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Joseph A. v. Gina L.: The Suit Must Go on

Amy Baldwin Littman

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I. Introduction

One of the many social changes the United States has experienced in the past three decades is a dramatic rise in the number of births to unmarried women.[1] This development is particularly significant in view of the disproportionately high percentage of unmarried women and their children who can be classified as living "below the poverty line."[2] Many of these families require state assistance when the fathers provide no monetary support.[3]

A concern for the "public purse" and the desire to indemnify it against the necessity of support for women and children, led to the evolution of modern paternity proceedings, which establish paternity through orders of filiation.[4] These orders are

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1. In 1950, the Census Bureau reported that a total of four percent of all live births were to unmarried women. By 1970, that number had risen to 10.7%. At the last census in 1980, the percentage had nearly doubled again to 18.4%, with an almost 100% increase among white women. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1984 at 70 (104th ed. 1983). *See also* Caban v. Mohammed, 441 U.S. 380, 402 n.2 (1979) (citing *National Center for Health Statistics*, in U.S. DEP'T OF HEALTH, EDUC. & WELFARE., 27 VITAL STATISTICS REPORT, No. 11 at 19 (1979)) (statistics indicating that illegitimate births comprised over 15% of all births in the United States in 1977).

2. In 1979, the Census Bureau reported that 287,300 single mother families were living at or below the poverty level in New York. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATE AND METROPOLITAN AREA DATA BOOK 507 (1982).

Moreover, among female-headed households, never-married women comprised the second-largest percentage in poverty, in 1978. NATIONAL ADVISORY COUNCIL ON ECONOMIC OPPORTUNITY, WOMEN IN POVERTY, *reprinted in* 15 CLEARINGHOUSE REV. 925, 927 (1982) (citing *1978 Poverty Rates of Female-Headed Families, by Marital Status* in BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-60, No. 124, CHARACTERISTICS OF THE POPULATION BELOW THE POVERTY LEVEL: 1978 (1980) [hereinafter cited as WOMEN IN POVERTY]).

3. A national survey taken in 1975 found that only 25% of those eligible to receive child support payments actually did receive them; and 60% of those who did receive support received less than $1500. WOMEN IN POVERTY, *supra* note 2, at 928 (citing Schulman, *Poor Women and Family Law*, 14 CLEARINGHOUSE REV. 1069 (1981)).

4. N.Y. FAM. CT. ACT § 511 (McKinney 1983) grants exclusive, original jurisdiction over paternity proceedings to the family courts. It states, in relevant part: "Except as otherwise provided, the family court has exclusive original jurisdiction in proceedings to

entered after petitioners meet the burden of providing clear and convincing evidence. They may be accompanied by orders of support.[5] In 1984, the evolutionary process went a step further. In *Joseph A. v. Gina L.*,[6] a putative father filed a paternity petition in the Family Court of Westchester County. The court continued the proceeding and granted a nunc pro tunc order of filiation, adjudicating paternity after the death of the petitioner.[7] In its decision, the court held that Family Court Act section 518,[8] dealing with the non-abatement aspects of paternity proceedings must be read as gender-neutral.[9]

Part II of this Casenote sets forth the legal background of paternity proceedings brought by both mothers and fathers, tracing the development from the common law through the expansion of the statutory rights of the parties, and including the United States Supreme Court decisions that are reflected in the changing New York law. Part III discusses the factual background of *Joseph A.* and summarizes the opinion of the court. Part IV analyzes the decision on constitutional grounds and the ramifications of the court's interpretation of the statute, concluding that, while section 518 does violate the equal protection clause, orders of filiation entered after the death of the putative father must be statutorily severed from orders of support in order to ensure adequate protection of the rights of the father. Finally, Part V recommends that the Legislature take appropriate

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establish paternity and, in any such proceedings in which it makes a finding of paternity, to order support and to make orders of custody or of visitation, as set forth in this article."

See also N.Y. DOM. REL. LAW § 111-b (McKinney Supp. 1984-1985), which grants authority to the surrogate to make necessary findings of paternity that arise in the course of adoption proceedings.

5. N.Y. FAM. CT. ACT § 511 (McKinney 1983).

6. 126 Misc. 2d 63, 481 N.Y.S.2d 203 (Fam. Ct. Westchester County 1984).

7. *Id.* at 69, 481 N.Y.S.2d at 208. The order was not accompanied by an order of support.

8. N.Y. FAM. CT. ACT § 518 (McKinney 1983) reads:

> If, at any time before or after a petition is filed, the mother dies or becomes mentally ill or cannot be found within the state, neither the proceeding nor the right to commence the proceeding shall abate but may be commenced or continued by any of the persons authorized by this article to commence a paternity proceeding.

For a discussion of § 518, see *infra* notes 113-44 and accompanying text.

