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## Raising the Dead: An Examination of *In Re Kingsbury* and Maine's Law Regarding Intestate Succession and Posthumous Paternity Testing

Dylan R. Boyd  
*University of Maine School of Law*

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# RAISING THE DEAD: AN EXAMINATION OF *IN RE KINGSBURY* AND MAINE'S LAW REGARDING INTESTATE SUCCESSION AND POSTHUMOUS PATERNITY TESTING

*Dylan R. Boyd*

- I. INTRODUCTION
- II. JURISPRUDENCE REGARDING INTESTATE SUCCESSION AND PROOF OF PATERNITY
  - A. *Proof of Paternity to Establish Intestate Inheritance Rights*
  - B. *Supreme Court Decisions Involving Inheritance Rights of Illegitimate Children*
  - C. *Maine's Intestate Succession Law Regarding Illegitimate Children*
- III. METHODS OF POSTHUMOUS PATERNITY TESTING
  - A. *Testing Relatives Who Are Parties to the Action*
  - B. *Testing Collateral Parties*
  - C. *Testing the Body of the Decedent*
- IV. THE *KINGSBURY* DECISION
- V. ANALYSIS
  - A. *Conflicting Interests in Posthumous Paternity Testing*
  - B. *Balancing the Interests*
  - C. *Beyond Balancing Interests: Other Reasons for a Change in the Law*
  - D. *Proposed Changes to Maine Law*
- VI. CONCLUSION

## RAISING THE DEAD: AN EXAMINATION OF *IN RE KINGSBURY* AND MAINE'S LAW REGARDING INTESTATE SUCCESSION AND POSTHUMOUS PATERNITY TESTING

Dylan R. Boyd\*

### I. INTRODUCTION

In 2001, Ben Erskine, a man who claimed to be the son of renowned guru Paramahansa Yogananda, planned to ask a Los Angeles judge to order that the guru's body be exhumed for DNA testing to determine Erskine's paternity.<sup>1</sup> Erskine's allegations threatened both Yogananda's reputation and the fortune of his estate, which belonged to his organization the Self Realization Fellowship.<sup>2</sup> In 2002, seven years after the allegations arose, conclusive tests comparing Erskine's DNA and that of Yogananda's surviving male relatives in India resolved the controversy and vindicated the guru, thus putting to rest the looming possibility of exhuming his body for DNA testing.<sup>3</sup>

The difficult legal questions that the Los Angeles judge would have faced—in the event that dispositive DNA tests of Yogananda's living male relatives had not been made available before litigation—have been raised in similar, albeit less sensational, cases in courts nationwide.<sup>4</sup> In 2008, the Maine Supreme Judicial Court, sitting as the Law Court, considered these questions in the case of *In re Kingsbury*.<sup>5</sup> In particular, the Law Court upheld the Probate Court's decision that required the legitimate daughter of a decedent to submit to DNA testing or, alternatively, that the decedent's

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\* J.D. Candidate, 2010, University of Maine School of Law. I would like to thank Professor Laura Underkuffler and Professor Melvyn Zarr for their valuable insight and guidance, which helped make this Note possible.

1. Ron Russell, *Exhuming the Truth*, NEW TIMES L.A., November 29, 2001, <http://www.rickross.com/reference/selfreal/selfreal4.html>.

2. *Id.* The existence of a love child, mothered by a devotee of Yogananda, would show that the guru broke his vow of celibacy. *Id.* In addition, Yogananda's followers believe that the guru's body is in "immutable" condition, having resisted decomposition since the time of his death in 1952. *Id.* Had he been successful, Erskine potentially could have claimed a stake in the ownership rights of Yogananda's image and likeness as well as the considerable wealth and property holdings of the Self Realization Fellowship. *Id.*

3. Teresa Watanabe, *DNA Clears Yoga Guru in Seven-Year Paternity Dispute*, L.A. TIMES, July 11, 2002, at B3, available at <http://www.rickross.com/reference/selfreal/selfreal7.html>.

4. Charles Nelson Le Ray, *Implications of DNA Technology on Posthumous Paternity Determination: Deciding the Facts When Daddy Can't Give His Opinion*, 35 B.C. L. REV. 747, 766 n.122 (1994) (collecting cases). See, e.g., *Batchelder v. Boyd*, 423 S.E.2d 810, 815 (N.C. Ct. App. 1992); *Alexander v. Alexander*, 42 Ohio Misc. 2d 30, 34 (1988); *In re Estate of Greenwood*, 587 A.2d 749, 757 (Pa. Super. Ct. 1991); *Le Fevre v. Sullivan*, 785 F. Supp. 1402, 1407 (C.D. Cal. 1991).

5. 2008 ME 79, 946 A.2d 389.

body be exhumed for testing to determine the paternity of the petitioner, who claimed to be the decedent's illegitimate daughter.<sup>6</sup>

This Note begins by exploring the development of the law regarding illegitimate children and the determination of paternity as it relates to intestate succession, with a focus on the law in Maine. Part II of this Note discusses the possible methods of posthumous paternity testing and the ways in which the law in Maine and other jurisdictions has responded to those methods.

In Part III, this Note summarizes the *Kingsbury* decision and its importance. Next, in Part IV, this Note confronts the question presented by *Kingsbury* by examining the interests that inform the analysis. More particularly, this Note will explore the interests of the illegitimate child in determining her true paternity—including intestacy inheritance rights, knowledge of both parents' medical histories, and a fuller sense of personal and cultural identity—as well as the interests of those who would be tested or affected by testing of the decedent's body. This Note suggests that in balancing these interests, the interests of the illegitimate child in determining her true paternity outweigh opposing interests, particularly in the context of posthumous paternity cases. This Note concludes by proposing a revision of Maine's probate law that would (1) provide a hierarchy of sources from which to obtain DNA samples for posthumous paternity testing, and (2) give the Probate Court the authority to order such testing upon a sufficient showing that paternity will be established.

## II. JURISPRUDENCE REGARDING INTESTATE SUCCESSION AND PROOF OF PATERNITY

### A. *Proof of Paternity to Establish Intestate Inheritance Rights*

According to the English common law, an illegitimate child was *filius nullius* (the child of no one) and lacked intestate inheritance rights.<sup>7</sup> Many states, including Maine, departed from the harshness of English common law and moved “in the direction of humanity and justice towards innocent and unoffending sufferers.”<sup>8</sup> Although Maine's intestacy law mitigated the harshness of English common law, it required “some positive act on the part of the putative father in order to make the illegitimate child heir of the father.”<sup>9</sup> For example, in the late nineteenth century, an illegitimate child's right of inheritance was recognized only if the putative father married the mother of the child, adopted the child, or acknowledged before a public official that he was the father.<sup>10</sup>

In the case of children born in wedlock whose paternity was called into question, the legal system historically recognized a presumption that the mother's husband was also the child's father.<sup>11</sup> However, as one Commentator noted, “changing norms in the American family and scientific advancements in genetic testing have challenged the

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6. *Id.* ¶ 1, 946 A.2d at 391.

