

A STUDY OF THE INTERSECTION OF DNA
TECHNOLOGY, EXHUMATION AND HEIRSHIP
DETERMINATION AS IT RELATES TO MODERN-DAY
DESCENDANTS OF SLAVES IN AMERICA

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Good friend, for Jesus' sake forbear
To dig the dust enclosed here;
Blest be the man that spares these stones,
And curst be he that moves my bones.¹

I. INTRODUCTION

There has been a proliferation of deoxyribonucleic acid (DNA) testing in the last few years to establish paternity,² grand-paternity, great-grand-paternity and beyond.³ Evidence of paternity through DNA testing is virtually error-proof and,

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1. JOHN BARTLETT, *FAMILIAR QUOTATIONS* 226 (Justin Kaplan ed., 16th ed. 1992) (epitaph on the tomb of William Shakespeare at Stratford-on-Avon).

2. See Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 141. Brashier notes that:

Because modern methods of paternity testing are virtually foolproof, evidence such as that provided by DNA testing is perhaps the most persuasive that a claimant can present. A rather unpleasant development resulting from the remarkable increase in the accuracy of paternity testing in recent years is the corresponding increase in requests for exhumation of the purported father's remains.

Id. (footnote omitted).

3. Rochelle Cooper Dreyfuss & Dorothy Nelkin, *The Jurisprudence of Genetics*, 45 VAND. L. REV. 313, 315 (1992).

therefore, extremely persuasive.⁴ Genetic research has been hailed as both offering "definitive answers at a time of frustration with the vagueness of other disciplines" and "provid[ing] apparently concrete information in the face of demands for efficiency and accountability."⁵ DNA testing often yields paternity indices well above 99.99%, a near absolute determination.⁶

Increased paternity testing has been the predictable result of the exploding DNA phenomenon and accounts for a surprising increase in requests for exhumation of the putative father's remains to administer such testing.⁷ DNA, "present in almost all human cells, . . . may remain unchanged long after an individual's death. . . . [DNA] technology creates the promise of accurate paternity determination long after a putative father is dead and buried."⁸

Assuming the accuracy of DNA as credible evidence and the fact of its reliability even from human remains, it is entirely feasible for a present-day descendant of a slave master to establish a causal DNA link with that ancestor of decades past.⁹ This could give rise to a legal claim, under which such a distant ancestor to the slave descendant could have taken had he or she been able to qualify as an heir under a probate court determination of heirship. This avenue might prove a difficult journey for one such descendant who claims under an estate where there was a will duly executed and admitted to probate, although there is current statutory authority to support the grant of an intestate share to a child born out of wedlock, conceived by consensual or non-consensual intercourse and omitted from the testator's will.¹⁰ The well-established pretermitted child doc-

4. Brashier, *supra* note 2, at 141.

5. Dreyfuss & Nelkin, *supra* note 3, at 343 (footnote omitted).

6. 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, 748 (1994).

7. Brashier, *supra* note 2, at 141.

8. Le Ray, *supra* note 6, at 748 (footnote omitted).

9. *See id.* at 764-65.

10. MICH. COMP. LAWS ANN. § 700.127(2) (West 1993). The statute states:

If a testator fails to provide in the testator's will for any of his or her children; for the issue of a deceased child; or for a child who is born out of wedlock or who is born or conceived during a marriage but is not the issue of that marriage, which child was conceived as a result of sexual intercourse between the testator and the child's mother, and except as provided in subsec-

trine opens yet another avenue. But, in an instance where there was no will executed by a remote ancestor, where property (such as real estate) or assets traceable to its sale have remained "in the family" up to present times, the heirship determination would have potential results across many generations to recognize the current claimant to paternity as a legitimate heir entitled to a share of the remaining estate. Establishing the DNA link is commensurate to what the now-living heirs sought to do in the case of the famous outlaw, Jesse James, which this Article will discuss.

Common sense seems to dictate that the first defense to such a claim against a remote slave-holding ancestor is that neither laches nor statutes of limitation in modern jurisprudence would sustain such an action in our legal system, thereby protecting Great-Great Granddaddy's land and estate from what appears to be a stale claim. The purpose of this Article is to show that, in fact, in some jurisdictions, statutes of limitation do not pose a significant threat to such a claim; laches does not provide an adequate defense; lack of notice for due process opens avenues for reconsideration of heirship judgments; and the availability of modern DNA testing may serve to make this curious notion a reality. Two case studies stirred the inquiries which provide the foundation for further analysis.

A. Case Study One

Though he had been a part of the colorful history of the "Wild, Wild West," never in his wildest dreams could the infamous outlaw Jesse James¹¹ have imagined that his remains

tion (3), it appears that the omission was not intentional but was made by mistake or accident, the child, or the issue of the child, shall have the same share in the estate of the testator as if the testator had died intestate.

Id. The same applies to a child conceived by nonconsensual sexual intercourse. *Id.* § 700.127(3).

11. 6 THE NEW ENCYCLOPEDIA BRITANNICA, MICROPEDIA 487 (1985) (stating Jesse James was a Western outlaw whose gang held up banks, stagecoaches, and trains until 1876); *Jesse James' Descendants Want End to Name Robbing*, L.A. DAILY NEWS, July 9, 1995, at N14, available in 1995 WL 5410702 [hereinafter *Descendants Want End*] (stating some historians estimate that James and his gang held up at least nine banks, eight trains, and four stagecoaches from Minnesota to Alabama and killed thirty-two people following the Civil War).

would be exhumed to establish who his legitimate heirs really are. However, approximately 113 years after the highly publicized death of this notorious outlaw,¹² his remains were exhumed to seek suitable bone to test for DNA.¹³ The DNA results from these remains were subjected to testing against the DNA of living descendants of Jesse James' sister.¹⁴

The impetus for such measures stems from conflicting views on whether the grave actually entombs the body of Jesse James. Many historians believe that Jesse James was killed in 1882 by a member of the James gang in order to collect \$10,000 in reward money.¹⁵ Additionally, historians believe Jesse James was first buried on the family farm in Missouri, and later his remains were moved from his mother's backyard to the Mount Olivet Cemetery in Kearney, Missouri.¹⁶

B. Case Study Two

In 1996, a small article appeared in *Newsweek*, describing the mission of two African-American sisters and their curious and persistent investigation into the establishment of themselves as the slave descendants of George Washington.¹⁷ Quite apart from the usual curiosities regarding the birthright to which they may be able to claim a connection, the relationship between these sisters and their alleged distant famous paternity indeed raises further legal issues should such a connection be effectively established.

