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Illegitimates' Intestate Succession Rights in New York: Is Further Liberalization Forthcoming?

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NOTES

ILLEGITIMATES' INTESTATE SUCCESSION RIGHTS IN NEW YORK: IS FURTHER LIBERALIZATION FORTHCOMING?

INTRODUCTION

The right of an illegitimate to inherit by intestate succession [1] from his father's estate historically has been limited or denied.[2] The large number of persons expected to die intestate,[3] combined with a dramatic increase in both the number and percentage of illegitimate births,[4] however, has brought illegitimates' intestate succession rights

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1. When a person dies without a will, he is said to have died intestate. T. Atkinson, The Law of Wills § 1, at 4 (2d ed. 1953). In such a case, the decedent's property is distributed not according to his wishes, but according to the applicable state law. *Id.* The state laws that govern the disposition of an intestate's property frequently are called statutes of "descent and distribution," which commonly express a preference for succession by the decedent's spouse and children. *See, e.g.*, Conn. Gen. Stat. Ann. §§ 45-272 to -287 (West 1960 & Supp. 1980); Fla. Stat. Ann. §§ 732.101-.111 (West 1976 & Supp. 1980); N.Y. Est., Powers & Trusts Law §§ 4-1.1 to -1.5 (McKinney 1967 & Supp. 1980-1981); Ohio Rev. Code Ann. §§ 2105.01-.21 (Page 1976 & Supp. 1979); 20 Pa. Cons. Stat. Ann. §§ 2101-2109.1 (Purdon 1975 & Supp. 1980-1981). The provisions of most American intestacy statutes can be traced to the English Statute of Distribution, 22 & 23 Car. II, c. 10 (1670). T. Atkinson, *supra*, § 14, at 60-61; 3 J. Schouler, The Law of Wills, Executors and Administrators §§ 1389-1390 (6th ed. 1923). *See generally* Rollison, *Principles of the Law of Succession to Intestate Property*, 11 Notre Dame Law. 14 (1935).

2. T. Atkinson, *supra* note 1, § 22, at 81-84; 1 W. Blackstone, Commentaries * 459; 2 J. Kent, Commentaries * 212.

3. A recent survey revealed that 55% of all respondents did not have a will. Fellows, Simon & Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 1978 Am. B. Foundation Research J. 319, 337-38. Demographically, 53% of the respondents with an annual family income between $14,000 and $19,999 did not have wills, while only 34.6% of those with annual family incomes over $25,000 did not have wills. *Id.* In addition, 55% of the respondents did not know who would inherit their property upon their intestate death. Thus, these respondents cannot be accurately relying upon state intestacy statutes by not executing a will. *Id.* at 340.

4. In 1960, there were approximately 224,000 illegitimate births recorded in the United States, accounting for approximately 5% of all live births. Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 66 (1979). By 1970, the number of such births had risen to over 398,000, representing 10.7% of all live births. *Id.* In 1977, the 515,000 illegitimate births accounted for over 15% of all live births in the country. *Id.* In 1979, there were over 53,000 illegitimate births in the State of New York. Office of Biostatistics, N.Y. State Dep't of Health, Out-of-Wedlock Births in N.Y. State 1970-1979 (unpublished statistics on file with the *Fordham Law Review*). In 1976, an estimated 30% of all births in New York City were illegitimate. The rate of illegitimate births in New York City tripled between 1956 and 1976, while the rate of legitimate births declined by 50%. *30% of Births in New York City Called Illegitimate*, N.Y. Times, Sept. 29, 1977, § B, at 3, col. 1. *See*

under increased judicial review[5] and has intensified the need for legislative reform. In response to this situation, the New York State Legislature recently amended section 4-1.2 of the New York Estates, Powers and Trusts Law,[6] and is considering further modification in 1980[7] to continue the liberalization of illegitimates' intestate succession rights.

This legislation reflects modern society's enlightened view that "visiting the iniquity of the fathers upon the children"[8] serves only to penalize innocent persons.[9] Nevertheless, serious questions concerning the constitutional validity[10] and logical underpinnings of limitations on illegitimates' succession rights have continued to arise under section 4-1.2. This Note will analyze the historical and constitutional background of restrictions involving the succession rights of illegitimates; examine the strengths and shortcomings of the current New York provisions; and recommend alternatives that confer on illegitimates more equitable rights of inheritance in their fathers' estates.

I. EMERGING RIGHTS OF ILLEGITIMATES

Illegitimates have been subject to legal and societal discrimination for centuries.[11] At common law, a child born out of wedlock was

generally Clines, *Children of Desire*, N.Y. Times, Sept. 30, 1979, § 6, at 37, col. 1, at 48, col. 5.

5. *See In re* Estate of Harris, 98 Misc. 2d 766, 769-70, 414 N.Y.S.2d 612, 614-15 (Sur. Ct. 1979) (discussion of cases reviewing illegitimates' intestate succession rights in New York).

6. 1979 N.Y. Laws, ch. 139, § 1 (codified at N.Y. Est., Powers & Trusts Law § 4-1.2 (McKinney Supp. 1980-1981)).

7. N.Y.A. No. 10346, 203d Sess. (March 19, 1980); N.Y.S. No. 8202, 203d Sess. (March 4, 1980). Both bills contain identical provisions. Throughout this article, they will be cited as 1980 Bills.

8. *Exodus* 20:5 (King James).

9. *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972) ("The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liasons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust.").

10. *E.g.*, *In re* Estate of Harris, 98 Misc. 2d 766, 414 N.Y.S.2d 612 (Sur. Ct. 1979) (two year limitation on initiation of petition for orders of filiation for purposes of illegitimates' succession rights held unconstitutional); *In re* Estate of Angelis, 97 Misc. 2d 1, 410 N.Y.S.2d 521 (Sur. Ct. 1978) (same); *In re* Estate of Perez, 69 Misc. 2d 538, 330 N.Y.S.2d 881 (Sur. Ct. 1972) (same). *But see In re* Estate of Belton, 70 Misc. 2d 841, 335 N.Y.S.2d 177 (Sur. Ct. 1972) (§ 4-1.2 held constitutionally valid); *In re* Estate of Hendrix, 68 Misc. 2d 439, 326 N.Y.S.2d 646 (Sur. Ct. 1971) (same); *cf. In re* Estate of Rodriguez, 100 Misc. 2d 983, 420 N.Y.S.2d 349 (Sur. Ct. 1979) (strict compliance with provisions of § 4-1.2 required before an illegitimate is entitled to succession rights); *In re* Estate of Flemm, 85 Misc. 2d 855, 381 N.Y.S.2d 573 (Sur. Ct. 1975) (same).

11. 1 W. Blackstone, *supra* note 2, at 454-59; H. Clark, The Law of Domestic Relations § 5.4 (1968); 2 J. Kent, *supra* note 2, at 208-17. *See generally* H. Krause, Illegitimacy: Law and Social Policy (1971); L. Stone, The Family, Sex and Marriage in England 1500-1800, at 612-15 (1977).

known as a *filius nullius*, the child of no one, and his rights were limited.[12] He was incapable of inheriting as an heir and could not have any heirs, other than those of his own body.[13] Moreover, contrary to canon law, a child born out of wedlock could not subsequently be legitimated by the intermarriage of his natural parents.[14] The primary reason for such harsh discrimination was the belief that extramarital relationships could be discouraged by penalizing illegitimates.[15]

Disparagement of illegitimacy, however, no longer justifies limiting the rights of illegitimates. In analyzing classifications involving illegitimacy, the Supreme Court has determined that an intermediate standard of review, which falls somewhere between the "strict

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12. Robbins & Deak, *The Familial Property Rights of Illegitimate Children: A Comparative Study*, 30 Colum. L. Rev. 308, 316 (1930); *see* notes 13-14 *infra* and accompanying text. At early common law, neither the mother nor the father was responsible for the support of the illegitimate child. This duty, along with the duty of supporting paupers and vagrants, fell upon the local parish. Robbins & Deak, *supra*, at 317. The parishes, however, were displeased with this arrangement and sought to be relieved of such expenses. In response, Parliament enacted the Poor Law Act of 1576, 18 Eliz. c. 3, which shifted the burden of supporting an illegitimate to his parents. The discouragement of vice was an incidental purpose only. Fritz, *Judging the Status of the Illegitimate Child in Various Western Legal Systems*, 23 Loy. L. Rev. 1, 26 (1977); Robbins & Deak, *supra*, at 317.

13. Robbins & Deak, *supra* note 12, at 316. If an illegitimate died without lawful issue, his real and personal property escheated to the crown. *Id.* at 316-17, *see* 1 W. Blackstone, *supra* note 2, at 459; 2 J. Kent, *supra* note 2, at 221-22. An illegitimate acquired his name by reputation only because he could not inherit a surname. 1 W. Blackstone, *supra* note 2, at 459; Fritz, *supra* note 12, at 25.

14. 1 W. Blackstone, *supra* note 2, at 454-56; 2 J. Kent, *supra* note 2, at 208-09. Blackstone and Kent disagreed, however, on the wisdom of this rule. *Compare* 1 W. Blackstone, *supra*, note 2, at 454-57 *with* 2 J. Kent, *supra* note 2, at 208-10. The doctrine of legitimation by subsequent intermarriage was a product of Roman law, introduced by the Emperor Constantine. 2 C. Sherman, Roman Law in the Modern World § 493 (2d ed. 1922). The issue of whether an illegitimate could be legitimated by the subsequent intermarriage of his parents was unsettled at early common law. In 1236, the Barons at the Merton Parliament rejected the Bishops' request that the canon law, which supported this doctrine, be adopted as the law of England. Known as the Statute of Merton, this decision was considered a significant triumph of English nationalism over the intrusions of foreign institutions. Fritz, *supra* note 12, at 27; Robbins & Deak, *supra* note 12, at 318.

