Who's Your Daddy?: Challenging the Application of the Best Interest of the Child Standard to Adults and in the Context of an Intestate Estate.

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I. INTRODUCTION

Recently, a Kansas District Court decided *In the Matter of the Estate of Waldschmidt*, a case that, if upheld, could potentially change the landscape of heirship determinations in Kansas for generations.[1] As a case of first impression in Kansas, the *Waldschmidt* decision raises several ripe issues: (1) whether a *Ross* hearing, the judicial imposition of a best interest of the child analysis as a precursor to ordering a genetic test to determine paternity,[2] should apply to an adult; (2) whether a *Ross* hearing should apply in the context of an intestate estate; and (3) whether the Kansas Probate Code should defer heirship challenges to the Kansas Parentage Act. This article will argue that in addressing these issues, the *Waldschmidt* court made several errors. Initially, the *Waldschmidt* court wrongfully expanded the best interest of the child standard to include its application to adults, because it ignored the limited scope of *In re Marriage of Ross*.[3] Next, the *Waldschmidt* court improperly applied the best interest of the child standard in the context of an intestate estate, because the court ignored the contrasting purposes of the Kansas Probate Code and Kansas Parentage Act. Moreover, the *Waldschmidt* court failed to recognize nontraditional family arrangements in the arena of intestate estates and

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[1] The Honorable James T. Pringle, 19th Judicial District, District Court of Cowley County, Kansas, sitting in Arkansas City, Kansas, delivered a memorandum decision on January 15, 2004. The Kansas Supreme Court docketed *In the Matter of the Estate of Waldschmidt* for appeal as Case No. 04-92810-A. The memorandum decision, an unpublished trial court opinion, provides the facts presented in this article.

[2] In re Marriage of Ross, 245 Kan. 591 (1989) (creating the judicially imposed "*Ross* hearing" that requires a best interest of the child analysis before the ordering of a genetic test to determine paternity).

[3] *Id*.

failed to properly utilize technological advances to efficiently and effectively resolve heirship challenges.

Before a discussion of these issues, one must understand the facts of *Waldschmidt*. Waldschmidt died intestate, survived by his wife. While the surviving wife appeared to be his sole heir, a thirty-three year old woman born during the marriage of Waldschmidt and his first wife, also made claim to his estate.[4] Other evidence, however, suggested that Waldschmidt did not father the claimant. Consequently, the surviving wife petitioned for genetic testing to determine the claimant's true paternity. The claimant then filed a separate paternity action, seeking the shelter of a *Ross* hearing against genetic testing.[5] The court held that Waldschmidt was the presumed father because of the claimant's birth during the first marriage[6] and found that under *Ross* it was against the claimant's best interest to have a genetic test performed that might rebut the presumption of Waldschmidt's paternity. This conclusion relegated the surviving spouse to share the estate equally with the claimant.[7]

This article will focus on the issues presented in *Waldschmidt* in four parts. First, this article will explore how situations like *Waldschmidt* arise under the Kansas Probate Code and its deference to the Kansas Parentage Act and *Ross*. Second, this article will dissect the increasing occurrence of nontraditional family situations like *Waldschmidt* and its impact on the law. Third, this article will analyze the improper application of a *Ross* hearing to an adult and in the context of an intestate estate. Finally, this article will

[4] *See* KAN. STAT. ANN. §59-506 ("If the decedent leaves such child, children, or issue, and a spouse, one-half of such property shall pass to such child, children, and issue as aforesaid").
[5] *See supra* note 2 and accompanying text.
[6] *See* KAN. STAT. ANN. §38-1114(a)(1) ("A man is presumed to be the father of the child if: (1) The man and the child's mother are, or have been, married to each other and the child is born during the marriage").
[7] *See supra* note 4 and accompanying text.

propose a uniform solution that incorporates the advent of scientific technology while still giving preference to testator intent.

II. STATUTORY SCHEME & THE *ROSS* BEST INTEREST OF THE CHILD STANDARD

A. Kansas Probate Code and Kansas Parentage Act.

Under the Kansas Probate Code, if a claimant is adjudicated the child of the decedent, then one-half of the estate would pass to the surviving spouse and one-half would pass to the claimant.[8] If there is a surviving spouse, but no children, however, the entire estate passes to the surviving spouse.[9] Thus, one can easily see that the correct determination of heirship is critical, especially when a large estate is at issue. Determining the proper heirship, however, has not proven easy. The Kansas Probate Code defines "children" for purposes of intestate succession as "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."[10] This definition supplies the only guidance for determining heirship among children of a decedent under the Kansas Probate Code. Consequently, deferring heirship challenges to the Kansas Parentage Act creates quite a quandary in that it allows for the adjudication of heirship rights by non-probate standards.

In 1985, Kansas adopted the Uniform Parentage Act of 1973.[11] The Kansas Parentage Act contains several presumptions of paternity, such as the presumption used in *Waldschmidt* that, "a man is presumed to be the father of a child if . . . the man and the

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[8] *See supra* note 4 and accompanying text.
[9] KAN. STAT. ANN. §59-504 ("If the decedent leaves a spouse and no children nor issue of a previously deceased child, all the decedent's property shall pass to the surviving spouse").
[10] *Id*. §59-501(a).
[11] *Id*. §38-1110 *et seq*.; s*ee also*, KAN. LAW & PRAC., FAM. LAW §§7.1 – 7.2 (outlining the provisions of the Kansas Parentage Act).

child's mother are, or have been, married to each other and the child is born during the marriage."[12] A presentation of clear and convincing evidence to the contrary, however, rebuts these presumptions.[13] Although the Parentage Act allows for a litany of admissible evidence to rebut a presumption of paternity,[14] genetic testing arguably provides the most conclusive evidence.[15] In fact, the Kansas Parentage Act appears to give preference to genetic testing. The Act provides that when evaluating paternity in any action, including probate proceedings, "the court, upon its own motion or upon motion of any party to the action or proceeding, shall order the mother, child and alleged father to submit to genetic tests."[16] The Kansas Supreme Court decision in *Ross*, however, complicated the obtainment of such genetic testing.