12. *Descendants Want End*, *supra* note 11, at N14 (stating Jesse James was reported to have died in 1882).

13. *Id.* See generally Le Ray, *supra* note 6, at 748 (noting that DNA testing takes post-death paternity determination to a new scientific and legal plateau).

14. *Judge to Allow Remains of Jesse James to Be Exhumed*, L.A. TIMES, July 8, 1995, at A16; see also James E. Starrs, *Recent Developments in Federal and State Rules Pertaining to Medical and Scientific Expert Testimony*, 34 DUQ. L. REV. 813, 836-37 (1996) (regarding exhumation of the body of Jesse James and DNA testing of the teeth, in lieu of degraded bone, for a sequential DNA pattern).

15. *Jesse James Exhumation Ok'd*, DEN. POST, July 8, 1995, at A3.

16. *Judge to Allow Remains of Jesse James to Be Exhumed*, *supra* note 14, at A16.

17. Lucy Howard & Karla Koehl, *Tracing a Familiar Face*, NEWSWEEK, Nov. 25, 1996, at 8.

II. POSTHUMOUS DNA TESTING—THE VALUE OF GENETIC MATERIAL FROM THE GRAVE

The evil that men do lives after them,
The good is oft interred with their bones¹⁸

Jesse James IV, a forty-year-old carpenter claiming to be the descendant of Jesse James, asserts that his "great-grandfather" faked his death in 1882 and resurfaced shortly thereafter under the alias J. Frank Dalton.¹⁹ According to Jesse James IV, Dalton died in 1951 in Granbury, Texas, at the ripe old age of 107 and was laid to rest beneath a headstone bearing the name "Jesse Woodson James."²⁰

Jesse James IV sought an order of exhumation of the body in Missouri to validate his ancestral interests²¹ and to protect himself against any claims that might arise from the recovery of \$4,000,000 in silver and gold, allegedly buried in Waco, Texas in 1917 by J. Frank Dalton.²² Although he has been discredited by historians,²³ Jesse James IV was willing to submit to blood testing for comparison with DNA tests planned for the body in Missouri and was also willing to seek exhumation of the body in Texas.²⁴

Phillip Steele, president of the James-Younger Gang, "a group of history buffs dedicated to researching the life of Jesse James and his outlaw colleagues," receives an average of forty to fifty letters a month from people claiming to be related to Jesse James.²⁵ James R. Ross, recognized by many historians to be the true great-grandson of Jesse James,²⁶ consented to the ex-

18. WILLIAM SHAKESPEARE, *THE TRAGEDY OF JULIUS CAESAR* act 3, sc. 2, ll. 83-84, at 61 (Alvin Kernan ed., Yale Univ. Pres rev. ed. 1959).

19. *Jesse James' Grave to Be Exhumed; Alleged Descendant Says Bandit Faked His Death in 1882*, CHI. TRIB., July 13, 1995, § 1, at 10, available in 1995 WL 6226354.

20. *Id.*

21. *Descendants Want End*, *supra* note 11, at N14 (listing some of those people claiming to be descendants of J. Frank Dalton, a.k.a. Jesse James).

22. *Id.* (noting additionally that no gold or silver has been found to date).

23. *See id.* (alleging that the motives of many imposters is usually to make money from personal appearances).

24. Kim Bell, *The DNA Trail: Experts Say It's Jesse James, but Legends Die Hard*, ST. LOUIS POST-DISPATCH, Feb. 24, 1996, at 1A.

25. *Descendants Want End*, *supra* note 11, at N14.

26. *Id.* (listing all descendants of Jesse James' son, James E. James, who had

humation to "settle it once and for all."²⁷

A judge in Missouri then granted the request for a team of forensic scientists to open James' grave and remove samples from the remains to conduct DNA and other testing.²⁸ The remains located in the Missouri grave site were exhumed in July 1995.²⁹ The bone fragments were taken to Kansas State University for initial analysis and cleaning.³⁰ Then, a molecular biology laboratory at Penn State University performed mitochondrial DNA tests comparing two teeth from the corpse to blood samples from two of James' known living descendants.³¹ James E. Starrs, who led the exhumation, found with better than ninety-nine percent certainty that the remains were those of Jesse James.³²

All of these proceedings provide a stark example of the legal ramifications involved when using DNA testing to determine heirship many decades after the death of the alleged father. The research which follows will center around four main queries:

- 1) Is there a statute of limitations which will prevent establishing heirship after the expiration of several generations?
- 2) What are the legal requirements to requesting an exhumation to collect samples for DNA testing in the heirship context?
- 3) Is DNA testing dispositive on the issue of heirship determination?
- 4) How conclusive is a judgment of heirship when lack of notice and lack of due process have omitted heirs born out of wedlock?

four daughters including Jo Frances James Ross (James Ross' mother)).

27. *Id.*

28. *Id.*

29. *See id.*

30. *James Exhumation Report Set*, HOUS. CHRON., Aug. 6, 1995, at 2, available in 1995 WL 9397931.