15. 2 J. Kent, *supra* note 2, at 212. Other reasons have included protection of the family unit, and the Christian moral doctrine that non-marital sexual relations are sinful. Fritz, *supra* note 12, at 7, 24; Krause, *Equal Protection for the Illegitimate*, 65 Mich. L. Rev. 477, 489-98 (1967); Robbins & Deak, *supra* note 12, at 308. One commentator has suggested that the "real" reason for such discrimination was a mixture of greed, prejudice, male chauvinism, and the desire to use the illegitimate as a scapegoat. Krause, *supra*, at 498-500. *See also* 2 F. Pollock & F. Maitland, The History of English Law 397 (2d. ed. 1898).

scrutiny"[16] and "rational relationship"[17] standards of review, is appropriate.[18] Under this emerging intermediate standard,[19] states may

16. The strict scrutiny standard of review is applied to all legislative classifications that infringe upon a fundamental right or discriminate against a suspect class. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (per curiam). Fundamental rights include the right to vote, Bullock v. Carter, 405 U.S. 134 (1972), the right to travel, Shapiro v. Thompson, 394 U.S. 618 (1969), the right to procreate, Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942), as well as each of the guarantees of the first amendment. Williams v. Rhodes, 393 U.S. 23 (1968). Suspect classifications are those that involve race, Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964), national origin, Oyama v. California, 332 U.S. 633 (1948), or alienage. *In re* Griffiths, 413 U.S. 717 (1973); Graham v. Richardson, 403 U.S. 365 (1971). To justify its actions under the strict scrutiny test, the government must show that the classification is necessary to promote a compelling governmental interest, Shapiro v. Thompson, 394 U.S. 618, 638 (1969), and that less burdensome means of furthering the interest are unavailable. Dunn v. Blumstein, 405 U.S. 330, 342-43 (1972); *see* Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification, and Some Criteria*, 27 Vand. L. Rev. 971, 996-1006 (1974). *See generally* L. Tribe, American Constitutional Law §§ 16-6 to -22 (1978); Barrett, *Judicial Supervision of Legislative Classifications—A More Modest Role for Equal Protection?*, 1976 B.Y.U.L. Rev. 89, 89-121.

17. The rational relationship standard of review is employed when a legislative scheme neither involves a suspect classification nor infringes upon a fundamental right. To withstand review under this test, the classification need only be rationally related to a legitimate governmental interest. *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297 (1976) (per curiam); McGowan v. Maryland, 366 U.S. 420 (1961). Under this analysis, a classification is invalid only when it cannot be justified under any conceivable set of facts. *See* Allied Stores, Inc. v. Bowers, 358 U.S. 522, 530 (1959); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 563 (1947). *See generally* L. Tribe, *supra* note 16, §§ 16-2 to -5.

18. Jimenez v. Weinberger, 417 U.S. 628 (1974); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968); *see* Lalli v. Lalli, 439 U.S. 259 (1978); Trimble v. Gordon, 430 U.S. 762 (1977). *But see* Mathews v. Lucas, 427 U.S. 495 (1976); Labine v. Vincent, 401 U.S. 532 (1971). *See generally* Note, *Illegitimacy and Equal Protection: Two Tiers or an Analytical Grab-Bag?*, 7 Loy. Chi. L.J. 754 (1976); Note, *Illegitimates and Equal Protection*, 10 U. Mich. J. L. Ref. 543 (1977). This intermediate standard is also employed in analyzing classifications based on gender. *E.g.*, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971). *But see* Schlesinger v. Ballard, 419 U.S. 498 (1975); Kahn v. Shevin, 416 U.S. 351 (1974). *See generally* Lombard, *Sex: A Classification in Search of Strict Scrutiny*, 21 Wayne L. Rev. 1355 (1975). The same standard is used in analyzing classifications based on indigency. *E.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971); Douglas v. California, 372 U.S. 353 (1963). *But see* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Dandridge v. Williams, 397 U.S. 471 (1970). *See generally* L. Tribe, *supra* note 16, §§ 16-33 to -57.

19. The appropriate standard of review for analyzing classifications based on illegitimacy is within a " 'realm of less than strictest scrutiny,'. . .[T]he scrutiny [, however,] 'is not a toothless one.' " Trimble v. Gordon, 430 U.S. 762, 767 (1977) (quoting Mathews v. Lucas, 427 U.S. 495, 510 (1976)). The Court also held that classifications based on illegitimacy require "more than the mere incantation of a proper state purpose." 430 U.S. at 769. In recent years, the Supreme Court has applied this intermediate standard of review without formally recognizing it as such.

not attempt to "influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships,"[20] because "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."[21]

The Court, in three recent cases,[22] has considered the validity of state intestate succession laws that define an illegitimate's inheritance rights. According to these decisions, it is constitutionally permissible for a state to demand a higher standard of proof for an illegitimate claiming under his father's estate than for one claiming under his mother's[23] because this is sufficiently related to the state's interest in providing for an orderly and efficient scheme of disposition of an intestate's property.[24] The Court, however, has determined that the promotion of legitimate family relationships,[25] as well as the theory that intestate succession laws reflect the presumed intentions of citizens concerning the disposition of property upon death,[26] are not valid justifications for the unequal treatment of illegitimates.

Although the Court has established that only state requirements for proving paternity may justify a disparity between legitimates' and illegitimates' inheritance rights,[27] it has refused to specify the forms of

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E.g., Craig v. Boren, 429 U.S. 190, 197-99 (1976); Eisenstadt v. Baird, 405 U.S. 438, 446-55 (1972); *see* J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law 525-26 (1978); L. Tribe, *supra* note 16, §§ 16-30 to -32. For a discussion of the evolving nature of equal protection analysis, see San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-111 (1973) (Marshall, J., dissenting); Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 Geo. L.J. 1071 (1974); Shaman, *The Rule of Reasonableness in Constitutional Adjudication: Toward the End of Irresponsible Judicial Review and The Establishment of a Viable Theory of the Equal Protection Clause*, 2 Hastings Const. L.Q. 153 (1975); Simson, *A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause*, 29 Stan. L. Rev. 663 (1977); Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 Va. L. Rev. 945 (1975).

20. Trimble v. Gordon, 430 U.S. 762, 769 (1977).

21. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).

22. Lalli v. Lalli, 439 U.S. 259 (1978); Trimble v. Gordon, 430 U.S. 762 (1977); Labine v. Vincent, 401 U.S. 532 (1971).

23. Trimble v. Gordon, 430 U.S. 762, 770 (1977). " '[T]he lurking problems with respect to proof of paternity' " is the rationale for these differing standards. *Id.* at 771 (quoting Gomez v. Perez, 409 U.S. 535, 538 (1973)); *see In re* Estate of Ortiz, 60 Misc. 2d 756, 761, 303 N.Y.S.2d 806, 812 (Sur. Ct. 1969).

24. Trimble v. Gordon, 430 U.S. 762, 770-71 (1977).

25. *Id.* at 768.

26. *Id.* at 775-76. Even if such an assumption were true, *see* note 3 *supra*, it is nevertheless an impermissible basis for a state's discrimination against an illegitimate. Trimble v. Gordon, 430 U.S. 762, 775 n.16 (1977).

27. "Evidence of paternity may take a variety of forms, some creating more significant problems of inaccuracy and inefficiency than others." Trimble v. Gordon, 430

such proof that states may constitutionally require.[28] Due to the Court's insufficient guidance,[29] it is incumbent upon the states to proceed with the important task of liberalizing illegitimates' succession rights according to modern society's notions of fairness and equality.[30]

II. THE NEW YORK EXPERIENCE

New York initially followed the common law precedent of prohibiting an illegitimate from inheriting by intestate succession from either parent's estate.[31] The retreat from this strict common law doctrine began when the legislature enacted a law that permitted an illegitimate to inherit from his natural mother's estate.[32] The legislature further altered the common law by expanding the definition of a legitimate child to include any child born out of wedlock whose par-

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U.S. 762, 772 n.14 (1977). The Court, however, has recognized that "[f]or at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates." *Id.* at 771.

28. "The States, of course, are free to recognize these differences in fashioning their requirements of proof." *Id.* at 772 n.14. They must, however, "consider the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity." *Id.* at 770-71.

29. Lalli v. Lalli, 439 U.S. 259, 277 (1978) (Blackmun, J., concurring) (the Court is "offering little precedent for constitutional analysis of State intestate succession laws"); *see* 43 Mo. L. Rev. 116, 124 (1978) (the Court has provided states with indirect guidelines by which they may, for all practical purposes, completely exclude illegitimates from intestate succession). *See also* Mathews v. Lucas, 427 U.S. 495, 515-16 (1976).

30. Although the Supreme Court's recent rejection of a constitutional challenge to New York's prior § 4-1.2 in Lalli v. Lalli, 439 U.S. 259 (1978), represents a retreat from Trimble v. Gordon, 430 U.S. 762 (1977), it does not necessarily signal a reversal in the trend of expansion of the rights of the illegitimate. *Compare* Lalli v. Lalli, 439 U.S. 259, 276-77 (1978) (Blackmun, J., concurring) *and* 50 Miss. L.J. 201, 220-21 (1979) *with* Comment, *Can Louisiana's Succession Laws Survive in Light of the Supreme Court's Recent Recognition of Illegitimates' Rights?*, 39 La. L. Rev. 1132, 1140 (1979). The New York Law Revision Commission "believes that *Lalli* has not stopped or reversed the trend, but only decided the constitutionality of EPTL 4-1.2, leaving the door open for further refinement of the statute." Law Revision Commission, Recommendation to the 1979 Legislature Relating to Inheritance By or From Illegitimate Children, N.Y. Legis. Doc. No. 65(L), 202d Sess. (1979), *reprinted in* 1979 N.Y. Laws 1522, 1523 [hereinafter cited as 1979 Report].

31. Todd v. Weber, 95 N.Y. 181, 189 (1884); *accord, In re* Estate of Lauer, 76 Misc. 117, 136 N.Y.S. 325 (Sur. Ct. 1912) (discussing New York's adoption of common law's imposition of disabilities upon illegitimates). Although a father of an illegitimate had no duty to support the child, a promise by him to provide support, whether express or implied, was enforceable against him by those who had been requested by him to care for the child. Todd v. Weber, 95 N.Y. 181, 189 (1884).