B. Creation of the *Ross* best interest of the child standard.

The law regarding determinations of paternity has evolved dramatically. Historically, Kansas courts applied a 1777 English doctrine called the Lord Mansfield Rule.[17] This Rule established one of the most ancient and strongest presumptions known to law – that a child born in wedlock is the child of the husband and wife.[18] Under this presumption, the husband and wife "shall not be permitted to say after marriage, that they have had no connection, and therefore that the offspring is spurious."[19] In the 1926 decision of *Lynch v. Rosenberger*, however, the Kansas Supreme Court overturned the

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[12] *Id*. §38-1114(a)(1).
[13] *Id*. §38-1114(b).
[14] *See Id*. §38 1119 (outlining that evidence relating to paternity may include evidence of sexual intercourse during the time of conception, an expert's opinion concerning the statistical probability of the alleged father's paternity based on the duration of the pregnancy, genetic tests, medical or anthropological evidence, physician's records, testimony relating to sexual access to the mother by another man at the probable time of the conception, and birth weight).
[15] *See infra* notes 47-51 with accompanying text.
[16] KAN. STAT. ANN. §38-1118(a).
[17] Stillie v. Stillie, 129 Kan. 19, 281 P. 925 (1929) (elsewhere reported as Martin v. Stillie, 281 P. 925).
[18] *Id*.; Bariuan v. Bariuan, 186 Kan. 605, syl. ¶ 3 (1960).
[19] *Stillie*, 281 P. at 927.

Lord Mansfield Rule, declaring it "artificial and unsound."[20] This ruling opened the door for presentation of the "best evidence" of paternity.[21] Therefore, the *Lynch* decision advances the same principle presently contained in the Kansas Parentage Act provision that allows for a rebuttable presumption of paternity by "clear and convincing evidence."[22] Recent decisions, such as *Ross*, however, obstruct the utilization of the "best evidence" to rebut paternity – namely, genetic testing.

In 1989, the Kansas Supreme Court decided *In re Marriage of Ross*, holding that a best interest of the child analysis must be conducted before a genetic test to determine paternity will be ordered.[23] This has commonly become known as the "*Ross* hearing." The *Ross* court took the position that the rights of the child, parent, and state, were best protected by the imposition of a best interest of the child standard.[24] In particular, the court adopted the standard in an effort to protect the emotional and physical stability of minor children from warring parents, because as the court observed, a paternity suit, by its very nature, threatens the stability of a child's world.[25] Rather than risk the disruption potentially caused if scientific evidence proved non-paternity, *Ross* reasoned that the status quo presumption of paternity would better protect a child's environment.[26] In other words, the *Ross* court followed a policy against bastardizing presumably legitimate children.[27]

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[20] Lynch v. Rosenberger, 121 Kan. 601, 249 P. 682, 684 (1926).
[21] *Id*.
[22] *See supra* notes 13 & 14 and accompanying text.
[23] *Ross*, 245 Kan. 591, 602-03 (1989) (finding that the results of a prior genetic test would be disregarded until the lower court determined it was in the child's best interest to have the presumption of paternity rebutted).
[24] *Id*. at 601-02.
[25] *Id*. at 602. (following McDaniels v. Carlson, 108 Wash.2d 299, 310-11 (1987)).
[26] *Id*. at 601-02; *see also*, Sheila Reynolds, *Challenging the Presumption of Paternity*, 65 DEC. J. KAN. BAR ASSOC. 36, 38 (1996).
[27] *Ross*, 245 Kan. at 601.

As a means of accomplishing this end, the *Ross* hearing gives a judge discretion to consider various factors in determining a child's best interest. Decisions subsequent to *Ross* more clearly articulated the factors considered during the hearing to include: (1) whether the presumed father and child have established a relationship; (2) whether the presumed father wants to continue to serve as the primary parent by providing financial and emotional support; (3) if the presumed father is determined to not be the father, whether another man can be determined to be the father; (4) who the child believes their father to be, and the emotional impact if they were to be proven wrong; (5) the mother's position on the issue and her motives; (6) who was married to the mother when the child was born; (7) whether there has been an acknowledgment of paternity in any writing, birth certificate, or contract; and (8) whether there has been an order to pay child support.[28] Thus, by imposing a factual inquiry that includes these considerations, *Ross* and its progeny altered the procedure of paternity actions in Kansas.[29]

The Uniform Parentage Act of 1973, the version adopted by Kansas, did not contemplate a best interest of the child standard.[30] In a sense, then, the *Ross* court undertook the role of the legislature by constructing the *Ross* hearing as a roadblock in the path of rebutting paternity. Moreover, the imposition of a *Ross* hearing undermined the *Lynch* decision, which allowed for the "best evidence" in a paternity suit. The Uniform Parentage Act of 2000 also contains a provision consistent with a best interest of the child standard, which acts as a mechanism for courts to deny a Motion for Genetic

[28] Reynolds, *supra* note 26, at 39-40 (citing Jensen v. Runft, 252 Kan. 76 (1992) and In re D.B.S., 20 Kan. App. 2d 438 (1995)).
[29] Kristin Blomquist-Shinn, *Family Law: A New Requirement for Paternity Determinations in Kansas – Determining if Blood Tests are in the Best Interest of the Child*, 30 WASHBURN L.J. 112, 115 (Fall 1990).
[30] *See* KAN. STAT. ANN. §38-1110 *et seq*.

Testing based on a finding of the best interest of the child.[31] A *Ross* hearing, or the substantial equivalent, is now the standard followed in at least thirteen states,[32] by either common law creation[33] or adoption of the Uniform Parentage Act of 2000.[34] Therefore, it is only a matter of time before a situation like *Waldschmidt* occurs again, an added reason to be sure the law is applied correctly.

