.

195. MD. CODE ANN., EST. & TRUSTS § 1-208(b) (LexisNexis 2008).

196. UNIF. PARENTAGE ACT § 607(a) (amended 2002), 9B U.L.A. 37 (Supp. 2007) (requiring that the “proceeding . . . be commenced not later than two years after the birth of the child”).
post-death is not grounded in the same purposes. Rather, the purpose is to determine who will inherit the decedent's assets.

Let us examine why retaining this holding out rule in post-death cases is problematic in addition to the systemic costs it imposes via evidentiary hearings. If genetic testing is an option, but the child claiming does not want to use that mechanism, and instead chooses to use the holding out rules, what is the impact on the state’s interest in an accurate determination of paternity? And even if we define the state’s interest broadly to include “expressive intent,” what is the state’s interest in avoiding the circumvention of adoption? In addition, is it fair to allow the child to establish the father’s parentage and not allow relatives to rebut what should really now be merely a presumption (as it is under the UPA) through DNA testing?

Using the Lalli hypotheticals posed above, the first scenario contemplated a relationship where the father open and notoriously held-out the child. To establish paternity post-death, the child could either opt to use the surrogate rule or genetic testing if it is added. But the child would likely not want to risk DNA testing if he thought he could convince a probate court through the alternative evidentiary means, since the DNA test might conclusively demonstrate that his putative father was not in fact his genetic father. In such a case, we might feel badly that a child who was held-out might be eliminated from inheritance because he has chosen to establish paternity but a relative then is allowed to rebut by introducing DNA testing to the contrary. But the child has always had to engage in some sort of hearing to establish that the holding out or the acknowledgement met a certain level of proof—in many states by clear and convincing evidence. Thus, the relatives always presumably had a right to respond by presenting evidence that the child’s proof did not meet the standard. Would it make much sense to continue to allow the relatives to present non-genetic testing proof but bar them from asking for a DNA test in such a proceeding?

In the second scenario, the child never had a

197. See Part III.C (exploring possible alternative outcomes of the Lalli facts).
198. Id.
relationship with the father and appears post-death to claim
in the probate proceeding. Here, the child would have to use
the genetic testing option since he could not presumably
establish his father's link to him through holding-out or
written acknowledgement. In that case, we would not need to
address the question of whether the relatives would have to
ask for the court to order such tests since the child must do so
to establish parentage.

In the first scenario, we are faced with an end run
around the adoption statutes if we do not allow a court on its
own motion or a relative to ask a court to establish the
parentage by DNA testing. Simply using the holding-out or
informal written acknowledgement to establish paternity,
when DNA testing is available, is the least likely means by
which to meet the state's articulated interest as expressed by
the Court in Trimble and Lalli, i.e., accurately determining
 genetic paternity. And it would seem odd for the state to
craft a new statute that includes less accurate mechanisms
when far more accurate means are available. States might
consider leaving such surrogate rules in, but treating them
not as legal conclusions of paternity but rather as mere
 presumptions, rebuttable with DNA testing.

Of course, if during life a determination of legal
parentage was made by adjudication or by a presumption
that became irrebuttable by passage of time under the UPA,
such a finding should not be allowed to be overturned post-
death by a relative who asks for the Court to order a DNA
test. Such relatives should only be allowed to use DNA
testing in a defensive posture to rebut when a child has
initiated an action to establish paternity post-death by using
a surrogate rule. They should not be allowed to initiate
proceedings against the child. This approach comports with
fairness, efficiency and the need for finality of such findings.

Some nonmarital children may be disadvantaged by
turning the holding-out provision into a presumption rather
than a conclusive determination. They may discover that
they are not the child of the father if DNA testing is ordered.
But many more who could not afford to hire a lawyer to
establish “holding-out” may find that an inexpensive DNA
test is a far easier way to prove the decedent was their
genetic and thus, legal father. Some might argue that if we
make the holding-out clause a presumption rather than a
conclusive determination of paternity, we might as well repeal it. Presumptions in an age of genetic testing have lost much of their utility and advantage—because they are so readily rebuttable. 199 However, transforming these rules into presumptions rather than eliminating them is an incremental approach which is appropriate in a transitional world. It will give states some experience in how they fit together with the new DNA testing rules. Of course, in states that allow for holding-out to establish paternity during life such determinations would be conclusive and could not be revisited post-death. Thus, the ability of relatives to rebut using DNA testing would not have an impact on these determinations made during life.

