

For Love or Money: The Kansas Supreme Court's Problematic Acceptance of the "Best Interests of the Child" Standard in an Intestate Claim [*Reese v. Muret*, 150 P.3d 309 (Kan. 2007)]

Angela Chesney Herrington*

*When I was a child, I spoke and thought and reasoned as a child does.
But when I grew up, I put away childish things.*¹

I. INTRODUCTION

Your husband of more than twenty years has just died, leaving no will. Together you had no children. The marriage was your husband's second, and you knew that his first marriage produced a child. His first wife became pregnant before their marriage, and your husband always assured you that the child born during that marriage was not his. He had exercised no visitation with the child and had paid no child support since the child was one year old. No traditional father/daughter relationship existed, and many members of the community believed that this girl, now grown, was not your husband's biological daughter. Five days after your husband's death, this woman, now age thirty-two, files a petition in your husband's estate. You stand to lose one-half of your rightful inheritance to this woman, who may not be a rightful heir.

You assume that, in this day of constantly advancing technology, a simple genetic test can prove whether this supposed daughter is, in fact, a rightful heir, and you ask the court to order the test. In response, still pushing for an inheritance, the alleged daughter files a paternity action, which presumes, for example, paternity when a child is born during a marriage.² She hopes to shield herself from genetic testing by focusing

* B.A. 1994, Kansas Wesleyan University; J.D. Candidate 2009, Washburn University School of Law. I thank the entire editorial staff of the *Washburn Law Journal*, particularly Laurel Klein Searles, Stacey Schlimmer, and David Stucky, for their constructive criticism and support throughout the writing process. I also thank Professor Aida Alaka, Professor Nancy Maxwell, and Professor Michael Schwartz for their input and encouragement. I dedicate this piece to my friends and family, whom have been my pillars of support for particularly the past months; and most importantly to Tyler, Taite, Timeri and Trevor—four extraordinary children—without whom I would be nothing. Thank you for your sacrifices.

1. 1 *Corinthians* 13:11 (New Living Translation). See Wendy Anton Fitzgerald, *Maturity, Difference and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 12 (1994).

2. See BLACK'S LAW DICTIONARY 1163 (8th ed. 2004) (defining a "paternity suit" as "[a] court proceeding to determine whether a person is the father of a child"); see also KAN. STAT. ANN. § 38-1114(a)(1) (1985) (amended 1994) (stating that a man is presumed to be the father of a child if the

on the presumption, based upon his marriage to her mother, that your husband was her father.³ The woman uses the presumption to her advantage, hoping that the court will determine that it is not in her best interests to allow genetic testing.⁴ The court decides in favor of the supposed daughter and determines that what is most at stake in this case is the child's interest in maintaining a family identity, even though the child is an adult. The court ignores valuable and conclusive evidence, and you lose half of your husband's estate to someone who may not be a rightful heir under the laws of intestate succession.

The Kansas Supreme Court effectively took this approach in the case of *Reese v. Muret*.⁵ This case is a first impression intersection of family law and probate law in Kansas, and little instructive case law exists in other jurisdictions. The court upheld the district court's decision to deny the motions for genetic testing largely based upon the *Ross* doctrine.⁶ This doctrine, as defined by the Kansas Supreme Court in *In re Marriage of Ross*,⁷ requires the court to hold a hearing prior to genetic testing in a paternity action to determine whether such testing is in the best interests of the child.⁸ Reese effectively timed her filing of the paternity action to invoke the protection of *Ross* to avoid genetic testing.⁹ Her exploitation of the doctrine ultimately allowed her to inherit from her presumed father's estate.¹⁰

While *Ross* could conceivably apply to an adult child in some circumstances, the court drew a bright line in holding that *Ross* could apply to an adult in an intestate claim.¹¹ Without qualifying the circumstances under which *Ross* applies, this holding opens the door to future instances of fraud by supposed adult children making claims on decedents' estates.

The court could have determined whether Reese was entitled to a

child is born while the man is married to the child's mother).

3. See KAN. STAT. ANN. § 38-1114(a)(1).

4. See *In re Marriage of Ross*, 783 P.2d 331, 338 (Kan. 1989) (holding that before allowing genetic testing a district court must hold a hearing to determine whether the genetic testing is in the best interests of the child).

5. 150 P.3d 309 (Kan. 2007).

6. *Ross*, 783 P.2d at 332, 338-39. In *Ross*, the minor child was born during the marriage of his mother and presumed father, Robert Ross. *Id.* at 332. After the parents divorced, the mother filed a paternity action to establish that Robert was not the child's biological father, and the district court ordered the genetic testing and admitted the results. *Id.* at 333. Based on the testing, the court determined that Robert was not the child's biological father. *Id.* The court named Charles Austin as the biological father and ordered him to pay child support, but the court continued the custody arrangement with the presumed father, Robert, in order to maintain the father/child relationship. *Id.* at 333-34. The Kansas Supreme Court reversed the order for genetic testing and the order establishing Charles as the biological father. *Id.* at 339. The Court held that before allowing genetic testing a district court must hold a hearing to determine whether the genetic testing is in the best interests of the child. *Id.* at 338.

7. 783 P.2d 331 (Kan. 1989).

8. *Id.* at 338.

9. See *Reese*, 150 P.3d at 311.

10. *Id.* at 311, 316.

11. *Reese*, 150 P.3d at 316.

portion of the estate by using genetic testing. Conclusive evidence was reasonably available and the court simply chose to ignore it. The Kansas Legislature should address the issue of advancements in genetic testing, particularly in the context of presumptive parents and determinations of inheritance.

II. CASE DESCRIPTION

Deloris Waldschmidt Cleary gave birth to Heather Waldschmidt Reese on January 25, 1971, approximately seven months after her marriage to Wade Samuel Waldschmidt, Jr. (Sam).¹² Although the appellant alleges that Cleary admitted she became pregnant before she married Sam,¹³ Reese's birth certificate identified Sam as her father.¹⁴ Sam and Cleary divorced on July 12, 1972, when Reese was one-and-a-half years old.¹⁵ The divorce pleadings listed Reese as a child of the marriage.¹⁶ Sam agreed to pay child support and the court awarded visitation rights; however, he only exercised those rights for approximately five months after the divorce.¹⁷ On December 11, 1972, the court terminated child support pursuant to Sam's motion that alleged that Cleary took Reese and disappeared.¹⁸ The district court granted the termination of child support until Cleary could show just-cause for reinstating support, but a reinstatement never occurred.¹⁹ Sam did not pay any further support or exercise any visitation rights.²⁰ Reese was not quite two years old at that time.²¹

Although the presumption existed that Sam was Reese's biological father, there was speculation regarding Reese's true biological paternity.²² In 1985 or 1986, Cleary admitted to Reese that she had sexual relations with another man before she married Sam, and that Sam may not be Reese's father.²³ Likewise, Reese herself acknowledged the possibil-

12. *Reese*, 150 P.3d at 310.

13. Brief of Appellant at 3, *Reese*, 150 P.3d 309 (No. 92,809).

14. *Reese*, 150 P.3d at 310.

15. *Id.*

16. *Id.*

17. Brief of Appellee at 3, *Reese*, 150 P.3d 309 (No. 92,809).

18. *Reese*, 150 P.3d at 310. It is unusual that a judge in the 1970s would terminate child support for any reason, given the strong policy implications of leaving the child without financial support. See Telephone Interview with Scott Curry-Sumner, Faculty, University of Maastricht (June 21, 2007) (Mr. Curry-Sumner was counsel of record, along with Rachael K. Pirmer, for Sandra Waldschmidt on appeal). Possibly, the judge did not believe that Reese was Sam's child. *Id.* Sam also asked for custody, which the court denied. See *Reese*, 150 P.3d at 310. Again, the judge may not have believed that Sam was actually Reese's biological father. See Telephone Interview with Scott Curry-Sumner, Faculty, University of Maastricht (June 21, 2007).

19. *Reese*, 150 P.3d at 310.

20. Brief of Appellant, *supra* note 13, at 4-5.

21. *Id.* at 3-4.

22. See *id.* at 3, 6.

23. See *id.* at 6; Brief of Appellee, *supra* note 17, at 5. Allegedly, Cleary told Reese the man's name was Jim Blatchford. See Brief of Appellant, *supra* note 13, at 6. However, according to the Brief of Appellee, Cleary later recanted this and assured Reese that she believed Sam to be Reese's

ity that Sam might not be her biological father.²⁴ Further, rumors had spread throughout the small community that Sam was not Reese's father.²⁵

Sam married Sandra Woodard in 1976.²⁶ Their marriage was tumultuous; in fact, they separated in 1988, and were divorced in 1990.²⁷ They resumed living together in 1995, and remarried in 1996.²⁸ During the second marriage, Sandra lived and worked in other cities while visiting Sam occasionally on weekends, yet the couple remained married until Sam's death.²⁹ Although Sandra knew of Reese's existence, Sandra alleged that both Sam and his sister told her that Reese was not Sam's child.³⁰ Sandra assumed that Sam did not attempt a relationship with Reese because he did not believe her to be his biological daughter.³¹

Sandra's appellate brief contains several alleged facts to support the claim that Sam and Reese did not have a relationship.³² Sam allegedly did not telephone Reese or make any one-on-one contact with her during holidays, nor did Sam send Reese any type of correspondence during birthdays.³³ Reese herself described her relationship with Sam as "cold and almost nonexistent."³⁴ Reese, as an adult, allegedly made no effort to develop a relationship with Sam; she did not invite him to her wedding or send him an announcement after the birth of her child.³⁵ According to Sandra, Sam and Reese had not spoken in the fifteen to twenty years prior to their brief contact at Sam's mother's funeral in 2000.³⁶ Reese, however, did maintain relationships with other members of the Waldschmidt family, including Sam's mother, his brother, and his aunt, as well as many of Sam's cousins.³⁷

Prior to resuming his relationship with Sandra in 1994, Sam executed a will that left his entire estate to his two sisters.³⁸ Sam visited with an attorney again on December 10, 2002, to discuss his estate.³⁹ At

father. See Brief of Appellee, *supra* note 17, at 5. It is unclear in the record why Cleary retracted this statement. *Id.*

24. Brief of Appellant, *supra* note 13, at 4.

25. *Id.* at 6; see also Brief of Appellee, *supra* note 17, at 5 (acknowledging rumor or "scuttlebutt" in the community).