III. CHANGES IN THE LANDSCAPE OF SOCIETY AND THE LAW

In circumstances such as an intestate distribution, should the court focus on the best interest of the child, or should it focus on biological accuracy? As discussed below, the traditional meaning of "family" is no longer reality,[35] the stigma of bastardization is weakened,[36] and genetic testing has become a foolproof method of establishing paternity;[37] however, *Waldschmidt*, *Ross*, and other cases, ignore these truths and rule in favor of a judicially determined equity.[38] Thus, given the changes in the definition of "family" and the advent of biological technology, legislatures must develop and courts must apply a uniform procedure to address the growing number of difficult situations like that in *Waldschmidt.*

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[31] UNIF. PARENTAGE ACT OF 2000 §608, *Authority to Deny Motion for Genetic Testing*.
[32] Michael K.T. v. Tina L.T., 182 W.Va. 399 (1989) (following best interest of child standard); C.C. v. A.B., 406 Mass. 679 (1990) (following *Ross* and *McDaniels*); Ban v. Quigley, 168 Ariz. 196 (1991) (following *Ross* and *McDaniels*); M.F. v. N.H., 252 N.J.Super. 420 (1991) (following *Ross*); Kelly v. Cataldo, 488 N.W.2d 822 (Minn. App. 1992) (following best interest of child standard); Jones v. Trojak, 535 Pa. 95 (1993) (following *Ross*); Dep't of Health & Rehab. Serv. v. Privette, 617 So.2d 305 (Fla. 1993) (following *Ross*); Matter of Paternity of Adam, 273 Mont. 351 (1995) (following best interest of child standard); Tedford v. Gregory, 125 N.M. 206 (1998) (following best interest of child standard); Langston v. Riffe, 359 Md. 396 (2000) (following *Ross* and *McDaniels*); N.A.H. v. S.L.S., 9 P.3d 354 (Colo. 2000) (following *Ross*).
[33] Just two years after the *Ross* decision, *C.C. v. A.B.*, 406 Mass. 679 (1990) and *Ban v. Quigley*, 168 Ariz. 196 (1991) both entered opinions adopting a best interest of the child standard consistent with *Ross* and *McDaniels v. Carlson*, 108 Wash.2d 299 (1987).
[34] Delaware, Texas, Washington, and Wyoming have adopted the Uniform Parentage Act of 2000.
[35] *See infra* notes 39-44 and accompanying text.
[36] *See infra* note 45.
[37] *See infra* notes 47-51 and accompanying text.
[38] *See supra* notes 1-2 & 23-29 and accompanying text; *see also infra* note 46.

Some United States Supreme Court Justices acknowledge that the idea of a "traditional family" is no longer the norm. Although some Justices stick to a "continual insistence upon respect for the teachings of history and solid recognition of the basic values that under lie our society,"[39] other Justices acknowledge that family relationships may develop in unconventional settings.[40] Statistics support the Justices who acknowledge nontraditional family arrangements. During 2002, the birth rate in Kansas increased, while the marriage rate decreased.[41] This led to the largest number of out-of-wedlock births ever reported in Kansas.[42] Furthermore, as the population aged and the baby-boomers began to reach retirement, Kansas experienced a consistent increase in the number of deaths per capita.[43] Together, these trends have a close relationship with probate law and explain the increased potential for situations like *Waldschmidt,* where estranged, long-forgotten, or illegitimate children may become estate claimants. This leads to one conclusion – if the definition of "family" changes, the law that deals with family must change too.

Recent changes in the law with regard to familial rights[44] and the societal shift away from the traditional idea of family reflect a lessened stigma of bastardization,

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[39] Michael H. v. Gerald D., 491 U.S. 110, 122-123 (1991) (Justice Scalia arguing for the plurality and citing Griswold v. Conn., 381 U.S. 479, 501 (1965)).
[40] *Id*. at 133 (Justice O'Connor concurring).
[41] During 2002, there were 39,338 births in Kansas, representing a birth rate of 14.5 per 1,000 population. This was a 0.7 increase from the 2001 rate of 14.4. Meanwhile, in 2002, the marriage rate (7.3) decreased 16.1% from the 1992 rate of 8.7. 2002 KAN. VITAL STATISTICS, KAN. DEP'T OF HEALTH & ENV'T.
[42] Between 1992 and 2002, the out-of-wedlock birth ratio increased by 26.7%. The number of out-of-wedlock births in Kansas reached a record high in 2002 at 12,129. This represented 30.8% of all Kansas births, the highest ever reported. *Id.*
[43] There were 24,968 resident deaths recorded in Kansas during 2002, an increase of 1.5% from 2001. The Kansas death rate in 2002 was 9.2 deaths per 1,000 population, which was 9.5% higher than the national average. *Id.*
[44] In both *Trimble v. Gordon*, 430 U.S. 762 (1977) and *Lalli v. Lalli*, 439 U.S. 259 (1978), the court recognized that the Equal Protection Clause deems the right of illegitimate children to inherit equivalent to the right of legitimate children. *Cf.* Lehr v. Robertson, 463 U.S. 248 (1983) (recognizing the due process rights of putative fathers); Quillon v. Walcott, 434 U.S. 246 (1977) (recognizing that there is a freedom of

because both society and the law have come to accept illegitimate children in nontraditional family arrangements.[45] The *Waldschmidt* decision, however, demonstrates that although some areas of the law with regard to parental rights attempt to keep pace with changing societal trends, probate law does not. The Kansas Probate Code's reliance upon the Kansas Parentage Act and *Ross*, exhibits a lapse in the handling of tough probate cases and a reluctance to embrace the lessened stigma of bastardization. Such a contention becomes apparent in cases like *Waldschmidt*, where courts revert to a best interest of the child analysis rather than a reliance on scientific accuracy and testator intent. Thus, in order to align the judiciary with changing societal trends, courts should become less concerned about the bastardization of a presumed legitimate child, and more willing to leave the child, at least temporarily, as the heir of only the mother.[46]

A mechanism for achieving this goal, which closely relates to the societal acceptance of nontraditional families, is courts' recognition of the usefulness and admissibility of genetic testing in resolving issues of biology.[47] In 1982, the Kansas Court of Appeals accepted genetic testing as sufficiently established in the scientific field to be admissible evidence on paternity.[48] At a minimum, if the blood type of the mother and child are known, then one can determine what possible blood types the father must

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personal choice in matters of family life); Stanley v. Ill., 405 U.S. 645 (1972) (recognizing that the private interest of a father in his children warrants protection).

[45] Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 125 (1996); *see also*, Trust Created by Agreement Dated December 20, 1961, 166 N.J. 340, 357 (2001) (stating "the social opprobrium once associated with being a child born out of wedlock has dissipated").