32. 1855 N.Y. Laws, ch. 547, § 1 (current version at N.Y. Est., Powers & Trusts Law § 4-1.2(a)(1) (McKinney Supp. 1980-1981)). The illegitimate, however, continued to have no succession rights in his father's estate. *Id.*

ents subsequently intermarry.[33] The movement towards parity between the rights of illegitimates and legitimates accelerated with the enactment of section 83-a of the Decedents Estate Law, now contained in section 4-1.2 of the Estates, Powers and Trusts Law,[34] which granted an illegitimate a limited right to inherit by intestate succession from his father's estate.[35] This right was conditioned upon the satisfaction of two requirements. First, an order of filiation declaring paternity must have been entered by a court of competent jurisdiction during the father's lifetime.[36] Second, the filiation proceeding must have been initiated during the pregnancy of the mother or within two years of the birth of the child.[37] The legislature's most recent attempt to expand the rights of illegitimates occurred in 1979 when it amended the statute by increasing the time limitation on initiation of filiation proceedings and by providing for voluntary acknowledgments of paternity.[38]

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33. 1961 N.Y. Laws, ch. 843, § 1 ("All illegitimate children whose parents have heretofore intermarried or who shall hereafter intermarry shall thereby become legitimatized and shall become for all purposes the legitimate children of both parents . . . .") (current version at N.Y. Dom. Rel. Law § 24(1) (McKinney 1977)). The canon law had long espoused the doctrine of legitimation by subsequent intermarriage. *See* note 14 *supra*. The current statute not only legitimates children whose parents intermarry, but also legitimates those whose parents have participated in a void or voidable marriage. N.Y. Dom. Rel. Law § 24(1) (McKinney 1977) ("A child heretofore or hereafter born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage, or shall have consummated a common-law marriage where such marriage is recognized as valid . . . is the legitimate child of both natural parents notwithstanding that such marriage is void or voidable . . . ."). *See also In re* Estate of Newins, 12 N.Y.2d 824, 826, 187 N.E.2d 360, 360, 236 N.Y.S.2d 346, 347 (1962) ("[A] Surrogate [has] the power to decide and declare that a child of a void or voidable marriage is the legitimate child of the decedent whose will or estate is before him."). A child whose parents have subsequently intermarried according to the laws of another jurisdiction also is recognized as legitimate. Olmsted v. Olmsted, 190 N.Y. 458, 83 N.E. 569 (1908), *aff'd*, 216 U.S. 386 (1910); *cf. In re* Estate of Macklin, 82 Misc. 2d 376, 371 N.Y.S.2d 238 (Sur. Ct. 1975) (recognition of child of void, bigamous, common law, or incestuous marriage as legitimate); *In re* Estate of Ortiz, 60 Misc. 2d 756, 303 N.Y.S.2d 806 (Sur. Ct. 1969) (application of retroactive Puerto Rican legitimation statute to Puerto Rican-born New York resident).

34. 1966 N.Y. Laws, ch. 952, § 4-1.2 (codified at N.Y. Est., Powers & Trusts Law § 4-1.2 (McKinney 1967)) (current version at N.Y. Est., Powers & Trusts Law § 4-1.2 (McKinney Supp. 1980-1981)).

35. 1965 N.Y. Laws, ch. 958, § 1 (current version at N.Y. Est., Powers & Trusts Law § 4-1.2 (McKinney Supp. 1980-1981)).

36. *Id.*

37. *Id.*

38. 1979 N.Y. Laws, ch. 139, § 1. The current version of § 4-1.2 provides that "[a]n illegitimate child is the legitimate child of his father so that he and his issue inherit from his father and his paternal kindred if: (A) a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within ten

The stated purpose of section 4-1.2 is "to grant to illegitimates in so far as practicable rights of inheritance on a par with those enjoyed by legitimate children while protecting innocent adults and those rightfully interested in their estates from fraudulent claims of heirship and harassing litigation."[39] Section 4-1.2, however, has been criticized for failing to achieve these goals.[40] Not only has this provision been unsuccessful in granting illegitimates rights of inheritance on a par with those enjoyed by legitimate children, but the requirements have been applied inconsistently.[41] Furthermore, certain provisions have been, and remain, subject to constitutional doubt.[42]

A. *Methods of Attaining Succession Rights*

Prior to 1979, an illegitimate became entitled to inherit by intestate succession from his father's estate only if a court had entered an order of filiation declaring paternity against the father, stemming from a

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years from the birth of the child, or: (B) the father of the child has signed an instrument acknowledging paternity, provided that (i) such instrument is acknowledged or executed or proved in the form required to entitle a deed to be recorded within ten years from the birth of the child in the presence of one or more witnesses and acknowledged by such witness or witnesses, in either case, before a notary public or other officer authorized to take proof of deeds and (ii) such instrument is filed within sixty days from the making thereof with the putative father registry established by the state department of social services . . . ." N.Y. Est., Powers & Trusts Law § 4-1.2 (McKinney Supp. 1980-1981).

39. Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates, Fourth Report, 1965 N.Y. Legis. Doc. No. 19, Report No. 1.8A, 188th Sess. 265 (1965), *reprinted in* Bennett Commission on Estates 1309, 1573 (1962-1965) [hereinafter cited as Bennett Commission Report]. The Bennett Commission was created by the New York legislature in 1961 to study the law of estates and to make recommendations for its revision and modernization. 1961 N.Y. Laws ch. 731, § 7.

40. *E.g.*, *In re* Estate of Harris, 98 Misc. 2d 766, 772, 414 N.Y.S.2d 612, 616 (Sur. Ct. 1979); *In re* Estate of Angelis, 97 Misc. 2d 1, 6, 410 N.Y.S.2d 521, 524 (Sur. Ct. 1978); *In re* Estate of Perez, 69 Misc. 2d 538, 543, 330 N.Y.S.2d 881, 887-88 (Sur. Ct. 1972); Prudential Ins. Co. v. Hernandez, 63 Misc. 2d 1058, 1059-60, 314 N.Y.S.2d 188, 190 (Sup. Ct. 1970); *see In re* Estate of McLeod, 430 N.Y.S.2d 782, 785 (Sur. Ct. 1980) (criticism of time limitation).

41. *Compare In re* Estates of Niles, 53 A.D.2d 983, 385 N.Y.S.2d 876 (3d Dep't 1976) (entry of order of filiation after death of putative father), *appeal denied*, 40 N.Y.2d 809, 392 N.Y.S.2d 1027 (1977) *and In re* Estate of Kennedy, 89 Misc. 2d 551, 392 N.Y.S.2d 365 (Sur. Ct. 1977) (settlement agreement held tantamount to entry of order of filiation) *with In re* Estate of Rodriguez, 100 Misc. 2d 983, 420 N.Y.S.2d 349 (Sur. Ct. 1979) (strict compliance with requirements of statute necessary for illegitimate to obtain succession rights) *and In re* Estate of Leventritt, 92 Misc. 2d 598, 400 N.Y.S.2d 298 (Sur. Ct. 1977) (settlement agreement held insufficient compliance with entry of order of filiation).

42. *See* note 10 *supra* and accompanying text.

proceeding instituted within two years of the child's birth.[43] The rationale for allowing proof of paternity only by formal judicial decree was the desire to protect innocent men from unjust, fraudulent, or harassing claims of paternity.[44] Some courts, however, have been sympathetic to the plight of illegitimates and have ignored the literal wording of the statute. They have permitted an illegitimate to become a distributee[45] in his father's estate upon proof of paternity far less stringent than a formal order of filiation, by holding that certain agreements or actions constitute "substantial compliance" with the statute.[46]

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43. N.Y. Est., Powers & Trusts Law § 4-1.2 (McKinney 1967) (current version at N.Y. Est., Powers & Trusts Law § 4-1.2 (McKinney Supp. 1980-1981)).

44. Bennett Commission Report, *supra* note 39, at 266-67.

45. Attaining distributee status is critical because all of the decedent's distributees must be served with notice, regardless of whether the decedent died testate or intestate. N.Y. Surr. Ct. Proc. Act (58A) §§ 1003(1), 1403(1)(a) (McKinney 1967 & Supp. 1980-1981). When a testator has not provided for his illegitimate child, the child may still be able to share in his father's estate. Only those persons whose interests would be adversely effected by the admission or denial of a testator's will to probate are entitled to file objections thereto. N.Y. Surr. Ct. Proc. Act (58A) § 1410 (McKinney Supp. 1980-1981). Thus, if the illegitimate were a distributee, he could interpose objections to the admission of his father's will to probate, which, if successful, would cause the estate to be distributed according to intestate succession laws. N.Y. Surr. Ct. Proc. Act (58A) § 1408(1) (McKinney 1967) (Before admitting a will to probate, the court must be satisfied with the will's authenticity and the validity of its execution.); *see* N.Y. Est., Powers & Trusts Law §§ 4-1.1 to -1.5 (McKinney 1967 & Supp. 1980-1981) (rules of distribution of an intestate's property).

46. In one instance, a putative father had entered into a settlement in which he admitted his paternity and agreed to provide support for the child. The court held that this settlement substantially complied with the requirements of an order of filiation. *In re* Estate of Anonymous, 60 Misc. 2d 163, 302 N.Y.S.2d 688 (Sur. Ct. 1969). In another case, a settlement agreement between the mother and the putative father was held tantamount to an order of filiation, even though the court had stricken the putative father's admission of paternity from the record. *In re* Estate of Kennedy, 89 Misc. 2d 551, 392 N.Y.S.2d 365 (Sur. Ct. 1977); *see In re* Estate of Niles, 53 A.D.2d 983, 385 N.Y.S.2d 876 (3d Dep't 1976), *appeal denied*, 40 N.Y.2d 809, 392 N.Y.S.2d 1027 (1977). One court has permitted an illegitimate to become a distributee of his father's estate even though no proceeding had been brought before any court, and the father had never signed an admission of paternity. *In re* Estate of Abbati, N.Y.L.J., Dec. 30, 1977, at 11, col. 6 (Sur. Ct. Dec. 2, 1977) (common law relationship of 34 years held to be substantial compliance with the requirement of entry of an order of filiation). Some New York courts, in applying section 4-1.2, have insisted upon strict compliance with the provision's terms. *E.g.*, *In re* Estate of Rodriguez, 100 Misc. 2d 983, 420 N.Y.S.2d 349 (Sur. Ct. 1979); *In re* Estate of Leventritt, 92 Misc. 2d 598, 400 N.Y.S.2d 298 (Sur. Ct. 1977); *In re* Estate of Flemm, 85 Misc. 2d 855, 381 N.Y.S.2d 573 (Sur. Ct. 1975). One court, for example, held that an illegitimate who was the subject of a filiation proceeding that was settled by the mother and putative father was not entitled to distributee status in the latter's estate due to the absence of a formal order of filiation. *In re* Estate of Leventritt, 92 Misc. 2d 598, 599-602, 400 N.Y.S.2d 298, 299-301 (Sur. Ct. 1977).