C. Should Later Marriage and/or Adjudication be Preserved?

Mechanisms for establishing paternity like adjudication and later marriage should be retained. Later marriage should, however, be accompanied by formal acknowledgement, not simply oral or written acknowledgement. The formal adjudication of paternity requirement should be retained. But should a formal proceeding be the only vehicle for presenting the DNA test results or should there be an alternative? For example, either the child can present an adjudication of paternity or the child can ask the probate court to order tests (especially post-death). The concern with relying simply on an adjudication is that the adjudication still has quasi-criminal

199. A movement toward using genetic links in post-death determinations of legal parentage does make it more likely that non-genetic nonmarital children will discover they are not linked. Whether excluding those children from taking in intestacy is unfair is a policy decision legislatures will have to make, but this movement will not exclude truly genetically linked nonmarital children and may well include more of them in inheritance. See Naomi Cahn, Perfect Substitutes or the Real Thing?, 52 DUKE L.J. 1077, 1083 n.16 (2003) (“The American Bar Association asserts that the UPA actually increases the difficulty of establishing legal parenthood for nonmarital children because it relies on proof of a genetic link. ‘[T]he 2000 UPA makes it more difficult . . . for nonmarital children to have two legal parents.’ This reliance on genetic connection rather than affection or function is reminiscent of the early adoption law . . . when courts and legislatures struggled, for example, with the inheritance rights of adoptees versus those with a blood connection to the decedent.”) (citation omitted); see also Naomi Cahn, Children’s Interests and Information Disclosure: Who Provided the Egg and Sperm? Or Mommy, Where (and Whom) Do I Come From?, 2 GEO. J. GENDER & L. 1 (2000).
and unfavorable connotations in some states. Children who have good relationships with presumed nonmarital fathers may be reluctant to initiate these kinds of proceedings for fear of alienating the parent. So reliance on adjudication alone seems unlikely to foster ease of paternity determination for nonmarital children. The New York statute has both adjudication and a separate provision allowing for test results as alternative means of establishing legal fatherhood.

The DNA validation procedure could be a separate proceeding akin to the proceeding provided for in many state probate statutes to determine whether the heir was

200. See Rivera v. Minnich, 483 U.S. 574, 583-86 (1987) (Brennan, J., dissenting) (arguing that the putative father in a paternity determination should have the benefit of a clear and convincing standard of proof, rather than a preponderance standard, because “the stigma that attaches to the father . . . reflects a judgment regarding moral culpability”).

201. The relevant section reads:

§ 4-1.2 Inheritance by non-marital children.
(a) For the purposes of this article:
   (1) A non-marital child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.
   (2) A non-marital child is the legitimate child of his father so that he and his issue inherit from his father and his paternal kindred if:
      (A) a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity or the mother and father of the child have executed an acknowledgment of paternity . . . 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 . . . 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.

N.Y. EST. POWERS & TRUSTS LAW § 4-1.2 (McKinney 2008).
responsible for killing the decedent. When applying the homicide exception to inheritance, many states allow a finding in a criminal or civil proceeding to suffice, but if none exists, the probate court is permitted to make that determination in a separate proceeding. Similarly, probate courts could be given jurisdiction to order such tests in a separate proceeding and establish a system of verifying their reliability, e.g., the results came from a certified lab.

Formal written acknowledgement, if done as the New York statute requires, is less costly than open and notorious holding-out in terms of evidentiary proof. Under the UPA (2000 as amended in 2002), voluntary acknowledgement no longer provides a mere presumption of paternity—it establishes paternity. The UPA states: "The mother of a child and a man claiming to be the genetic father of the child may sign an acknowledgment of paternity with intent to establish the man's paternity." The UPA drafters note:

PRWORA does not explicitly require that a man acknowledging parentage necessarily is asserting his genetic parentage of the child. In order to prevent circumvention of adoption laws, § 301 corrects this omission by requiring a sworn assertion of genetic parentage of the child. A 2002 amendment provides that a man who signs an acknowledgment of paternity declares

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202. See supra note 9.
203. Id.
204. To ensure validity of testing, drafters of such a new statute might borrow from states like Louisiana which provides in LA. REV. STAT. ANN. § 9:397 (2008): "The tests shall be conducted by a court appointed expert or experts qualified as examiners of blood or tissue samples for inherited characteristics, including but not limited to blood and tissue type. The number and qualifications of such expert or experts shall be determined by the court."
205. See Part III.C (exploring possible alternative outcomes of the Lalli facts).
206. Note also the Comment to UPA:
   One presumption found in UPA (1973) is not repeated in the new Act. Former UPA § 4(5) created a presumption of paternity if the man "acknowledges his paternity of the child in a writing filed with [named agency] [and] the mother does not dispute the acknowledgment within a reasonable time." This presumption was eliminated because it conflicts with Article 3, Voluntary Acknowledgment of Paternity, under which a valid acknowledgment establishes paternity rather than a presumption of paternity.
207. Id. § 301, 9B U.L.A. 19.
that he is the genetic father of the child.\textsuperscript{208}

\textit{D. Summary of Proposed Statutory Reforms}

Thus, once again, the idea that underpins voluntary acknowledgement, even under the UPA, is one of genetic connection and statutes like Maryland's should include more formal acknowledgement as a means of establishing parentage post-death. Informal written acknowledgement suffers from the same problems described above that affect holding-out.\textsuperscript{209}

Thus, informal acknowledgement and the open and notorious holding-out option could be eliminated as too costly. Eliminating these provisions may exclude some children who thought they were genetically linked to their nonmarital father. However, the same result obtains in the context of children who thought they were legally adopted and find out post-death that they were not. We require a high level of proof in cases where the doctrine of equitable adoption applies to allow such children to take an intestate share. Rather than retaining these surrogate rules, we could rely on similar equitable principles to develop in the context of nonmarital children whose parentage has not been established during the father's life. Otherwise, there seems to be a significant discrepancy between the treatment of a non-genetically linked child who finds out she was not adopted post-death and a nonmarital child who finds out she is not genetically linked. The latter is currently entitled to a conclusive presumption of paternity by simple holding-out, while the former has to hurdle the tremendous doctrinal barriers of equitable adoption in order to inherit.