[46] *Id*.

[47] The American Medical Association and the American Bar Association acknowledge the reliability of human leukocyte antigen testing to prove paternity. Tice v. Richardson, 7 Kan. App. 2d 509, 512-13 (citing Seider, *Who is the Father? HLA Testing Provides a Sure Answer to This Question – If Courts Would Only Listen*, 3 FAM. ADVOC. 13, 14 (Fall 1980)); *see also*, State *ex rel.* Hausner v. Blackman, 233 Kan. 223 (1983).

[48] *See supra* note 47 and accompanying text citing Tice, 7 Kan. App. 2d at 512-13.

have.[49] With the use of genetic testing, such as human leukocyte antigen testing, however, it is possible to both prove and disprove paternity with 99.9 percent accuracy.[50] Accordingly, the United States Supreme Court stated, "as far as the accuracy, reliability, dependability – even infallibility – of the [genetic] test are concerned, there is no longer any controversy."[51] Therefore, a genetic test could reduce, if not eliminate, the risk of spurious estate claims. Yet in *Waldschmidt*, the court ignored scientific accuracy. Decisions like this show courts' willingness to accept genetic testing as admissible evidence, but unwillingness to rely upon it as determinative of the truth.

Perhaps the unwillingness to rely upon an accurate determination of the truth has gone on too long. Traditionally, courts have followed the law rather than blood.[52] Amongst the fifty states, there are stark differences in the handling of heirship challenges when paternity is at issue: there are states with uniform probate codes, states with uniform parentage codes, states with both uniform probate and parentage codes, and states with no uniform code.[53] Thus, current state law is incapable of uniformly handling the fundamental changes in family structures and inheritance claims. As seen in *Waldschmidt*, someone could live their entire life, die, and then have a court decide that the person they thought would inherit their fortune will be forced to settle for a smaller piece of the pie because of judicial decisions that ignore objective evidence. It is therefore essential to the integrity of the probate system, that the courts not be "burdened by the ambiguity of statutes or the overloading of the judicial machinery," but instead be

[49] Little v. Streater, 452 U.S. 1, 7 (1981).
[50] *Tice*, 7 Kan. App. 2d at 513.
[51] *Little*, 452 U.S. at 6-7.
[52] Brashier, *supra* note 45, at 222–24.
[53] E. Donald Shapiro, Stewart Reifler & Claudia L. Psome, *The DNA Paternity Test: Legislating the Future Paternity Action*, 7 J.L. & HEALTH 1 (1992-1993).

provided a tool that can more swiftly and accurately determine the rights of all parties.[54] Given the changing face of family arrangements, reliance on scientific truth, namely genetic testing, may be the only tool that can uniformly resolve difficult cases.

IV. *WALDSCHMIDT* IMPROPERLY EXPANDED THE BEST INTEREST OF THE CHILD STANDARD TO ADULTS AND IN THE CONTEXT OF AN INTESTATE ESTATE

Based on the increasing occurrence of nontraditional families, the advent of genetic testing, and the establishment of how situations like *Waldschmidt* occur under Kansas law, this article will now discuss the *Waldschmidt* court's improper expansion of the best interest of the child standard to adults and in the context of an intestate estate. First, applying the best interest of the child standard to an adult, as done in *Waldschmidt*, improperly expanded the *Ross* decision. The *Ross* opinion itself, as well as other persuasive authority, supports the contention that an adult child lies outside the scope of a *Ross* hearing and that the various factors considered during a *Ross* hearing do not apply to an adult. Second, applying the best interest of the child standard in the context of an intestate estate, as done in *Waldschmidt*, improperly expanded the *Ross* decision. Intestate succession may require the determination of heirship and therefore paternity, but use of the best interest of the child standard in this context ignores the separate and distinct purposes of the Kansas Probate Code and Kansas Parentage Act.

A. A *Ross* hearing should not apply to an adult.

Applying the best interest of the child standard to a thirty-three year old woman in *Waldschmidt* improperly expanded and wrongfully interpreted the *Ross* decision. The term "child," as used in "best interest of the child," should be understood to include "minor children" and exclude "adult children." Support for this contention comes from

[54] *Id*.

the *Ross* opinion itself. The *Ross* court distinguished minors from adults by acknowledging that a minor child's "perception of time is different from that of an adult."[55] *Ross* also gave a court the discretion to protect a child, presumably unable to protect himself or herself, from warring parents.[56] It is therefore nonsensical for a court to apply a *Ross* hearing to an adult; doing so would assume that an adult is incapable of protecting himself. Such an assumption contradicts the rights and responsibilities afforded adults in society and under the law.

The circumstances attendant to a minor and an adult are starkly different and therefore necessitate a different rule. Facts ascribable to most adults support this contention: adults may no longer live in their hometown, adults will likely have an established career, and adults will perhaps have a family of their own. Furthermore, a close read of the leading cases imposing the best interest of the child standard[57] demonstrates the limited factual scenario to which the best interest of the child standard applies. Each of those cases involved the parental rights of a putative father where there was already an established relationship between the "minor child" and presumed father.[58] *Waldschmidt*, on the other hand, involved a dispute over intestate assets between a rightful heir and a questionable "adult" heir. Thus, the circumstances of these leading cases are distinguishable from any situation involving the determination of an adult's paternity.

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[55] *Ross*, 245 Kan. at 602 (recognizing that the concept of time differs between minors and adults).
[56] *Id*. ("The child is placed in jeopardy whenever a parent's claim for the child is based solely or predominantly on motives to score over a warring partner after divorce . . .").
[57] *Ross*, 245 Kan. 591; *McDaniels*, 108 Wash.2d 299; *C.C.*, 406 Mass. 679; *Ban*, 168 Ariz. 196.
[58] *Ross*, 245 Kan. at 592; *McDaniels*, 108 Wash.2d at 301-02; *C.C.*, 406 Mass. at 680; *Ban*, 168 Ariz. at 198.