31. Bell, *supra* note 24, at 1A.

32. *Id.* According to this report the announcement was made at the Opryland Hotel, where Vince Simmons, who claims to be Jesse James' great-grandson, grabbed a front row seat and proclaimed the findings bogus. *Id.* Simmons claims the real Jesse James is buried in Stover, Missouri. *Id.*

III. STATUTE OF LIMITATIONS ISSUES

The tenor of the Uniform Probate Code (UPC) favors the prompt disposition of a decedent's estate in the interest of settling matters of estate administration in order to wind up the business of the decedent's affairs in a timely and orderly manner.³³ Accordingly, under the UPC, proceedings for probate, testacy and appointment of a personal representative must occur within three years from the date of death.³⁴ However, strict time limitations do not apply to determination of heirship proceedings to determine heirships.³⁵ In thirteen UPC states, there is no statute of limitations for proceedings to determine heirship of an intestate.³⁶

Because the main purpose of statutes of limitation is to compel the prompt exercise of the right to bring an action, such statutes require that the action be brought within a certain time "so that the opposing party has a fair opportunity to defend."³⁷ The United States Supreme Court recognizes that the purpose of a statute of limitations is to ensure repose and require that claims be brought while the evidence to rebut them is still fresh.³⁸ However, this "policy of repose"³⁹ fundamental to statutes of limitation is sometimes outweighed where the "interests

33. UNIF. PROBATE CODE § 3-108, 8 U.L.A. 42 (1998). An estate is deemed conclusively intestate if no formal proceeding is commenced within three years, creating a three-year bar to late-offered wills. *Id.*

34. *See id.*

35. *Id.* § 3-108(b) (stating that the time "limitations do not apply to proceedings to construe probate wills or determine heirs of an intestate"). The official comments to the UPC indicate that several of the original UPC states rejected the idea that formal proceedings to determine heirs in estates previously unadministered were "necessary to generate title muniments locating inherited land in lawful successors." *Id.* § 3-108(b) cmt.

36. ALASKA STAT. § 13.16.040 (Michie 1996); ARIZ. REV. STAT. ANN. § 14-3108 (West Supp. 1997); COLO. REV. STAT. ANN. § 15-12-108 (West 1997); HAW. REV. STAT. ANN. § 560:3-108 (Michie 1997); IDAHO CODE § 15-3-108 (1979); ME. REV. STAT. ANN. tit. 18-A, § 3-108 (West 1998); MINN. STAT. ANN. § 524.3-108 (West Supp. 1998); NEB. REV. STAT. § 30-2408 (1995); N.M. STAT. ANN. § 43-3-108 (Michie 1995); N.D. CENT. CODE § 30.1-12-08 (1996); S.C. CODE ANN. § 62-3-108 (Law Co-op. Supp. 1997); S.D. CODIFIED LAWS § 29A-3-108 (Michie 1997); UTAH CODE ANN. § 75-3-107 (1993).

37. 51 AM. JUR. 2D *Limitations of Actions* § 17 (1970).

38. *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 428 (1965).

39. *Id.*

of justice require vindication of the plaintiff's rights, as where a plaintiff has not slept on his rights, but rather has been prevented from asserting them.⁴⁰ Although states adopting the Uniform Probate Code's position face no bar by statutes of limitation on heirship determination,⁴¹ claimants in jurisdictions that do enforce heirship statutes of limitation may argue that a potential heir was prevented from asserting the right to have his or her status as an heir adjudicated. Arguably, this assertion was not feasible until the technology of DNA testing made such an evidentiary determination possible.

Where there is no statute of limitations set by a state legislature, there is no default which arises due to laches or the mere passage of time.⁴² In *Bilbrey v. Smithers*,⁴³ the decedent's legitimate son and daughter asserted the defense of laches against the descendant of another son of the decedent born out of wedlock who claimed an equal share of real property in the decedent's estate.⁴⁴ The court held that a child born out of wedlock can inherit from his father upon a judicial determination of paternity by clear and convincing evidence, and there was no need to address the laches issue since the paternity of the illegitimate son had never been disputed by the legitimate heirs.⁴⁵

An issue of delay was posed in *In re Heirship of McCleod*.⁴⁶ When the decedent died intestate in 1933, his brothers and sisters took his land without probate.⁴⁷ Almost fifty years later the plaintiff claimed to be the common law wife and sole heir.⁴⁸ The plaintiff defeated the challenge that her claim was barred

40. 51 AM. JUR. 2D *Limitations of Actions* § 18 (1970).

41. See *supra* notes 33-36 and accompanying text.

42. See 51 AM. JUR. 2D *Limitations of Actions* §§ 6 & 9 (1970).

43. No. 01A01-9502-ch-0039, 1995 WL 371653 at *1 (Tenn. App. June 21, 1995), *aff'd on other grounds*, 937 S.W.2d 803 (Tenn. 1996).

44. *Bilbrey*, 1995 WL 371653, at *2; see also *Conlon v. Sawin*, 651 N.E.2d 1234, 1235-36 (Mass. 1995) (holding that the passage of time alone does not establish the defense of laches, but affirming the dismissal of an action to establish paternity of a fifty-nine-year-old plaintiff because the complaint "fail[ed] to allege any reason why a determination of paternity would serve any interest of the plaintiff that the law should recognize").

45. *Bilbrey*, 1995 WL 371653, at *2.

46. 506 So. 2d 289, 290 (Miss. 1987).

47. *McCleod*, 506 So. 2d at 290.

48. *Id.*

by statute of limitations or laches.⁴⁹ The court held that the statutes providing for the action to determine heirship do not prescribe any time limit.⁵⁰ The action is needed only when there is a question about an heirship, and no statute runs until the question is raised.⁵¹ The plaintiff in *McLeod* learned of the decedent's interest only the year before bringing the action; therefore it was not barred.⁵²

Texas is among the states whose probate code sets no apparent limitation period within which a determination of heirship must be brought.⁵³ However, a recent case established a four-year limitation period for heirship determination in an instance where the estate had been closed.⁵⁴ The issue brought to bear a public policy argument that the finality of estates outweighs an individual's right to establish heirship.⁵⁵

IV. DETERMINATION OF PATERNITY AFTER THE DEATH OF THE FATHER

Many state statutes permit the determination of paternity to establish heirship after the death of the father, provided paternity is established by clear and convincing evidence.⁵⁶ In Michigan, for example, a child born out of wedlock can establish paternity for the application of intestate succession by one of the following means:

(a) The man joins with the mother of the child and acknowledges that child as his child by completing . . . an acknowledgment of parentage as prescribed in the acknowledgment of

49. *Id.* at 293.