9. *Joseph A.*, 126 Misc. 2d at 68, 481 N.Y.S.2d at 207-08. In *Joseph A.*, the petitioner was the father. Many more cases are commenced by mothers. The gender-neutral reading of § 518 covers these situations as well.

action to rectify the uncertain status of orders of filiation, typified in *Joseph A.*, in which orders of filiation are sought for reasons other than support.

II. Background

A. *Evolution of Paternity Proceedings*

1. *Early English Law*

Blackstone defined a child born out of wedlock[10] as one "not only begotten, but born, out of lawful matrimony."[11] The common law of England considered an out-of-wedlock child to be "filius nullius" (no one's child).[12] No laws existed regarding the support of illegitimate children, and, indeed, no one was obligated to support them.[13] Illegitmate children relied on the church and the towns for their support.[14] The first statute imposing any obligation on a putative father was enacted in 1574.[15] This statute enabled the parishes to obtain bastardy orders obligating putative fathers to pay money that was used to care for the children.[16] Despite the statutorily-imposed tie between father and child, the child remained "filius nullius." It was not until 1883 that British courts acknowledged that an out-of-wed-

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10. New York law mandates the use of the term "child born out of wedlock" as a specific replacement for the labels of "bastard" and "illegitimate" in all local laws and public documents. N.Y. GEN. CONSTR. LAW § 59 (McKinney 1951). The terms "illegitmate" and "bastard" are used solely in their historical context.

11. 1 W. BLACKSTONE, COMMENTARIES *454-55.

12. *Id.* at *459. Alternatively, an illegitmate child was known as "filius populi," the son of the people. *But see* Todd v. Weber, 95 N.Y. 181, 189 (1884) (recognizing that an illegitimate child "may acquire rights").

13. Todd v. Weber, 95 N.Y. at 189.

14. J. TEICHMAN, ILLEGITIMACY: AN EXAMINATION OF BASTARDY 60 (1982). For a complete discussion of the treatment of out-of-wedlock children in an historical context, see *id.* at 53-50. *See also*, Comment, *The Sins of the Fathers*, 14 U. Tol. L. Rev. 1017, 1019 (1983).

15. J. TEICHMAN, *supra* note 14, at 61. There is, however, a discrepancy in the date of the enactment of the statute among several sources. Blackstone cites to the statute as enacted in 1575, 1 BLACKSTONE, *supra* note 11, at *459. Duerr v. Whittmann, 5 A.D.2d 326 (1st Dep't 1958), refers to the statute as enacted in 1576. *Id.* at 329.

16. J. TEICHMAN, ILLEGITIMACY at 61. A bastardy order was obtainable at the request of a parish officer, provided that the mother of the child swore on oath that a particular man was the father. *Id.* at 64. For a discussion of the procedures and enforcement of bastardy orders, see W. BLACKSTONE, *supra* note 11, at *458.

lock child had any legal parentage whatsoever.[17]

2. *Filiation Proceedings in New York Courts*

a. *Transition from Criminal to Family Courts*

New York, like many other United States jurisdictions, traditionally followed the common law rule that fathers of out-of-wedlock children were not responsible for their support.[18] The first New York statutes to impose any liability for the support of out-of-wedlock children were criminal in nature.[19] These statutes, enacted to protect the public coffers from undue financial drain,[20] set out criminal procedures to be followed when the mother or a state official commenced paternity proceedings.[21] Even the courts, however, recognized that filiation proceedings were "not a prosecution for the punishment of a crime."[22] Paternity proceedings were classified as "a creature sui generis . . . quasi-criminal . . . special proceedings of a criminal nature."[23] Nevertheless, until 1962, paternity proceedings continued to be conducted in the Courts of Special Sessions in New York City, and the Children's Courts elsewhere in New York.[24] In that year,

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17. The Queen v. Nash, 10 Q.B.D. 454 (1883) (holding that the mother of an out-of-wedlock child was entitled to issue a writ of habeas corpus in respect of the child).

18. *See, e.g.*, People *ex rel.* Lawton v. Snell, 216 N.Y. 527, 532-33, 111 N.E. 50, 51-52 (1917) (emphasizing that liability in paternity actions existed solely by virtue of the criminal law and must be strictly construed).

19. *Id.* at 530-31, 111 N.E. at 51. The criminal sections dealing with filiation covered the issuance of warrants and the procedure for subsequent arrest; the trial procedure; the orders of support; and the indemnification of the county for any expense occurred on behalf of the child, or its mother during her confinement. *Id.*, 111 N.E. at 51-52.

20. *E.g.*, Commissioner of Public Welfare v. Simon, 270 N.Y. 188, 192, 200 N.E. 781, 783 (1936) ("The [predecessor to article 5 of the Family Court Act] apparently was enacted to give the procedure in these paternity proceedings whereby the public might be relieved from the support of those liable to become public charges.").

21. The criminal procedures are discussed in Duerr v. Wittmann, 5 A.D.2d 326, 171 N.Y.S.2d 444 (1st Dep't. 1958). These included provisions for the issuance of a warrant for the apprehension of a defendant after a paternity complaint was filed, as well as ex parte judgments; and the requisite standard of proof. *Id.* at 328-29, 171 N.Y.S.2d at 446-47.