Distinguishing minor and adult paternity actions is not a novel idea. In 1998, the New Mexico Court of Appeals decided *Tedford v. Gregory*, a case where an adult woman brought an action against her presumed biological father to determine paternity and seek retroactive child support.[59] The *Tedford* court recognized that the best interest of the child standard invariably applied to "minor children" and not adults.[60] The court relied on *Ross* in analyzing the purpose behind the best interest of the child standard and noted that the standard applies, "where the child is young and has already established a close emotional bond with the presumed father, and where the trial court determines that it would be detrimental to the child's welfare to compromise the continuity of that established relationship . . ."[61] Analyzing the reasons for the best interest of the child standard, the *Tedford* court held that the standard was applicable in a paternity action only when the child involved in the proceeding was a "minor" and had developed a close emotional attachment to the presumed parents.[62] Arguably, the facts of *Tedford* differ from *Waldschmidt*, but the application of a best interest of the child analysis to an adult comes to bear in both.

Other Kansas cases, not following the *Tedford* rationale, illustrate the confusion over whether a *Ross* hearing applies to an adult. In 2000, the Kansas Court of Appeals decided *Ferguson v. Winston*, where the presumed father sought an adjudication of paternity with regard to an "adult child."[63] The trial court in *Ferguson* ordered a genetic test without first holding a *Ross* hearing, a decision consistent with the *Tedford*

[59] Tedford v. Gregory, 125 N.M. 206, 959 P.2d 540 (1998) (holding that the best interest of the child analysis applied to minor children only and not adults).
[60] *Id*. at 545.
[61] *Id*.
[62] *Id*. at 546.
[63] Ferguson v. Winston, 27 Kan. App. 2d 34, 35 (2000).

rationale.[64] The appellate court stated, however, that they "cannot distinguish this case from *Ross*," and held that a *Ross* hearing must be conducted before the ordering of a genetic test. It is hard to say whether age played a part in the trial court's decision not to apply a *Ross* hearing, but the appellate court's reversal of that decision failed to properly recognize the scope and intent of *Ross*. The appellate court's finding that *Ferguson* was indistinguishable from *Ross* is facially flawed: *Ross* involved the paternity of a minor and *Ferguson* involved the paternity of an adult. Similarly, in *Estate of Teeter*, another Kansas case determining the paternity of an adult, the court discussed the utilization of genetic testing and the provisions of the Kansas Parentage Act, but the court never addressed the necessity of a *Ross* hearing.[65] However, because the case is still pending, it is unknown whether this court will also distinguish the *Tedford* rationale.

Following *Tedford* makes sense: the considerations used during a *Ross* hearing are consistent with the interests of a minor child and not an adult child. The *Ross* hearing considerations encompass three themes: (1) protecting the emotional and physical stability of the child's environment, (2) analyzing the parent's motives for potentially disrupting family harmony, and (3) avoiding the impact of bastardization.[66] These themes, however, do not relate to an adult in the same manner as they relate to a minor child. If a genetic test reveals the presumed father is not the biological father there would undoubtedly be an emotional impact on any child regardless of age, but the protection of family stability that the best interest of the child standard seeks to afford is significantly

[64] *Id*.; *see also*, Wilson v. Wilson, 16 Kan. App. 2d 651 (1992) (reversing a trial court for failing to conduct a *Ross* hearing with regard to the paternity of a seventeen-year-old). *Ferguson* and *Wilson* raise the issue of whether the best interest of the child standard is applicable when a child becomes an adult, or almost an adult.

[65] Estate of Teeter, 2004 WL 944029 (Kan. Ct. App. April 30, 2004) (unpublished opinion reversing the entry of summary judgment and holding that genuine issues of material fact remain).

[66] *See supra* note 28 and accompanying text.

less when that child is an adult.[67] When a child becomes emancipated, the emotional and physical bond between the child and parent becomes more distant, because an adult child is likely no longer dependent on his or her parent. Consequently, it would be a stretch of the imagination to think that warring parents would use an unimpaired adult child as a pawn in any domestic relations dispute. It is also difficult to imagine that the bastardization of an adult would have the same impact as the bastardization of a minor child, especially considering the lessened stigma of bastardization and the societal trend towards acceptance of nontraditional family arrangements.[68] In reality, an adult, perhaps one who has moved away from his parents, has his own career, and has his own family, would only be minimally impacted, if at all, by the stigma of bastardization when compared to the impact on a minor child.[69] Thus, the considerations used during a *Ross* hearing were created with minors in mind and not adults.[70]

B. A *Ross* hearing should not apply in the context of an intestate estate.

The increasing number of nontraditional families has led to frequent paternity challenges during the determination of heirship.[71] Several cases in particular illustrate paternity challenges with regard to estates and trusts.[72] As early as 1923, in *In re Tinker's Estate*, the parents of a decedent challenged the paternity and heirship of a child

[67] *See Tedford*, 959 P.2d at 546 (holding that the best interest of the child standard is applicable only when a minor child has established a close emotional bond with the presumed parent).
[68] *See supra* notes 39-45 and accompanying text.
[69] Contrast the weakened stigma of bastardization with regard to an adult and with regard to a child. In *Jensen v. Runft*, 252 Kan. 76, 79 (1992), the impact of bastardization was discussed with regard to a seven-year-old boy living in a rural area. The paternity action filed in his home county did not use anonymous initials to identify the parties. The court stated that all the information regarding the minor child's paternity was available, and the child would be left to face his peers, who were fully versed of his parental situation. Consequently, the court ordered a genetic test.
[70] *See supra* notes 55-58 and accompanying text.
[71] *See supra* notes 39-44 and accompanying text.
[72] In re Tinker's Estate, 91 Okla. 21 (1923); In re McMurray's Estate, 114 Cal. App. 439 (1931); Green v. Long, 547 A.2d 630 (Del. Fam. Ct. 1988); In re Estate of Olenick, 204 Ill. App. 3d 291 (1990); In re Estate of Raulston, 805 P.2d 113 (Okla. Ct. App. 1990); Estate of Trew, 244 Neb. 490 (1993); Parker v. Parker, 313 S.C. 482 (1994); Trust Created by Agreement Dated December 20, 1961, 166 N.J. 340 (2001).

based on the child's premature birth.[73] Methods of challenging heirship became more sophisticated in *Estate of Trew*, where the siblings of the decedent filed motions requesting an order compelling the decedent's alleged children, who had suffered the divorce and subsequent remarriage of both parents, to submit to genetic testing to prove their legitimacy for purposes of intestate succession.[74] Additionally, in a bitter dispute over the $350 million Johnson & Johnson Corporation fortune, children, grandchildren and great-grandchildren of the corporation's founder have been locked in paternity challenges as they attempt to exclude each other from the family trust.[75] Hence, whether dealing with estates valued in the millions or just the passing of the family farm, judicial decisions in cases like *Waldschmidt* have direct impact on the future of estate administration. Setting a bad precedent in one case has the potential to change the distribution of millions of dollars, not to mention the assurances that estate planners, lawyers, and citizens rely on for structuring asset distribution upon death.