50. *Id.* at 291.

51. *Id.* at 292.

52. *McLeod*, 506 So. 2d at 290. See generally Jean A. Mortland, *Determination of Heirship Was Not Time Barred*, 14 EST. PLAN. 314 (1996) (noting that the *McLeod* plaintiff could bring suit more than fifty years after the decedent's death).

53. See *Smith v. Little*, 903 S.W.2d 780, 787 (Tex. Civ. App. 1995), *aff'd in part rev'd in part*, *Little v. Smith*, 943 S.W.2d 414 (Tex. 1997).

54. *Little v. Smith*, 943 S.W.2d 414, 415 (Tex. 1997) (involving a claim by an adopted child against the closed estate of her biological grandmother).

55. *Little*, 943 S.W.2d at 420.

56. ILL. COMP. STAT. ANN. 5/2-2 (West 1992); MICH. COMP. LAWS ANN. § 700.111(4) (West 1995 & Supp. 1997); MO. REV. ST. § 474.060(2) (1992); NEB. REV. STAT. § 30-2309 (1994).

parentage act.

(b) The man joins with the mother in a written request for a correction of certificate of birth pertaining to the child that results in issuance of a substituted certificate recording the birth of the child.

(c) The man and the child have borne a mutually acknowledged relationship of parent and child that began before the child became age 18 and continued until terminated by the death of either.

(d) The man has been determined to be the father of the child and an order of filiation establishing that paternity has been entered as provided in the paternity act⁵⁷

Although the Michigan statute addresses the method for establishing post-mortem filiation, it does not purport to address the effect of judicial determination of paternity on rights granted under intestate succession.⁵⁸

The case of *Miller v. Foster* established another route to inheritance when an action under Michigan's Paternity Act⁵⁹ led to the determination of paternity.⁶⁰ In this case, a child born out of wedlock petitioned for declaration of paternity and for a share of the decedent's estate.⁶¹ The court ruled that the petitioner could inherit, as she had, by non-statutory means and established that she was the daughter of the decedent.⁶²

Maine has adopted the "clear and convincing" standard for establishment of paternity after death,⁶³ while in Florida, for purposes of intestate succession, paternity is established by an adjudication before or after the death of the father,⁶⁴ by clear and convincing evidence.⁶⁵

Likewise, in several non-Uniform Probate Code jurisdictions, under the intestacy statutes of these states, a child can establish paternity before the putative father's death by adjudi-

57. MICH. COMP. LAWS ANN. § 700.111(4) (West 1995 & Supp. 1997).

58. See *Miller v. Foster*, 524 N.W.2d 246, 248 (Mich. Ct. App. 1994) (explaining § 700.111(4) before its 1993 amendment).

59. MICH. COMP. LAWS ANN. §§ 722.711-722.730 (West 1993 & Supp. 1997).

60. *Miller*, 524 N.W.2d at 246.

61. *Id.*

62. *Id.* at 249.

63. ME. REV. STAT. ANN. tit. 18-A § 2-109(2) (West 1996).

64. FLA. STAT. ANN. ch. 732.108(2)(b) (Harrison Supp. 1997).

65. *In re Breedlove*, 586 So. 2d 466, 467 (Fla. Dist. Ct. App. 1991).

cation or after the putative father's death by presenting "clear and convincing" evidence that the man was the father.⁶⁶ In addition, these cases also establish that the laws governing parentage bear no relation to the laws governing statutes of limitation on heirship, but yield to the probate statutes concerning resolution of heirship.⁶⁷

V. EXHUMATION GRANTED

Exhumation, the process of removing a human corpse from its burial place in the earth,⁶⁸ is governed by a combination of statutory law and case law in many jurisdictions.⁶⁹ The exhumation provides still another hurdle, assuming the statute of limitations poses no obstacle. Bodies may not be wrenched from their final resting places on mere conjecture or speculation.⁷⁰ "The quiet of the grave, the repose of the dead, are not lightly to be disturbed. Good and substantial reasons must be shown before disinterment is to be sanctioned."⁷¹ Once buried, the remains are in the custody of the law, rendering removal or disturbance subject to the jurisdiction of a court of equity.⁷²

As early as 1915, the probate court recognized that exhumation

66. See, e.g., *Bilbrey v. Smithers*, 937 S.W.2d 803, 807-08 (Tenn. 1996) (citing TENN. CODE ANN. § 31-2-105(a)(2)(A) (Supp. 1998)).

67. See *Bilbrey*, 937 S.W.2d at 807-08; see also *Ellis v. Ellis*, 752 S.W.2d 781, 782 (Ky. 1988) (discussing a situation in which a child born out of wedlock in 1926 filed for determination of heirship for paternity in 1983); *Estate of Greenwood*, 587 A.2d 749, 753 (Pa. Super. Ct. 1991) (holding that even though a statute of limitations for support exists which requires a determination of paternity before the child reaches the age of majority (eighteen years), that statute of limitations does not apply to the right to inherit).

68. BLACK'S LAW DICTIONARY 573 (6th ed. 1990).

69. See, e.g., *Estate of Tong v. Tong*, 619 P.2d 91 (Colo. Ct. App. 1980); *Life Investors Ins. Co. v. Heline*, 285 N.W.2d 31 (Iowa 1979); *Perth Amboy Gas Light Co. v. Kilek*, 141 A. 745 (N.J. 1928); *Will of Janis*, 600 N.Y.S.2d 416 (N.Y. App. Div. 1993), *aff'd*, *Estate of Janis*, 620 N.Y.S.2d 342 (N.Y. App. Div. 1994); *Batchelder v. Boyd*, 423 S.E.2d 810 (N.C. Ct. App. 1993) (citing N.C. GEN. STAT. § 130A-390(b) (Cum. Supp. 1991)); *Wawrykow v. Simonich*, 652 A.2d 843 (Pa. Sup. Ct. 1991); *In re Percival's Estate*, 85 S.E. 247 (S.C. 1915).