22. *Id.* at 329, 171 N.Y.S.2d at 447. The court based this conclusion upon the distinction that "criminal actions [are] . . . for the purpose of imposing punishment . . . ." *Id.* at 328, 171 N.Y.S.2d at 446-47.

23. *Id.* at 330, 171 N.Y.S.2d at 448.

24. For a discussion of the jurisdiction of both these courts, see Czajak v. Vavonese, 104 Misc. 2d 601, 604 n.1, 428 N.Y.S.2d 986, 988 n.1 (Fam. Ct. Onondaga County 1980).

exclusive original jurisdiction was granted to the family courts under the newly-enacted Family Court Act, which incorporated relevant provisions of the Children's Court Acts and the Domestic Relations Court Act.[25]

Transfer of jurisdiction to the family court prompted new recognition of the purposes of filiation proceedings. They were no longer viewed as criminal in nature but rather were viewed as proceedings to establish rights. In *ABC v. XYZ*,[26] for example, the family court noted that filiation proceedings had a twofold purpose. They determine paternity and secure support for an out-of-wedlock child.[27] Although the court held that the paternity proceeding was barred by the statute of limitations,[28] the court did not say that a support agreement would bar a subsequent paternity action. The court noted: "[T]he law does not and should not look with favor upon suspending the question of parentage of a child in limbo particularly where the child upon a judicial declaration of paternity may enjoy substantial rights."[29] The court concluded that orders of filiation are not dependent upon an adjudication of a child's right to support from his putative father.

In *Kordek v. Wood*,[30] the appellate division held that the family court has, by virtue of section 511 of the Family Court Act, jurisdiction to make orders of support or custody or visitation.[31] It noted that the benefits of orders of filiation included

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25. The Family Court Act, ch. 686, 1962 N.Y. Laws 3043.

26. 50 Misc. 2d 792, 271 N.Y.S.2d 781 (Fam. Ct. N.Y. County 1966).

27. *Id.* at 795-96, 271 N.Y.S.2d at 784. *See also* Jean C. v. Andrew B., 86 A.D.2d 891, 891, 447 N.Y.S.2d 524, 525 (2d Dep't 1982) ("The statutory scheme for paternity proceedings, as set forth in Article 5 of the Family Court Act, was enacted to provide for the financial welfare of the child, as well as to insure that 'paternity should be established with the greatest care.' "). *Contra* Czajak v. Vavonese, 104 Misc. 2d at 601, 428 N.Y.S.2d at 986. *Czajak* held that the provisions of article 5 relating to paternity were for the purposes of establishing support only, and the family courts had no jurisdiction to determine the status of either the child or the father. *Id.* at 601, 428 N.Y.S.2d at 986. The court went on to distinguish legitimation from filiation, noting that only legitimation can alter or determine the legal status of the child. It outlined some of the ways in which legitimation can occur, such as the marriage of the parents, adoption or by declaratory judgment in the supreme court. *Id.* at 605-06, 428 N.Y.S.2d at 989.

28. *ABC*, 50 Misc. 2d at 798, 271 N.Y.S.2d at 786.

29. *Id.* at 796-97, 271 N.Y.S.2d at 785.

30. 90 A.D.2d 209, 457 N.Y.S.2d 156 (4th Dep't 1982).

31. *Id.* at 211, 457 N.Y.S.2d at 158. For the text of the statute, see *supra* note 4.

establishing certain concomitant rights, such as rights of inheritance, rights to recover benefits, and the right to notice of adoption proceedings.[32] Thus, the *Kordek* court concluded that "the child's need for support no longer bears a nexus to the granting" of an order of filiation.[33]

In *Brooks v. Willie*,[34] the family court noted another purpose served by orders of filiation. The court found that the "*collateral* powers expressly or impliedly found in article 5 . . . can otherwise serve to satisfy the 'protection of the child' purpose of paternity proceedings."[35] Thus, the family court had the ability to enter an order to "insure that in the care, protection, discipline and guardianship of the child, his religious faith shall be preserved and protected."[36] In *Brooks*, the family court relied on this rationale to protect the child from the "recognizable stigma that attaches to illegitimacy,"[37] by amending the child's birth record so that it included the name of his father.[38]

Although recognizing the varied purposes of filiation orders, the courts generally considered that the primary purpose of filiation statutes was to determine the liability for and the adequacy of orders of support.[39] Petitions that did not request orders of support could be directed to the supreme court because they were considered to be outside the jurisdiction of the family court.[40] This principle is still the prevailing view.

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32. *Id.* at 212, 457 N.Y.S.2d at 158-59.

33. *Id.* at 213, 457 N.Y.S.2d at 159.

34. 117 Misc. 2d 640, 458 N.Y.S.2d 860 (Fam. Ct. Suffolk County 1983).