Current uniform laws, such as the Uniform Probate Code and Uniform Parentage Act, do not adequately address paternity challenges during heirship determinations. States vary widely with respect to statutory treatment of these types of situations. The Uniform Probate Code, adopted in sixteen states, contains a provision that defers challenges of paternity to state parentage statutes. The provision provides that for determining heirship, "the parent and child relationship may be established under [the

[73] *Tinker's Estate*, 91 Okla. 21 (1923) (holding that under the Oklahoma statutory definition of "descendants," the parents of the decedent were without standing to challenge paternity); *see also*, *Estate of Raulston*, 805 P.2d 113 (Okla. Ct. App. 1990).
[74] Estate of Trew, 244 Neb. 490 (1993) (holding that the recognition of paternity from a prior divorce and child custody was a final adjudication of paternity and therefore estopped the challenge of paternity during the probate proceedings).
[75] Trust Created by Agreement Dated December 20, 1961, 166 N.J. 340 (2001).

Uniform Parentage Act] [applicable state law] [insert appropriate statutory reference]."[76] The issue, however, becomes even more complicated because not every state has adopted the Uniform Parentage Act. Consequently, there are essentially four categories of statutes in this context: (1) states with both the Uniform Probate Code and Uniform Parentage Act, (2) states with the Uniform Probate Code but no Uniform Parentage Act, (3) states with the Uniform Parentage Act but no Uniform Probate Code, and (4) states with neither uniform law.

First, those states with both the Uniform Probate Code and Uniform Parentage Act have all adopted the proposed uniform probate statute that defers heirship determinations of the parent-child relationship to the Parentage Act,[77] leaving these states with potentially the same problem that arose in *Waldschmidt.* Second, those states with the Uniform Probate Code but no Uniform Parentage Act have widely differing provisions, which potentially lead to a menagerie of problems. The various state statutes in this category provide for deference to a state created parentage code,[78] deference to the Uniform Act on Paternity (predecessor to the Uniform Parentage Act),[79] deference to presumptions of paternity provided for in the probate statute,[80] or deference to a prior adjudication of paternity by clear and convincing evidence.[81] Third, those states with the Uniform Parentage Act but no Uniform Probate Code, such as Kansas, are more difficult

[76] UNIF. PROBATE CODE §2-114 *Parent and Child Relationship*; *see also,* UNIF. PROBATE CODE §1-201(5) & (32) (defining "child" and "parent" with reference to their determined status under the laws of intestate succession provided for in the Uniform Probate Code).
[77] COLO. REV. STAT. ANN. §15-11-114(1); MINN. STAT. ANN. §§524.2-114(2) & 524.2-109(2); N.M. STAT. ANN. §45-2-114; MONT. CODE ANN. §72-2-124(1); HAW. REV. STAT. ANN. §560:2-114(a); N.D. CENT. CODE. §30.1-04-09(2-3).
[78] ARIZ. REV. STAT. §14-2114(A); ALASKA STAT. §13.12.114(a).
[79] UTAH CODE ANN. §75-2-114(1).
[80] MICH. COMP. LAWS ANN. §700.2114(a-b); S.D. CODIFIED LAWS §29A-2-114(c); FLA. STAT. ANN. §732.108(2); ME. REV. STAT. ANN. §2-109(2).
[81] S.C. CODE ANN. §62-1-109(2); IDAHO CODE §15-2-109(b); NEB. REV. STAT. §30-2309(2).

to categorize. The statutory provisions vary between no provision for dealing with paternity challenges during heirship determinations,[82] the allowance of genetic testing to determine the parent-child relationship,[83] deference to the Uniform Parentage Act,[84] or deference to a prior adjudication of paternity by clear and convincing evidence.[85] Finally, those states with neither the Uniform Probate Code nor the Uniform Parentage Act each have a unique way of handling paternity challenges during heirship determinations. For example, the Oklahoma probate statutes have self-contained presumptions of paternity, the Missouri probate statutes allow for deference to prior adjudications of paternity by clear and convincing evidence, and the Georgia probate statutes allow for the judicial resolution of the identity of heirs with genetic testing.[86] Thus, the difference between the states demonstrates the inability to uniformly handle situations like *Waldschmidt* and the need for a modern uniform statutory scheme that is current with societal trends and technological advances.

The decision of the *Waldschmidt* court brings the differing views on paternity challenges during the determination of heirship to the forefront. Particularly, in Kansas, the application of a *Ross* hearing in the context of an heirship determination ignores the separate and distinct purposes of the Kansas Probate Code and Parentage Act, and disregards testator intent. The focus of probate relates to wills, intestacy, administration of estates, and the distribution of assets.[87] The preliminary sections of the Kansas Probate Code provide that the probate statutes may be used to "determine the heirs,

[82] R.I. GEN. LAWS §§33-1-8 & 33-1-1; NEV. REV. STAT. §§132.055 & 132.085.
[83] OHIO REV. CODE ANN. §§2123.01, 2105.17, 2105.25 & 2105.26.
[84] WYO. STAT. ANN. §2-4-107(a)(iii); CAL. PROB. CODE §6453; TEX. PROB. CODE ANN. §42(b); N.J. STAT. ANN. §3B:5-10;
[85] DEL. CODE ANN. §12-508(2); ALA. CODE §43-8-48(2).
[86] OKLA. STAT. ANN. §84-4-215; MO. ANN. STAT. §474.060; GA. CODE ANN. §§53-2-20 & 53-2-27.
[87] UNIF. PROBATE CODE OF 1969, *Preamble.*

devisees, and legatees of decedents."[88] Cases dealing with both testate and intestate estates illustrate that the testator's intent is the primary concern of probate law. The traditional rule in the interpretation of wills holds that the function of the court is to ascertain the testator's intent and to then carry out that intent.[89] Other states, which have adopted the Uniform Probate Code, have provisions delineating the purpose of probate as a way to "discover and make effective the intent of the decedent in distribution of his property."[90] As was previously discussed, however, the Kansas Probate Code defers determinations of heirship to the Kansas Parentage Act.[91] Thus, the Kansas Probate Code is not the mechanism used to determine all heirs, devisees, and legatees. Instead, the Kansas Parentage Act, a body of law that does not correspond with the purpose and intent of probate, is the mechanism used in some heirship determinations.