Although the statute has recently been amended,[47] the uncertainties surrounding what constitutes substantial compliance with the entry of an order of filiation have not been resolved. Some courts may continue to accept informal proofs of paternity as indicating substantial compliance with the formal requirements of the statute.[48] Other courts, however, may not be as lenient and will insist upon strict adherence to the statute's provisions.[49] The rights of an illegitimate who cannot prove strict compliance with the requirements of section 4-1.2 should not depend to such a great extent upon the sympathies of the court. New legislation is required[50] to prevent continued inconsistency among the courts and to provide a uniform set of criteria by which illegitimates can establish paternity.

A further shortcoming of the New York approach is the "costly and complex" filiation procedure itself.[51] Judicial determinations of paternity are intended to promote accuracy and to prevent spurious or harassing claims of heirship.[52] They have, however, often proven overly restrictive in denying succession rights to illegitimates who could prove paternity by other methods.[53]

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47. 1979 N.Y. Laws, ch. 139, § 1 (codified at N.Y. Est., Powers & Trusts Law § 4-1.2 (McKinney Supp. 1980-1981)).

48. Such proof may well include the putative father's informal recognition of his paternal responsibilities. *See In re* Estate of Abbati, N.Y.L.J., Dec. 30, 1977, at 11, col. 6 (Sur. Ct. Dec. 29, 1977); note 46 *supra*.

49. *E.g., In re* Estate of Rodriguez, 100 Misc. 2d 983, 420 N.Y.S.2d 349 (Sur. Ct. 1979). The court held that the father's petition to amend the child's birth certificate to indicate his paternity did not satisfy the voluntary acknowledgment provision of § 4-1.2. This decision is inconsistent with cases holding that an agreement, settlement, or admission of paternity constitutes substantial compliance with the statute, *see* note 46 *supra* and accompanying text, as well as with modern policy, which favors the expansion of illegitimates' rights.

50. "Despite this liberalizing amendment of 1979, the [Law Revision] Commission is of the opinion that the statute is still substantially deficient." Law Revision Commission, Recommendation to the 1980 Legislature Relating to Inheritance by or from Illegitimate (Non-Marital) Children Under Section 4-1.2 of the Estates, Powers and Trusts Law, N.Y. Legis. Doc. No. 65(B), 203d Sess. 2 (1980) [hereinafter cited as 1980 Recommendation]; *see In re* Estate of Rodriguez, 100 Misc. 2d 983, 986, 420 N.Y.S.2d 349, 352 (Sur. Ct. 1979) ("even the present statute may require further amendment").

51. 1979 Report, *supra* note 30, at 1524.

52. Bennett Commission Report, *supra* note 39, at 266-67.

53. *In re* Estate of Lalli, 43 N.Y.2d 65, 71-73, 371 N.E.2d 481, 484-85, 400 N.Y.S.2d 761, 765 (1977) (Cooke, J., dissenting), *aff'd sub nom.* Lalli v. Lalli, 439 U.S. 259 (1978); *see, e.g., In re* Estate of Rodriguez, 100 Misc. 2d 983, 420 N.Y.S.2d 349 (Sur. Ct. 1979) (illegitimate held not entitled to succession rights despite his father's execution of a document to indicate himself as father on child's birth certificate); *In re* Estate of Leventritt, 92 Misc. 2d 598, 400 N.Y.S.2d 298 (Sur. Ct. 1977) (illegitimate who was subject of settlement agreement between his mother and putative father permitted neither succession rights nor opportunity to prove paternity after putative father's death).

In an attempt to alleviate this difficulty, the legislature recently added a provision to section 4-1.2 that confers succession rights upon an illegitimate whose father has executed a voluntary acknowledgment of paternity.[54] A significant problem with this acknowledgment provision is the potential effect of encouraging fraudulent claims of paternity, not against innocent men, as was so often feared,[55] but against the estates of illegitimates. Upon the death of an illegitimate, an unrelated man could simply acknowledge paternity and claim as a distributee in the child's estate.[56] Thus, although the statute provides an additional method by which an illegitimate can obtain inheritance rights, the acknowledgment provision has created additional difficulties for illegitimates.

The problems of allowing more liberal proofs of paternity, however, are not insurmountable. Several states now permit an illegitimate to inherit from his intestate father's estate not only upon a judicial determination or voluntary acknowledgment of paternity, but also upon proof of the fulfillment of other informal conditions. In several states, a showing that a father "openly and notoriously" recognized an illegitimate child as his own will entitle that child to succession rights,[57] while other states permit the establishment of the existence of a parent-child relationship between the father and his illegitimate child.[58]

The New York legislature has yet to enact sufficiently liberal provisions as twice recommended by the Law Revision Commission.[59]

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54. N.Y. Est., Powers & Trusts Law § 4-1.2(a)(2)(B)(i) (McKinney Supp. 1980-1981).

55. This fear has been expressed in reports and studies on illegitimates' inheritance rights and has been a major impediment to the liberalization of these rights. *See* 1979 Report, *supra* note 30, at 1523; Bennett Commission Report, *supra* note 39, at 266.

56. Indeed, the New York State Bar Association has already expressed its concern over this matter. *See* Memorandum, Estates—Inheritance Rights of Illegitimate Children, *reprinted in* 1979 N.Y. Laws 1771 (Governor Carey on approving ch. 139 of the Laws of 1979).

57. Iowa Code Ann. § 633.222 (West 1964); Kan. Stat. Ann. § 59-501 (1976); Md. Est. & Trusts Code Ann. § 1-208 (b)(3) (1974); Vt. Stat. Ann. tit. 14, § 553(b)(3) (1974).

58. Mich. Comp. Laws Ann. § 700.111(4)(c) (1980); Okla. Stat. Ann. tit. 84, § 215(c) (West Supp. 1979-1980); 20 Pa. Const. Stat. Ann. § 2107(c) (Purdon Supp. 1980-1981); Wis. Stat. Ann. § 852.01(1)(b) (West 1971). South Dakota's statutes are inconsistent. One provisions states that an illegitimate may share in his intestate father's estate only if the father had voluntarily acknowledged paternity, S.D. Codified Laws Ann. § 29-1-15 (1976), while another statute provides that if the father publicly acknowledges an illegitimate child as his own and receives the child into his family, treating it as if legitimate, he thereby adopts the child, and the child will be deemed legitimate for all purposes. S.D. Codified Laws Ann. § 25-6-1 (1976).

59. In 1979, the legislature rejected the Law Revision Commission's proposals and instead enacted the current statute. 1979 N.Y. Laws, ch. 139, § 1 (codified at

Such proposals include a recommendation that, in addition to the entry of an order of filiation or a voluntary acknowledgment of paternity, an illegitimate should be entitled to inherit from his father's estate upon a showing that the father received the child into his home and treated him as his own.[60] Such a provision would dramatically expand an illegitimate's succession rights and yet, would be "sufficiently restrictive to protect against fraudulent claims."[61] Furthermore, to eliminate the possibility of an unrelated man claiming to be the father of a deceased illegitimate child,[62] the statute should contain a provision that, absent entry of an order of filiation, a putative father cannot inherit from an illegitimate's estate unless he had acknowledged paternity prior to the child's death, or had openly and notoriously treated the child as his own and had not refused to support him. Such a provision, similar to one contained in the Uniform Probate Code,[63] reduces the possibility of fraudulent claims against an illegitimate's estate because a claimant must prove the prior existence of a father-child relationship before he becomes entitled to distributee status in the child's estate.[64]

B. *Time Limitations*

The most significant problem with the New York statute has been the time limitations on the initiation of orders of filiation and voluntary acknowledgments of paternity. When the prior two year limit was enacted, it was felt that permitting filiation proceedings to be initiated beyond two years after the child's birth would make it exceedingly difficult for a putative father to defend against such suits.[65] The limitation, therefore, was imposed to act as a "further safeguard" against spurious claims of paternity.[66]

N.Y. Est., Powers & Trusts Law § 4-1.2 (McKinney Supp. 1980-1981)). The Law Revision Commission has introduced similar legislation in 1980. 1980 Bills, *supra* note 7.

60. 1979 Report, *supra* note 30, at 1525; *see* 1980 Bills, *supra* note 7.

61. 1979 Report, *supra* note 30, at 1524.

62. *See* note 56 *supra* and accompanying text.

63. Uniform Probate Code § 2-109(2)(ii). The Code does not contain a provision for voluntary acknowledgments of paternity. *See* notes 105-111 *infra* and accompanying text.

64. *See* Curry, *Intestate Succession and Wills: A Comparative Analysis of Article II of the Uniform Probate Code and the Law of Ohio*, 34 Ohio St. L.J. 114, 127 (1973); O'Connel & Effland, *Intestate Succession and Wills: A Comparative Analysis of the Law of Arizona and the Uniform Probate Code*, 14 Ariz. L. Rev. 205, 221 (1972).

65. *See In re* Estate of Flemm, 85 Misc. 2d 855, 863, 381 N.Y.S.2d 573, 578 (Sur. Ct. 1975).