\textsuperscript{208} Id. § 301 cmt., 9B U.L.A. 19 (citing 42 U.S.C. § 666(a)(5)(C)).

\textsuperscript{209} For example, both impose systemic costs in terms of extensive evidentiary proceedings and both open the door to raise inconsistencies with the doctrine of equitable adoption. See supra text accompanying note 208. Note that these statutes are aimed at establishing paternity. While there is the possibility that they might be used to establish post-death maternity for inheritance purposes in a domestic partnership where the lesbian partner of the biological mother has died, the statute is not intended to establish maternity. Rather than disallowing relatives to use genetic testing to rebut an effort to establish paternity so that the nonmarital child of such a couple could inherit, a better approach would be to enact a new statute that is clearly meant to establish post-death maternity in such a situation. Note that under the regime proposed herein, if the partner had either established her parentage during life or made a will the child would be able to inherit.
In addition, surrogate rules yield “answers” that are not nearly as accurate as DNA testing if the question is whether the putative father is the genetic father. There is little relation between such surrogate rules and the goal of accurately determining the parent-child relationship for purposes of inheritance. When redrafting these statues in 2008, a state might argue that its substantial interest is in preventing fraud. With the advent of reliable DNA testing, a state could argue that retaining surrogate rules would actually frustrate the state’s substantial interest in preventing fraud. On the other hand, the state might argue that the purpose of this particular nonmarital parent-child statute is consistent with the entire body of intestacy statutes, which is to replicate decedent’s intent. Thus, the children who have been open and notoriously held-out by their father are “expressively intended” children, even if they turn out not to be the genetic child of the father. This is what the states will have to argue to now maintain that there is a link between the goal of the statute and the means used to achieve it. Given these various positions, as noted above, the most appropriate route in such a transitional world is to phase-in such statutory change by reducing these surrogate rules to presumptions rather than eliminating them altogether. This would allow time for equitable principles to develop and to see how the two sets of rules interact.

Under the amended regime, the statutory scheme would provide that a child is a child of the father if the parents:

(1) were married at the time of the child’s birth, or

(2) later marry and the father made a formal acknowledgement of the child and such acknowledgement has become conclusive during life, or

(3) never marry, but there has been an adjudication of paternity during the father’s life, or

(4) never marry, but the father has made a formal acknowledgement and such acknowledgement has become conclusive during life, or

(5) never marry, but through post-death DNA testing, a genetic connection is established.210

210. To ensure validity of testing, drafters of such a new statute might borrow from states like Louisiana which provides:
(6) never marry, but the father held the child out as his own or made an informal acknowledgement and the presumption of paternity that arises is not rebutted in post-death probate proceedings.

Thus, surrogate means of proving a man is the child's father would be reduced to presumptions if there has been no determination of parentage during life. This approach best balances fairness, efficiency and constitutional concerns in today's era of readily available DNA testing. It allows for accurate post-death means of determining parentage, while avoiding some of the complexities of more expansive family law regimes for determining parentage during life for purposes of raising and supporting the child over a long period of time.

VI. CONCLUSION

By including DNA testing in the post-death regime for establishing the parentage of nonmarital children, inheritance law would be moving away from a rule that currently places "the burden of inertia"211 on nonmarital children. Children would no longer have to rely solely on their putative father's actions in holding them out or acknowledging them, or their mother's actions in filing a paternity suit during life to establish a parent-child link for purposes of inheritance. Such a shift is justified in an increasingly complex world, where reproduction is often divorced from marriage or even ongoing relationships. In such a world, it is highly beneficial to have a clear bright-line rule with which to resolve whether a nonmarital child may inherit from his or her father if the issue of parentage has not been determined during life. Such a rule is likely to include more nonmarital children in the group of those who inherit, and will thus reduce social stigmas and enhance their financial well-being. This is in keeping with the spirit of the Court's holdings in cases like Trimble and Lalli, that

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Selection of expert. The tests shall be conducted by a court appointed expert or experts qualified as examiners of blood or tissue samples for inherited characteristics, including but not limited to blood and tissue type. The number and qualifications of such expert or experts shall be determined by the court.


nonmarital children deserve to be included in inheritance regimes whenever possible, consistent with the state’s interest in preventing fraudulent claims.

Legislatures should consider the words of Justice Powell when he said that “the burden of inertia” should not be placed on the nonmarital child. That principle should still guide the drafting of default rules in this area of the law today. As the Powers court noted:

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

212. Id.