70. *Will of Janis*, 600 N.Y.S.2d at 419.

71. *Id.* (quoting *Matter of Currier*, 90 N.E.2d 18, 19 (N.Y. 1949)).

72. *Kilek*, 141 A. at 745; see also *Heline*, 285 N.W.2d at 35 (holding that where the relatives of the deceased were offended by the exhumation, such was insufficient consideration to defeat the powers of the court to order disinterment of the body).

tion could be ordered for the purpose of heirship determination.⁷³ Emphasizing the strength of the probate court's jurisdiction, the Internal Revenue Service could not obtain an exhumation order to prove a taxpayer was actually dead, where the probate court denied the exhumation request.⁷⁴

Where the inquiry of paternity is the substance of the request for exhumation, for example, case law has in several instances grappled with the standards for imposition of the exhumation order, though only a few cases of this nature have been litigated.⁷⁵ In each case the court wrestles with differing standards of necessity and reasonableness in assessing whether the court has jurisdiction to order the exhumation. Most courts, however, will consider an exhumation request if there is reasonable belief that evidence to be found is probative to determine paternity and if there is sufficient evidence that the bone or tissue is retrievable.⁷⁶ Upon sufficient showing of necessity, a probate court can exercise jurisdiction to authorize an exhumation and autopsy of a body located within its jurisdiction.⁷⁷

In *Batcheldor v. Boyd*,⁷⁸ the court ordered an exhumation to determine paternity, as the information sought was reasonably calculated to lead to admissible evidence and the defendant had shown good cause to support exhumation of the body.⁷⁹ The court rejected the assertion that to order the exhumation for DNA testing would open the floodgates of litigation because substantial evidence of paternity already existed.⁸⁰ Moreover, the court insisted that "the 'floodgate of litigation' argument should not be allowed to deter the court from its search for the truth."⁸¹

73. *In re Percival's Estate*, 85 S.E. at 247.

74. See Christopher R. Brauchli, *From the Wool Sack*, 23 COLO. LAW 1471 (1994) (discussing an amusing account of the attempted I.R.S. exhumation of taxpayer Ahsanolla Motaghed, who owed \$156,000 in back taxes at his death).

75. See *Le Ray*, *supra* note 6, at 751.

76. See discussion *infra* text accompanying notes 77-90.

77. *Estate of Tong v. Tong*, 619 P.2d 91, 92 (Colo. Ct. App. 1980) (citation omitted).

78. 423 S.E.2d 810 (N.C. Ct. App. 1993).

79. *Batcheldor*, 423 S.E.2d at 814.

80. *Id.*

81. *Id.*

In another jurisdiction, the court ruled exhumation permissible when reasonable cause, as determined by experts, is shown.⁸² Reasonable cause is shown when all the evidence presented leads the court to believe that the child's paternity will be discovered upon exhumation.⁸³ Also, the court must find that "the 'availability' of blood and/or tissue samples of the decedent is not compromised by the passage of time and embalming rendering their retrieval improbable or highly unlikely to produce results from which testing may be performed."⁸⁴

However, if the DNA of the decedent is compromised by time or process, is non-existent, or cannot be achieved, it is the option of the court, under certain circumstances, to order a blood sample from a relative of the deceased.⁸⁵ Such was the case in *Sudwischer v. Estate of Hoffpauir*,⁸⁶ where the court ordered a blood sample from a half-sister, as necrotic tissue from the decedent was not feasible.⁸⁷

In most states adopting the pre-1990 Uniform Probate Code but not the Uniform Parentage Act, a child born out of wedlock may petition a court for determination of paternity to establish a right of heirship by clear and convincing evidence.⁸⁸ Such a petition would not be barred by the statute of limitations for paternity proceedings, as paternity in this regard is governed by inheritance statutes rather than statutes governing child support.⁸⁹ These courts should consider exhumation if there is a reasonable belief that evidence is probative to determine paternity and if there is sufficient evidence that the bone or tissue is

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

83. See *Wawrykow*, 652 A.2d at 846-47.

84. *Id.* at 847.

85. See *Sudwischer v. Estate of Hoffpauir*, 589 So. 2d 474, 476 (La. 1991) (holding that the right of a putative daughter to determine through filiation proceedings whether the intestate was her biological father was a constitutionally protected emotional and financial interest which outweighed the privacy interest of the intestate's legitimate daughter, so as to require the legitimate daughter to submit to blood testing for DNA comparison purposes).

86. 589 So. 2d at 475.

87. *Id.*

88. UNIF. PROBATE CODE § 2-109(2)(ii), *repealed and replaced by* § 2-109 (1990), 8 U.L.A. 284 (1998).

89. See *C.L.W. v. M.J.*, 254 N.W.2d 446, 449 (N.D. 1977) (holding that the pre-1990 UPC permits a child to file a paternity suit after the father's death in order to determine inheritance).

retrievable.⁹⁰

VI. EXHUMATION DENIED

At least two cases exhibit the court's unwillingness to grant an exhumation request in the DNA-paternity context.⁹¹ In *Will of Janis*,⁹² Robin Ladas sought to exhume the body of Sidney Janis for DNA testing, alleging it would prove Sidney Janis to be her father by clear and convincing evidence.⁹³ Robin was not named in the will, which left the decedent's estate to his two marital sons and their issue.⁹⁴ However, Robin was "the income beneficiary and presumptive remainderman of an inter vivos trust established by the decedent."⁹⁵

Assuming a rigid reading of the trust code, the surrogate court denied the exhumation request on the ground that a blood test must be administered during the putative father's lifetime.⁹⁶ According to the trust statute, one could establish paternity if "a blood genetic marker test had been administered to the father," which indicates a past-tense interpretation and necessitates a test performed "while living."⁹⁷

The Supreme Court of New York further reasoned that even though the statute anticipated post-death testing, the request for exhumation was unreasonable as a matter of law because the decedent chose not to acknowledge or designate the alleged daughter in his will as an heir.⁹⁸ However, he did make her a legatee, and if she were allowed standing to challenge the probating of the will based on paternity, she "would still face the formidable task of demonstrating incompetence, fraud and undue influence to prevent probate."⁹⁹ The very narrow facts of

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

91. See *Will of Janis*, 600 N.Y.S.2d 416, 419 (N.Y. App. Div. 1993), *aff'd*, *Estate of Janis*, 620 N.Y.S.2d 342 (N.Y. App. Div. 1994); *Voss v. Duerschlerl*, 425 N.W.2d 828 (Minn. 1988).