66. Bennett Commission Report, *supra* note 39, at 267.

This time limitation, however, has been challenged on constitutional grounds in the New York courts.[67] The issue of the constitutionality of the statute reached the New York Court of Appeals in *In re Estate of Lalli*.[68] In rejecting the challenge to the statute, the court upheld the requirement that an order of filiation must have been entered during the putative father's lifetime before an illegitimate becomes entitled to succession rights in his father's estate. The court found no need to consider the appellant's contention that the two year limitation was unconstitutional because no order of filiation had ever been obtained against the decedent.[69]

In light of the court of appeals' failure to rule on the validity of the time limitation, the lower courts have continued their assault on the provision.[70] One court, for example, found that this limitation divided "illegitimates whose paternity has been established by a filiation order into two classes."[71] One class included those illegitimates

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67. *See* note 10 *supra* and accompanying text. The constitutionality of the two year limitation was first questioned in Prudential Ins. Co. v. Hernandez, 63 Misc. 2d 1058, 314 N.Y.S.2d 188 (Sup. Ct. 1970). In *Hernandez*, the decedent had been the father of two illegitimate children and had acknowledged his paternity in two separate instruments. His life insurance policy did not designate a beneficiary, and because the decedent had no spouse, his children and his parents both claimed rights under the policy by intestate succession. In finding the children to be the sole distributees of the estate, the court stated that § 4-1.2 served no rational purpose in excluding illegitimates from inheriting from their fathers' estates, *id.* at 1059-60, 314 N.Y.S.2d at 190, and doubted that the statute could withstand a test of constitutionality on equal protection grounds. *Id.* In *In re* Estate of Perez, 69 Misc. 2d 538, 330 N.Y.S.2d 881 (Sur. Ct. 1972), Surrogate Midonick found the two year limitation violative of the equal protection clause. *Id.* at 543, 330 N.Y.S.2d at 888 ("[T]he last 20 words of [§ 4-1.2(a)(2)] must be disregarded as patently setting up a[n] unconstitutional invidious distinction, unequally protecting children depending upon their age at the institution of successful paternity suits."). The court held that a valid order of filiation will be effective whether it stems from proceedings commenced before or after the two year limitation. *Id.* at 543, 330 N.Y.S.2d at 887-88.

68. 38 N.Y.2d 77, 340 N.E.2d 721, 378 N.Y.S.2d 351 (1975), *vacated sub nom.* Lalli v. Lalli, 431 U.S. 911, *aff'd on rehearing sub nom. In re* Estate of Lalli, 43 N.Y.2d 65, 371 N.E.2d 481, 400 N.Y.S.2d 761 (1977), *aff'd sub nom.* Lalli v. Lalli, 439 U.S. 259 (1978).

69. *Id.* at 80 n. *, 340 N.E.2d at 723 n. *, 378 N.Y.S.2d at 354 n. *. In affirming the New York Court of Appeals, the Supreme Court also did not consider the constitutionality of the two-year limitation. Lalli v. Lalli, 439 U.S. 259, 267 n.5 (1978). Although the court of appeals held that the appellant had no rights in his father's estate, it seems probable that he was in fact the illegitimate son of the decedent. During his lifetime, the decedent had provided financial support to the appellant, had given his parental consent for the appellant's marriage, and had referred to the appellant as "my son" in a document sworn to before a notary public. 38 N.Y.2d at 79, 340 N.E.2d at 722, 378 N.Y.S.2d at 353.

70. *E.g.*, *In re* Estate of Harris, 98 Misc. 2d 766, 414 N.Y.S.2d 612 (Sur. Ct. 1979); *In re* Estate of Angelis, 97 Misc. 2d 1, 410 N.Y.S.2d 521 (Sur. Ct. 1978).

71. *In re* Estate of Harris, 98 Misc. 2d 766, 772, 414 N.Y.S.2d 612, 616 (Sur. Ct. 1979).

whose fathers have had an order of filiation entered against them within the prescribed period; the other class consisted of those who have obtained filiation orders beyond the period.[72] The court found that this statutory scheme, which resulted in a disparity of rights between the respective groups, violated the equal protection clause because it could "not [be] supported by either public policy or logic."[73]

Although the current New York statute provides for a ten year limitation on the initiation of paternity proceedings,[74] it is difficult to perceive any significant improvement over the prior two year limitation. Each provision classifies illegitimates into two groups with widely disparate rights, depending only upon the time from birth to the initiation of a successful paternity proceeding,[75] and each fails to bear a sufficient relationship to the state's interest in furthering a proper governmental interest.[76] The Law Revision Commission has

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72. *Id.; In re* Estate of Angelis, 97 Misc. 2d 1, 410 N.Y.S.2d 521 (Sur. Ct. 1978); *In re* Estate of Drayton, N.Y.L.J., Feb. 14, 1978, at 14, col. 5 (Sur. Ct. Feb. 13, 1978).

73. *In re* Estate of Harris, 98 Misc. 2d 766, 772, 414 N.Y.S.2d 612, 616 (Sur. Ct. 1979).

74. N.Y. Est., Powers & Trusts Law § 4-1.2(a)(2)(A) (McKinney Supp. 1980-1981). The prior § 4-1.2 was frequently criticized because it was inconsistent with related provisions of prior New York law. *In re* Estate of Harris, 98 Misc. 2d 766, 773, 414 N.Y.S.2d 612, 617 (Sur. Ct. 1979); *In re* Estate of Angelis, 97 Misc. 2d 1, 4-5, 410 N.Y.S.2d 521, 523 (Sur. Ct. 1978); *In re* Estate of Perez, 69 Misc. 2d 538, 543, 330 N.Y.S.2d 881, 887-88 (Sur. Ct. 1972). Under § 517 of the Family Court Act, an order of filiation could be initiated by a public welfare official within ten years of the birth of an illegitimate child. The time limitation was extended if the father had acknowledged paternity in writing or had furnished support to the child. N.Y. Fam. Ct. Act (29A) § 517 (McKinney 1975) (current version at N.Y. Fam. Ct. Act (29A) § 517 (McKinney Supp. 1976-1979)). Although such an order of filiation declaring paternity could have been used to compel the father to support the child, it would have been ineffective to qualify the child for succession rights in his father's estate unless the proceeding was actually initiated within two years of the child's birth. *See In re* Estate of Harris, 98 Misc. 2d 766, 772, 414 N.Y.S.2d 612, 616 (Sur. Ct. 1979); *In re* Estate of Angelis, 97 Misc. 2d 1, 4-5, 410 N.Y.S.2d 521, 523 (Sur. Ct. 1978). This inconsistency continues to exist. Under certain circumstances, a petition for an order of filiation may be initiated beyond the expiration of ten years after the child's birth, N.Y. Fam. Ct. Act (29A) § 517(a) (McKinney Supp. 1979), but will be ineffective for purposes of an illegitimate's inheritance rights unless initiated within ten years of the child's birth. N.Y. Est., Powers & Trusts Law § 4-1.2(a)(2)(A) (McKinney Supp. 1980-1981).

75. 1980 Recommendation, *supra* note 50, at 8; Law Revision Commission, Memorandum Relating to Inheritance by or from Illegitimate (Non-Marital) Children Under Section 4-1.2 of the Estates, Powers and Trusts Law, N.Y. Legis. Doc. No. 65(B), 203d Sess. 2 (1980) [hereinafter cited as 1980 Memorandum].

76. *In re* Estate of Harris, 98 Misc. 2d 766, 772, 414 N.Y.S.2d 612, 616 (Sur. Ct. 1979). *See also In re* Estate of Angelis, 97 Misc. 2d 1, 6, 410 N.Y.S.2d 521, 524 (Sur. Ct. 1978); *In re* Estate of Perez, 69 Misc. 2d 538, 543, 330 N.Y.S.2d 881, 888 (Sur. Ct. 1972).

recently stated that "[t]he ten-year counterpart of the law presents equally invidious distinctions and should be eliminated."[77]

Furthermore, despite the increase in the time limitation from two to ten years, the illegitimate continues to have no opportunity to initiate a paternity proceeding by his own undertaking. Both at two as well as at ten years after his birth, he must necessarily depend on the actions of another to secure his rights. Such a person is often legally unsophisticated and ignorant of the procedures that must be undertaken to secure all the legal rights of the child.[78]

The original purpose of a time limitation as a safeguard against paternity suits "motivated by blackmail, harassment or fraud,"[79] is no longer being served. In the past, the inaccuracy of paternity testing[80] necessitated reliance on testimony and circumstantial evidence to prove paternity. Consequently, it was difficult to defend against unjust paternity suits several years after the child's birth.[81] Within the past few years, however, genetic research has advanced exclusionary paternity testing to a level of remarkable accuracy,[82] thus casting

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77. 1980 Memorandum, *supra* note 75, at 2.

78. *See In re* Estate of Lalli, 43 N.Y.2d 65, 71, 371 N.E.2d 481, 484, 400 N.Y.S.2d 761, 765 (1977) (Cooke, J., dissenting) ("not obtaining an order of filiation . . . often is the product of carelessness or ignorance on the part of those who might institute a proceeding within the statutory limitation, for neither of which should a child suffer"), *aff'd sub nom.* Lalli v. Lalli, 439 U.S. 259 (1978); *In re* Estate of Johnson, 75 Misc. 2d 502, 504, 348 N.Y.S.2d 315, 317 (Sur. Ct. 1973) ("[t]he provisions of [§ 4-1.2] . . . deny to the infants forever significant rights based upon an act of omission of a mother who may be totally lacking in sufficient sophistication to be competent to protect the legal rights of the infants"). Furthermore, the interests of the mother may actully be in conflict with those of the child. The mother may wish to conceal the circumstances of the child's birth, and thus may have no desire to initiate judicial proceedings to secure the child's rights. Even if the time limitation on the initiation of paternity proceedings were not eliminated, § 4-1.2 should nevertheless be harmonized with analogous New York law, which tolls any statute of limitations while a person entitled to commence an action is under the disability of infancy. N.Y. Civ. Prac. Law § 208 (McKinney Supp. 1980-1981); *see* C.L.W. v. M.J., 254 N.W.2d 446 (N.D. 1977) (statute of limitations on paternity proceedings tolled while illegitimate under disability of infancy); Uniform Parentage Act § 7. Despite the inability of an illegitimate to commence a proceeding by his own undertaking, he may nevertheless object to a putative father's voluntary acknowledgment of paternity. N.Y. Est., Powers & Trusts Law § 4-1.2(a)(4) (McKinney Supp. 1980-1981).

79. Bennett Commission Report, *supra* note 39, at 267.

80. *See In re* Estate of Lalli, 38 N.Y.2d 77, 81, 340 N.E.2d 721, 724, 378 N.Y.S.2d 351, 354-55 (1975), *vacated sub nom.* Lalli v. Lalli, 431 U.S. 911, *aff'd on rehearing sub nom. In re* Estate of Lalli, 43 N.Y.2d 65, 371 N.E.2d 481, 400 N.Y.S.2d 761 (1977), *aff'd sub nom.* Lalli v. Lalli, 439 U.S. 259 (1978).

81. *See In re* Estate of Flemm, 85 Misc. 2d 855, 863, 381 N.Y.S.2d 573, 578 (Sur. Ct. 1975) ("a longer period than two years would make it difficult and even impossible for the putative father to defend against a charge of paternity").