26. Reese v. Muret, 150 P.3d 309, 310 (Kan. 2007).

27. *Id.*

28. See *id.*; Brief of Appellee, *supra* note 17, at 5.

29. See Brief of Appellee, *supra* note 17, at 5; Reese, 150 P.3d at 310.

30. See Brief of Appellant, *supra* note 13, at 3, 6; Reese, 150 P.3d at 310.

31. Brief of Appellant, *supra* note 13, at 5.

32. *Id.* at 4-5.

33. *Id.* Sam's attendance at family gatherings seemed to coincide with his separations from Sandra. Brief of Appellee, *supra* note 17, at 5.

34. Brief of Appellant, *supra* note 13, at 5; see Brief of Appellee, *supra* note 17, at 4.

35. Brief of Appellant, *supra* note 13, at 5.

36. *Id.*

37. Reese v. Muret, 150 P.3d 309, 310 (Kan. 2007).

38. *Id.*

39. *Id.*

that time, he informed the attorney that he had a daughter.⁴⁰ It was apparent to the attorney, however, that tension existed between Sandra and Sam about the situation, but Sam did not provide further details to the attorney.⁴¹

On December 13, 2002, Sam committed suicide.⁴² Reese was then almost thirty-two years old.⁴³ On the very day of Sam's funeral, Reese contacted an attorney regarding Sam's estate, and only five days after his death filed a claim in his estate.⁴⁴ Sandra responded to this petition and filed her own petition demanding that Reese submit to genetic testing.⁴⁵ Hoping that the court would determine Sam's paternity without ordering genetic testing, Reese responded to this motion by filing a paternity action under the Kansas Parentage Act.⁴⁶

Sandra then filed a motion to intervene in the paternity action and a motion for genetic testing in the paternity case.⁴⁷ The district court granted Sandra's motion to intervene, but ordered a *Ross* hearing prior to genetic testing to determine whether such testing was in Reese's best interests.⁴⁸ The court, based on stipulated evidence, decided that genetic testing would not be in Reese's best interests, and denied both motions for genetic testing.⁴⁹ Sandra appealed both actions, but before the Kansas Court of Appeals could hear the cases, the Kansas Supreme Court, *sua sponte*, consolidated the appeals and assumed jurisdiction.⁵⁰ Upon discovering Sam's will, the Kansas Supreme Court remanded the cases back to the district court to determine the legitimacy of the will.⁵¹ The district court found that Sam's sister did not defeat the presumption

40. *Id.*

41. *Id.*

42. *Id.*

43. See Reply of Appellant to Brief of Appellee at 9, *Reese*, 150 P.3d 309 (No. 92,809); Brief of Appellee, *supra* note 17, at 16. Although the Reply and the Brief state that Reese was thirty-three years old at the time of filing, Reese was not quite thirty-two when filing the petition for administrator of the estate.

44. See *Reese*, 150 P.3d at 311; Brief of Appellant, *supra* note 13, at 7. The district court appointed William E. Muret, a disinterested third party, as administrator. *Reese*, 150 P.3d at 311; Brief of Appellee, *supra* note 17, at 1. Both Sandra and Reese had financial incentive in the case. See Brief of Appellee, *supra* note 17, at 6. If Reese were, in fact, Sam's daughter, she would inherit one-half of his estate. *Id.* Reese's mother, Cleary, reportedly asked her daughter to "shake on a deal" to receive \$10,000 from Reese if she successfully inherited from Sam's estate. Brief of Appellant, *supra* note 13, at 7. If Reese were determined not to be Sam's daughter, Sandra would inherit the entire estate. Brief of Appellee, *supra* note 17, at 6. Counsel for the appellant estimated the value of Sam Waldschmidt's estate at approximately \$550,000. E-mail from Rachael K. Pirner, Attorney-at-law, Triplett, Woolf & Garretson, L.L.C., to Angela Chesney Herrington, Student, Washburn University School of Law (July 23, 2007, 08:38 CST) (on file with author). Ms. Pirner was counsel of record for the appellant, Sandra Waldschmidt. See *supra* text accompanying note 18.

45. *Reese*, 150 P.3d at 311.

46. See *id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

that Sam had destroyed or revoked his will and refused to probate it.⁵² The Kansas Supreme Court then reinstated the appeal and affirmed the district court's denial of both motions.⁵³

III. BACKGROUND

A. *History and Purpose of the Marital Presumption of Paternity in Kansas*

The marital presumption of paternity has its roots in the English common law, and dates back to 1777.⁵⁴ This doctrine presumes that a child born to married parents is the child of the husband.⁵⁵ Prior to statutory guidance, the courts followed the Lord Mansfield Rule, which stated:

The law of England is clear, that the declarations of a father or mother cannot be admitted to bastardize the issue born after marriage. . . . It is a rule, founded in decency, morality, and policy, that they shall not be permitted to say after marriage, that they have had no connection, and therefore that the offspring is spurious⁵⁶

The Kansas Supreme Court in *Bariuan v. Bariuan*⁵⁷ recognized that the historical marital presumption of paternity is one of the strongest presumptions under the law.⁵⁸ As early as 1926, however, the court recognized that the rule may be "artificial and unsound."⁵⁹ According to the court in *Lynch v. Rosenberger*,⁶⁰ courts should not use the Lord Mansfield Rule to conceal the truth or obstruct justice.⁶¹

In 1973, the National Conference of Commissioners on Uniform State Laws approved the Uniform Parentage Act (UPA).⁶² The Kansas Legislature adopted the act in 1985, and codified it as the Kansas Parentage Act (KPA).⁶³ Section 38-1114(a) of the KPA sets out six instances in which the court will presume the man to be the father of a child,⁶⁴ the first being if the man is married to the child's mother when

52. *Id.*

53. *Id.*

54. See *In re Marriage of Ross*, 783 P.2d 331, 335 (Kan. 1989) (quoting *Stillie v. Stillie*, 281 P. 925, 927 (Kan. 1929)).

55. See BLACK'S LAW DICTIONARY 1225 (8th ed. 2004) (defining "presumption of paternity").

56. See *Ross*, 783 P.2d at 335 (quoting *Stillie*, 281 P. at 927).

57. 352 P.2d 29 (Kan. 1960).

58. *Ross*, 783 P.2d at 335.

59. *Lynch v. Rosenberger*, 249 P. 682, 684 (Kan. 1926).

60. 249 P. 682 (Kan. 1926).

61. See *id.* at 684-85.

62. See *Ross*, 783 P.2d at 335. The overarching goal of the Uniform Parentage Act (UPA) was to allow the courts to treat all children equally, regardless of whether their parents are married. *Id.* at 335-36.

63. KAN. STAT. ANN. §§ 38-1110 to -1131 (1985) (amended 1994). Kansas has yet to adopt the 2002 amendment to the UPA, which includes the best interests of the child standard. See UNIFORM PARENTAGE ACT (2002). This could show reluctance of the legislature to codify the *Ross* doctrine.

64. KAN. STAT. ANN. § 38-1114(a).

the child is born.⁶⁵ Any presumption under section 38-1114 may be rebutted by “clear and convincing evidence,” and if presumptions conflict, the presumption that is based on the “weightier considerations of policy and logic, including the best interests of the child, shall control.”⁶⁶

In 1994, the legislature amended the KPA to include section 38-1114(a)(5), a presumption of paternity based on genetic testing, if “genetic test results indicate a probability of ninety-seven percent or greater that the man is the father of the child.”⁶⁷ Under sections 38-1114(a)(5) and 38-1118, a presumption of parentage appears based on the biological definition of a child.⁶⁸ Section 38-1118 provides that if paternity is at issue, the court *shall* order genetic tests.⁶⁹ The plain language of 38-1114(a)(5) establishes a biological presumption of paternity, and 38-1118 mandates genetic testing.⁷⁰

In 1989, *In re Marriage of Ross* radically altered the court’s application of section 38-1118, and ultimately of section 38-1114(a)(5) after its addition to the KPA.⁷¹ The decision in *Ross* is the most important development in Kansas case law regarding the marital presumption of paternity.⁷² By statute, the court may presume a man to be a child’s father, and if this presumption occurs, significant consequences follow.⁷³ The consequence most applicable to the following analysis is that the court will not rebut the presumption with genetic testing until the court holds a *Ross* hearing to determine whether genetic testing is in the best interests of the child.⁷⁴ *Ross* defined the “best interests of the child” standard and mandated that, prior to ordering genetic testing, the court must consider, based on the facts, the best interests of the child, including the child’s “physical, mental, and emotional needs.”⁷⁵ The court in

65. *Id.* § 38-1114(a)(1). Other presumptions that a man is the father include the following: (1) if the man and the mother have attempted to marry prior to the child’s birth, but the marriage was invalid; (2) if the man and the mother attempted to marry after the child’s birth, but the marriage was invalid; (3) if the man acknowledges paternity, either openly or in writing; (4) if genetic test results show that the man’s chances of being the father are equal to or greater than ninety-seven percent; and (5) if the man has been ordered by the court to support the child, even if he has never been married to the child’s mother. *Id.* § 38-1114(a).

66. *Id.* §§ 38-1114(b), (c); see Sheila Reynolds, *Challenging the Presumption of Paternity*, 65 J. KAN. B. ASS’N 36, 37 (1996).

67. KAN. STAT. ANN. § 38-1114(a)(5).

68. *Id.* §§ 38-1114(a)(5), -1118.

69. *Id.* § 38-1118; see Reynolds, *supra* note 66, at 37 (emphasis added).

70. KAN. STAT. ANN. § 38-1118; see Reynolds, *supra* note 66, at 37.

71. See Reynolds, *supra* note 66, at 37; see *supra* text accompanying note 6.

72. Reynolds, *supra* note 66, at 37.

73. *Id.*

74. *Id.* Professor Reynolds notes four important consequences in Kansas regarding a presumption of paternity: (1) the party opposing the presumptive paternity must rebut the presumption with clear and convincing evidence; (2) no statute of limitations exist for such a rebuttal; (3) any order for child support does not require additional proceedings; and (4) as held in *Ross*, the genetic tests may not rebut the presumption until the court determines the best interests of the child. *Id.*

75. *In re Marriage of Ross*, 783 P.2d 331, 336, 338-39 (Kan. 1989) (citing *McDaniels v. Carlson*, 738 P.2d 254 (Wash. 1987) (holding that filing a paternity action does not assume that the determination of paternity is in the child’s best interest and the court must look at the facts of each case individually)).