7. Le Ray, *supra* note 4, at 750 (citing WILLIAM BLACKSTONE, 1 COMMENTARIES \*459).

8. *Messer v. Jones*, 34 A. 177, 179 (Me. 1896).

9. *Id.*; see also *In re Joyce's Estate*, 183 A.2d 513, 514 (Me. 1962) (“[T]he illegitimate child will be deprived [rights of inheritance] unless an affirmative act is performed.”).

10. *Messer*, 34 A. at 179.

11. Megan Pendleton, *Intestate Inheritance Claims: Determining a Child's Right to Inherit When Biological and Presumptive Paternity Overlap*, 29 CARDOZO L. REV. 2823, 2825 (2008).

strength of the marital presumption over the past several decades.”<sup>12</sup> Accordingly, courts and legislatures must decide “which relationships, biological or social, are most important in determining the existence of a father-child relationship.”<sup>13</sup>

*B. Supreme Court Decisions Involving Inheritance Rights of Illegitimate Children*

The United States Supreme Court addressed the issue of the inheritance rights of illegitimate children in two seminal cases: *Trimble v. Gordon*<sup>14</sup> and *Lalli v. Lalli*.<sup>15</sup> In 1977, the *Trimble* Court held that section 12 of the Illinois Probate Act, which allowed a child born out of wedlock to inherit by intestate succession only from the mother (while a child born in wedlock could inherit by intestate succession from both the mother and the father), denied children born out of wedlock equal protection of the law.<sup>16</sup> Applying a standard of intermediate scrutiny, the Court found the statute possessed only an “attenuated relationship” to the state’s asserted goals of promoting two-parent families and the orderly disposition of estates.<sup>17</sup> Accordingly, the Court held that the statute violated the Equal Protection Clause of the Fourteenth Amendment.<sup>18</sup>

One year later, in *Lalli*, the Court upheld a New York statute that permitted non-marital children to inherit from their biological father only if paternity had been legally determined during the father’s lifetime.<sup>19</sup> The Court upheld the statute on the ground that the requirement of a paternity judgment during the father’s lifetime furthered the state’s goals of ensuring accuracy, simplifying estate administration, and discouraging fraudulent paternity claims.<sup>20</sup> In addition, the Court noted that the statute in this case, unlike that in *Trimble*, did not condition inheritance rights on the marriage of the biological parents.<sup>21</sup>

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12. *Id.*

13. *Id.*

14. 430 U.S. 762 (1977).

15. 439 U.S. 259 (1978).

16. *Trimble*, 430 U.S. at 776. Section 12, in relevant part, stated:

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.

*Id.* at 764-65 (quoting ILL. REV. STAT. c. 3, § 12 (1973)).

17. *Id.* at 768-70. Intermediate scrutiny requires that classifications bear a rational relationship to a legitimate state purpose. *Id.*

18. *Id.* at 776.

19. *Lalli*, 439 U.S. at 264-66. Section 4-1.2 of New York’s Estates, Powers and Trusts Law provided: 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 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 . . . .

N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(a)(2)(A) (McKinney 1967).

20. *Lalli*, 439 U.S. at 271-72.

21. *Id.* at 273.

*C. Maine's Intestate Succession Law Regarding Illegitimate Children*

Today, intestate succession rights of illegitimate children are determined by reference to title 18-A, section 2-109 of the Maine Revised Statutes—contained in Maine's version of the Uniform Probate Code (MPC).<sup>22</sup> Section 2-109 expands the possibility of inheritance rights for illegitimate children by allowing paternity to be established “by an adjudication before the death of the father” or “thereafter by clear and convincing proof.”<sup>23</sup> Thus, the MPC provides two exceptions to the old law that required some positive act on the part of the putative father in order to make an illegitimate child his heir apparent.

Interestingly, Maine's law regarding proof of paternity in intestate succession proceedings is inconsistent with its law regarding proof of paternity in child support proceedings. Questions regarding proof of paternity in child support cases are answered by reference to title 19-A, sections 1558 and 1561 of the Maine Revised Statutes—contained in Maine's version of the Uniform Act on Paternity (MAP).<sup>24</sup> In contrast to the MPC, the MAP explicitly allows for blood and tissue tests in determining

22. The statute, in relevant part, provides:

[A] person born out of wedlock . . . is also a child of the father if:

- (i) The natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or
- (ii) The father adopts the child into his family; or
- (iii) The father acknowledges in writing before a notary public that he is the father of the child, or the paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof . . .

ME. REV. STAT. ANN. tit. 18-A, § 2-109(2)(i)-(iii) (1998).

23. *See id.* § 2-109(2)(iii).

24. Section 1558 provides that courts may “order the mother, child and alleged father to submit to blood or tissue typing tests.” ME. REV. STAT. ANN. tit. 19-A, § 1558 (1998). Additionally, section 1558 provides that “[i]f a party refuses to submit to those tests, the court may resolve the question of paternity against the party or may enforce the order, if the rights of others and the interests of justice so require.” *Id.* Section 1561, in pertinent part, reads as follows:

- 1. Effect of results. The results of the tests required pursuant to section 1558 are evidence to be used in determining paternity as follows.
  - A. If the court finds that the conclusion of all the experts, as disclosed by the evidence based upon the tests, is that the alleged father is not the parent of the child, the question of paternity must be resolved accordingly.
  - B. If the experts disagree in their findings or conclusions, the question must be submitted upon all the evidence.
  - C. If the experts conclude that the blood or tissue tests show that the alleged father is not excluded and that the probability of the alleged father's paternity is less than 97%, this evidence must be admitted by the court and weighed with other competent evidence of paternity.
  - D. If the experts conclude that the blood or tissue tests show that the alleged father is not excluded and that the probability of the alleged father's paternity is 97% or higher, the alleged father is presumed to be the father, and this evidence must be admitted.

The court shall admit as evidence the results of any genetic test that is of a type generally acknowledged as reliable by accreditation bodies designated by the federal Secretary of the Department of Health and Human Services and performed by a laboratory approved by such an accredited body.

*See id.* at § 1561.

paternity and provides for the admissibility and evidentiary weight of the possible results of such tests.<sup>25</sup> While it seems logical to apply the evidentiary model of the MAP to intestate succession proceedings under the MPC, Maine's current statutory scheme does not appear to recognize the inferiority of the MPC's proof of paternity requirements as compared to those of the MAP. In particular, the MPC is inferior in this respect because of the scientific certainty with which paternity can be proven by DNA testing.<sup>26</sup>

It is worth noting that a later version of the Uniform Probate Code (UPC), which Maine has *not* adopted, revises the proof of paternity requirements so as to defer to the applicable state paternity statute for determination of paternity in intestate succession proceedings.<sup>27</sup> Thus, if Maine were to adopt this revised version of the UPC, proof of paternity in intestate succession proceedings would be determined by reference to sections 1558 and 1561 of the MAP. However, this is not the case.