92. 600 N.Y.S.2d at 417.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 418.

97. *Will of Janis*, 600 N.Y.S.2d at 417.

98. *Estate of Janis*, 620 N.Y.S.2d 342, 343 (N.Y. App. Div. 1994).

99. *Estate of Janis*, 620 N.Y.S.2d at 343.

this case (existence of a will with a provision for the illegitimate daughter under an inter vivos trust and the likelihood of failure on the will contest) called for a limited application of the exhumation refusal.

VII. THE SLAVE-DESCENDANT NEXUS: "MASSA'S IN
DE COLD COLD GROUND"¹⁰⁰

Facing no time bar and assuming the potential for a DNA paternity match, the Jesse James scenario clearly establishes that DNA testing can effectuate an heirship determination whose reality exhibits significant present-day ramifications. It appears, therefore, entirely possible for a similar application in an heirship determination linking a present-day slave descendant to an intestate slave master (putative father) of decades past. What then is the potential for recovery, and what further legal hurdles must be bounded?

There is today a resurgence of interest in genealogy research by African Americans and both white and black historians.¹⁰¹ The purpose is to learn of potential blood ties which allow for a connection to be made back to plantation owners whose family lines included children fathered by white owners and black slave women.¹⁰² Most are curious, though many seek answers to the genealogy puzzle in order to lay claim to rightfully proud places in the history of a country which has virtually ignored the economic contributions of the labor of African American slaves in the building of this nation.¹⁰³

For example, Thomas Jefferson owned some 130 slaves when he died in 1826.¹⁰⁴ Descendants of Thomas Jefferson have invested in much research of both oral and recorded histo-

100. The song is by Stephen Collins Foster, an early American composer (1826-1864), recognized as the first professional songwriter in the United States. Stephen Collins Foster, *Massa's in De Cold Cold Ground* (Firth, Pond & Co., 1852) (held by University of Pittsburgh Library, Foster Hall Collection).

101. See *Genealogists Across South Ardently Retrace Slaves' Stories*, HOUS. CHRON., Mar. 23, 1997, at 15 (discussing the research of Edward Ball, a white descendant of Charleston, South Carolina, rice planters, who has researched the Ball family slave history and is writing a book on the subject).

102. See *id.*

103. See *id.*

104. *Id.*

ry to discover that John Q. Taylor King, the chancellor and president emeritus of Houston-Tillotson College in Austin, is the great-great grandson of Thomas C. Woodson, the first son of Jefferson and Sally Hemings, a slave of Jefferson's.¹⁰⁵ Jefferson fathered a number of children with Hemings after his wife, Martha, died.¹⁰⁶

Researchers with President James Monroe's Ash Lawn-Highland Home record stories of African Americans who can trace the oral tradition back to the tobacco plantation belonging to Monroe, our fifth president, who owned a mere thirty to forty slaves on this plantation.¹⁰⁷

Though the oral tradition is often the only grasp which most African Americans have on links to their ancestry, it can prove to be a strong link.¹⁰⁸ However, if the question is not just one of ownership, but paternity, modern DNA testing may lend the necessary credential to silence the skepticism that threatens to erupt and tarnish the image of many historically revered forefathers.

The beginning of this Article cited two studies, the second of which was the research by two African American sisters who believe themselves to be descendants of George Washington.¹⁰⁹ According to family oral history, their great-great-great-great grandfather, West Ford, was Washington's son by a slave named Venus.¹¹⁰ A DNA test is possible today because locks of

105. *Id.*

106. *Genealogists Across South Ardently Retrace Slaves' Stories*, *supra* note 101, at 15; see also Lucien Truscott, IV, *Still Barred from the Main House*, N.Y. TIMES, May 19, 1998, at A-21 (discussing generally the issue of Thomas Jefferson fathering children with slave Sally Hemings).

107. *Genealogists Across South Ardently Retrace Slaves' Stories*, *supra* note 101, at 15.

108. See generally Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597 (1993) (discussing the issue of historical reparations in African American history by relying in part on oral history and tradition).

109. Howard & Koehl, *supra* note 17.

110. *Id.* at 8; see also *Whose Ancestor? Family Traces Lineage to Washington*, DEN. POST, Apr. 24, 1997, at E-01 (explaining the similarities between oral histories from two different families in the context of tracing lineage to George Washington); *George Washington in Family Apple Tree, Black Sisters Say Thesis Says He Fathered Slave Their Great Great Great Great Grandfather*, ROCKY MOUNTAIN NEWS, Nov. 4, 1996, at 24A (discussing claims by two black sisters that George Washington fathered their great-great-great-great grandfather West Ford).

Washington's hair are preserved by the Mt. Vernon Ladies Association, which acknowledges that talk exists regarding Washington's "relations," but which also purports to seek proof for substantiation.¹¹¹ The sisters make it clear that their only interest in pursuing the testing lies in their prerogative to claim their heritage.¹¹² The DNA link to Washington for purposes of determination of heirship appears at least technically implausible in the context of West Ford because Washington left a will.¹¹³

Contrary to traditional notions supported by intestacy schemes, a testator who executes a will is not mandated by law, in any state except one to provide legacies of inheritance to children.¹¹⁴ For this reason, unless there is a credible challenge to the will which would render it invalid and the testator intestate, heirs at law, no matter how remote, generally have no standing to demand a share of the estate when the testator has chosen to exclude lineal descendants under a will. Therefore, any such remote descendants of George Washington may lack standing, even if they were disposed to do so, to demand paternity testing to establish heirship in order to claim a share of whatever estate, if any, is still traceable today.