The scope of the Kansas Parentage Act, although not explicitly stated in the statutes themselves, is quite different from the scope of the Kansas Probate Code. The stated purpose of the Parentage Act is to determine the rights of children, parents, and the state; thus, the Act focuses on child support, custody, and other family law matters as opposed to the Probate Code, which focuses on determining testator intent.[92] Therefore, determining heirship by way of the Kansas Parentage Act and its imposed *Ross* hearing makes little sense and ill serves the objectives of the Kansas Probate Code.

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[88] KAN. STAT. ANN. §59-103(a)(5).
[89] Estate of Winslow, 23 Kan. App. 2d 670, 672 (1997); *see also*, In re Estate of Mildrexter, 971 P.2d 758 (Kan. Ct. App. 1999) (holding that if testator's intent can be ascertained then no extrinsic evidence is admissible to vary the intent); Matter of Estate of Koch, 849 P.2d 977 (Kan. Ct. App. 1993) (holding that "public policy recognizes that testator's intent reigns supreme."); Bradley v. Jackson's Estate, 573 P.2d 628 (Kan. Ct. App. 1977) (holding that the intent of the testator is the controlling factor).
[90] UNIF. PROBATE CODE §1-102(b)(2).
[91] *See supra* note 10. It is of note that the determination of heirship in *Waldschmidt* reached the Kansas Parentage Act and *Ross* in a slightly different manner, because the alleged daughter instituted a paternity action on her own accord.
[92] KAN. STAT. ANN. §38-1110 *et seq*.; UNIF. PARENTAGE ACT OF 1973; UNIF. PARENTAGE ACT OF 2000.

The idea that a Probate Code should supercede the Parentage Act and not defer heirship determinations is not a novel theory. Several cases have addressed whether a state's Probate Code should apply to the determination of paternity when a claimant attempts to inherit from an intestate estate. Although these decisions were limited to narrow holdings that the statute of limitations in the Probate Code supercedes the statute of limitations in the Parentage Act, they also provide strong support for separating the Probate Code and Parentage Act. In *Wingate v. Estate of Ryan*, for example, a thirty-one year old claimant sought to prove paternity for purposes of intestate succession under New Jersey's Parentage Act.[93] The *Wingate* court held that the New Jersey Parentage Act's statute of limitations did not bar the probate claim.[94] The court stated, "The Parentage Act and the Probate Code are independent statutes designed to address different primary rights. The purpose of the Parentage Act is to establish 'the legal relationship . . . between a child and the child's natural or adoptive parents, incident to which the law confers or imposes rights, privileges, duties, and obligations.' Child support is the major concern under the Parentage Act. The purpose of the Probate Code, on the other hand, is to determine the devolution of a decedent's real and personal property."[95] In *Lewis v. Schneider*, the Colorado Court of Appeals also found that the statute of limitations in the Uniform Parentage Act did not apply to a determination of heirship.[96] Similarly, in *In re Nocita*, the Supreme Court of Missouri held that for purposes of determining paternity in an heirship situation, the court should apply the

[93] Wingate v. Estate of Ryan, 149 N.J. 227, 229 (1997).
[94] *Id*. at 242-43.
[95] *Id*. at 238 (citing N.J. STAT. ANN. §§9:17-39 & 3B:1-3).
[96] Lewis v. Schneider, 890 P.2d 148 (Colo. Ct. App. 1994).

Probate Code and not the Parentage Act.[97] These cases suggest that the purpose of the two bodies of law caution against deference to Parentage Act procedures in a probate case. Rather, Probate Codes should institute a separate methodology for determining paternity.

V. A SOLUTION TO *WALDSCHMIDT*

As demonstrated in Part IV above, the *Ross* best interest of the child standard is inapplicable to an adult and in the context of an intestate estate. Cases like *Waldschmidt* exhibit the changing idea of what "family" means. At this point, however, it should be quite clear that the decision of the *Waldschmidt* court to apply a *Ross* hearing to an adult and in the context of an intestate estate is not an appropriate application of current law to changing trends in society.

The reasoning in *Ross* supports the contention that the best interest of the child standard was never intended to apply to an adult. Accordingly, the *Waldschmidt* court would have been well advised to consider the *Tedford* rationale, which explicitly held the best interest of the child standard inapplicable to adults. Reliance on *Tedford* and the intent of the *Ross* decision draws further strength from a review of the considerations used during a *Ross* hearing. Some of the best interest considerations may relate to an adult, but the overall focus of these considerations is directed at "minors."[98] Conducting a *Ross* hearing for an adult is both nonsensical and in defiance of the idea that an unimpaired adult is fully capable of handling his own life. This article establishes that the best interest of the child standard determines who is in the best position to be

[97] In re Nocita, 914 S.W.2d 358 (Mo. 1996).
[98] *See supra* notes 55-58 and accompanying text.

responsible for a minor child's welfare, whereas reaching the age of majority brings with it a duty of responsibility for oneself.