As a result of the MPC's silence on the issue of biological evidence, the questions surrounding proof of paternity in intestate succession proceedings are left to the Probate Court. The MPC confers both personal and subject matter jurisdiction on the Probate Court in intestate succession proceedings.<sup>28</sup> Moreover, the Probate Court has equity jurisdiction "concurrent with the Superior Court, over 'all cases and matters relating to the administration of the estates of deceased persons, to wills and to trusts which are created by will or other written instrument.'"<sup>29</sup> Thus, in intestate succession proceedings calling for a determination of paternity, the Probate Court is left to decide

25. In contrast, for purposes of posthumous paternity testing, title 18-A, section 2-109 merely allows for "clear and convincing proof." ME. REV. STAT. ANN. tit. 18-A, § 2-109(2)(iii) (1998).

26. *See infra* notes 97-100 and accompanying text for a discussion of the unfairness of requiring "clear and convincing" proof for posthumous paternity determinations while making it difficult to obtain dispositive DNA evidence; *see also* Ilene Sherwyn Cooper, *Advances in DNA Techniques Present Opportunity to Amend EPTL to Permit Paternity Testing*, N.Y. ST. B.J., July-Aug. 1999, at 34, 41 (1999) (citation omitted) (discussing the scientific accuracy of DNA testing). Cooper explains:

For paternity applications, the odds that two unrelated people possess the same DNA band pattern have been calculated to be, on average, 30 billion to one. Given that the Earth's population is about 5 billion (only 2.5 billion males), it is impossible to be more sure of a paternity determination with any other available test.

*Id.*

27. UNIF. PROBATE CODE § 2-114, 8 U.L.A. 91 (1997). The proposed statute states: Except as provided in subsections (b) and (c), for purposes of intestate succession by, through, or from a person, an individual is the child of his [or her] natural parents, regardless of their marital status. The parent and child relationship may be established under [the Uniform Parentage Act] [applicable state law] [insert appropriate statutory reference].

*See id.* § 2-114(a), 8 U.L.A. at 91.

28. ME. REV. STAT. ANN. tit. 4, § 252 (1998). The *Kingsbury* court explained: [T]he Probate Court has both personal jurisdiction over Kingsbury's estate as a resident of Sagadahoc County at the time of his death, . . . and subject matter jurisdiction over MacMahan's petition in that it regards "subject matter relating to . . . estates of decedents, including construction of wills and determination of heirs and successors of decedents and estates of protected persons . . ."

*Kingsbury*, 2008 ME 79, ¶ 7 n.3, 946 A.2d at 393, n.3 (quoting ME. REV. STAT. ANN. tit. 18-A, § 1-302(a) (1998 & Supp. 2008)).

29. *Kingsbury*, 2008 ME 79, ¶ 7 n.3, 946 A.2d at 393, n.3 (quoting ME. REV. STAT. ANN. tit. 4, § 252 (1998)).

what constitutes “clear and convincing proof” and in what ways that proof may be obtained.<sup>30</sup>

The Law Court’s recent decision in *Kingsbury* reveals the inadequacy of Maine’s probate code. In *Kingsbury*,<sup>31</sup> the Law Court considered the following questions arising from the Probate Court’s order to exhume the body of an intestate decedent for paternity testing: (1) Is an interlocutory appeal appropriate under the death knell exception where the appellant seeks to prevent an exhumation? (2) Does the Probate Court have the authority to order an exhumation?<sup>32</sup> Before addressing the *Kingsbury* decision, it is helpful to consider the possible methods of posthumous paternity testing and their legal implications.

### III. METHODS OF POSTHUMOUS PATERNITY TESTING

#### A. Testing Relatives Who Are Parties to the Action

The Probate Court may order an examination of the “physical condition (including blood group) of a party” upon a showing of “good cause.”<sup>33</sup> Accordingly, the Probate Court is authorized to order a party, who is a blood relative of an intestate decedent, to submit to DNA testing to determine the paternity of a petitioner.

The MAP authorizes courts to order the mother, child, or alleged father submit to “blood or tissue typing tests.”<sup>34</sup> However, this statute primarily concerns child support litigation and seemingly presumes that the putative father is alive.<sup>35</sup> Accordingly, under the current statutory scheme the MAP has no obvious relevance to cases requiring posthumous paternity testing.

#### B. Testing Collateral Parties

One Commentator has suggested that the law in states such as Maine “fails to recognize the utility of performing blood or DNA tests on collateral persons.”<sup>36</sup> This reluctance to test collateral parties, however, is likely rooted in conflicting policy concerns. For example, in other jurisdictions where the question of testing collateral parties has been presented, courts have struggled to balance the right of illegitimate children to prove paternity with the privacy interests of those to be tested.<sup>37</sup>

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30. ME. REV. STAT. ANN. tit. 18-A, § 2-109 (1998).

31. 2008 ME 79, 946 A.2d 389.

32. *Id.* ¶ 1, 946 A.2d at 391.

33. See ME. R. CIV. P. 35(a); ME. R. PROB. P. 35.

34. ME. REV. STAT. ANN. tit. 19-A, § 1558 (1998).

35. See Dep’t of Hum. Servs. v. Hafford, 2003 ME 15, ¶ 9, 815 A.2d 806, 809 (noting that the legislature enacted the UAP to specify “a father’s child support responsibilities”).

36. Le Ray, *supra* note 4, at 755.

37. See, e.g., Sudwischer v. Estate of Hoffpauir, 589 So.2d 474, 476 (La. 1991) (noting that the plaintiff’s right to discover her true paternity is weighed against the invasion of the legitimate daughter’s privacy that would result from a compelled blood drawing); Voss v. Duerscherl, 408 N.W.2d 161, 166-67 (Minn. Ct. App. 1987) (considering four factors in a right-to-privacy balancing analysis: (1) the importance of the state’s purpose in requiring the intrusion in question; (2) the nature and seriousness of the intrusion; (3) whether the state’s purpose justified the intrusion; and (4) whether the means adopted were proper and reasonable).



Some courts have ordered testing of collateral parties based on the court's inherent powers or upon statutory interpretation.<sup>38</sup> For example, a New Jersey court held:

If a court has the inherent power to require a nonparty to give evidence in the form of testimony in the quest for the truth, it also has the inherent power to require a nonparty to give evidence in the form of a blood sample in the quest for the truth.<sup>39</sup>

In contrast, the Supreme Court of Louisiana employed civil discovery rules to order the legitimate daughter of a decedent, who was not a party to the case, to submit to a blood test for DNA testing.<sup>40</sup>

In Maine, courts may issue subpoenas to compel a nonparty adult to provide “testimony or to produce and permit inspection and copying of designated books, documents or tangible things, or permit inspection of premises, in the possession, custody or control of that person.”<sup>41</sup> While the plain language of this rule does not suggest that subpoenas may be used to obtain DNA samples from collateral parties, it seems plausible that a court could broadly interpret the rule or extrapolate from it to allow for such subpoenas.