However, consider the approach favoring an intestate award to illegitimate children which was adopted under Michigan statute. The section provides:

If a testator fails to provide in the testator's will for any of his or her children; for the issue of a deceased child; or for a child who is born out of wedlock or who is born or conceived during a marriage but is not the issue of that marriage, which child was conceived as a result of sexual intercourse between the testator and the child's mother, and . . . it appears that the omission was

111. Howard & Koehl, *supra* note 17, at 8.

112. *Id.*

113. Thomas D. Russell, *A New Image of the Slave Auction: An Empirical Look at the Role of Law of Slave Sales and a Conceptual Re-evaluation of Slave Property*, 18 CARDOZO L. REV. 473, 513 (1996). Interestingly, George Washington's will of 1799 devised to his wife, Martha Curtis Washington, 124 slaves who were to be freed upon her death. *Id.*

114. See EUGENE F. SCOLES & EDWARD C. HALBACH, JR., *DECEDENTS' ESTATES AND TRUSTS* 112 (5th ed. 1993); see also LA. CIV. CODE art. 1493(A), 1494 (1997) (providing for the right to a forced share for a child twenty-three years or younger as well as other children under legal disability in Louisiana).

not intentional but was made by mistake or accident, the child, or the issue of the child, shall have the same share in the estate of the testator as if the testator had died intestate.¹¹⁵

A similar provision applies to a child conceived as a result of nonconsensual sexual intercourse.¹¹⁶

VIII. THE PRETERMITTED CHILD

There is, however, a small avenue open for recovery in other cases even where there is a will leaving the estate to others.¹¹⁷ The doctrine of protection afforded a pretermitted or omitted child is such an avenue. The pretermitted child is one born to or adopted by the testator after the execution of a will, for which the testator made no provision in the will.¹¹⁸ The UPC version is typical:

(a) Except as provided in subsection (b), if a testator fails to provide in his [or her] will for any of his [or her] children born or adopted after the execution of the will, the omitted after-born or after-adopted child receives a share in the estate as follows:

(1) If the testator had no child living when he [or she] executed the will, an omitted after-born or after-adopted child receives a share in the estate equal in value to that which the child would have received had the testator died intestate, unless the will devised all or substantially all of the estate to the other parent of the omitted child and that other parent survives the testator and is entitled to take under the will.

(2) If the testator had one or more children living when he [or she] executed the will, and the will devised property or an interest in property to one or more of the then-living children, an omitted after-born or after-adopted child is entitled to share in the testator's estate as follows:

(i) The portion of the testator's estate in which the omitted after-born or after-adopted child is entitled to share is limited to

115. MICH. COMP. LAWS ANN. § 700.127(2) (1993). See generally Robert Silverman, *Inheritance Rights of Non-Marital Children Under Michigan's 1993 Probate Code Changes*, 1995 DET. C.L. REV. 1123 (1995) (discussing changes in the Michigan Probate Code which represent the growing trend to recognize unadopted, non-marital children through their biological links).

116. *Id.* § 700.127(3).

117. UNIF. PROBATE CODE § 2-302, 8 U.L.A. 135 (1998).

118. *Id.*

devises made to the testator's then-living children under the will.

(ii) The omitted after-born or after-adopted child is entitled to receive the share of the testator's estate, as limited in subparagraph (i), that the child would have received had the testator included all omitted after-born and after-adopted children with the children to whom devises were made under the will and had given an equal share of the estate to each child.

(iii) To the extent feasible, the interest granted an omitted after-born or after-adopted child under this section must be of the same character, whether equitable or legal, present or future, as that devised to the testator's then-living children under the will.

(iv) In satisfying a share provided by this paragraph, devises to the testator's children who were living when the will was executed abate ratably. In abating the devises of the then-living children, the court shall preserve to the maximum extent possible the character of the testamentary plan adopted by the testator.¹¹⁹

Under the statute, a pretermitted child would take nothing if substantially all of the estate is devised to the living parent of the pretermitted child,¹²⁰ an unlikely situation in the slavery context. The statute makes no differentiation based on children born out of wedlock.¹²¹ If the testator had children living at the time of the will execution, and those children were devised a share under the will, the share of a pretermitted child would be comparable to that of the other children.¹²²

For example, if it could be proven that George Washington fathered slave children who were born after the execution of his will, heirs of those children might be entitled to claim a share as determined by an heirship proceeding, unless they were otherwise provided for or intentionally not included in the will of the deceased.

IX. DUE PROCESS AND THE CONCLUSIVENESS OF PRIOR HEIRSHIP JUDGMENTS

The finality of the heirship judgment varies under jurisdic-

119. *Id.* § 2-302(a).

120. *Id.* § 2-302(a)(1).

121. *See id.*

122. *See* UNIF. PROB. CODE § 2-302(a)(2), 8 U.L.A. 135 (1998).

tional statutes. Some statutes regard the heirship proceeding as "not an ordinary civil action but a special proceeding in rem, wherein the res is the right of heirship and distribution and as to which issue the decree is binding on the whole world."¹²³ Other statutes provide that "the decree is conclusive on all persons who were notified of the proceedings either personally or by mail in accordance with the statute, but is not conclusive on those not so notified."¹²⁴

A Texas statute provides that "[i]n a suit against the estate of a decedent involving the title to real property, the executor or administrator, if any, and the heirs must be made parties defendant."¹²⁵ In the Texas case of *Minga v. Perales*,¹²⁶ none of the heirs were made parties to a suit which determined interests in the decedent's real property.¹²⁷ The court regarded the provisions of Article 1982 [now section 17.002] to be mandatory: "The heirs at law of a decedent are jurisdictionally indispensable parties when the suit against the estate involves the title to real estate. Failure to join jurisdictionally indispensable parties constitutes fundamental error which an appellate court must recognize when it becomes apparent in the record."¹²⁸

Such notice to indispensable parties is the premise of fundamental due process. *Mullane v. Central Hanover Bank and Trust Co.*¹²⁹ established that state action affecting property must generally be accompanied by notification of such an action: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably

123. 23 AM. JUR. 2D *Descent and Distribution* § 114 (1983).