Deferring paternity challenges during an heirship determination to the Kansas Parentage Act ignores the intent and purpose of the Kansas Probate Code. The Parentage Act is in place to govern domestic relation issues such as divorce, custody, and child support, and a Probate Code is in place to distribute assets in a manner consistent with testator intent. Thus, the Probate Code's deference to Parentage Act principles is misplaced. To this end, requiring a *Ross* hearing prior to ordering a genetic test under the Kansas Parentage Act has no useful application in probate proceedings. The application of this doctrine only frustrates the efficiency and efficacy of probate. Although, without utilization of Parentage Act principles, the Kansas Probate Code must find a workable solution to cases like *Waldschmidt.*

One option for finding a workable solution involves looking at law outside Kansas. Particularly, Georgia appears to be one step ahead of other jurisdictions, or at least has an enticing and unique body of law for handling heirship determinations. The Georgia Probate Code provides, "the identity or interest of any heir may be resolved judicially upon application to the probate court that has jurisdiction by virtue of pending administration . . ."[99] At this point, and at least for purposes of this article, there are two bodies of law in Georgia that Kansas would be wise to consider – judicially ordered genetic testing and equitable legitimation.

[99] GA. CODE ANN. §53-2-20 ("Resolution of identity or interest of any heir").

As recently as 2002, Georgia enacted a probate statute that allows the use of genetic testing to resolve the heirship challenge of any party in interest to a decedent.[100] The Georgia legislature enacted this statute in reaction to various circumstances, including a dispute of blood relationship in the context of an intestate estate.[101] The statute attempts to "clear up confusion and prevent delay in the settlement of estates," problems that previously existed because of the lack of statutory provisions for disinterment and genetic testing to determine heirship.[102] The statute provides that, "when the kinship of any party in interest to a decedent is in controversy . . . a superior court may order the removal and testing of deoxyribonucleic acid (DNA) samples from the remains of the decedent and from any party in interest whose kinship to the decedent is in controversy for purposes of comparison and determination of the statistical likelihood of such kinship."[103] Such an order is only granted upon a motion for good cause shown and accompanying supportive affidavits describing a reasonable belief that the kinship is questionable.[104]

Alternatively, Georgia codified the equitable legitimation doctrine.[105] Equitable legitimation stands for the idea that an out-of-wedlock child can inherit from his father by establishing that he is in fact the child of the deceased father and that the father intended that he share in the estate.[106] The claimant child must meet two evidentiary burdens: (1)

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[100] GA. CODE ANN. §53-2-27 ("Disinterment and DNA testing where kinship of any party in interest to decedent is in controversy"); 10 GA. JUR. DECEDENT'S ESTATES AND TRUSTS §6:48.5.
[101] Gregory Todd Jones, *Disinterment and DNA Testing: Providing for Court Order for Disinterment and DNA Testing in Certain Cases Where Kinship of any party in Interest to a Decedent is in Controversy*, 19 GA. ST. U. L. REV. 347, 348 (Fall 2002).
[102] *Id*. at 347.
[103] GA. CODE ANN. §53-2-27(a).
[104] GA. CODE ANN. §53-2-27(b)(1-2).
[105] GA. CODE ANN. §53-4-4(c) ("Inheritance by children born out of wedlock and their offspring").
[106] James C. Rehberg, *Wills, Trusts and Administration of Estates*, 47 MERCER L. REV. 387, 392 (Fall 1995).

clear and convincing evidence that the child is the child of the father, and (2) clear and convincing evidence that the father intended for the child to share in the father's intestate estate in the same manner in which the child would have shared if he had been legitimate.[107] The doctrine of equitable legitimation, first annunciated in *Prince v. Black*,[108] stands for the proposition that an illegitimate child can still inherit from his father's intestate estate if he can meet the two evidentiary burdens. To take this one step further, just three years after *Prince v. Black* announced the equitable legitimation doctrine, the Supreme Court of Georgia decided *Simpson v. King* and held that genetic testing could be used to meet the clear and convincing evidentiary burden.[109]

These two Georgia probate statutes directly address the issues attendant to situations like *Waldschmidt.* The statutes recognize the changing meaning of "family," the advent of scientific technology, and the impact of these trends on probate law, without reliance on Parentage Act principles such as the best interest of the child standard. Thus, Kansas should amend the Probate Code to rectify the misapplication of law that occurred in *Waldschmidt* and create a new standard for future paternity challenges during heirship determinations, based in part on the Georgia statutory scheme.

First, eliminate from the Kansas Probate Code any means by which a paternity challenge during an heirship determination could be adjudicated by Parentage Act principles. Second, amend the Probate Code to include provisions similar to those adopted in Georgia. The new probate provisions should provide that when the paternity or kinship of any party in interest to a decedent is in controversy, a probate court, upon a

[107] GA. CODE ANN. §53-4-4(c)(1-2); *see also,* In re Estate of Burton, 265 Ga. 122, 123 (1995).
[108] Prince v. Black, 256 Ga. 79 (1986).
[109] Simpson v. King, 259 Ga. 420, 421 (1989) (stating that a blood test showing a 99.7% probability of paternity is sufficient to satisfy the clear and convincing evidence requirement of equitable legitimation).

motion for good cause shown, may order the genetic testing of a decedent and the person whose paternity or kinship are in controversy. If the genetic test results in a positive determination of paternity or kinship, the party should be allowed to inherit pursuant to already existing distribution provisions. If the genetic test results in a negative determination of paternity, then equitable provisions may be applied by the court to ensure the application of testator intent. In the latter instance, the burden will be on the party claiming heirship to present clear and convincing evidence that the decedent intended for them to inherit from the intestate estate, despite the finding of non-biology. The burden will then shift to the challenging party to rebut the presentation of evidence by the claimant and demonstrate that equity should not allow the claimant to inherit from the estate, in accordance with the finding of non-biology.

VI. CONCLUSION

The conclusion that a *Ross* hearing is inapplicable to an adult and in the context of an intestate estate, that the Kansas Probate Code should not defer challenged heirship determinations to the Kansas Parentage Act, and that the Kansas Probate Code should be amended to include new provisions for the determination of heirship, creates several beneficial results. It would modify the law to keep pace with societal changes in the meaning of "family" and fully utilize the recognition of genetic testing as determinative evidence regarding blood relationships. It would shift the law away from reliance on human determinations of equity and move it towards recognition of scientific truth. Finally, it would ensure the nexus of the Kansas Probate Code, testator intent, is at the heart of the outcome in cases like *Waldschmidt* and not the nexus of the Kansas Parentage Act, the best interest of the child.