82. The results of a paternity test customarily are reported as a percentage of likelihood that a putative father is excluded from paternity. S. Katz & M. Inker,

further doubt on the necessity of a time limitation. Indeed, the New York Court of Appeals has implied that when scientific evidence of paternity attains sufficient reliability, the time limitation would no longer advance any significant governmental interest.[83] Although protecting innocent men from unjust claims of paternity remains desirable, it must be balanced against an illegitimate's right of intestate succession. The constitutional uncertainties of the arbitrary time limitation,[84] as well as the scientific advancement of paternity testing, dictate the elimination of a time limitation on the initiation of paternity proceedings.[85]

The ten year limitation on voluntary acknowledgments must also be questioned, partially because of the New York courts' liberal construction of the prior two year limitation on initiation of orders of filiation.[86] In their desire to mitigate the harsh results of the provision, the time limitation was not considered to be an absolute bar to entry of filiation orders, but merely a statute of limitations that the putative father could waive.[87] Thus, when a putative father voluntar-

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Fathers, Husbands and Lovers 65 (1979). Numerous tests are currently available, each with varying degrees of likelihood of exclusion. *Id.* at 67-68. One particular test, based on genetic markers, provides a 76% chance of exclusion. When combined with three other similar tests, however, the test provides a 90% chance of exclusion. *Id.* It may be possible to achieve results of over 99% exclusion. *Id.* Presently, tests of 70% exclusion can readily be performed by a number of laboratories. "[T]he capability of conducting tests with a 90% or higher chance of exclusion [, however,] could be reached in a short time." *Id.* at 68. Indeed, researchers at the U.C.L.A. School of Medicine have recently developed a new paternity test that has a 95% chance of exclusion. N.Y. Times, Sept. 16, 1978, at 86. *See generally* University of S. Cal. Center for Health Services Research, Paternity Determination: Techniques and Procedures to Establish the Paternity of Children Born Out of Wedlock (1976).

83. *See In re* Estate of Lalli, 38 N.Y.2d 77, 81, 340 N.E.2d 721, 724, 378 N.Y.S.2d 351, 354-55 (1975) ("It may be one day that, notwithstanding the nonparticipating role of the father at birth, scientific tests will nonetheless be available by means of which the fact of fatherhood can be demonstrated as compellingly as is presently true with respect to the fact of motherhood."), *vacated sub nom.* Lalli v. Lalli, 431 U.S. 911, *aff'd on rehearing sub nom. In re* Estate of Lalli, 43 N.Y.2d 65, 371 N.E.2d 481, 400 N.Y.S.2d 761 (1977), *aff'd sub nom.* Lalli v. Lalli, 439 U.S. 259 (1978).

84. 1980 Memorandum, *supra* note 75, at 2; *see* notes 40, 76 *supra* and accompanying text. The constitutionality of the previous two year limitation was not addressed by the court of appeals or the Supreme Court. *See* note 69 *supra* and accompanying text.

85. 1980 Memorandum, *supra* note 75, at 2.

86. *See, e.g., In re* Estate of Harris, 98 Misc. 2d 766, 414 N.Y.S.2d 612 (Sur. Ct. 1979); *In re* Estate of Angelis, 97 Misc. 2d 1, 410 N.Y.S.2d 521 (Sur. Ct. 1978); *In re* Estate of Thomas, 87 Misc. 2d 1033, 387 N.Y.S.2d 216 (Sur. Ct. 1976); *In re* Estate of Bell, N.Y.L.J., Nov. 10, 1969, at 17, col. 1 (Sur. Ct. Nov. 7, 1969).

87. In one instance, for example, orders of filiation and support were entered in Family Court upon the consent of the putative father, nine years after the birth of his illegitimate children. *In re* Estate of Bell, N.Y.L.J., Nov. 10, 1969, at 17, col. 1 (Sur. Ct. Nov. 7, 1969). The Surrogate's Court held that the children were entitled

ily appeared in a paternity proceeding initiated beyond the prescribed time period and admitted paternity of an illegitimate child, he was deemed to have waived the defense of the statute of limitations.[88] Consequently, the court could then enter an order of filiation that would entitle the child to succession rights in his father's estate.[89]

Presently, section 4-1.2 does not specifically state whether the ten year limitation is absolute or may be waived.[90] It appears that the current time limitation on the entry of orders of filiation for purposes of illegitimates' inheritance, like the prior two year limitation, also may be disregarded by the courts in the interest of justice. The problem, however, is that the statute remains inconsistent. While a putative father may waive the statute of limitations defense, he is not able to acknowledge his illegitimate child for purposes of the child's right of inheritance if ten years have elapsed since the child's birth.[91]

The addition of the voluntary acknowledgment provision was intended to avoid judicial filiation proceedings.[92] Yet, after the expiration of ten years from the child's birth, a father desiring to establish his paternity of an illegitimate child can no longer do so through acknowledgment of paternity.[93] Rather, his alternative is to initiate formal and costly judicial proceedings, with the assumption that the court will consider this a waiver of his defense of the statute of limitations.[94]

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to distributee status in their father's estate because "the 2-year period being a statute of limitations, it may be lost by failure to invoke or voluntarily relinquished." *Id.* The putative father's voluntary appearance in the Family Court proceeding constituted "both a waiver and a relinquishment." *Id.*

88. The Bennett Commission referred to its proposed two year limitation as a "statute of limitations [which] will not apply to voluntary acknowledgments." Bennett Commission Report, *supra* note 38, at 267; *see* note 74 *supra*.

89. *E.g.*, *In re* Estate of Nurse, N.Y.L.J., Dec. 2, 1976, at 10, col. 1 (Sur. Ct. Dec. 1, 1976); *In re* Estate of Thomas, 87 Misc. 2d 1033, 387 N.Y.S.2d 216 (Sur. Ct. 1976); *In re* Estate of Bell, N.Y.L.J., Nov. 10, 1969, at 17, col. 1 (Sur. Ct. Nov. 7, 1969).

90. N.Y. Est., Powers & Trusts Law § 4-1.2(a)(2)(A) (McKinney Supp. 1980-1981). One court has permitted an illegitimate to obtain distributee status in her father's estate based upon an order of filiation entered sixteen years after her birth. *In re* Estate of Angelis, 97 Misc. 2d 1, 410 N.Y.S.2d 521 (Sur. Ct. 1978) (decided under the prior two year provision).

91. N.Y. Est., Powers & Trusts Law § 4-1.2(a)(2)(B)(i) (McKinney Supp. 1980-1981). In 1980, the Law Revision Commission again introduced legislation to amend § 4-1.2. 1980 Bills, *supra* note 7. The Commission's recommendations include the elimination of the ten year limitation on both orders of filiation and voluntary acknowledgments of paternity. *See* 1980 Bills, *supra* note 7; 1980 Memorandum, *supra* note 75.

92. *See* note 54 *supra* and accompanying text.

93. N.Y. Est., Powers & Trusts Law § 4-1.2(a)(2)(B)(i) (McKinney Supp. 1980-1981).

94. *See* note 88 *supra* and accompanying text.

There is no justification for a ten year limitation on such voluntary acknowledgments of paternity.[95] Even the concern that a father might acknowledge a child that is not his own cannot warrant this limitation.[96] A father wishing to execute an acknowledgment of paternity often does so to avoid the necessity for difficult and expensive litigation.[97] The abrogation of the effectiveness of a voluntary acknowledgment of paternity merely due to the passage of an arbitrary time period is illogical. Moreover, this limitation may be constitutionally defective because it classifies illegitimates based solely upon the period of time from birth to their fathers' acknowledgments of paternity. While an illegitimate whose father has executed an acknowledgment before the passage of ten years is granted succession rights, one whose father has executed an acknowledgment, or may wish to, after ten years have elapsed is barred from such rights.[98] Section 4-1.2, therefore, should be amended to provide that a voluntary acknowledgment of paternity will entitle an illegitimate to succession rights in his father's estate, regardless of when such an acknowledgment is executed.

C. *Post-Mortem Proof of Paternity*

An important consequence of the present New York statute is the absolute exclusion of proof of paternity after the putative father's

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95. 1980 Recommendation, *supra* note 50, at 8; 1980 Memorandum, *supra* note 75, at 2.

96. Even if a man were not the natural father of a child he wishes to acknowledge, or if he were uncertain as to his paternity, he and the child might nevertheless have an informal relationship that would prompt his acknowledgment. For example, he may have lived with the child and mother for several years, thus fostering a family unit. There is little justification to ineffectuate this man's voluntary acknowledgment of paternity merely due to the passage of an arbitrary period of time. *See* note 95 *supra* and accompanying text.

97. Voluntary acknowledgment of paternity is an ideal method for accomplishing the socially desirable goal of formally extending the parameters of the father-illegitimate child relationship to include all legally recognized rights and duties. If more than ten years have elapsed since the birth of the child, however, such an acknowledgment will be ineffective for purposes of an illegitimate's inheritance rights. Furthermore, although the father may be able to obtain a formal order of filiation beyond the ten year limitation, *see* notes 86-89 *supra* and accompanying text, that too will be technically ineffective. N.Y. Est., Powers & Trusts Law § 4-1.2(a)(2)(A) (McKinney Supp. 1980-1981).