Ross based its holding on the policy that interfering with an established relationship between a child and her presumed father could have detrimental consequences for the child.⁷⁶

Subsequent Kansas cases have further refined this holding.⁷⁷ *Jensen v. Runft*⁷⁸ and *In re D.B.S.*⁷⁹ provided additional considerations to guide the trial court when determining the best interests of the child.⁸⁰ In *Ferguson v. Winston*,⁸¹ the Kansas Court of Appeals applied *Ross* to an adult child who reached the age of eighteen during the pendency of the court proceedings.⁸² The court determined that the district court had erred when considering results of genetic tests performed before holding a *Ross* hearing.⁸³

Kansas courts have repeatedly interpreted the KPA as modified by the *Ross* doctrine. For example, in *In re Marriage of Phillips*,⁸⁴ the court concluded that an acknowledgement of paternity, even after genetic testing has disproven paternity, establishes a permanent father/child relationship that may be ended only by a court order.⁸⁵ In addition, in *Phillips* and *In re Parentage of Shade*,⁸⁶ the court reiterated that while the KPA provides for a rebuttable presumption of paternity,

76. *Ross*, 783 P.2d at 338-39; see Reynolds, *supra* note 66, at 38. In effect, *Ross* provides that in specific instances, the presumption of paternity is not allowed to be challenged by biology. See Reynolds, *supra* note 66, at 38.

77. See, e.g., *Jensen v. Runft*, 843 P.2d 191, 194 (Kan. 1992); *Ferguson v. Winston*, 996 P.2d 841, 845 (Kan. Ct. App. 2000); *In re D.B.S.*, 888 P.2d 875, 888 (Kan. Ct. App. 1995).

78. 843 P.2d 191 (Kan. 1992). Both the presumed father and the possible biological father refused a relationship with the child, and the situation was well known in the rural community. *Id.* at 194. The appellate court allowed genetic testing in an attempt to encourage the rightful father to establish a connection with the child. *Id.*

79. 888 P.2d 875 (Kan. Ct. App. 1995). The court held that genetic testing was not in the child's best interest, as the child had a close relationship with the presumed father and his older sibling. *Id.* at 888.

80. Reynolds, *supra* note 66, at 38-40 (citing *Jensen*, 843 P.2d at 194; *D.B.S.*, 888 P.2d at 887-88). As discussed by Professor Reynolds, examples of questions to be considered are as follows: (1) Whether the presumed father has an established relationship with the child, and to what degree the child might be affected if that relationship ended; (2) in the event the presumed father is found not to be the biological father, will the child have no legal father, or is any other man acting as a father; (3) does the child believe that the presumed father is her biological father, and what impact will a discovery of non-paternity have on the child; (4) what motives exist for the filing of the paternity action; (5) is there a persuasive medical need to resolve biological heritage; (6) does the presumed father have other children with which the child has relationships, and could those relationships be affected; and (7) is the general community aware of the child's parental uncertainty? *Id.*

81. 996 P.2d 841 (Kan. Ct. App. 2000).

82. *Id.* at 846.

83. *Id.* at 845. This case is distinguishable from *Reese* on its facts. *Ferguson* did not involve a claim against an estate; the child in *Ferguson* only became an adult after filing the case, and most importantly, the presumed father himself filed the paternity action. *Id.* at 844; see also Brief of the Appellant, *supra* note 13, at 10-11 (discussing the facts of both cases).

84. 58 P.3d 680 (Kan. 2002).

85. *Id.* at 686; see KAN. STAT. ANN. § 38-1138(b)(1) (1985) (amended 1994). In *Phillips*, the presumed father determined through genetic testing that he was not the father of the two minor children born during his marriage to the mother; however, no other presumed father was named. 58 P.3d at 681-82. The presumed father acknowledged paternity in writing even after the paternity test and continued to act as the children's father. *Id.* at 686. The mother failed to provide convincing evidence of any other possible father. *Id.* The court held that, in the best interests of the children, the presumption of his paternity had not been adequately rebutted. *Id.*

86. 126 P.3d 445 (Kan. 2006).

the evidence used in rebuttal must be sufficiently clear and convincing to overcome the presumption of paternity.⁸⁷

Courts outside Kansas have also followed the path of *Ross* in determining the best interests of the child prior to allowing a rebuttal of the marital presumption of paternity. In Arizona, the court cited to *Ross* to establish a best interests standard in *Ban v. Quigley*.⁸⁸ The Colorado Supreme Court in *N.A.H. v. S.L.S.*⁸⁹ stated that paternity is not ultimately determined by genetic testing and the court must consider the best interests of the child to resolve competing presumptions of paternity.⁹⁰ Several states, including Florida, Massachusetts, Minnesota, Montana, New Jersey, New Mexico, and Wisconsin use the best interests standard to determine whether the presumption of paternity should be rebutted.⁹¹ Courts have continued to enforce the common law presumption of paternity for public policy reasons.⁹²

B. Technological Advancements in Paternity Testing

A major reason that courts have continued to enforce the marital presumption of paternity is to avoid evidentiary impasses.⁹³ One major evidentiary difficulty was that, until fairly recently, scientific paternity tests did not exist.⁹⁴ Today there have been significant advancements in the field of paternity testing.⁹⁵

Scientists first discovered the blood-grouping test in the early 1900s, and the blood-grouping, or “genetic-marking,” paternity test followed.⁹⁶ This type of paternity test could not conclusively determine a child’s paternity; however, it could eliminate the possibility that a particular man was the father.⁹⁷ Although the courts began admitting these tests as evidence of paternity in the 1940s, they were of limited help to

87. *Phillips*, 58 P.3d at 686; *see also Shade*, 126 P.3d at 450 (finding that there was not adequate evidence to rebut the presumption of paternity and such was not in the child’s best interest).

88. 812 P.2d 1014, 1018 (Ariz. Ct. App. 1990).

89. 9 P.3d 354 (Colo. 2000).

90. *Id.* at 362, 366.

91. *See Dep’t of Health and Rehab. Servs. v. Privette*, 617 So. 2d 305, 308-09 (Fla. 1991); *C.C. v. A.B.*, 550 N.E.2d 365, 373 (Mass. 1990); *In re Paternity of B.J.H.*, 573 N.W.2d 99, 102 (Minn. Ct. App. 1998); *In re Paternity of Adam*, 903 P.2d 207, 211 (Mont. 1995); *M.F. v. N.H.*, 599 A.2d 1297, 1302 (N.J. Super. Ct. App. Div. 1991); *Tedford v. Gregory*, 959 P.2d 540, 545 (N.M. Ct. App. 1998); *In re Paternity of C.A.S.*, 468 N.W.2d 719, 726 (Wis. 1991). The above is not an exhaustive list of states applying this rule.

92. *See Debi McRae, Evaluating the Effectiveness of the Best Interests Marital Presumption of Paternity: It is Actually in the Best Interests of Children to Divorce the Current Application of the Best Interests Marital Presumption of Paternity*, 5 WHITTIER J. CHILD & FAM. ADVOC. 345, 359 (2006).

93. *See id.* at 361. Husbands and wives would have to testify against one another, which common law did not permit. *Id.* Other reasons for enforcing the presumption are that the courts wish to prevent declaring children illegitimate and to protect the institution of marriage. *Id.* at 359-61.

94. *See id.* at 362.

95. *See id.* at 367-68.

96. *See id.*; Jill. T. Phillips, Comment, *Who is My Daddy? Using DNA to Help Resolve Post-Death Paternity Cases*, 8 ALB. L.J. SCI. & TECH. 151, 158 (1997).

97. *See McRae, supra* note 92, at 369.

the courts, primarily because they were only tests of exclusion.⁹⁸ The blood-grouping paternity test also made it extremely difficult to determine paternity after the death of the putative father.⁹⁹

In the 1980s, new advancements in technology went beyond analyzing and comparing blood type.¹⁰⁰ The genetic paternity test was developed based on analysis of genetic material (DNA) found in bodily tissues.¹⁰¹ The DNA genetic test determines paternity with nearly absolute accuracy by examining the codes of physical traits at a molecular level rather than simply excluding a man as a potential father.¹⁰² Scientists have calculated that the odds of two unrelated people sharing the same DNA pattern are about thirty billion to one.¹⁰³ Thus, the DNA paternity test is able to establish probabilities of paternity above 99.99% and eliminate the obstacles that the courts once faced.¹⁰⁴

C. The Kansas Probate Code

The Kansas Probate Code (Code) codified the process for administering a decedent's estate.¹⁰⁵ This process requires the court to determine who is a rightful heir.¹⁰⁶ Code section 59-501(a) defines a "child."¹⁰⁷ The Code, however, does not provide a method or guidance for determining how a party would meet this definition.¹⁰⁸

While the presumption of paternity is constantly evolving through common law, statutes have superseded the common law right to receive an inheritance.¹⁰⁹ In *Jackson v. Lee*,¹¹⁰ the Kansas Supreme Court held

98. See *id.* The blood-grouping test was merely advanced enough to eliminate only a limited number—about seventeen percent—of falsely accused fathers from paternity. *Id.* (citing *Plemel v. Walter*, 735 P.2d 1209, 1213 (Or. 1987)).

99. See Phillips, *supra* note 96, at 158-59. This type of test must be completed soon after the blood sample is taken; in the case of death, blood may be discarded or too much time may have elapsed to have a reliable sample. *Id.*

100. See McRae, *supra* note 92, at 370.

101. See *id.* (noting that tissue samples could come from such bodily tissues as blood, saliva, or semen).

102. See *id.*; 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).

103. See Le Ray, *supra* note 102, at 759.

104. *Id.* at 748.

105. See *Reese v. Muret*, 150 P.3d 309, 311 (Kan. 2007); KAN. STAT. ANN. § 59-501 (1939) (amended 1985). The Probate Code is found in KAN. STAT. ANN. §§ 59-501 to -514.