35. *Id.* at 643, 458 N.Y.S.2d at 862.

36. *Id.* at 643-44, 458 N.Y.S.2d at 862-63 (quoting N.Y. FAM. CT. ACT § 551(h) (McKinney 1983), which permits the courts to enter orders of protection in assistance or as a condition of any other order made).

37. *Id.* at 645, 458 N.Y.S.2d at 863.

38. *Id.* at 646, 458 N.Y.S.2d at 864. *Contra* Dana A. v. Harry M., 113 Misc. 2d 635, 449 N.Y.S.2d 851 (Fam. Ct. N.Y. County 1982) (In the absence of a specific grant of power, the family court had no jurisdiction to change the child's surname.).

39. *See, e.g.*, Czajak v. Vavonese, 104 Misc. 2d at 607, 428 N.Y.S.2d at 990. The court in *Czajak* emphasized the importance of support by discussing the possibility of issuing a support order or approving a support agreement, even in circumstances where no order of filiation was made. *Id. See also* N.Y. FAM. CT. ACT § 523 (McKinney 1983), which provides that the petition shall state "why the court should not enter a declaration of paternity, an order of support, and such other further relief as may be appropriate under the circumstances."

40. For example, in Edward K. v. Marcy R., 106 Misc. 2d 506, 434 N.Y.S.2d 108 (Fam. Ct. Kings County 1980), the court reiterated that the principal purpose of pater-

However, it is far from universally accepted. For instance, in *Joye v. Schechter*,[41] the family court totally rejected the conclusion that the lack of a support demand warrants dismissal.[42] The court in *Joye* held that support was just one of many rights, interests and obligations created once a court makes an order of filiation.[43] It concluded that an order of filiation is separate and distinct from any order of support, visitation, or protection;[44] and that neither party may have a petition dismissed because of a failure to demand support.[45]

This view was confirmed by the appellate division in *Kordek v. Wood*.[46] It held that the plain language of Family Court Act section 511 did not condition jurisdiction upon a finding of financial need.[47] It concluded that "[t]he evolution of the provisions governing paternity proceedings into their present-day form and of the myriad rights which flow from a filiation order clearly indicates that the child's need for support no longer bears a nexus to the granting of such an order."[48]

The confusion of the courts regarding the issue is evident in

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nity is to "resolve problems of support." *Id.* at 507, 434 N.Y.S.2d at 109. Therefore, the court dismissed a paternity petition that did not contain a formal request for support. The court considered that a paternity petition, unaccompanied by a request for support, is tantamount to a petition for declaratory relief, and directed the parties to the supreme court. *Id.* at 508, 434 N.Y.S.2d at 110.

The supreme court has jurisdiction to grant relief under § 3001 of the Civil Practice Laws and Rules, which provides:

> The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment, it shall state its grounds.

N.Y. CIV. PRAC. LAW § 3001 (McKinney 1974). The Family Court Act has no comparable provision.

For cases that disagree with this rationale, see Kordek v. Wood, 90 A.D.2d 209, 211, 457 N.Y.S.2d 156, 158 (4th Dep't 1982) (Jurisdiction is not conditioned upon a finding of financial need.); Joye v. Schechter, 112 Misc. 2d 172, 178, 446 N.Y.S.2d 884, 888 (Fam. Ct. Nassau County 1982) (The purpose of a paternity proceeding is to determine the father of the child.).

41. 112 Misc. 2d 172, 446 N.Y.S.2d 884 (Fam. Ct. Nassau County 1982).
42. *Id.* at 177, 446 N.Y.S.2d at 887-88.
43. *Id.* at 178, 446 N.Y.S.d at 888.
44. *Id.*
45. *Id.* at 179, 446 N.Y.S.2d at 888.
46. 90 A.D.2d 209, 457 N.Y.S.2d 156 (4th Dep't 1982).
47. *Id.* at 211, 457 N.Y.S.2d at 158. For the text of the statute, see *supra* note 4.
48. *Id.* at 213, 457 N.Y.S.2d at 159.

Michael B. v. Sendi Diann W.[49] There the family court reiterated the holding in *Commissioner of Public Welfare v. Koehler*:[50] the purpose of filiation is to impose liability for support only. The court in *Michael B.* noted that *Koehler* is in fact the Court of Appeals' last word on this issue.[51] Conceding that various legislative amendments to article 5 may have dated *Koehler*, it urged the Legislature to "clarify the question of whether or not it intended to establish article 5 as a status proceeding, thereby changing the import of *Koehler*."[52] And it warned that if the Legislature failed to do so, "the prevailing confusion may well deteriorate into chaos."[53]

b. *Persons who may originate proceedings*

The criminal statutes, and their civil law successors, gave the courts jurisdiction to establish paternity and to provide for the support of natural children[54] and their mothers. A statutory duty was imposed on the fathers of these children where the common law had held the father to no such liability.[55] Until 1976, however, proceedings could only be brought by the mother or her representative, or by a public official.[56] Fathers were not permitted to petition for orders of filiation.[57]

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49. 121 Misc. 2d 475, 467 N.Y.S.2d 1009 (Fam. Ct. N.Y. County 1983).