Some courts have raised the question of whether ordering the submission to DNA testing is a violation of the Fourth Amendment protection against unreasonable searches and seizures. The United States Supreme Court recognized that because blood testing requires an intrusion into the body of a defendant, the Fourth Amendment requires that it be supported by probable cause.<sup>42</sup> Although *Schmerber* was a criminal case, the Court has since held that the constraints of the Fourth Amendment also apply in the civil context.<sup>43</sup> In the context of a paternity action, a New Jersey appellate court required the plaintiff to show, as a prerequisite to court-ordered blood testing of collateral parties, that there was “an articulable reason” for suspecting that the decedent was the plaintiff’s father.<sup>44</sup>

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38. See, e.g., *In re Estate of Rogers*, 583 A.2d 782, 783-84 (N.J. Super. Ct. App. Div. 1990) (ex-wife ordered to submit to tests); *Sudwischer*, 589 So.2d at 476 (legitimate daughter ordered to submit to tests).

39. *Rogers*, 583 A.2d at 784. Specifically, the court held that the trial court had the inherent power to order a collateral party to submit to blood tests and to use contempt or other sanctions to coerce that party’s compliance if it found the plaintiffs needed the blood test results to meet their burden of proof in the underlying paternity action. *Id.* See also *Tipps v. Metro. Life Ins. Co.*, 768 F. Supp. 577, 580 (S.D. Tex. 1991) (finding that DNA testing of living relatives provided the clear and convincing evidence required to rebut the presumption that the decedent was the plaintiff’s biological father).

40. *Sudwischer*, 589 So.2d at 475 (relying on the fact that the state’s discovery rules provide for discovery of any non-privileged matter that is relevant to the subject matter of the case).

41. ME. R. CIV. P. 45(a)(1)(C). See also ME. R. CIV. P. 34(c) (“A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45.”).

42. *Schmerber v. California*, 384 U.S. 757, 772 (1966). See *State v. Chase*, 2001 ME 68, 785 A.2d 702 (Me. 2001), for an application of this holding in Maine criminal law. In deciding *Chase*, the Law Court held: “Although a blood test does constitute a search that normally requires a warrant based on probable cause, . . . no Fourth Amendment violation occurred . . . because the police had probable cause to believe that [the defendant] was operating under the influence . . .” *Id.* ¶ 14, 785 A.2d at 706 (citation omitted).

43. See *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

44. *Rogers*, 583 A.2d at 785.

*C. Testing the Body of the Decedent*

In intestate succession cases involving petitions to exhume and test the body of a deceased putative father, courts have generally granted such requests unless barred from doing so by a specific statute.<sup>45</sup> For example, the Pennsylvania Superior Court held that as long as the plaintiff presented a “reasonable cause” to believe that the exhumation of the decedent would conclusively prove paternity, the court should grant the exhumation request.<sup>46</sup> Some states have enacted posthumous paternity laws that allow courts to order the testing of the deceased putative father’s remains.<sup>47</sup>

Prior to *Kingsbury*, Maine law contained no guidance, statutory or otherwise, regarding whether an intestate decedent’s body could be exhumed for DNA paternity testing. Ultimately, the Law Court concluded that the inherent power of the Probate Court includes the authority to order exhumation for genetic testing.<sup>48</sup>

IV. THE *KINGSBURY* DECISION

Bruce Kingsbury (Kingsbury) died on March 18, 2006.<sup>49</sup> At the time of the execution of his will he was married to Gloria Kingsbury, to whom he left his entire estate.<sup>50</sup> However, he and Gloria subsequently divorced, and he failed to revoke or change the provisions of his will.<sup>51</sup> Accordingly, Gloria’s rights under the will were nullified because “the Probate Code provides that the effect of the divorce was a revocation of the disposition to Gloria . . . .”<sup>52</sup> The will failed to provide an alternate disposition; therefore, the estate passed to Kingsbury’s heirs in accordance with the MPC’s intestacy provisions.<sup>53</sup> Because Kingsbury was not survived by a spouse or registered domestic partner, the MPC dictated that his estate was to be distributed to his children.<sup>54</sup>

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45. Le Ray, *supra* note 4, at 766-67.

46. Wawrykow v. Simonich, 652 A.2d 843, 847 (Pa. Super. Ct. 1994).

47. See, e.g., VA. CODE ANN. § 32.1-286 (1999). Virginia’s statute, in relevant part, provides: In any case of death in which a private person has an interest, such person may petition the judge of the circuit court exercising jurisdiction over the place of interment and, upon proper showing of sufficient cause, such judge may order the body exhumed. . . .

....

Upon the petition of a party attempting to prove . . . that he is the issue of a person dead and buried, a court may order the exhumation of the body of a dead person for the conduct of scientifically reliable genetic tests, including DNA tests, to prove a biological relationship. . . . This provision is intended to provide a procedural mechanism for obtaining posthumous samples for reliable genetic testing and shall not require substantive proof of parentage to obtain the exhumation order.

See *id.* § 32.1-286(B)-(C).

48. *Kingsbury*, 2008 ME 79, ¶ 9, 946 A.2d at 394.

49. Brief for the Appellant at 1, *In re Kingsbury*, 2008 ME 79, 946 A.2d 389 (2008) (No. SAG-07-520).

50. *Id.*

51. *Id.*

52. *Id.* (citing ME. REV. STAT. ANN. tit. 18-A, § 2-508 (1998)).

53. *Id.* (citing ME. REV. STAT. ANN. tit. 18-A, § 2-101 (1998)).

54. Brief for the Appellee at 1, *In re Kingsbury*, 2008 ME 79, 946 A.2d 389 (2008) (No. SAG-07-520).

Gloria is the mother of Terri MacMahan, who was conceived while Gloria was married to Larry Burnham.<sup>55</sup> However, during that marriage, Gloria was involved in an intimate relationship with Kingsbury.<sup>56</sup> During Kingsbury's lifetime, neither he nor anyone else told MacMahan that he could be her biological father.<sup>57</sup> She was informed of this possibility following Kingsbury's death.<sup>58</sup>

On April 3, 2006, Kingsbury's daughter Robin Whorff filed an Application for Informal Probate of Will and Appointment of Personal Representative with the Sagadahoc County Probate Court, wherein she claimed to be Kingsbury's sole heir and requested her appointment as personal representative.<sup>59</sup> On May 4, 2006, MacMahan filed a petition requesting, as a biological daughter of Kingsbury, that she and Whorff share in the distribution of the estate<sup>60</sup> pursuant to title 18-A, section 3-1001 of the Maine Revised Statutes. Initially, Kingsbury's siblings agreed to provide DNA samples to MacMahan for the purpose of proving her biological relationship to Kingsbury; however, they later reneged.<sup>61</sup>

On November 30, 2006, MacMahan filed an Emergency Motion for Continuance asking the court to compel Whorff to submit to DNA testing, or alternatively, to order the exhumation of Kingsbury's body for such testing.<sup>62</sup> The Probate Court granted MacMahan's motion, ordering that Whorff submit to the test within forty-five days of the order, otherwise the body would be exhumed for testing.<sup>63</sup> The Probate Court based its authority to order the exhumation on its equitable jurisdiction.<sup>64</sup>

On appeal to the Law Court, Whorff argued that her interlocutory appeal was appropriate under the "death knell exception"<sup>65</sup> to the final judgment rule.<sup>66</sup>

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55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 2.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 2-3.