106. See *Reese*, 150 P.3d at 311; Brief of Appellee, *supra* note 17, at 9; KAN. STAT. ANN. § 59-501.

107. This statute reads: "'Children' means biological children, including a posthumous child; children adopted as provided by law; and children whose parentage is or has been determined under the Kansas parentage act or prior law." KAN. STAT. ANN. § 59-501.

108. Brief of Appellee, *supra* note 17, at 9. Other courts have difficulty defining a "child" under probate statutes. For example, in *In re Estate of Palmer*, 658 N.W.2d 197, 199 (Minn. 2003), the Minnesota Supreme Court had difficulty determining whether the definition of "child" as written in the probate code required or merely permitted the court to look to the parentage act. See *id.* at 199; *infra* text accompanying note 124.

109. Brief of Appellant, *supra* note 13, at 11; see *Jackson v. Lee*, 392 P.2d 92, 95 (Kan. 1964).

110. 392 P.2d 92 (Kan. 1964).

that the common law is inapplicable to intestate succession and that statutes control the designation of heirs.¹¹¹ The United States Supreme Court, in *Irving Trust Co. v. Day*,¹¹² also observed that statutes established the rights of testate and intestate succession.¹¹³

D. Intersection of Paternity and Probate

The probate court is responsible for determining how to distribute a decedent's property to the proper heirs. This task becomes more difficult, however, when the decedent is a presumed or putative father.¹¹⁴ The question then becomes a complex issue of which policies and laws the court should apply—probate law or family law—and how the two fields intersect.

Kansas courts have addressed issues of paternity in a probate case only somewhat. Before the legislature amended the Code in 1985, the court in *In re Kuhn's Estate*¹¹⁵ noted that if a father has openly recognized a child as his own, or recognized the child in writing, that is sufficient to establish paternity under section 59-501.¹¹⁶ In *In re Estate of Foley*,¹¹⁷ the Kansas Court of Appeals held that a presumption of paternity based on genetic tests under section 38-1114(a) must occur prior to the commencement of a paternity action.¹¹⁸ In *Foley*, no presumption of paternity existed prior to the death of the decedent.¹¹⁹ Before *Reese*, Kansas courts had not addressed the issue of a rebuttal of a marital presumption of paternity in the context of an estate claim.

Other jurisdictions are somewhat instructive on the subject of paternity in a probate context, largely regarding conflicts between separate statutes of limitations. For example, New Jersey courts have labored to emphasize the differences between its probate code and its parentage act.¹²⁰ In Colorado, genetic testing rebutted the paternity of a presumed

111. *Id.* at 95.

112. 314 U.S. 556 (1942).

113. *Id.* at 562.

114. Black's Law Dictionary defines "presumed" or "putative" father as follows:

[P]resumed father. The man presumed to be the father of a child for any of several reasons: (1) because he was married to the child's natural mother when the child was conceived or born, (2) because the man married the mother after the child's birth and agreed either to have his name on the birth certificate or to support the child, or (3) because the man welcomed the child into his home and held out the child as his own.

[P]utative father. The alleged biological father of a child born out of wedlock.

BLACK'S LAW DICTIONARY 640-41 (8th ed. 2004).

115. 626 P.2d 794 (Kan. 1981).

116. *Id.* at 795.

117. 925 P.2d 449 (Kan. 1996).

118. *Reese v. Muret*, 150 P.3d 309, 312 (Kan. 2007) (citing *Foley*, 925 P.2d at 452).

119. *Foley*, 925 P.2d at 452. In *Foley*, the purported adult child had a presumptive father who was married to her mother and no presumption of the decedent's paternity existed prior to his death. *Id.*

120. See, e.g., *Fazilat v. Feldstein*, 848 A.2d 761, 764, 768-69 (N.J. 2004); *Wingate v. Estate of Ryan*, 693 A.2d 457, 463 (N.J. 1997). In *Wingate*, the thirty-one year old plaintiff, Wingate, brought a claim against her putative father's estate one day after his death. 693 A.2d at 459. No presumption

father, and paternity of the decedent was determined under the probate statutes. The court determined that the “probate code provisions control.”¹²¹

In a similar conflict between parentage and probate laws, the Supreme Court of Missouri held, in *In re Nocita*,¹²² that the probate statutes, not the parentage act, should determine the heirs of a purported father.¹²³ Minnesota courts have also separated family law from probate law to determine that its probate code permits, not requires, paternity in a probate case to be determined by its parentage act.¹²⁴ Other states, including New York and California, look at whether the decedent openly and notoriously acknowledged the putative heir as his child.¹²⁵ Although other states’ cases may be instructive, it is important to note that each case is statutorily distinct and factually unique.

In some cases, courts have allowed the posthumous DNA testing of a putative or presumed father in order to determine inheritance rights. The current national trend is to loosen restrictions on posthumous pa-

of paternity had previously existed. *Id.* The court allowed DNA testing that proved the decedent to be Wingate’s father. *Id.* The defendants argued that the plaintiff’s estate claim was time-barred under the twenty-three year statute of limitations in the Parentage Act. *Id.* The court noted that the Parentage Act and the Probate Code focus on different fundamental rights and held that the statute of limitations of the Probate Code controlled. *Id.* at 463, 465. In *Fazilat*, the mother of a child born out of wedlock brought a claim against the putative father’s estate for a determination of paternity and for child support. 848 A.2d at 764. The court held that the statute of limitations under the parentage act did not dictate the statute of limitations of the child support claim, as that was a true claim against the decedent’s estate for which the probate code controlled. *Id.* at 767-68. In regards to the paternity determination, however, the limitations period of the parentage act was applicable. *Id.* at 770. The court again noted that the probate and parentage statutes are distinct. *Id.* at 769. The court also observed that the child’s best interests actually may be to determine her parentage accurately. *Id.* at 769-70.

121. See *Lewis v. Schneider*, 890 P.2d 148, 150 (Colo. Ct. App. 1994). Plaintiff was born to married parents; however, her presumed father was aware that her mother was pregnant by another man at the time of their marriage. *Id.* at 149. Plaintiff was unaware of her biological parentage until she reached the age of eighteen. *Id.* Upon the death of the biological father, DNA testing proved decedent to be plaintiff’s father. *Id.* The defendant’s estate argued that the time limitations of the parentage act should control in this case. *Id.* at 150. The court disagreed, and upheld the trial court’s ruling that Lewis was able to determine her paternity notwithstanding the time limits under the parentage act. *Id.* at 150-51. It is important to note that the court stated that “the express language of [the Colorado Probate Code] does not refer to, or require, the application of the provisions in the Uniform Parentage Act to determine a child’s right of succession.” *Id.* at 150.

122. 914 S.W.2d 358 (Mo. 1996). The plaintiff, the illegitimate child of the decedent, could prove his paternity concerning the probate claim, despite the statute of limitations of the parentage act. *Id.* at 359.

123. *Id.*

124. *In re Estate of Palmer*, 658 N.W.2d 197, 199 (Minn. 2003). In *Palmer*, the adult purported child filed a claim against the presumed father’s estate. *Id.* at 198. Although the decedent’s wife and friends did not know about the purported child, the decedent had maintained a father/child relationship with the plaintiff. *Id.* For intestate succession purposes, Minnesota statutes state that paternity “may” be determined under the parentage act. *Id.* at 199. The court concluded that this was permissive language, and that a determination of paternity in a probate action was not required under the parentage act. *Id.*; see *In re Estate of Martignacco*, 689 N.W.2d 262, 266-67 (Minn. Ct. App. 2004) (clarifying that the holding in *Palmer* was not limited to those specific facts, and reiterating that the probate code does not require a designation of paternity to be made under the parentage act).

125. See, e.g., *In re Estate of Burden*, 53 Cal. Rptr. 3d 390, 395 (Ct. App. 2007); *Sanders v. Sanders*, 3 Cal. Rptr. 2d 536, 541 (Ct. App. 1992); *In re Davis*, 812 N.Y.S.2d 543, 546 (App. Div. 2006); *In re Bonanno*, 745 N.Y.S.2d 813, 815 (Sur. Ct. 2002).

ternity testing.¹²⁶ In Wisconsin, the court allowed the release of a posthumous blood sample for paternity testing to establish heirship of a putative child.¹²⁷ The court “drew the narrow distinction between ‘actions’ to determine paternity and ‘motions’ within a probate proceeding to establish heirship for purposes of intestate succession.”¹²⁸

Some states have even gone to the extreme of allowing exhumation in order to determine inheritance rights.¹²⁹ Connecticut courts have ordered exhumation for genetic testing on more than one occasion.¹³⁰ In *Brancato v. Moriscato*,¹³¹ the trial court’s holding was noteworthy because the court disagreed with the state’s claim that genetic tests should not be admitted in a probate proceeding.¹³² The court determined that because of technological advancements in the field of genetic testing—and its wide acceptance in many fields—that argument was no longer valid.¹³³

IV. COURT’S DECISION

The Kansas Supreme Court denied both motions for genetic testing, based on statutory interpretation, controlling precedent, and public policy.¹³⁴ Both parties and the court used statutory interpretation to boost their respective arguments.¹³⁵ Sandra argued that the legislature established a genetic presumption under section 38-1114(a)(5),¹³⁶ and that statutes *require* genetic testing under sections 38-1118(a)¹³⁷ and 38-1119(a)(4)¹³⁸ by the use of the word “shall.” Because the legislature amended the probate code to define a “child” under the KPA,¹³⁹ Sandra

126. Ilene Sherwyn Cooper, *Posthumous Paternity Testing: A Proposal to Amend EPTL 4-1.2(A)(2)(D)*, 69 ALB. L. REV. 947, 952 (2006).

127. *Id.* at 952-53 (citing *In re Estate of Bays*, No. 03-1120-FT, 2003 WL 22093479 (Wis. Ct. App. Sept. 3, 2003)).

128. *Id.* (citing *In re Estate of Bays*, 2003 WL 22093479).

129. *Id.* at 952.