50. 284 N.Y. 260, 30 N.E.2d 587 (1940). *See infra* note 54.

51. Michael B. v. Sendi Diann W., 121 Misc. 2d at 478 n.*, 467 N.Y.S.2d at 1011 n.1.

52. *Id.*

53. *Id.*

54. The New York City criminal statutes defined a natural child as one "begotten and born . . . out of lawful matrimony." Act 14, 1930, ch. 434, § 35-a, 1930 N.Y. Laws 908, 909. The New York statutes today refer to children "born out of wedlock." N.Y. GEN. CONSTR. LAW § 59 (McKinney 1951). Article 5 of the Family Court Act uses the word "child" to refer to a child born out of wedlock. N.Y. FAM. CT. ACT § 512(b) (McKinney 1983).

55. N.Y. FAM. CT. ACT § 513 (McKinney 1983) states in relevant part: "Each parent of a child born out of wedlock is liable for the necessary support and education of the child and for the child's funeral expenses."

56. THE FAMILY COURT ACT, ch. 686, § 522, 1962 N.Y. LAWS 3043, 3096. Public welfare officials could commence paternity proceedings if the child or its mother was or was likely to become a public charge. *Id.*

57. But a putative father could contract voluntarily to pay for the support of an acknowledged child, a process termed "buying his peace." *In re* Cirillo's Estate, 114 N.Y.S.2d 799, 801 (1952). In such a case, the agreement itself measured the limits of the father's liability. *Id.* This type of support obligation normally ended at the father's death.

In 1976, Family Court Act section 522 was amended to include "a person alleging to be the father, whether a minor or not."[58] At the same time, the legislature amended section 517, which provides the statute of limitations that governs commencement of paternity proceedings.[59] The new section gave the putative father the right to originate a paternity proceeding at any time prior to the child's eighteenth birthday.[60] The mother's right to bring a paternity action terminates five years after the birth of the child.[61]

The constitutionality of the differing statutes of limitation for the commencement of paternity actions by mothers and fathers was upheld in *Joye v. Schechter*.[62] In *Joye*, the family court held that the inherent differences in position between mothers and fathers, including the fact that a father has no notice of his paternity until the mother advises him, justifies disparate treatment.[63] In addition, the court noted that mothers and fathers seek different objectives when they bring paternity actions[64] and therefore, it is reasonable to "grant a purported father . . . a longer period of time to institute a paternity proceeding."[65] Thus, the putative father had standing to bring a paternity proceeding four years after the birth of the child.[66]

B. *Burden of Proof*

While filiation proceedings were initially criminal in nature, petitioners were never held to a standard of proof beyond a reasonable doubt. In *Commissioner of Public Welfare v. Ryan*,[67]

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58. Act of July 24, 1976, ch. 665, § 6, 1976 N.Y. Laws 1, 4.

59. *Id.*

60. N.Y. FAM. CT. ACT § 517(c) (McKinney 1983). The statute states in relevant part: "If the petitioner is . . . alleging to be the father, the proceeding may be originated at any time prior to the child's eighteenth birthday."

61. *Id.* § 517(a). The statute provides: "Proceedings to establish the paternity of a child may be instituted during the pregnancy of the mother or after the birth of the child, but shall not be brought after . . . more than five years from the birth of the child."

62. 112 Misc. 2d 172, 175-77, 446 N.Y.S.2d 884, 887 (Fam. Ct. Nassau County 1982).

63. *Id.* at 175, 446 N.Y.S.2d at 887.

64. *Id.* at 175-76, 446 N.Y.S.2d at 887.

65. *Id.* at 176, 446 N.Y.S.2d at 887.

66. *Id.* at 179, 446 N.Y.S.2d at 888-89.

67. 238 A.D. 607, 265 N.Y.S. 286 (1st Dep't 1933).

the appellate division stated that "the rule requiring proof beyond a reasonable doubt is limited to purely criminal trials" and it refused to further extend it.[68] However, it recognized that although filiation was quasi-criminal,[69] it was a "charge . . . so easily made and so difficult of satisfactory answer by the defendant, and the consequences of conviction are so serious."[70] Thus, *Ryan* held that the petitioner must meet a standard "stricter than [a] mere preponderance of the evidence and yet not so exacting as to eliminate all reasonable doubt . . . evidence sufficient to create a genuine belief in the mind of the trier of the facts that the defendant is the father of the child."[71]