64. See *Kingsbury*, 2008 ME 79, ¶¶ 8-9, 946 A.2d at 393-94 (citing ME. REV. STAT. ANN. tit. 4, § 252 (2007)).

65. There are three "narrow and well-defined exceptions" to the final judgment rule: the collateral order exception, the death knell exception, and the judicial economy exception. *Bruesewitz v. Grant*, 2007 ME 13, ¶¶ 5-8, 912 A.2d 1255, 1257-58 (quoting *State v. Me. State Employees*, 482 A.2d 461, 464 (Me. 1984)). "The death knell exception allows for an appeal of an interlocutory order 'where substantial rights of a party will be irreparably lost if review is delayed until final judgment.'" *Bruesewitz*, 2007 ME 13, ¶ 8, 912 A.2d at 1258 (quoting *Webb v. Haas*, 1999 ME 74, ¶ 5, 728 A.2d 1261, 1264) (citation omitted). "The death knell exception applies only to orders that, without an interlocutory appeal, result in a substantial loss or sacrifice of the rights, property, or claim at issue." *Id.* (citing ALEXANDER, MAINE APPELLATE PRACTICE § 304(a), at 166 (2005)). Only when "the injury to the plaintiff's claimed right would otherwise be imminent, concrete, and irreparable," will the Law Court review an interlocutory appeal pursuant to the death knell exception. *In re Bailey M.*, 2002 ME 12, ¶ 7, 788 A.2d 590, 594 (quoting *Morse Bros., Inc. v. Webster*, 2001 ME 70, ¶ 14, 772 A.2d 842, 847). "A right will be 'irreparably lost' if [the appellate court] . . . could not effectively provide a remedy to the appellant if [it] . . . ultimately decided to vacate the interlocutory determination after a final judgment." *Id.* ¶ 8, 788 A.2d at 594 (quoting *Andrews v. Dep't of Envtl. Prot.*, 1998 ME 198, ¶ 4, 716 A.2d 212, 215).

66. "[A]ppeals, in order to be cognizable, must be from a final judgment." *Bruesewitz*, 2007 ME 13, ¶ 5, 912 A.2d at 1257 (quoting *State v. Lemay*, 611 A.2d 67, 68 (Me. 1992) (citation omitted)). A final

Specifically, Whorff argued that if she were “not allowed to appeal [before the exhumation], substantial rights w[ould] be irreparably lost, viz., the prevention of exhumation of the remains.”<sup>67</sup> Moreover, Whorff argued that the exhumation would be at the estate’s expense.<sup>68</sup>

On the merits, Whorff argued that title 4, section 252 of the Maine Revised Statutes, which grants the court equitable jurisdiction and upon which the court relied for its order, did not provide authority to order exhumation.<sup>69</sup> Whorff conceded that section 252 provides that the Probate Court may exercise equity jurisdiction in connection with probate administration “in civil actions in which equitable relief is sought,” but she argued that because MacMahan did not commence a civil proceeding, “much less one requesting equitable relief,” MacMahan was not entitled to equitable relief under section 252.<sup>70</sup>

Additionally, Whorff contended that there was no authority under Maine law for the court to order the exhumation.<sup>71</sup> Lastly, Whorff contended that MacMahan’s petition represented the functional equivalent of a time-barred paternity action under the MAP.<sup>72</sup>

In her opposing brief, MacMahan argued that the appeal from the interlocutory order was inappropriate.<sup>73</sup> She argued that the death knell exception did not apply because the substantial right that Whorff argued would be irreparably lost (i.e., the prevention of the exhumation) would only be sacrificed if Whorff refused to submit to DNA testing.<sup>74</sup> Additionally, MacMahan refuted (1) Whorff’s contentions regarding the Probate Court’s authority to grant the equitable relief of exhuming the body, and (2) that the petition constituted a time-barred paternity action.<sup>75</sup>

In a four-to-three decision, the Law Court held that Whorff’s appeal qualified for interlocutory appeal under the death knell exception and found that the Probate Court was authorized to order the exhumation of Kingsbury’s body.<sup>76</sup> On the procedural issue, the Law Court reasoned that if the estate were “not permitted to seek redress now, its right to prevent the exhumation of Kingsbury’s remains w[ould] be irreparably

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judgment is one that “fully decides and disposes of the entire matter pending before the court or administrative agency, leaving no questions for the future consideration and judgment of the court or administrative agency.” *MacPherson v. Estate of MacPherson*, 2007 ME 52, ¶ 5, 919 A.2d 1174, 1175 (quoting *Carroll v. Town of Rockport*, 2003 ME 135, ¶ 16, 837 A.2d 148, 154 (Me. 2003)). “Any other interim order is deemed interlocutory and is not subject to appellate review until such a final judgment issues.” *Kingsbury*, 2008 ME 79, ¶ 4, 946 A.2d at 392.

67. Brief for the Appellant, *supra* note 49, at 2.

68. *Id.* at 2-3.

69. *Id.* at 3.

70. *Id.* at 4.

71. *Id.*

72. *Id.* at 6. Whorff noted that title 19-A, section 1554 of the Maine Revised Statutes provided that a paternity action must be commenced by the putative child’s eighteenth birthday. *Id.* Whorff contended that the MAP provided the exclusive means by which MacMahan could establish paternity and, because the statute of limitations for such an action had expired, the petition was time-barred. *Id.* at 6-7.

73. Brief for the Appellee, *supra* note 54, at 4.

74. *Id.* at 5.

75. *Id.* at 6-20.

76. *Kingsbury*, 2008 ME 79, ¶ 1, 946 A.2d at 391.

lost.”<sup>77</sup> The court noted that if the estate were barred from exercising its right to prevent the exhumation, “that right will be lost forever, and we could afford no adequate remedy for the violation of that right if the Probate Court’s final judgment on MacMahan’s petition was later vacated.”<sup>78</sup>

The court declined to determine whether the first alternative (i.e., ordering Whorff to submit to DNA testing) was sufficient to satisfy the death knell exception to the final judgment rule. Instead, the court held that Whorff, as personal representative of the estate, could “challenge the exhumation portion of the court’s order without regard to the other alternative in the order regarding her personally.”<sup>79</sup>

The Law Court determined that the Probate Court possessed personal jurisdiction over Kingsbury’s estate, subject matter jurisdiction over MacMahan’s petition, and equitable jurisdiction in this case.<sup>80</sup> Next, the court held that “[b]y the plain language of sections 1-302(b) and -252, the Probate Court has equitable authority to decide all matters relating to the determination of Kingsbury’s heirs and administration of his estate, and may take any action necessary to resolve such disputes properly before it.”<sup>81</sup>