130. *See, e.g.*, *Brancato v. Moriscato*, No. CV030472496S, 2003 WL 1090596, at *2 (Conn. Super. Ct. Feb. 27, 2003); *Lach v. Welch*, No. FA 930063955, 1997 WL 536330, at *7 (Conn. Super. Ct. Aug. 15, 1997); *Hornbeck v. Simmons*, No. 705309, 1994 WL 506620, at *2 (Conn. Super. Ct. Sept. 6, 1994).

131. No. CV030472496S, 2003 WL 1090596 (Conn. Super. Ct. Feb. 27, 2003).

132. Cooper, *supra* note 126, at 954 (quoting *Brancato*, 2003 WL 1090596, at *2).

133. *Id.*

134. *Reese v. Muret*, 150 P.3d 309, 316 (Kan. 2007).

135. *See id.* at 311-12. In the appellant’s reply brief, the appellant argues that the appellee did not address this issue in the district court and therefore could not raise this issue on appeal. *See Reply of Appellant to Brief of Appellee, supra* note 43, at 2.

136. KAN. STAT. ANN. § 38-1114(a)(5) (1985) (amended 1994). *See Reply of Appellant to Brief of Appellee, supra* note 43, at 3-5.

137. KAN. STAT. ANN. § 38-1118(a) reads:

Whenever the paternity of a child is in issue in any action . . . the court, upon its own motion or upon motion of any party . . . shall order the mother, child and alleged father to submit to genetic tests. . . . If any party refuses to submit to the tests, the court may resolve the question of paternity against the party.

KAN. STAT. ANN. § 38-1118(a) (emphasis added).

138. “The court may, and upon request of a party shall, require the child, the mother and the alleged father to submit to appropriate tests.” *Id.* § 38-1119(a)(4) (emphasis added).

139. *Id.* § 59-501(a). *See supra* text accompanying note 107.

argued that it intended the court to determine who is a child based on biology.¹⁴⁰ Furthermore, she contended that because the statutes provide for competing presumptions, the court should weigh biological paternity against any other conflicting presumption.¹⁴¹ Reese argued that the court must read the KPA and the Code *in pari materia* and construe the statutes together.¹⁴² Because the Code expressly incorporated the KPA after its amendment in 1985, the legislature must have intended for courts to interpret the statutes together, and to separate them would be inconsistent with legislative intent.¹⁴³

Interestingly, the parties and the court each stated that the KPA is clear and unambiguous, and that the rules of statutory construction supported each party's respective opinion.¹⁴⁴ The court ultimately ruled that, because the Code incorporates the KPA, a determination of parentage under the KPA is conclusive and the Code gives no statutory authority for a party to challenge that determination.¹⁴⁵ Therefore, Sandra's motion for genetic testing in the probate action had no statutory basis.¹⁴⁶ The court followed Reese's argument and determined that the language found in section 59-501(a), stating "whose parentage *is or has been determined* under the Kansas parentage act," allowed the probate action and the parentage action to occur at the same time.¹⁴⁷ Because the court considered the cases to be occurring simultaneously, it focused on the "is" language to hold that the definition of a child under the KPA applied in this case.¹⁴⁸

Regarding the paternity action, the parties and court agreed that Sam was the presumed father of Reese pursuant to section 38-1114(a)(1).¹⁴⁹ Sandra argued that a competing presumption could exist under section 38-1114(a)(5)¹⁵⁰ and that section 38-1118 requires genetic testing.¹⁵¹ The court, however, cited *Foley* to conclude that any pre-

140. See Brief of Appellant, *supra* note 13, at 13. This does not apply to adoption. *Id.*

141. See *id.* at 14.

142. See Brief of Appellee, *supra* note 17, at 8-10. As defined, "*in pari materia*" means "[o]n the same subject; relating to the same matter. It is a canon of construction that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject." BLACK'S LAW DICTIONARY 807 (8th ed. 2004).

143. See Brief of Appellee, *supra* note 17, at 10-11.

144. See *Reese v. Muret*, 150 P.3d 309, 314 (Kan. 2007); Reply of Appellant to Brief of Appellee, *supra* note 43, at 6.

145. *Reese*, 150 P.3d at 312.

146. *Id.*

147. KAN. STAT. ANN. § 59-501(a) (1939) (amended 1985) (emphasis added). For the full language, see *supra* note 107. See *Reese*, 150 P.3d at 312; Brief of Appellee, *supra* note 17, at 8 (specifically noting the "is or has been" language).

148. See *Reese*, 150 P.3d at 312. If Reese had not filed the paternity action and the case rested on the probate action, the outcome could likely have been different.

149. See *id.* at 310; KAN. STAT. ANN. § 38-1114(a)(1). Reese was born to married parents. *Reese*, 150 P.3d at 310.

150. KAN. STAT. ANN. § 38-1114(a)(5); see *Reese*, 150 P.3d at 312 (assuming genetic tests proved Sam not to be Reese's biological father, a competing presumption would exist); Brief of Appellant, *supra* note 13, at 14.

151. See Brief of Appellant, *supra* note 13, at 13.

sumption based on genetic testing must have occurred before the filing of the paternity action.¹⁵² The *Ross* doctrine modified section 38-1118(a) to require the determination of the child's best interests before ordering genetic testing.¹⁵³

Although Sandra contended that *Ross* is not applicable to an adult, the court relied on *Ferguson* to allow the court to apply *Ross* to an adult child in a paternity action.¹⁵⁴ Sandra argued that precedent does not permit application of *Ross* to an adult¹⁵⁵ and she distinguished *Ferguson* on its unique set of facts.¹⁵⁶ The distinguishing facts in *Ferguson* included: (1) the paternity action did not involve an intestate claim; (2) the paternity action was commenced while the child was a minor and while the presumed father was alive; (3) counsel did not represent the child in *Ferguson*; and (4) the presumed father initiated the proceedings.¹⁵⁷ The court dismissed Sandra's arguments by stating that the attempt to distinguish *Ferguson* "overlooks the legal foundation" of the holding in that case.¹⁵⁸

In *Ferguson*, as well as in *Ross*, a legal presumption of paternity existed before the plaintiff filed the paternity action.¹⁵⁹ Even though the child in *Ferguson* became an adult during the proceedings, the presumption of paternity had existed for many years.¹⁶⁰ The court questioned the relevance of biology in both *Ross* and *Ferguson*, and determined that the court should protect presumptive paternity over biological paternity when it is in the child's best interests, whether the child is a minor or an adult.¹⁶¹ Without applying *Ross* to an adult child, the court observed that genetic testing would become conclusive, and override any other presumption of paternity.¹⁶² Had the legislature intended for genetic testing to be conclusive for adult children, the court reasoned, the statutes would have included language limiting other presumptions under the KPA to minor children.¹⁶³ The court also concluded that extending *Ross* to an adult child protects the adult child's right to inheri-

152. *Reese*, 150 P.3d at 312 (citing *In re Estate of Foley*, 925 P.2d 449, 452 (Kan. Ct. App. 1996)).

153. *See id.*

154. *Ferguson v. Winston*, 996 P.2d 841, 844 (Kan. Ct. App. 2000). The former husband/presumed father filed a paternity action as to the presumed child, who was fourteen at the time of filing but became an adult during court proceedings. *Id.* at 844-45. The district court ordered DNA testing without a *Ross* hearing; the appellate court reversed. *Id.* at 844.

155. Brief of Appellant, *supra* note 13, at 15-16.

156. *Id.* at 10. The appellant quoted *Ferguson*: "The facts which underlie this action give it a somewhat bizarre tilt and certainly create questions as to . . . just why this is being litigated. Michael [the child] became an adult during the litigation, and it is apparent that there were and are no issues of child custody or child support being litigated." *Id.* (quoting *Ferguson*, 996 P.2d at 844).

157. *Id.* at 11.

158. *Reese*, 150 P.3d at 314; *see Ferguson*, 996 P.2d at 845.

159. *Reese*, 150 P.3d at 314.

160. *See id.*

161. *Id.*

162. *Id.*

163. *Id.*

tance and abides by the purpose of the KPA.¹⁶⁴ Although courts do not need to protect a child's right to *support* after the child reaches the age of majority, a child's right to inherit remains into adulthood.¹⁶⁵

The court focused on two policy arguments: (1) that paternity is more than simple genetics, and (2) that the court must protect the presumption of paternity.¹⁶⁶ The court first looked at the effect of genetic testing on the child, and the effect that a change in paternity might have on the child's emotional or physical welfare.¹⁶⁷ If the court allowed *Ross* to be applied to an adult child, the court would leave the child's relationship with her presumed father and family identity intact.¹⁶⁸ Secondly, it determined that the important issue was protecting the legal presumption of paternity.¹⁶⁹ The court stated that it "cannot support a policy which gives anyone an opportunity to legally undermine a child's lifelong understanding of his or her parental heritage after his or her presumptive parents are deceased."¹⁷⁰

The court disregarded Sandra's use of *Tedford v. Gregory*,¹⁷¹ instructive case law from New Mexico.¹⁷² The *Tedford* court determined that the best interests standard does not apply to an adult.¹⁷³ Sandra emphasized that, following the court's application in *Tedford*, *Ross* should not apply to Reese.¹⁷⁴ Although the *Tedford* court held that the best interests of the child standard does not apply to adult children, the Kansas Supreme Court dismissed this as non-controlling precedent that was decided prior to the binding precedent of *Ferguson*.¹⁷⁵

V. COMMENTARY

In *Reese v. Muret*, the Kansas Supreme Court drew a bright line by applying the best interests standard to an adult child in a probate action. This holding set a precedent that is problematic for many reasons. First, this case raises concerns about how and when *Ross* actually applies to

164. *Id.* at 314-15 (quoting *In re Marriage of Ross*, 783 P.2d 331, 335-36 (Kan. 1989)).

165. *Id.* at 315.

166. *Id.*

167. *Id.* (quoting *Ross*, 783 P.2d at 339).

168. *Id.*

169. *Id.* The court recognized that the critical issue was the division of Sam's estate; however, that issue rested on the designation of Reese's paternity and the existing legal presumption of paternity. *Id.*

170. *Id.*

171. 959 P.2d 540 (N.M. Ct. App. 1998).