Many years later, when paternity proceedings were considered to be civil in nature, the courts continued to accept the standard of proof described in *Ryan*. In *Commissioner of Public Welfare v. Wentlandt*,[72] for example, the appellate division held that the petitioner's burden of proof in filiation proceedings was that such proof must be "entirely satisfactory."[73] It found that this standard was analagous to a requirement of "clear and convincing proof," clearly less than proof beyond a reasonable doubt.[74] Applying this standard to the facts of *Wentlandt*, the appellate division ordered a new trial. The respondent appealed an order of filiation on the grounds that he had been sterilized. The appellate division was not convinced that the evidence presented at trial was entirely satisfactory.[75]

In *Edick v. Martin*,[76] the appellate division reiterated this standard, holding that petitioner's testimony that she had had sexual relations with every man she ever dated, and that she had lived with the respondent's brother until four months prior to her pregnancy, sufficiently weakened her testimony that the burden was not met.[77] In addition, in *Margie L. v. Gary M.*,[78] the

68. *Id.* at 608, 265 N.Y.S. at 287-88.
69. *Id.*, 265 N.Y.S. at 288.
70. *Id.*
71. *Id.*
72. 25 A.D.2d 640, 268 N.Y.S.2d 547 (1st Dep't 1966).
73. *Id.* at 641, 268 N.Y.S.2d at 549.
74. *Id.*
75. *Id.* at 642, 268 N.Y.S.2d at 550.
76. 34 A.D.2d 1096, 312 N.Y.S.2d 427 (4th Dep't 1970).
77. *Id.* at 1096-97, 312 N.Y.S.2d at 428.
78. 46 A.D.2d 935, 361 N.Y.S.2d 742 (3d Dep't 1974).

appellate division held that the petitioner's inability to explain a gestation period of only 259 days, in the absence of hospital records that indicated prematurity, resulted in a failure to properly meet the burden.[79]

The appellate courts, however, have noted that "[w]here the determination rests basically on a resolution of credibility the finding of the Trial Judge, sitting without jury, is accorded great weight."[80] Therefore, a lack of evidence concerning whether other men had access to the petitioner has been held to be sufficient to sustain an order of filiation.[81] In fact, it has been established that, although petitioner "had the continuing burden . . . [putative father's] tacit admission of intercourse on or about the date of conception obligated him to go forward with some competent proof to show access to petitioner by another individual during that period."[82]

Petitioner's burden of proof by clear and convincing evidence may be met by the showing of one or more other factors. Often, results of human leukocyte antigen blood tissue tests (HLA tests) are received in evidence.[83] In admitting evidence of a 99.4% probability result of one such test, the appellate division, in *Bowling ex rel. Morgan v. Coney*,[84] held that petitioner's burden was met because "this test is highly accurate on the issue of paternity, and should be accorded great weight . . . ."[85] Evidence such as visits to the hospital, occasional provision of

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79. *Id.*, 361 N.Y.S.2d at 742-43.

80. Nancy V. v. Raymond E. C., 75 A.D.2d 599, 599, 426 N.Y.S.2d 805, 806 (2d Dep't 1980).

81. *Id.*, 426 N.Y.S.2d at 806. *See also* Seeberg v. Davis, 84 A.D.2d 262, 264, 447 N.Y.S.2d 168, 170 (1st Dep't 1982) (Respondent's failure to introduce rebuttal evidence demonstrated that petitioner's burden was met.); Anonymous v. Anonymous, 55 A.D.2d 557, 389 N.Y.S.2d 607 (1st Dep't 1976) (The burden was met because there was no probative evidence adduced that petitioner had sexual relations with anyone but respondent during the time in question.).

82. Seeberg v. Davis, 84 A.D.2d at 264, 447 N.Y.S.2d at 170 (Respondent's failure to deny having had intercourse with respondent was deemed an admission.).

83. In Catherine H. v. James S., 112 Misc. 2d 429, 430, 447 N.Y.S.2d 109, 110 (Kings County 1982), the court took judicial notice of the legislature's position that HLA test results may be admitted into evidence. For a discussion of the test and its use in the courts, see Seider, *Who is the Father?*, 3 FAM. ADV. 12 (Fall 1980).

84. 91 A.D.2d 1195, 459 N.Y.S.2d 183 (4th Dep't 1983).

85. *Id.* at 1196, 459 N.Y.S.2d at 184.

money,[86] or of the father's positive feelings about petitioner and the baby[87] have also been admitted to help meet the burden.

Lock v. Fisher[88] dealt with the burden of proof imposed on fathers who petition for an order of filiation. The family court noted that, because critical information regarding the conception and birth of the child is exclusively within the mother's knowledge, some courts had suggested that a male petitioner's burden be reduced to a preponderance of the evidence.[89] However, the court dismissed that notion, holding that "[t]he fact that the alleged father may willingly assume a financial burden is not . . . sufficient reason to risk burdening a child with one who is not in fact his natural father."[90] It cautioned that "to protect the child, paternity should be established with the greatest of care."[91] Thus, it reasoned, a petitioner, whether male or female, can and must meet the same standard of proof.[92]

C. *The Supreme Court Expansion of the Rights of Children and Putative Fathers*

During the 1970s, the United States Supreme Court began to examine the status of out-of-wedlock children and their fathers. Issues of inheritance, custody, and adoption were held up to the scrutiny of the equal protection clause.