However, the court noted that “the authority of the Probate Court is not without limit, and that there *must be good cause or sufficient reason advanced to justify exercise of such broad power*.”<sup>82</sup> By this standard, the court determined that MacMahan had presented sufficient evidence that she was Kingsbury’s biological daughter and that such evidence created “at the very least a reasonable probability that genetic testing of Kingsbury’s exhumed body, as ordered by the Probate Court, w[ould] reveal that MacMahan is the daughter of Kingsbury.”<sup>83</sup> Accordingly, the court held that “the Probate Court was indeed authorized to order the exhumation of Kingsbury’s remains for the purpose of DNA paternity testing in connection with MacMahan’s petition.”<sup>84</sup>

The dissent argued that because Whorff was “both the personal representative and a party-in-interest in this action,” she was “properly subject to a discovery request and order in either capacity.”<sup>85</sup> Thus, the dissent argued, the Law Court should not have been involved in this “interlocutory discovery dispute.”<sup>86</sup> Rather, the Probate Court should have “directed Whorff to provide a sample for DNA testing or, alternatively, face a default on the issue that would be subject to the genetic test.”<sup>87</sup> The dissent reasoned that “[s]uch an order, part of ongoing discovery that occurs in civil and criminal cases, should not justify an interlocutory appeal.”<sup>88</sup> Moreover, “[h]aving to give a small sample of one’s hair or other similar, noninvasive sample does not cause

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77. *Id.* ¶ 6, 946 A.2d at 392.

78. *Id.* ¶ 6, 946 A.2d at 393.

79. *Id.* ¶ 6, 946 A.2d at 392 n.2.

80. *Id.* ¶¶ 8-9, 946 A.2d at 393-94.

81. *Id.* ¶ 9, 946 A.2d at 393-94.

82. *Id.* ¶ 9, 946 A.2d at 394 (emphasis added). The italicized language appears to be the standard announced by the Law Court for determining future analogous cases.

83. *Id.*

84. *Id.*

85. *Id.* ¶ 11, 946 A.2d at 394.

86. *Id.* ¶ 10, 946 A.2d at 394.

87. *Id.* ¶ 11, 946 A.2d at 394.

88. *Id.*

a substantial or irreparable loss of a right, property, or claim” as would justify an interlocutory appeal under the death knell exception to the final judgment rule.<sup>89</sup>

## V. ANALYSIS

*Kingsbury* presented the question of how the law should deal with requests for posthumous paternity testing in the context of intestate succession proceedings. In effect, the *Kingsbury* decision establishes that in such cases, the Probate Court—upon a showing that paternity will likely be established—may order that a party-in-action, who is a blood relative of the decedent, submit to DNA testing pursuant to rule 35 of the Maine Rules of Civil Procedure. Alternatively, if the party refuses to so submit, the court is authorized to order the disinterment of the decedent’s body for DNA testing. Although *Kingsbury* was a step in the right direction, the law should be further refined to better serve the interests of illegitimate children.

### A. Conflicting Interests in Posthumous Paternity Testing

Obviously, a putative illegitimate child has a substantial financial interest in posthumous paternity testing—the possibility of obtaining inheritance rights to the decedent’s estate under state intestacy laws. However, apart from this financial interest, the illegitimate child has other substantial interests in determining paternity posthumously.

Perhaps most compelling among these is the child’s interest in learning the medical histories of her biological parents. Commentators have noted that knowledge of both parents’ medical histories enables a child to be aware of genetic predispositions to certain illnesses thereby allowing the child to take preventive medical measures and make lifestyle adaptations.<sup>90</sup> Conversely, if a child is ignorant of a parent’s medical history, there is a substantial risk that the child’s health will eventually suffer; the availability of family medical information could result in faster and more accurate diagnoses and, in turn, better treatment and preventive care. In addition, beyond risks to her own health, the illegitimate child who does not know both parents’ medical histories has a justifiable concern about potentially dangerous genetic predispositions facing their own children.

Another considerable interest of the illegitimate child in this context is the relationship between the illegitimate child’s sense of personal and cultural identity and the knowledge of her biological origins.<sup>91</sup> For example, studies of adopted children

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89. *Id.* ¶ 13, 946 A.2d at 394.

90. See Donald C. Hubin, *Daddy Dilemmas: Untangling the Puzzles of Paternity*, 13 CORNELL J.L. & PUB. POL’Y 29, 32-35 (2003) (“Individuals who lack the medical history of both parents are at a disadvantage in the diagnosis and treatment of a variety of diseases compared to those who possess such information.”); see also Lauren Taub, *Major Privacy Concerns When Minor Sues for Paternity*, 26 WASH. U. J.L. & POL’Y 459, 465 (2008). Taub asserts:

[A] child may have a medical interest in finding his or her parents’ identity because many medical disorders are genetic and can be inherited from maternal or paternal lines. If potential defects are determined early in the child’s life, there is a possibility that the defects can be prevented or treated to minimize the effects of an inherited disease.

*Id.*

91. Ilene Sherwyn Cooper, *Posthumous Paternity Testing: A Proposal to Amend EPTL 4-1.2(A)(2)(D)*, 69 ALB. L. REV. 947, 965 (2006) (“Apart from financial benefits, a determination of paternity will also

have found that a child's knowledge of her background is crucial to the formation of positive self-identity.<sup>92</sup>

Lastly, it is important to consider the illegitimate child's interest in simply knowing the identity of her father. Who was he? What were the circumstances of the parental relationship? What is the story of his life? These are reasonable and unavoidable questions, and the illegitimate child has an interest in finding their answers.

In the context of posthumous paternity testing, the opposing interests belong to the people from whom DNA samples are obtained as well as those who have an interest in keeping the decedent's body undisturbed. For example, blood relatives of the decedent have a privacy interest in preventing the invasion of their person for the purpose of obtaining a DNA sample for testing. With regard to testing the decedent's body, the family may have an emotional and religious interest in keeping the decedent's body undisturbed. Lastly, recognized heirs of an intestate decedent have a financial interest in denying a putative illegitimate child access to proof of paternity (i.e., a sample of their DNA), on the basis of which he or she could gain a substantial share in the estate.

### B. *Balancing the Interests*

Upon balancing the aforementioned competing interests, the interests of the illegitimate child outweigh the opposing interests. First, compare the illegitimate child's interests to those of a blood relative from whom a DNA sample is sought. The illegitimate child's interests—gaining inheritance rights, learning of a biological parent's medical history, and developing a more complete sense of identity—are far more compelling than the privacy and financial interests of blood relatives from whom DNA samples are sought. The argument in support of the privacy interest of blood relatives of the decedent is attenuated by the fact that the bodily invasion in obtaining a DNA sample is minimal. DNA samples can be obtained from blood, tissue, pulled head hair samples with intact roots, fingernail clippings, bone marrow, tooth pulp, dried blood stains, and biopsy samples.<sup>93</sup>

In contrast to this Note's contention that the financial interests of the recognized heirs of an intestate decedent—in preventing the illegitimate child's access to proof of paternity—are outweighed by the aforementioned interests of the illegitimate child, one Commentator has suggested that in the context of posthumous paternity testing, the illegitimate child should not share in the distribution of the estate because she did not share in the parent-child relationship.<sup>94</sup> Under this theory, one could argue that the

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provide a child with the intangible psychological and emotional benefits inherent in both establishing a familial bond and learning cultural heritage. Indeed, an individual's sense of identity is often linked to an awareness of parentage and family history.”).