172. *Reese*, 150 P.3d at 315 (citing *Tedford*, 959 P.2d at 545-46). In *Tedford*, the court held that the best interests of the child standard did not apply to an adult child who had filed a paternity action against her supposed natural father. 959 P.2d at 545-46. She asked for back child support, even though a presumptive marital father raised her. *Id.* at 544. The New Mexico Court of Appeals upheld the district court's decision to allow the genetic testing, finding the best interests analysis inapplicable. *Id.*

173. *Tedford*, 959 P.2d at 546.

174. Brief of Appellant, *supra* note 13, at 18; see *Reese*, 150 P.3d at 315.

175. *Reese*, 150 P.3d at 315. The court also noted that Reese herself invoked the best interests standard, and she is the appropriate party to do so. *Id.*

adult children. Next, because the court extended *Ross* to an adult's estate claim, this holding opens the floodgates to future instances of fraud by supposed children making claims on decedents' estates. In addition, the determination of rightful heirs and the determination of paternity have different fundamental purposes; thus, the court must take great care when applying paternity policy to an intestate claim. In fact, the court could have avoided these difficulties by determining Reese's paternity conclusively with genetic testing; however, the court ignored readily available evidence. Finally, because the court did not determine Reese's biological paternity, *res judicata* is a likely result.

A. Application of Ross to an Intestate Claim by an Adult

The court in *Ross* and its progeny have largely been concerned with the protection of minor children.¹⁷⁶ The *Reese* court, however, overextended its application of *Ross* when it held that the best interests standard was equally relevant to adult and minor children.¹⁷⁷ While it is conceivable that a court should take the best interests of an adult into consideration in some circumstances, there are distinct policy differences between the best interests of the child standard as applied to a minor child and its application to an adult.¹⁷⁸

Before *Ross* established the best interests of the child doctrine, paternity designations in Kansas courts evolved through the common law and statutory law.¹⁷⁹ Courts historically determined paternity issues based on the marital presumption of paternity and the desire of the courts to prevent the bastardization of children.¹⁸⁰ The National Conference of Commissioners on Uniform State Laws then codified these common law doctrines in the UPA, with a stated purpose of equalizing the treatment of legitimate and illegitimate children.¹⁸¹ The Kansas Legislature later adopted the UPA as the KPA to grant children equal access to child support, inheritance rights, accurate identification of parentage, and preservation of family relationships.¹⁸²

The *Ross* decision seemed to shift the court's focus to preventing the dissolution of an existing family (or father/child) relationship.¹⁸³ The court in *Ross* was concerned that, although determining biological

176. See, e.g., *In re D.B.S. v. M.S.*, 888 P.2d 875, 888 (Kan. 1995); *Jensen v. Runft*, 843 P.2d 191, 194 (Kan. 1992); *In re Marriage of Ross*, 783 P.2d 331, 338-39 (Kan. 1989).

177. See *Reese*, 150 P.3d at 315-16.

178. See, e.g., *Tedford*, 959 P.2d at 546.

179. See *Ross*, 783 P.2d at 335; see discussion *supra* Part III.A.

180. See *Ross*, 783 P.2d at 335 (citing *Bariuan v. Bariuan*, 352 P.2d 29, 31 (1960)).

181. See *id.* at 335; UNIFORM PARENTAGE ACT prefatory note, at 1 (2002).

182. *Ross*, 783 P.2d at 335-36.

183. *Id.* at 337 (discussing the court's holding in *In re Marriage of Zodrow*, 727 P.2d 435, 440 (Kan. 1986)). As in *Zodrow*, the *Ross* court held that it had "continued a relationship that otherwise might be severed." *Id.*

paternity would be conclusive and economical for the court, such a general acceptance of genetic tests would run counter to the court's policy of preventing bastardization of children.¹⁸⁴ Once the court establishes paternity through genetic testing, it is difficult for that child to continue a relationship with the presumed father whom the test found not to be the biological father.¹⁸⁵ It may be equally difficult for the child to form a relationship with the biological father if no relationship previously existed.¹⁸⁶

Because the *Ross* court was concerned with protecting the father/child relationship and the rights that stem from this relationship, the majority of the opinion referred to a "child" seemingly in terms of a minor child.¹⁸⁷ For example, the court spoke of a child's need for "bodily comfort and gratification" as well as the necessity of the parents to meet the child's needs.¹⁸⁸ The court stated that a child's "perception of time is different from that of an adult," and that an innocent child should not suffer because she has no "conception of the environment into which [] she has been placed."¹⁸⁹ The court stated that it should provide stability in the child's life at a time when the parents are not able to do so.¹⁹⁰

The court in *Ross* and subsequent cases also referred to the motive behind the paternity action and how it relates to the minor child.¹⁹¹ Many paternity actions arise when the mother and presumed father are divorced, and the mother is attempting to replace her ex-husband as the child's father.¹⁹² In these situations, the motives are purely that of the parents, and the court must act as a guardian to preserve the child's interests.¹⁹³ In fact, the Kansas Supreme Court, in *Ferguson*, suggested that if the parties are not litigating child custody or child support issues, the significance of the identity of the biological father is questionable.¹⁹⁴ It appears that the protection of *Ross* is most applicable to a minor child, who is the innocent bystander in a paternity dispute.¹⁹⁵

Illustrating this assumption, the New Mexico Court of Appeals has held that the best interests of the child standard does not apply to an

184. *Id.* at 338.

185. *See id.*

186. *Id.*

187. *Id.* at 338-39.

188. *Id.* at 338.

189. *Id.* at 338-39.

190. *Id.* at 338.

191. *Id.*

192. *Id.*

193. *Id.*

194. *See Ferguson v. Winston*, 996 P.2d 841, 844 (Kan. 2000). The court in *Ferguson* did apply *Ross* to an adult child; however, at the filing of the action, the child in *Ferguson* was a minor. *Id.* The child reached the age of majority during the course of the action. *Id.*

195. *See Ross*, 783 P.2d at 338.

adult.¹⁹⁶ The *Tedford* court reasoned that in most paternity cases where the best interests standard is applied, the child is a minor and a parent or putative parent filed the action to dispute paternity.¹⁹⁷ The court concluded that the best interests standard is only relevant in a paternity action when the minor child and the presumed parent have developed a close bonding relationship, and the dissolution of the relationship would cause emotional damage to the minor child.¹⁹⁸

The United States Supreme Court, in *Bellotti v. Baird*,¹⁹⁹ articulated three differences between adults and children, including: (1) that children are especially vulnerable; (2) that children are unable to make important decisions in an “informed, mature manner;” and (3) that parents play a critical role in the rearing of a child.²⁰⁰ Other research has found that children generally do not have the ability or maturity to manage traumatic situations with the appropriate skill and need the guidance of adults.²⁰¹

An obvious illustration of this point is the number of statutes that treat children and adults differently.²⁰² For example, states impose restrictions on the age when a child may receive a driver’s license.²⁰³ Also, criminal offenses by minors are handled by juvenile codes, while adults are dealt with under the criminal codes.²⁰⁴ Employment law also differentiates between adults and children in the context of child labor regulations.²⁰⁵ Children are not allowed to marry until they reach a statutory minimum age, nor are minors allowed to vote.²⁰⁶ This list is not exclusive because many fields of law apply differently to children. These examples demonstrate that society is willing to embrace fundamental dif-

196. *Tedford v. Gregory*, 959 P.2d 540, 546 (N.M. Ct. App. 1998).

197. *Id.* at 545.

198. *Id.* at 546. A situation in which the best interests standard could apply to an adult is conceivable; however, it is difficult to envision a situation where significant harm would result. For example, if an adult child had a longstanding relationship with her presumed father, and only learned after his death that he may not be her biological parent, emotional and financial harm could result. The very premise of the *Ross* protection, however, seems to be that the potential harm from such a situation could cause irreparable damage to a child as opposed to a mature adult. *See Ross*, 783 P.2d at 338-39.

199. 443 U.S. 622 (1979).

200. *Id.* at 634 (plurality opinion) (speaking in the context of applying constitutional rights to children); *see e.g.*, *May v. Anderson*, 345 U.S. 528, 536 (1953) (concurring opinion) (stating that “children have a very special place in life which law should reflect”).

201. *See* NOVELLA A. RUFFIN, CHILDREN AND STRESS: CARING STRATEGIES TO GUIDE CHILDREN 1 (2001), <http://www.ext.vt.edu/pubs/family/350-054/350-054.pdf>.

202. *Cf.* Fitzgerald, *supra* note 1, at 13 (arguing that the law should not view children as potential adults, but simply as children, and illustrating how laws treat children differently).

203. *See, e.g.*, KAN. STAT. ANN. § 8-237 (1937) (amended 2000).

204. *Compare, e.g.*, Revised Kansas Juvenile Justice Code, KAN. STAT. ANN. §§ 38-2301 to -2387 (2006), with Kansas Criminal Code, KAN. STAT. ANN. §§ 21-3101 to -4729 (1970).

205. *See, e.g.*, KAN. STAT. ANN. § 38-601 (1973) (no child under age fourteen may be employed); KAN. STAT. ANN. § 38-602 (1973) (no child under age eighteen may be employed in a hazardous occupation).

206. *See, e.g.*, KAN. STAT. ANN. § 23-106 (1876) (amended 1994) (stating that in most cases, a person cannot obtain a marriage license until age sixteen); KAN. STAT. ANN. § 25-2306 (1968) (stating minimum age to vote is age eighteen).

ferences between adults and children.²⁰⁷ An assumption exists that adults are more able to make mature, informed decisions about their welfare, and because of this, the law should protect children.²⁰⁸

The courts do not need to protect adults, which was the basis of the court's logic in *Tedford*.²⁰⁹ The *Reese* court, however, ignored this logic and relied heavily on *Ferguson*.²¹⁰ The court disregarded distinguishing facts between *Ferguson* and *Reese*, and simply stated that the purpose of both *Ross* and *Ferguson* was to determine paternity even though the child had a presumptive father.²¹¹ While this is true, and though *Tedford* is non-binding in Kansas, its reasoning is useful because it acknowledges the real differences in policy between protecting a minor child and unnecessarily applying *Ross* to an adult.²¹²

The *Reese* court opined that to deny a child, even as an adult, the protection of a *Ross* hearing is to rewrite the KPA, because the genetic test removes all other presumptions of paternity.²¹³ Yet the non-rebuttable presumption of paternity, if found not to be in a child's best interests, in effect, does the very thing that the court discourages.²¹⁴ By making the marital presumption non-rebuttable, even with conclusive genetic testing, the court essentially rewrote the KPA by eliminating all other possible presumptions.²¹⁵

As part of its reasoning for not allowing genetic testing, the court firmly stated that it would not disturb a child's "lifelong understanding" of her parentage.²¹⁶ In fact, Reese's lifelong understanding was questionable.²¹⁷ Although she believed Sam might be her father, she knew for years of the possibility that he may not be her biological father.²¹⁸ According to the appellant, Reese's mother even named another man as her possible father when Reese was only a teenager.²¹⁹ At the time of appeal, Reese was a thirty-three year old woman who had suspected for nearly twenty years that her presumed father may not be her father at all.²²⁰ Her lifelong understanding was that her parentage was in doubt and the court merely perpetuated her uncertainty.