98. *See* note 91 *supra* and accompanying text. Moreover, the fathers of illegitimates are similarly classified. Depending only upon the time from their childrens' birth, their right to voluntarily acknowledge paternity is impaired for no rational reason. This right is significant because a father cannot attain succession rights in his illegitimate child's estate absent his acknowledgment of paternity, or entry of an order of filiation, within ten years from the child's birth. N.Y. Est., Powers & Trusts Law § 4-1.2(b) (McKinney Supp. 1980-1981). It is difficult to perceive of a sufficiently important state interest that would justify the termination of the effectiveness of a father's right to execute a voluntary acknowledgment of paternity.

death. Although this may prevent fraudulent claims of paternity against a decedent's estate, it also excludes a large class of illegitimates from succession rights in their fathers' estates.[99] In addition, it is far more restrictive than the provisions of many other states.[100]

Although the Supreme Court has upheld the constitutionality of this provision,[101] policy considerations compel its elimination. A father who, during his lifetime, willingly accepts his social duties and responsibilities often will voluntarily support his illegitimate child. An unwilling father, however, will neither acknowledge nor support his child. It is the latter who will most frequently have a paternity proceeding instituted against him, while there is usually no need to bring such an action against the former.[102] The effect of the statute is anomalous in that an illegitimate may be able to inherit from an irresponsible and uncooperative father due to the entry of an order of filiation, while he may be prohibited from acquiring rights in the estate of his willing father for lack of an order of filiation or the father's

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99. "Under the present statute, a substantial class of natural non-marital children is being deprived of their inheritance rights through no fault of their own, even though there is no dispute as to paternity. Many fathers openly acknowledge, live with, and support their non-marital children and no tought is ever given to formally establishing paternity by either a judicial proceeding or the filing of a formal witnessed and notarized acknowledgement with the Department of Social Services. Nevertheless, such children are *absolutely* barred from intestate inheritance under the present statute." 1980 Memorandum, *supra* note 75, at 1. "[T]he basic problem which remains with the present statute is its insistence that the intestate rights of non-marital children depend on there having been a formal procedural step taken during the father's life." 1980 Recommendation, *supra* note 50, at 4.

100. See note 105-111 *infra* and accompanying text.

101. Lalli v. Lalli, 439 U.S. 259 (1978); *see* note 69 *supra* and accompanying text. Despite the provisions of the New York statute and the Supreme Court's holding in *Lalli*, some New York courts have held that an order of filiation may nevertheless be entered after the death of the putative father. In one instance, a pregnant woman initiated a paternity proceeding against the putative father who subsequently admitted his paternity. The judge of the Family Court adjourned the proceeding to await the birth of the child, and in the interim, the putative father died. The court nevertheless entered an order of filiation *nunc pro tunc* against the decedent, which was accepted by the Surrogate's Court to entitle the illegitimate child to become the sole distributee of the decedent's estate. *In re* Estate of Niles, 53 A.D.2d 983, 385 N.Y.S.2d 876 (3d Dep't 1976), *appeal denied*, 40 N.Y.2d 809, 392 N.Y.S.2d 1027 (1977); *cf.* Henry v. Rodd, 95 Misc. 2d 996, 408 N.Y.S.2d 745 (Fam. Ct. 1978) (court suggested that petition for purpose of adding father's name to child's birth certificate may be brought after putative father's death); Gordon v. Cole, 54 Misc. 2d 967, 283 N.Y.S.2d 787 (Fam. Ct. 1967) (petition for order of filiation for purpose of changing child's surname to that of putative father's survives the latter's death). *But cf.* Corbett v. Corbett, 100 Misc. 2d 270, 418 N.Y.S.2d 981 (Fam. Ct. 1979) (petition for order of filiation may not be initiated after putative father's death); Middlebrooks v. Hatcher, 55 Misc. 2d 301, 285 N.Y.S.2d 257 (Fam. Ct. 1967) (same).

102. *See In re* Estate of Flemm, 85 Misc. 2d 855, 863-64, 381 N.Y.S.2d 573, 578 (Sur. Ct. 1975).

failure to recognize the need to execute an acknowledgment of paternity.[103]

Under the Uniform Probate Code, the death of an illegitimate's father will not terminate the illegitimate's right to establish paternity.[104] Many states have adopted section 2-109 of the Code,[105] which permits an illegitimate to inherit from his intestate father if paternity has been established by adjudication[106] during the father's lifetime or by "clear and convincing"[107] proof after his death. The high standard of proof required to establish paternity after the father's death[108] virtually eliminates the possibility of successful fraudulent claims of paternity, while not unduly burdening the settlement of estates. Several of these states also have added provisions for additional proofs of paternity,[109] and three states have reduced the required standard of proof.[110] Although the actions of these latter states might

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103. Another consideration is the fear of antagonizing a cooperative father. *See* Lalli v. Lalli, 439 U.S. 259, 278 (1978) (Brennan, J., dissenting). *See also* Roth, *New Legislation Affecting Trusts and Estates*, N.Y.L.J., Oct. 22, 1979 at 1, col. 1.

104. Uniform Probate Code § 2-109(2)(ii). The Uniform Probate Code states that an illegitimate is considered the child of his father for purposes of intestate succession if "the paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof, but the paternity established under this subparagraph is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his, and has not refused to support the child." *Id.*

105. Alaska Stat. § 13.11.045 (1972); Ariz. Rev. Stat. Ann. § 14-2109 (1975); Colo. Rev. Stat. § 15-11-109 (1973 & Supp. 1979); Fla. Stat. Ann. § 732.108 (West 1976 & Supp. 1980); Hawaii Rev. Stat. § 560:2-109 (Supp. 1979); Idaho Code § 15-2-109 (1979); Me. Rev. Stat. Ann. tit. 18-A, § 2-109 (1980); Mont. Rev. Codes Ann. § 72-2-213 (1979); Neb. Rev. Stat. § 30-2309 (1979); N.M. Stat. Ann. § 45-2-109 (1978); N.D. Cent. Code § 30.1-04-09 (Supp. 1979); Utah Code Ann. § 75-2-109 (1978). Four states have enacted statutes with provisions similar or identical to those of § 2-109 of the UPC. Del. Code Ann. tit. 12, § 508 (1979); Ill. Ann. Stat. ch. 110½, § 2-2 (Smith-Hurd Supp. 1980-1981); N.J. Stat. Ann. § 3A:2A-41 (West Supp. 1980-1981); Tenn. Code Ann. § 31-206 (Supp. 1980). Two other states have similar provisions, but impose a time limitation within which claims of paternity against a decedent must be brought. Ark. Stat. Ann. § 61-141 (1971 & Supp. 1979); Va. Code §§ 64.1-5.1 to -5.2 (1980).

106. It is unclear whether the word "adjudication" encompasses court-approved settlements or orders of support, neither of which satisfies New York's strict requirement of orders of filiation. *See* 1979 Report, *supra* note 30, at 1524.

107. This standard of proof is less restrictive than the "beyond a reasonable doubt" standard, but more restrictive than the "preponderance of the evidence" standard. C. McCormick, The Law of Evidence §§ 338-341 (2d ed. 1972 & Supp. 1978).

108. *See* note 107 *supra* and accompanying text.

109. These states have added voluntary acknowledgment provisions. Fla. Stat. Ann. § 732.108(2)(b), (c) (West 1976 & Supp. 1980); Ill. Ann. Stat. ch. 110½, § 2-2 (Smith-Hurd Supp. 1980-1981); Me. Rev. Stat. Ann. tit. 18-A, § 2-109 (1980); Neb. Rev. Stat. § 30-2309(2)(ii) (1979); N.M. Stat. Ann. § 45-2-109 (1978).

110. These three states have modified the required proof of paternity to a "preponderance of the evidence" standard. Colo. Rev. Stat. § 15-11-109 (1973 & Supp.

increase the incidence of spurious claims, they have determined that, as a policy matter, expansion of illegitimates' rights outweighs the possible detrimental effects of spurious claims.[111]

New legislation is needed in New York that will expand an illegitimate's opportunity to prove paternity after his father's death. Less arbitrary and formal provisions could remove the undue restrictions of the present statute while simultaneously preserving the orderly settlement of estates. Any further modification, however, must ensure that the decedent's executor or administrator will be aware of the existence of additional distributees because the failure of a personal representative to serve and cite all distributees[112] causes great difficulties in the administration of estates.[113] Permitting an illegitimate to inherit from his intestate father's estate if the father had received the child into his home and openly and notoriously treated the child as his own would serve both goals.[114] Not only would the addition of such a provision greatly increase the number of illegitimates entitled

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1979); Del. Code Ann. tit. 12, § 508(b) (1979); Fla. Stat. Ann. § 732.108 (West 1976 & Supp. 1980).

111. *See* Wellman & Gordon, *Uniformity in State Inheritance Laws: How UPC Article II Has Fared in Nine Enactments*, 1976 B.Y.U.L. Rev. 357, 370. Several states have adopted the progressive Uniform Parentage Act, the purpose of which is to "fill the statutory void left by the developments in constitutional law." Krause, *The Uniform Parentage Act*, 8 Fam. L.Q. 1, 1 (1974); *see* Cal. Civ. Code § 7004 (West Supp. 1980); Colo. Rev. Stat. § 19-6-105 (1978); Hawaii Rev. Stat. § 584-4 (1976); Mont. Rev. Code Ann. § 40-6-105 (1979); N.D. Cent. Code § 14-17-04 (Supp. 1977); Wash. Rev. Code Ann. § 26.26.040 (Supp. 1980-1981); Wyo. Stat. § 14-2-102 (1978). Without adopting the Uniform Parentage Act, Nevada has enacted a provision similar to § 4 of the Act. Nev. Rev. Stat. § 126.051 (1979). The Act prescribes certain criteria that raise a presumption of paternity, thereby shifting the burden to disprove paternity on the putative father or his estate. Paternity is presumed under the Act if the illegitimate's mother and putative father intermarry, regardless of whether the marriage is valid or void; or if, while the illegitimate is a minor, the father receives the child into his home and openly holds out the child as his own; or if, in writing, the father acknowledges his paternity, which the mother does not dispute. Uniform Parentage Act § 4. A presumption raised under § 4 may be rebutted "only by clear and convincing evidence." *Id.* §4(b). An action to prove the non-existence of the presumed paternity must be brought within five years of the child's birth. *Id.* § 6(a). If the putative father's actions have not given rise to a presumption of paternity, an action to establish paternity may not be brought later than three years after the child's birth. *Id.* § 7. California has omitted the acknowledgment provision from its enactment, Cal. Civ. Code § 7004 (West Supp. 1980), while Nevada has added an additional criterion of cohabitation between the mother and putative father. Nev. Rev. Stat. § 126.051(1)(b) (1979).

112. *See* note 45 *supra*.

113. The concern that an executor or administrator may fail to learn of and cite all of a decedent's distributees has impeded the liberalization of illegitimates' succession rights. *In re* Estate of Flemm, 85 Misc. 2d 855, 859, 381 N.Y.S.2d 573, 575-76 (Sur. Ct. 1975). *See also* N.Y. Surr. Ct. Proc. Act (58A) §§ 2222-2226 (McKinney 1967 & Supp. 1980-1981).