92. See generally Ilke Turkmendag, Robert Dingwall & Thérèse Murphy, *The Removal of Donor Anonymity in the UK: The Silencing of Claims by Would-Be Parents*, 22 INT'L J.L. POL'Y & FAM. 283 (2008); Alexina McWhinnie, *Gamete donation and anonymity: Should offspring from donated gametes continue to be denied knowledge of their origins and antecedents?*, 16 HUM. REPROD. 807 (2001); JOHN TRISELIOTIS, IN SEARCH OF ORIGINS: THE EXPERIENCES OF ADOPTED PEOPLE (1973).

93. Le Ray, *supra* note 4, at 764-65.

94. Megan Pendleton, *supra* note 11, at 2827. Pendleton argues that in heirship determinations “the threshold inquiry should be the nature of the parent-child relationship,” and “legislatures should assign

balance tips in favor of legitimate children; that is, the illegitimate child should not be allowed to assert inheritance rights by determining paternity after the putative father's death. However, upon reflection, this argument is unconvincing. Intestate inheritance rights are determined by reference to state laws, which must allow for inheritance by illegitimate children. Thus, the illegitimate child has an equal financial interest in the decedent's estate. In addition, the child's other interests—such as learning family medical history and developing a better sense of identity—tip the scales in favor of allowing posthumous paternity testing using the DNA samples of blood relatives (i.e., legitimate children).

Now, compare the interests of those who have an emotional and religious interest in keeping the decedent's body undisturbed with those of the illegitimate child. In the event that the decedent's body is exhumed for DNA testing, the decedent's family and friends would likely be subjected to emotional distress. However, the aforementioned compelling interests of the illegitimate child outweigh the temporary emotional distress resulting from the exhumation of the decedent's body. Moreover, in light of the intestacy law policy goal of determining the rightful heirs of the decedent, the law should favor posthumous paternity determinations over temporary emotional distress.

Lastly, an instructive comparison can be drawn between posthumous paternity testing and adoption and sperm donor cases. In most cases in which there is an adopted or artificially conceived child, there is a living biological father. As such, the living father has competing interests that may include a desire to remain anonymous to the child and a desire to remain free from obligation to the child. In the context of adoption and sperm donor cases, the father's interest in anonymity is considerable and weighs heavily against an adopted or artificially conceived child's right to know.<sup>95</sup> In contrast, the issue of anonymity is not a consideration in the case of posthumous paternity testing because the putative father is dead. This raises the argument that if the adopted child has the right to certain information regarding his biological parents,<sup>96</sup> so too should the illegitimate child in a posthumous paternity determination case.

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courts the discretion to evaluate the existence of a familial parent-child relationship when paternity is at stake in intestate inheritance claims." *Id.* Pendleton's argument is based on the intestacy law policy goal of effectuating the probable intent of the decedent, which, according to Pendleton, would be to distribute the estate only to those children with whom the decedent had a relationship. *Id.*; see also Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 26-27 (2000) ("The data provides overwhelming support for the proposition that the public believes that disposition through intestacy should reflect families as functional units and not be based merely on legal ties of marriage, blood and adoption.").

95. See, e.g., Taub, *supra* note 90, at 483. Taub notes:

If a court determined that a child's best interests were served by acquiring information about his or her absent biological parent, the court could award the child *non-identifying information* about the parent. An award of non-identifying information would protect the privacy of both biological parents, yet provide the child with necessary medical or psychological information about the absent biological parent.

*Id.*

96. The Maine Legislature recently passed a law authorizing adult adoptees to obtain a copy of their original certificate of birth from the State Registrar of Vital Statistics. ME. STAT. ANN. tit. 22, § 2768 (2008). Additionally, the law provides that birth parents of adoptees shall have the option of providing a medical history form and a contact preference form, which are kept with the certificate of birth. See *id.* § 2769.



*C. Beyond Balancing Interests: Other Reasons for a Change in the Law*

One Commentator, Kate Schuler, suggested that posthumous paternity cases should be resolved by giving the courts discretion and by providing statutory standards of proof (i.e., “clear and convincing proof”).<sup>97</sup> However, she noted that it is unfair to impose the “clear and convincing proof” standard while denying illegitimate children access to DNA evidence by which to meet the standard. This is the current state of the law in Maine.<sup>98</sup> Schuler reasoned that with the advent of accurate DNA paternity testing “deceased putative fathers are protected against false paternity claims, [and] illegitimate children must be protected against impossible hurdles in proving paternity.”<sup>99</sup> Schuler concluded:

[U]nless an illegitimate child has a fair opportunity to obtain posthumous DNA evidence, the “clear and convincing” standard is inequitable . . . . Lowering standards for a court order of exhumation or the blood testing of relatives seems to be a necessary outcome if a state’s goal is to grant illegitimate children equality with those children born in wedlock.<sup>100</sup>

Schuler’s observations illuminate the current inadequacy of Maine’s probate code. In the event that a child learns of her biological father for the first time only after his death, such as the petitioner in *Kingsbury*, that child faces significant hurdles in determining her true paternity. Although the *Kingsbury* decision made positive strides by affirming the Probate Court’s authority to order a party-in-action to submit to DNA testing and to exhume the decedent’s body for such testing, the law should be further refined to facilitate the availability of DNA samples for posthumous paternity testing.

Specifically, the Maine Legislature should codify *Kingsbury* as well as expand upon its holding by authorizing the genetic testing of collateral parties, which is less controversial and less burdensome than testing the body of the decedent. Moreover, if collateral parties are unavailable or refuse to submit to testing, then the law should favor exhuming the body for dispositive DNA testing—rather than forcing the opposing party to face a conditional default judgment.

Those who would object to such a statutory scheme should consider that any perceived injustice is easily avoided by the creation of an effective will, which would avoid any involvement of intestacy statutes.<sup>101</sup>

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97. Kate Schuler, *The Liberalization of Posthumous Paternity Testing—Expanding the Rights of Illegitimate Children*, 17 QUINNIPIAC PROB. L.J. 150, 172 (2003).

98. See ME. REV. STAT. ANN. tit. 18-A, § 2-109 (1998).

99. Schuler, *supra* note 97, at 174 (“An illegitimate child must still be required to prove paternity of a decedent by clear and convincing evidence. However, illegitimate children must also be allowed to enter into evidence posthumous scientific paternity tests in order to meet that standard.”).

100. *Id.* at 152.

101. This Note is limited in scope to posthumous paternity testing in the context of intestate decedents. However, the questions posed here should be considered in other contexts as well. For example, what rights do illegitimate children have to posthumous paternity determinations when the decedent did *not* die intestate? Should these people be allowed to subpoena DNA samples from relatives or exhume the body for testing?