It is well settled law that, while the fourteenth amendment does not deny to states the power to treat different classes of people in different ways, it does deny states the power to legislate different treatment "on the basis of criteria wholly unrelated to the objective of [the] statute."[93] The Supreme Court has held that a classification "must rest upon some ground of difference having a fair and substantial relation to the object of the

86. *See* Theresa J. v. Troy M., 89 Misc. 2d 909, 910-11, 392 N.Y.S.2d 199, 201 (Fam. Ct. N.Y. County 1977).

87. *See* Jane L. v. Rodney B., 111 Misc. 2d 761, 765-66, 444 N.Y.S.2d 1012, 1015-16 (Fam. Ct. N.Y. County 1981).

88. 104 Misc. 2d 656, 428 N.Y.S.2d 868 (Fam. Ct. Westchester County 1980).

89. *See* Jaynes v. Tulla, 70 A.D.2d 680, 416 N.Y.S.2d 357 (3d Dep't 1979); Smith v. Lane, 101 Misc. 2d 615, 421 N.Y.S.2d 786 (Fam. Ct. Bronx County 1979).

90. Lock v. Fischer, 104 Misc. 2d at 660, 428 N.Y.S.2d at 872.

91. *Id.*

92. *Id.* at 661, 428 N.Y.S.2d at 872.

93. Reed v. Reed, 404 U.S. 71, 75-76 (1971).

legislation."[94]

Lalli v. Lalli[95] was a constitutional challenge to EPTL 4-1.2, which required out-of-wedlock children who wished to inherit from their fathers to furnish an order of filiation, made during the lifetime of the father in a manner providing by statute.[96] The Court held that the statute did not violate the equal protection clause.[97] It reasoned that the states have a considerable interest in providing for a just and orderly disposition of property at death, and recognized that the procedural burdens placed on out-of-wedlock children bore a substantial relationship to that interest.[98] The Court held that EPTL 4-1.2 successfully alleviated the plight of illegitimate children, while avoiding the assertion of spurious claims against the estates of putative fathers.[99] It noted alternative remedies available to the children, including most significantly "if necessary to prevent unnecessary injustice," an order of filiation signed nunc pro tunc to a date before

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94. *Id.* at 76 (citing Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

95. 439 U.S. 259 (1978). For a complete discussion of the *Lalli* case and its aftermath, see generally, Note, *Illegitimates and Equal Protection*, 57 DEN. L.J. 453 (1980).

96. Section 4-1.2 of the Estates, Powers and Trusts Law read at that time:

(a) For the purposes of this article:

(1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.

(2) An illegitimate child is the legitimate child of his father so that he and his issue may inherit from his father if a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

(3) The existence of an agreement obligating the father to support the illegitimate child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made as prescribed by subparagraph (2).

(4) A motion for relief from an order of filiation may be made only by the father, and such motion must be made within one year from the entry of such order.

(b) If an illegitimate child dies, his surviving spouse, issue, mother, maternal kindred and father inherit and are entitled to letters of administration as if the decedent were legitimate, provided that the father may inherit or obtain such letters only if an order of filiation has been made in accordance with the provisions of subparagraph (2).

Act of Aug. 2, 1966, ch. 952, § 4-1.2, 1966 N.Y. Laws 2761, 3784, *amended by* Act of Apr. 27, 1967, ch. 686, §§ 28, 29, 1967 N.Y. Laws 1711, 1716-17.

97. Lalli v. Lalli, 439 U.S. at 268-71.

98. *Id.*

99. *Id.* at 271-72.

the father's death.[100] Thus, the statute did not create a constitutionally impermissible barrier.

In *Stanley v. Illinois*,[101] the Supreme Court took a significant step in the development of the rights of unwed fathers. *Stanley* challenged an Illinois statute that made out-of-wedlock children wards of the state upon the death of the mother, without consideration of the fitness of the father to become guardian. The Court held that "the private interest . . . of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."[102] The Court noted that "the law has not refused to recognize those family relationships unlegitimated by [marriage]."[103] The Court did not question the legitimacy of the state's interests in protecting the welfare of the children, the best interests of the community and the strengthening of family ties whenever possible.[104] Rather, it determined that the statute used to achieve these ends operated to "spite its own articulated goals" because it needlessly separated children from their fathers without benefit of a hearing.[105] It recognized that the statute may have prevented the "administrative inconvenience of inquiry in any case,"[106] but noted that "the Constitution recognizes higher values than speed and efficiency."[107] The advantage of convenience, the Court held, was insufficient to justify refusing a father a hearing when the issue at stake was the dismemberment of his family.[108] Thus the Court asserted that it would not ignore the relationship between a father and his out-of-wedlock children.[109]