114. *See* notes 59-61 *supra* and accompanying text.

to succession rights,[115] but an executor or administrator would normally be aware of such an illegitimate's presence because he would have been an obvious member of the decedent's household.

Although informal criteria for establishing illegitimates' succession rights are not readily discoverable by an executor or administrator, they nonetheless can be harmonized with the overall goals of expanding illegitimates' inheritance rights and preserving the orderly settlement of estates. In all cases, the executor or administrator should be required to notify by publication[116] illegitimate children of the decedent, some of whom may have proof of paternity not specifically set forth by the statute.[117] Any illegitimate child who receives notice by publication must, within a prescribed period of time,[118] serve notice on the personal representative of his intention to prove paternity. The illegitimate must then come forward and prove paternity by clear and convincing evidence.[119] If the representative does not receive notice within the prescribed time, the rights of intestate succession of all unknown illegitimates should terminate.[120]

This suggestion is a workable compromise between the achievement of the desired objectives of liberalizing illegitimates' succession rights and the necessity of maintaining an orderly and efficient method of disposition of property after death. The difficulties of establishing paternity after the death of a putative father cannot justify the penalization of a large class of illegitimates by denying them rights of intestate succession.[121]

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115. *See* note 99 *supra* and accompanying text.

116. This would not unduly burden estate administration because notice to the decedent's creditors may be given by publication as well. N.Y. Surr. Ct. Proc. Act (58A) § 1801 (McKinney 1967 & Supp. 1980-1981).

117. Such indications might include open cohabitation by the illegitimate's mother and father during the period of conception, paternal acknowledgment evidenced by the signing of the child's birth certificate, or paternal support of the child. Of course, an illegitimate who can prove the prior fulfillment of the specific requirements of the statute has attained distributee status and must be served personally. *See* notes 45, 113 *supra* and accompanying text.

118. Currently, claims against a decedent's estate must be presented within seven months. N.Y. Surr. Ct. Proc. Act (58A) § 1802 (McKinney Supp. 1980-1981). This provision can also be applied to an illegitimate's claim of paternity. *See* N.Y. Surr. Ct. Proc. Act (58A) § 1803 (McKinney 1967).

119. *See* note 107 *supra* and accompanying text.

120. Three states place the burden on the illegitimate to come forward and prove paternity. Ark. Stat. Ann. § 61-141 (1971 & Supp. 1979); N.C. Gen. Stat. § 29-19 (Supp. 1979); Va. Code § 64.1-5.1 (Supp. 1980). *See also* Lalli v. Lalli, 439 U.S. 259, 279 (1978) (Brennan, J., dissenting); Midonick, *Inheritance Rights of Illegitimates in N.Y.–Rethinking in Order?*, N.Y.L.J., June 13, 1977, at 23, col. 1, at 33, col. 5.

121. *See In re* Estate of Lalli, 43 N.Y.2d 65, 71-72, 371 N.E.2d 481, 484, 400 N.Y.S.2d 761, 764-65 (1977) (Cooke, J., dissenting), *aff'd sub nom.* Lalli v. Lalli, 439 U.S. 259 (1978).

III. Related Areas

In two areas of the law closely related to intestate succession—wrongful death recoveries and inheritance under will—illegitimates had faced obstacles similar to those under intestate succession laws. Judicial activism, however, has led to parity between the rights of legitimates and illegitimates. Both areas now confer full equality of treatment upon all persons, regardless of status at birth.

Although the Supreme Court established the right of an illegitimate to recover for the wrongful death of his mother,[122] such a right upon the death of his father was statutorily denied.[123] Several lower New York courts held this distinction a denial of equal protection because no proper governmental purpose was served in excluding an illegitimate who suffers pecuniary loss from sharing in the recovery for the wrongful death of his father, regardless of whether any order of filiation had been entered.[124] The New York legislature has since rectified this inequity by enacting a statute that specifically grants an illegitimate the right to share in the wrongful death recovery for the death of his father upon proof of paternity and pecuniary loss, without requiring the prior entry of any order of filiation or formal voluntary acknowledgment of paternity.[125]

It is illogical to require proof of paternity for purposes of an illegitimate's intestate succession rights by formal methods that must be initiated during the father's lifetime, while permitting informal, post-mortem proof of paternity if the father's death has been wrongful. The variation between the types of proof required of an illegitimate for intestate succession and for wrongful death recoveries often lead to inconsistent results.[126] For example, absent order of filiation or voluntary acknowledgment of paternity, an illegitimate, upon proof

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122. Levy v. Louisiana, 391 U.S. 68 (1968).

123. New York law provides that only the decedent's distributees can be recipients of wrongful death recoveries. N.Y. Est., Powers & Trusts Law § 5-4.4 (McKinney 1967 & Supp. 1980-1981). Prior to 1975, however, an illegitimate could not become a distributee in his father's estate unless the requirements of § 4-1.2 had been fulfilled. N.Y. Est., Powers & Trusts Law § 4-1.2(a) (McKinney Supp. 1980-1981).

124. *In re* Estate of Johnson, 75 Misc. 2d 502, 348 N.Y.S.2d 315 (Sur. Ct. 1973); *In re* Estate of Perez, 69 Misc. 2d 538, 330 N.Y.S.2d 881 (Sur. Ct. 1972). *In re* Estate of Ortiz, 60 Misc. 2d 756, 303 N.Y.S.2d 806 (Sur. Ct. 1969). One court went so far as to judicially amend the statute, holding that § 5-4.4 of the Estates, Powers and Trusts Law must be construed as follows: "The damages [in a wrongful death action] . . . are exclusively for the benefit of the decedent's distributees *which shall include illegitimate children.*" *In re* Estate of Ross, 67 Misc. 2d 320, 323, 323 N.Y.S.2d 770, 773 (Sur. Ct. 1971).

125. N.Y. Est., Powers & Trusts Law § 5-4.5 (McKinney Supp. 1980-1981).

126. *See, e.g., In re* Estate of Murray, 90 Misc. 2d 852, 396 N.Y.S.2d 149 (Sur. Ct. 1977) (illegitimate entitled to proceeds attributable to his father's wrongful death, but not entitled to share in that portion allocated to pain and suffering which belonged to the estate).

of paternity and pecuniary loss, is permitted to share in the recovery for the wrongful death of his father.[127] He may not, however, share with his father's legitimate distributees in the surviving personal injury action that belongs to his father's estate, even though both actions arose from the same occurrence.[128] The rights of the illegitimate should not hinge upon the circumstances of his father's death. Moreover, the differing standards of proof required under wrongful death and intestate succession are anomalous in light of New York's attempt to eliminate disparagement of illegitimacy.[129] Although intestate succession and wrongful death may be distinguished by their distribution on property,[130] the formal and more difficult standard of proof required for illegitimates to obtain succession rights indirectly expresses a preference for legitimates' inheritance.

Illegitimates also have been granted full equality of rights with legitimates when the construction of a will is involved. It had been well established that the word "issue" referred to legitimate persons only.[131] As a result of a recent New York decision,[132] however, "issue" now includes both legitimate as well as illegitimate persons, absent any express qualification. Consequently, if a testator devises property to his "issue" or "children," his illegitimate children would be entitled to inherit under the will. If the same decedent died intestate, however, the same illegitimates would not succeed to the decedent's property, absent an order of filiation or formal acknowledgment

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127. *See* N.Y. Est., Powers & Trusts Law § 5-4.5 (McKinney Supp. 1980-1981).

128. *See* note 126 *supra*.

129. *Cf. In re* Estate of Lalli, 43 N.Y.2d 65, 70, 371 N.E.2d 481, 483, 400 N.Y.S.2d 761, 764 (1977) ("[w]e know of nothing . . . to suggest that our statute was intended as a moral, ethical or social disparagement of illegitimacy"), *aff'd sub nom.* Lalli v. Lalli, 439 U.S. 259 (1978).

130. Under wrongful death, recovery by one party does not detract from the recovery of another, as each party generally is entitled to recover his pecuniary loss. W. Prosser, The Law of Torts § 127, at 905-08 (4th ed. 1971). Under intestate succession, however, property received by one distributee necessarily reduces the inheritance of another because each shares in the finite property of the decedent's estate. T. Atkinson, *supra* note 1, §§ 14-26.

131. *In re* Estate of Cady, 257 A.D. 129, 12 N.Y.S.2d 750 (3d Dep't), *aff'd*, 281 N.Y. 688 (1939); Bell v. Terry & Tench Co., 177 A.D. 123, 124-25, 163 N.Y.S. 733, 734 (3d Dep't 1917); Gelston v. Shields, 23 N.Y. Sup. Ct. 143, 151-56 (2d Dep't 1878), *aff'd*, 78 N.Y. 275 (1879); *In re* Estate of Underhill, 176 Misc. 737, 28 N.Y.S.2d 984 (Sur. Ct. 1941); Braun v. Gilsdorff, 126 Misc. 366, 214 N.Y.S. 243 (Sup. Ct. 1926).

132. *In re* Hoffman, 53 A.D.2d 55, 385 N.Y.S.2d 49 (1st Dep't 1976). Despite strong precedent that "issue" meant only "lawful issue," the Appellate Division unanimously cited changes in societal attitudes, numerous statutes reflecting concern for illegitimates, and the expanding concept of the equal protection clause as the basis for its holding. *Id.; accord, In re* Estate of Lyden, 96 Misc. 2d 920, 409 N.Y.S.2d 700 (Sur. Ct. 1978).

of paternity.[133] Thus, although illegitimates have achieved the identical rights of legitimates both under testacy law and in wrongful death recoveries, the relation between these areas and the laws of intestate succession continues to produce results that are inconsistent with the overall goal of conferring on illegitimates rights equivalent to those enjoyed by legitimate children.

CONCLUSION

The trend of expansion of illegitimates' rights will undoubtedly continue. Although New York has taken small steps towards liberalization of illegitimates' rights of intestate succession, a leap is now needed. New legislation is necessary to expand illegitimates' succession rights, as well as to remove the inconsistencies of the current law. "We look forward to the day when minor children will no longer be penalized for the acts and omissions of their parents."[134]

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133. *See* Midonick, *supra* note 120, at 34, col. 1; Roth, *Inheritance Rights of Illegitimate Children*, N.Y.L.J., Jan. 17, 1977, at 1, col. 1.

134. Midonick, *supra* note 120, at 34, col. 1.