*D. Proposed Changes to Maine Law*

The statutory revisions proposed below essentially codify *Kingsbury* and expand upon it by providing for the testing of collateral parties and implementing a hierarchy of sources for paternity testing. Although the *Kingsbury* precedent is, in large part, the functional equivalent of the ideal law in this area, it falls short in one respect. Specifically, the Probate Court's order did not order testing of Kingsbury's siblings (i.e., collateral parties) in addition to its order that Kingsbury's legitimate daughter (i.e., representative of the estate and party-in-interest) submit to testing. Accordingly, the issue of testing collateral parties did not come before the Law Court, thus limiting its holding in that respect. The Maine Legislature should revise its statutory scheme in accordance with the revisions set forth below.

Maine should adopt the updated 1990 version of the UPC,<sup>102</sup> which incorporates the paternity-determination provisions of the state's applicable paternity statute; thus, in Maine, the UPC would incorporate the MAP. In addition, the MAP paternity-determination provision<sup>103</sup> should be amended to include the additional underlined language:

The court, upon its own initiative or upon suggestion made by or on behalf of a person whose blood or tissue is involved or the mother, may order or, upon motion of a party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child and alleged father to submit to blood or tissue typing tests, which may include, but are not limited to, tests of red cell antigens, red cell isoenzymes, human leukocyte antigens and serum proteins. If the alleged father is deceased, the court shall order DNA testing of blood relatives of the decedent, upon a showing that paternity may be established by the testing of such relatives. If a blood relative of the decedent is a party to the action, that relative should be tested first pursuant to M. R. Civ. P. 35. In the event that a blood relative is not a party to the action or refuses to submit to testing,<sup>104</sup> the court shall order DNA testing of blood relatives of the decedent who are not parties to the action. If blood relatives are unavailable or refuse<sup>105</sup> to submit to DNA testing, the court shall order DNA testing

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102. UNIF. PROBATE CODE § 2-114, 8 U.L.A. 91 (1997).

103. ME. REV. STAT. ANN. tit. 19-A, § 1558 (1998).

104. Rule 37 of the Maine Rules of Probate Procedure (incorporating by reference Rule 37 of the Maine Rules of Civil Procedure) provides the court means by which to sanction parties who fail to comply with orders. In the case of a failure to comply with an order to submit to a physical examination (i.e., provide a DNA sample), the rule provides that a court may issue an order:

(A) . . . that "matters regarding which the order was made . . . shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order; . . .

(C) . . . staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party[.]

ME. R. PROB. P. 37(b)(2)(A), (C). Notably, however, the court may not treat such a failure to comply as contempt of court. *See id.* at 37(b)(2)(D).

105. Although DNA samples are not mentioned in Rule 45 of the Maine Rules of Probate Procedure (incorporating by reference Rule 45 of the Maine Rules of Civil Procedure), this Note contends that ordering DNA testing of collateral parties in posthumous paternity cases should be viewed as a type of subpoena. Accordingly, collateral parties refusing to submit to such testing could be held in contempt. *Id.* at 45(f).

of the decedent's body or other samples. If genetic samples from the decedent or his blood relatives are stored in a DNA database, the court shall order their release for testing, and shall do so before ordering the testing of the decedent's relatives or testing of the decedent's body. If a party refuses to submit to those tests, the court may resolve the question of paternity against that party or may enforce the order, if the rights of others and the interests of justice so require.<sup>106</sup>

In sum, questions regarding paternity in probate proceedings would be resolved by reference to the UPC's incorporation of a revised MAP. The effect of this statutory change would be the creation of a hierarchy of sources of DNA for the purpose of posthumous paternity testing.

Under this hierarchy, a blood relative who is a party to the action would be ordered to submit to DNA testing by the non-invasive means of providing a bodily sample. If a blood relative party-in-interest does not exist or refuses to submit to testing, the hierarchy shifts to blood relatives who are collateral parties, requiring the same testing as previously mentioned. If such parties do not exist or refuse to submit to testing, then the hierarchy shifts to testing of the decedent's body.<sup>107</sup> If this is the case, the court is authorized to exhume the body to obtain samples for testing.

There is, however, an important exception to all of the aforementioned means of posthumous paternity testing. If genetic samples from the decedent or his blood relatives are stored in a DNA database, the court will order their release for testing and will do so before ordering the testing of the decedent's relatives—whether they are parties to the action or not—or testing of the decedent's body.

There remains only one possible situation for resolution. What if the intestate decedent's relatives refuse to submit to DNA testing, and the decedent's body is cremated or otherwise unavailable for testing? In that case, the Probate Court should

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106. I base my suggested revision of the MAP on Charles Nelson Le Ray's suggested revision of section 7 of the UAP, which provides:

The court, upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved may, or upon motion of any party to the [action] [proceeding] made at a time so as not to delay the proceedings unduly, shall order the mother, child and alleged father to submit to blood or other genetic tests. If the alleged father is deceased, the court may order DNA testing of his body or other samples, or of blood relatives of the deceased, upon a showing that paternity may be established by the testing of such relatives. If genetic samples from the deceased or his blood relatives are stored in a DNA database, the court may order their release for testing, and shall do so before ordering the testing of the deceased's relatives. The results of these DNA tests shall be limited to the question of paternity and shall not reveal information about any party's physical characteristics, predisposition to certain medical conditions or other matters. If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require.

Le Ray, *supra* note 4, at 796 (revisions underlined). Notably, Le Ray's suggested revision provides courts with the authority to order testing of the decedent's body or his blood relatives without offering guidance on which is preferable; apparently, the decision is left to the discretion of the courts. In contrast, my suggested revision provides that the possibility of testing blood relatives should be exhausted *before* the court orders exhumation and testing of the decedent's body.

107. "DNA fingerprinting can establish paternity even when the putative father is deceased because DNA testing uses molecules that remain stable and testable long after death." Le Ray, *supra* note 4, at 764. These molecular samples can be obtained from preserved blood or tissue, pulled head hair samples with intact roots, fingernail clippings, bone marrow, tooth pulp, dried blood stains, and biopsy samples. *Id.*

refer to the last sentence of section 1558 and resolve the question of paternity against the party refusing to submit to testing.

#### VI. CONCLUSION

The proposed changes reflect the utility of using non-invasive, accurate DNA samples from living blood relatives of the decedent for posthumous paternity testing in intestate succession proceedings. Such testing is justified by balancing the interests of the relatives of the decedent against those of the putative illegitimate child. In the exceedingly rare event that blood relatives do not exist or refuse to submit to testing, exhumation of the decedent's body is justified. Although the prospect of raising the dead is disturbing, it is a justifiable last resort upon consideration of the following: in most cases decedents have wills that render the proposed intestacy laws inapplicable to them. Moreover, even where the decedent dies intestate, it seems plausible that in most cases he or she will have left behind at least one blood relative who will be available and willing to supply a DNA sample for testing. In the rarest of cases where an intestate decedent leaves no relatives behind from whom DNA samples can be obtained, the exhumation of his body is justified by the weightier interests of the putative illegitimate child in obtaining inheritance rights and finding answers to questions of medical history and personal identity.