Generally, the state does not have the authority to interfere with

207. *Cf. Fitzgerald, supra* note 1, at 12-13.

208. *Cf. id.*

209. *See Tedford v. Gregory*, 959 P.2d 540, 545-46 (N.M. Ct. App. 1998).

210. *See Reese v. Muret*, 150 P.3d 309, 314-16 (Kan. 2007) (applying *Ferguson v. Winston*, 996 P.2d 841, 844-45 (Kan. Ct. App. 2000), to hold that the best interests standard may apply to an adult).

211. *Id.*; *see supra* text accompanying note 83; *supra* notes 154-156 and accompanying text (outlining distinguishing facts).

212. *See Tedford*, 959 P.2d at 545-46.

213. *Reese*, 150 P.3d at 314.

214. *Cf. McRae, supra* note 92, at 356-57.

215. *Cf. id.*

216. *Reese*, 150 P.3d at 315 (Kan. 2007).

217. *See Brief of Appellant, supra* note 13, at 3-4.

218. *See id.*

219. *See id.*

220. *See id.*

family relations absent a compelling state interest.²²¹ Although parents have the right to determine their child's best interests, when involved in a custody dispute, the parents' authority gives way to the court system.²²² The rationale of *Ross* is that the court steps in to protect the minor child from emotional harm or other damage that may result from the loss of a nurturing parental relationship when that relationship is questioned.²²³ This rationale should not apply to a grown woman who has no relationship with her presumed father, and who initiates the action only in the context of an estate claim for purely financial interests.

B. Misuse of Ross to Achieve Inheritance and Its Future Implications

The *Reese* decision is an example of how abuse can occur when the court applies a judicially-created family-preservation doctrine to an estate claim. Because the Kansas Supreme Court set the precedent for a blanket application of *Ross*, an increase in fraudulent estate claims could result.²²⁴ If the court intends for the best interests of the child standard to apply in all circumstances in which the KPA is invoked, it must be careful to apply the test to a specific set of facts in order to prevent estate fraud.

Abuse occurred in this case when the court obstructed the purpose of the estate action by allowing application of the *Ross* doctrine. The purpose of the Code is simple: to determine proper heirs and provide for the speedy and orderly administration of estates.²²⁵ Instructive case law from the New Jersey Supreme Court explained that the parentage statutes and the probate codes are independent of one another and focus on different primary rights.²²⁶

While the focus of the parentage act is to protect and preserve family relationships and the rights that stem from such relationships, the probate code focuses on distribution of a decedent's personal property.²²⁷ The purpose of a probate claim is simply to determine proper heirs, not to determine whether receiving an inheritance is in the heir's best interest. It would almost always be in a potential heir's best interest to receive money or property from a decedent.²²⁸ The court should not have applied the best interests of the child analysis to an estate

221. Daniel A. Krauss & Bruce D. Sales, *Legal Standards, Expertise, and Experts in the Resolution of Contested Child Custody Cases*, 6 PSYCHOL. PUB. POL'Y & L. 843, 845 (2000).

222. See generally David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 489 (1984) (noting that courts generally defer to parents' authority, however, when parents cannot resolve their disputes, the courts must step in).

223. *In re Marriage of Ross*, 783 P.2d 331, 338-39 (Kan. 1989).

224. See Brief of Appellant, *supra* note 13, at 21-22.

225. See KAN. STAT. ANN. § 59-103 (1977) (amended 1990); Brief of Appellee, *supra* note 17, at 8.

226. See *Wingate v. Estate of Ryan*, 693 A.2d 457, 463 (N.J. 1997) (internal citations omitted).

227. See Brief of Appellant, *supra* note 13, at 14-15 (quoting *Wingate*, 693 A.2d at 463).

228. See *id.* at 21-22.

claim, especially to an adult child, unless the facts were clear and convincing that the child had a relationship with the decedent.²²⁹ Application of the best interests standard to the estate claim, while ignoring obvious facts, is a dangerous extension of the *Ross* doctrine.

The facts of this case are so compelling that the district court should have recognized Reese's fraudulent motivation, and the court should have declined to extend *Ross* to a non-existent relationship.²³⁰ For example, little evidence supports the claim that any true relationship existed between Reese and Sam Waldeschmidt. Only legal presumptions of paternity existed: (1) Sam's marriage to Reese's mother at the time of Reese's birth; (2) the fact that the birth certificate listed his name; and (3) that he paid child support for five months.²³¹ According to the facts, Sam had essentially disowned Reese.²³² Reese appears to have disowned Sam as well, as she had made no attempt at a relationship with Sam.²³³ Aside from one conversation in 2000, it had been fifteen to twenty years since they had spoken, and Reese admitted a paternity determination would not change, alter, improve, or worsen the father/child relationship.²³⁴ Reese also admitted the possibility that Sam was not her father.²³⁵ Although she had apparently questioned her paternity for many years, she did not attempt to legalize her paternity while Sam was living.²³⁶ She filed her actions at times most advantageous to her pecuniary interests.²³⁷ These facts lead one to assume that Sam and Reese did not share a traditional father/child relationship, and the court should not have extended *Ross* protection under these circumstances.

Although Sandra did not assert a claim of fraud, and it would be nearly impossible to prove elements of actual fraud, Reese's actions hint at fraud on the court.²³⁸ At a minimum, the facts reveal that Reese

229. UNIFORM PARENTAGE ACT § 608(d) (2002). The court must base its denial of a motion for genetic testing on "clear and convincing evidence." *Id.*

230. Telephone Interview with Scott Curry-Sumner, Faculty, University of Maastricht (June 21, 2007). For example, an important fact that the court failed to highlight was that the district court, in 1972, terminated Sam's duty to pay child support. *See* *Reese v. Muret*, 150 P.3d 309, 310 (Kan. 2007). There is little reason for a judge to relieve a man from the duty to support his child, unless the judge believed that Sam was not Reese's father. Telephone Interview with Scott Curry-Sumner, Faculty, University of Maastricht (June 21, 2007).

231. *See Reese*, 150 P.3d at 310, 314.

232. *See* Brief of Appellant, *supra* note 13, at 4-6.

233. *See id.* at 5.

234. *See id.* at 4-5.

235. *Id.* at 4.

236. *See id.* at 7.

237. *See id.* Reese first contacted an attorney about Sam's estate on the day of his funeral, and filed her probate claim only a few days later. *Id.*

238. Fraud on the court is not fraud between the parties. *Weese v. Schukman*, 98 F.3d 542, 552-53 (10th Cir. 1996). A party directs fraud on the court at the court system itself and it is an intentional act to undermine the integrity of the court. *Id.* While Reese may not have intended to undermine the integrity of the court, her actions lead one to believe that, without the requests for genetic testing, she may never have filed the paternity action. *See* Brief of Appellant, *supra* note 13, at 1 (stating that Reese filed her paternity action "in response" to the motion for genetic testing).

timed the filing of the paternity action to protect herself from Sandra's requests for genetic testing.²³⁹ Although Reese did not specifically misrepresent facts, she did intend to hide the truth about her biological parentage.²⁴⁰ Reese appears to have deliberately filed the paternity action to manipulate the court into using *Ross* to deny genetic testing.²⁴¹ If the court found Reese to be a proper heir, she knew that she would inherit one-half of the estate.²⁴² Further, Reese's mother, Cleary, admitted to making a deal with Reese to profit if in fact Reese inherited from Sam's estate.²⁴³ Reese essentially undermined the purpose of *Ross* in order to secure her financial interests.

Because the court in this case allowed Reese to use the KPA as a weapon and allowed the application of *Ross*, an increase in fraudulent estate claims could result. Public examples of financial motivation in estate claims are not a new phenomenon;²⁴⁴ however, these issues become more sensational when paternity is at issue.²⁴⁵ With the trend in society moving toward unwed co-parenting, the possibility of presumed or putative children making estate claims increases.²⁴⁶ In *Reese*, by allowing application of the best interests standard, the court essentially determined that Reese's financial best interests outweighed the overwhelming evidence that supports the fact that no true parent/child relationship existed.²⁴⁷ This sets a dangerous future precedent, which could allow a

239. See *Reese v. Muret*, 150 P.3d 309, 311 (Kan. 2007). Reese filed her estate claim on December 18, 2002. *Id.* at 311. Reese did not file her paternity action until April 17, 2003, after Sandra requested genetic testing. Brief of Appellant, *supra* note 13, at 1.

240. See Brief of Appellant, *supra* note 13, at 4.

241. See *supra* text accompanying notes 238-239 (discussing the timing of Reese's filings).

242. The value of Sam Waldschmidt's estate was approximately \$550,000. E-mail from Rachael K. Pirner, Attorney-at-law, Triplett, Woolf & Garretson, L.L.C., to Angela Chesney Herrington, Student, Washburn University School of Law (July 23, 2007, 08:38 CST) (on file with author).

243. See Brief of Appellant, *supra* note 13, at 7. This agreement took place, however, on May 14, 2003, after Reese filed the estate and paternity actions. See *id.*

244. Cf. Vanda Carson, *Court Bid to Stop 'Killers' Inheritance*, AUSTRALIAN, at 7, Nov. 23, 2004, available at 2004 WLNR 12092419 (reporting children charged with killing their father out of greed because they were sole heirs to the father's estate); Andrew Stimmel, *Mediating Will Disputes*, 18 OHIO ST. J. ON DISP. RESOL. 197, 200 (2002) (stating that greed can be the primary motivator in disputing a will).