124. *Id.* (citing *Daniels v. Johnson*, 226 S.W.2d 571 (Ark. 1950) and *Henry v. Jean*, 115 So. 2d 363 (La. 1959)). Both cases cited demonstrate that minor grandchildren of a decedent were not bound by a previous heirship determination because they were neither cited nor represented in that proceeding; therefore, they were entitled to maintain an action for recognition as forced heirs of their grandmother. *Daniels*, 226 S.W.2d at 573; *Henry*, 115 So. 2d at 364; see also *Matter of Estate of Hoffas*, 422 N.W.2d 391, 396 (N.D. 1988) (holding that heirs who did not receive notice of estate proceeding were not bound by prior distribution orders because the court entering those orders lacked personal jurisdiction over them).

125. TEX. CIV. PRAC. & REM. CODE ANN. § 17.002 (West 1997); see also FLA. STAT. ANN. ch. 65.041 (Harrison Supp. 1997).

126. 603 S.W.2d 240, 241 (Tex. App. 1980).

127. *Minga*, 603 S.W.2d at 241.

128. *Id.* at 241 (citations omitted).

129. 339 U.S. 306 (1950).

calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.¹³⁰

Due process assumes the right to be heard.¹³¹ When one is by law denied the right to be heard, a fundamental, constitutionally protected right has been withheld.¹³² Applying this constitutional principle to children born of master-slave unions suggests that because they were denied notice and the right to be heard, they were, therefore, denied fundamental due process with regard to heirship determinations, which excluded them as heirs of their biological fathers. Therefore, those determinations of heirship should not be legally binding on illegitimate slave heirs or their descendants.

Moreover, slaves, regarded as property and classified as such by law, would not have been afforded recognition as "persons" before courts of law.¹³³ Rather than being recognized as beneficiaries or recipients as heirs at law of their masters, they were deeded, leased and devised in the same manner as real property.¹³⁴

Notwithstanding the lack of relevancy of notice and due process to a race of individuals whose legal presence before the law was not sanctioned or even recognized, the fact that slaves were not allowed to read or write rendered notice by citation, publication or any other means equally indignant, and therefore irrelevant. It was generally accepted that "[n]o person, not even

130. *Mullane*, 339 U.S. at 314.

131. *Id.* (citing *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)).

132. *Id.*

133. See Russell, *supra* note 113, at 488. Russell notes the historians' concept of slave as both person and property and quotes one historian as stating that "in Western Culture [slavery] had long represented the ultimate limit of dehumanization, of treating and regarding a man as a thing." *Id.* (quoting DAVID BRION DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* 10 (1966)).

134. *Id.* at 505. Russell describes this situation through the following example: Most commonly, a life estate was created by the writer of a will. The will writer specified that upon his or her death, a slave or group of slaves should descend to a particular person, who, for the rest of his or her life, would have the use of the slave or slaves. To hold a life estate in slaves meant that the holder could manage the slaves during his or her lifetime, but when the holder of the life estate died, the remainder of the life estate would pass to the person whom the testator had specified to receive the remainder.

Id.

the master, was to teach a slave to read or write, employ him in setting type in a printing office, or give him books or pamphlets."¹³⁵ Clearly, the law cannot prohibit and discourage the education of an entire class of individuals while holding that class responsible for notification by publication. Therefore, the descendants of slaves who were fathered by slave masters should be privileged to set aside judgments of heirship which failed to include their ancestors as illegitimate heirs.

X. CONCLUSION

There is a modern trend supporting expanded constitutional rights for illegitimate children¹³⁶ to foster facilitation of posthumous claims. Concurring in *Mills v. Habluetzel*,¹³⁷ Justice O'Connor observed that technological advances in paternity testing provide a new level of evidentiary certainty.¹³⁸ As a result, the state and federal governmental interests in avoiding evidentiary problems of fraudulent claims do not justify denial of substantive rights asserted by illegitimates.¹³⁹

Liberalized statutes of limitation governing determinations of heirship, the jurisprudence of exhumation supporting posthumous DNA paternity testing, and the potential for challenging existing judgments of heirship based on failure of notice and lack of due process set a curious theoretical framework. The claimants are descendants of the illegitimate offspring of slave master-female slave unions.

The exhumation and DNA tests on the remains of Jesse James were performed using a blood sample from a living descendant of James' sister. The purpose was to settle the heirship issue. James died around 1882. There is little distinction in the

135. KENNETH M. STAMPP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 208 (1956).

136. Johan Meeusen, *Judicial Disapproval of Discrimination Against Illegitimates*, 43 AM. J. COMP. L. 119-36 (1995).

137. 456 U.S. 91, 102 (1982).

138. *Mills*, 456 U.S. at 104 n.2 (O'Connor, J., concurring).

139. See generally Raymond C. O'Brien, *Illegitimacy: Suggestion for Reform Following Mills v. Habluetzel*, 15 ST. MARY'S L.J. 70 (1983) (discussing the evolution of constitutional guidelines concerning the rights of illegitimate children and the future implications of the *Mills* decision in terms of greater protection of the fundamental personal rights of illegitimates).

parallel to DNA testing on a living slave descendant for heirship determination. Judicial facilitation and scientific technology render this possible.

The approach to the challenge presented in this Article may appear to be based on exercises in contorting through legal loopholes. Cognizant of the trend toward treating illegitimate children as equals in the eyes of the law, and given the historical slavery context which produced illegitimate heirs for whom no relief was ever granted or even thought to be owed, the law may well make accommodations to foster retroactive relief.