245. Cf. CNN.com, *Birkhead Named Baby's Dad; Stern Won't Fight for Custody*, <http://www.cnn.com/2007/LAW/04/10/smith.baby/index.html> (last visited Sept. 26, 2007). This article is one of hundreds that discuss the recently sensational case of Dannielynn, infant daughter of the late Anna Nicole Smith, a media sensation. Howard Stern was the presumed father of Dannielynn, as the birth certificate listed him as her father. *Id.* However, the baby became the center of a paternity dispute between Stern and the putative biological father, Larry Birkhead. *Id.* A Bahamian court ordered DNA testing to take place, and Stern attempted to fight that ruling by arguing misinterpretation of law and invasion of Dannielynn's privacy. *Id.* The question of motivation in this case stemmed from the possibility that the child could inherit from the estate of the oil tycoon, Howard Marshall II, married to Anna Nicole at the time of his death. *Id.* The child potentially could be worth millions of dollars. See *id.* It is not difficult to infer motivation for the paternity dispute in this case, and as such illustrates the abuse that may occur when paternity and probate intersect.

246. Cf. Irene Sege, *Marry, Marry? Quite Contrary. The Number of Cohabiting Couples with Kids is on the Rise*, BOSTON GLOBE, July 24, 2007, at E1. In the United States, over half of the babies born outside marriage are born to unwed mothers who cohabitate with the father of their children. *Id.*

247. See *Reese v. Muret*, 150 P.3d 309, 315-16 (Kan. 2007).

previously unknown child to inherit from a presumed father's estate at the expense of other family members.²⁴⁸ Proof of paternity, without genetic evidence, is even more difficult after the death of the presumed father.²⁴⁹ Allowing DNA testing when no true father/child relationship exists is the only way to eliminate the possibility of false claims against the estate.²⁵⁰

C. Conclusive Evidence Was Readily Available, but the Court Ignored It

As stated by the Kentucky Supreme Court in *Bartlett v. Commonwealth ex rel. Calloway*,²⁵¹ "When the advances of science serve to assist in the discovery of the truth, the law must accommodate them. The law cannot pick and choose when truth will prevail."²⁵² In fact, courts have a duty to determine the outcome of a case based on all available facts.²⁵³

With a simple test, the court could have conclusively determined whether Reese was a proper heir. Even under the KPA, the burden of proof lies with the opponent of the presumption to rebut it with "clear and convincing evidence."²⁵⁴ Sam's widow, Sandra, opposed the presumption, and she attempted to rebut the presumption with conclusive evidence by filing the motion for genetic testing.²⁵⁵ Modern DNA test results are almost flawlessly accurate.²⁵⁶ Thirty billion to one odds is both clear and convincing.²⁵⁷

Courts that have allowed posthumous genetic testing have focused on whether the genetic test was reasonable and whether the decedent's genetic tissue was readily available.²⁵⁸ Due to the circumstances of Sam's death, the sheriff maintained DNA samples that law enforcement obtained at the scene.²⁵⁹ The appellant's counsel then arranged for a

248. See Brief of Appellant, *supra* note 13, at 21.

249. See Reply of Appellant to Brief of Appellee, *supra* note 43, at 7; Cooper, *supra* note 126, at 959.

250. See Reply of Appellant to Brief of Appellee, *supra* note 43, at 7; Le Ray, *supra* note 102, at 758-59.

251. 705 S.W.2d 470 (Ky. 1986).

252. *Id.* at 473.

253. See, e.g., Fortner v. Thomas, 257 N.E.2d 371, 372 (Ohio 1970) (stating that the courts have a long-established duty to decide cases as to specific facts).

254. KAN. STAT. ANN. § 38-1114(b) (1985) (amended 1994).

255. See Reese v. Muret, 150 P.3d 309, 311 (Kan. 2007).

256. See Le Ray, *supra* note 102, at 748. DNA testing can give results accurate to 99.99%. *Id.* In addition, the odds of two unrelated persons sharing a DNA pattern are about thirty billion to one. *Id.* at 759. In the past, genetic testing could merely exclude a man as the father; today, genetic testing can name the father with nearly absolute accuracy. See McRae, *supra* note 92, at 369-70.

257. Le Ray, *supra* note 102, at 759.

258. See Cooper, *supra* note 126, at 952-56. In fact, some courts have gone so far as to conclude that exhumation for genetic testing is reasonable. See, e.g., Brancato v. Moriscato, CV030472496S, 2003 WL 1090596, at *2 (Conn. Super. Ct. Feb. 27, 2003) (allowing exhumation for posthumous genetic testing to determine paternity in an estate action). The parties in this case did not have to go to the extreme of exhumation to obtain tissue from the decedent.

259. E-mail from Rachael K. Pirner, Attorney-at-law, Triplett, Woolf & Garretson, L.L.C., to Angela Chesney Herrington, Student, Washburn University School of Law (July 23, 2007, 08:38 CST)

commercial laboratory to take possession of part of the sample to preserve it for later testing.²⁶⁰ With these standards in mind, the sample was readily available to the parties, and a simple genetic test would have been reasonable. As stated by the New York County Surrogate's Court in *In re Estate of Bonnano*, "There is no basis in law or logic to exclude the results of posthumously conducted DNA tests on a decedent's genetic material Neither the parties nor the courts need be blind to scientific reality."²⁶¹

D. *Res Judicata Issues*

Res judicata issues could develop because of the *Reese* court's refusal to allow genetic testing in an estate claim. Currently, Kansas courts have not addressed this concern.²⁶² *Reese* could later decide that for psychological or medical reasons her biological parentage is important.²⁶³ Since the court decided it was not in her best interests to know whether Sam was her biological father, the court may preclude her from relitigating the paternity action and ever discovering her true biological parentage.²⁶⁴ Although the best interests standard is reviewable in a child custody case, there is no clear rule as to the review of a paternity determination.²⁶⁵

According to the KPA, under section 38-1121(a), a judgment determining paternity is conclusive for all purposes.²⁶⁶ The Kansas Legislature, however, adopted the KPA prior to the *Ross* decision.²⁶⁷ The Kansas Legislature should amend section 38-1121(a) to address the issue of reconsideration of paternity designations if the court makes its determination based on the child's best interests.

In the event that res judicata does not prevent *Reese* from obtain-

(on file with author). Sam died of a self-inflicted gunshot wound. See Brief of Appellee, *supra* note 17, at 6.

260. E-mail from Rachael K. Pirner, Attorney-at-law, Triplett, Woolf & Garretson, L.L.C., to Angela Chesney Herrington, Student, Washburn University School of Law (July 23, 2007, 08:38 CST) (on file with author).

261. *In re Estate of Bonanno*, 745 N.Y.S.2d 813, 815 (N.Y. Sur. Ct. 2002) (citations omitted); Cooper, *supra* note 126, at 958. In *Bonanno*, although the decedent's putative son was found not to be his biological son, the court held that DNA tests were admissible as clear and convincing evidence of paternity or non-paternity. *Bonanno*, 745 N.Y.S.2d at 815.

262. See Reynolds, *supra* note 66, at 40-41 (stating that the *Ross* decision provided no guidance as to the possible res judicata effects of making the presumption of paternity non-rebuttable by genetic testing).

263. See *McRae*, *supra* note 92, at 396. *Reese* may decide that she or her children must know her family medical history for health reasons. She could also simply change her mind, and decide that she wants to know the identity of her biological father. Brief of Appellant, *supra* note 13, at 16-17.

264. See Brief of Appellant, *supra* note 13, at 16-17.

265. See Reynolds, *supra* note 66, at 40-41. The best interests of the child may change over time, as the child matures and as circumstances change. *Id.* at 41. If the court bases a paternity designation on the best interests standard, it seems paramount that this designation should be reviewable. *Id.*

266. KAN. STAT. ANN. § 38-1121(a) (1985) (amended 2000); Reynolds, *supra* note 66, at 41.

267. Reynolds, *supra* note 66, at 41.

ing future genetic testing, she could discover that Sam was *not* her biological father. Such a revelation could lead to particularly difficult issues in estate claims where the court determined heirship through a best interests analysis. In this case, Reese's discovery would essentially disinherit her from Sam's estate. Consequently, such a ruling could affect the surviving spouse, Sandra, who lost half of her inheritance to Reese. Both Sandra and Reese could face litigation to determine whether Sandra could reclaim the inheritance given to Reese, who is no longer the proper heir.

Res judicata is a problematic issue stemming from the court's refusal to order genetic testing in any paternity action, but particularly in the estate context. Regardless of whether res judicata prevents a party from relitigating paternity, or whether genetic tests are later allowed which affect a party's designation of heirship, the best interests standard creates confusion within the courts. The Kansas Legislature should clarify this issue in two ways: first, in the KPA by resolving the res judicata effects of denying genetic testing; and second, in the Code, by outlining the method for use of the KPA to define a "child" and its effect if the determination is later overturned.

VI. CONCLUSION

The Kansas Supreme Court in *Reese v. Muret* shortsightedly applied the best interests standard to an adult in an intestate claim, especially where no true parent/child relationship existed that needed the court's protection.²⁶⁸ This lack of relationship, coupled with Reese's apparent fraudulent motivation, makes the precedent of this case problematic at best. Conclusive evidence in the form of genetic testing is the best way to protect decedents' estates from fraudulent claims of putative children.

With constant technological advancements and an ever-changing society where presumptions of paternity are becoming more common,²⁶⁹ it is important that the Legislature address this intersection of family law and probate law in order to protect innocent heirs and to prevent res judicata issues from occurring. As stated by the appellant, in *Reese v. Muret*, the Kansas Supreme Court allowed Reese to "defraud the estate by using *Ross* as a shield from the truth, after availing [herself] of the Parentage Act as a sword."²⁷⁰

268. Telephone Interview with Scott Curry-Sumner, Faculty, University of Maastricht (June 21, 2007).

269. See Sege, *supra* note 246, at E1. In the United States, over half of the babies born outside marriage are born to unwed mothers who cohabitate with the father of their children. *Id.*

270. Reply of Appellant to Brief of Appellee, *supra* note 43, at 7.