Most recently, the Court, in *Caban v. Mohammed*,[110] dealt with the unwed father's rights when the out-of-wedlock child was up for adoption. The Court concluded that the right to withhold consent, given to mothers, but denied to fathers, cre-

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100. *Id.* at 274.
101. 405 U.S. 645 (1972).
102. *Id.* at 651.
103. *Id.*
104. *Id.* at 652.
105. *Id.* at 652-53.
106. *Id.* at 656.
107. *Id.*
108. *Id.* at 658.
109. *Id.* at 651-52.
110. 441 U.S. 380 (1979).

ated a constitutionally impermissible distinction. The Court rejected the state's argument that most unwed fathers neither created nor maintained any relationship with their children. It held that "maternal and paternal roles are not invariably different in importance."[111] The court cautioned that, even assuming the state's argument to be valid, the distinction must further the end of a legitimate state aim, and be sufficiently narrowly drawn.[112]

D. *Abatement*

At common law, actions generally abated upon the death of one of the parties. The long-settled rule was that "[w]here neither common law nor a statute permits the bringing of an action against the executors or administrators of a deceased resident, the courts of this State are without jurisdiction to pass upon such a cause of action."[113]

New York's Family Court Act section 518 provided the requisite statutory authority to continue paternity actions when the mother died, or became mentally ill, or could not be found within the state.[114] If a paternity action had started before the mother's death, any person authorized by law to continue an action could do so regardless of the mother's death.[115] But the non-abatement provision of section 518 had an inherent limitation. The statute did not cover a situation in which the mother died before the proceeding was commenced.

Despite the seemingly clear language of the statute, the courts held that the legislative intent behind section 518 permitted commencement, as well as continuance of paternity proceedings after the mother's death. In *LaCroix v. Deyo*,[116] the court held that non-abatement was clearly [contemplated by section

111. *Id.* at 389.

112. *Id.* at 391.

113. *Id.* (quoting Herzog v. Stern, 264 N.Y. 379, 383-84, 191 N.E. 23, 24 (1934)).

114. Act of July 24, 1978, ch. 550, § 26, 1978 N.Y. Laws 1, 11, *amended by* Act of June 21, 1983, ch. 310, § 1, 1983 N.Y. Laws 1664, 1664. "Persons authorized" include mothers, fathers, and public officials in limited circumstances. N.Y. FAM. CT. ACT § 522 (McKinney 1983).

115. "Persons authorized" include mothers, fathers, and public officials in limited circumstances. N.Y. FAM. CT. ACT § 522 (McKinney 1983).

116. 108 Misc. 2d 382, 437 N.Y.S.2d 517 (Fam. Ct. Ulster County 1981).

518.[117] Thus, section 518 did not prevent a putative father from commencing an action against the legal representative of the deceased mother's estate when the petitioner did not seek to establish or support an obligation of support.[118] In a similar set of circumstances, the family court in *Alicia C. ex rel. Zulema C. v. Evaristo G.*[119] found that amendments to New York's Estates Powers and Trusts Law regarding out-of-wedlock children made the old arguments for abatement less compelling.[120] In that case, the respondent argued that if the legislature intended a cause of action to survive the death of the mother, whether or not she filed a paternity petition, it would have said so.[121] The family court rejected this argument, holding that a strict and limited interpretation of the wording of the statute would violate the equal protection rights of the child.[122]

Perhaps in response to *Evaristo G.*, section 518 was amended to provide specifically that paternity actions commenced *after* the mother's death may be maintained by the putative father.[123]

Although the legislature refined the law of abatement as it pertained to the death of mothers, very little change occurred in the law of abatement when the putative father dies. Generally, the courts construed the reference to "mothers" in section 518 as an unambiguous statutory inference for abatement upon the death of the father. Thus, for example, in *Middlebrooks v. Hatcher*,[124] the appellate division held that, in the absence of a

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117. *Id.* at 384, 437 N.Y.S.2d at 518. The burden of proof on the father is to establish paternity by clear and convincing evidence. *See supra* notes 88-92 and accompanying text.

118. *Id.* An obligation of support must be created before the parent dies. N.Y. FAM. CT. ACT § 513 (McKinney 1983), which covers the obligation of support, and enforces an obligation of support after the death of the parent.

119. 114 Misc. 2d 764, 452 N.Y.S.2d 523 (Fam. Ct. Queens County 1982).

120. *Id.* at 766, 452 N.Y.S.2d at 525. N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(a)(2)(A),(C) (McKinney 1981), *amended by* Act of Apr. 8, 1981, ch. 67, § 2, 1981 N.Y. LAWS 1074, states that for an out-of-wedlock child to inherit, there must have been an order of filiation made during the lifetime of the father or a "clear and convincing" showing of an "open and notorious" acknowledgement of the child.

121. Alicia C. *ex rel.* Zuelma C. v. Evaristo C., 114 Misc. 2d at 766, 452 N.Y.S.2d at 525.

122. *Id.* at 767, 452, N.Y.S.2d at 525.

123. Act of June 21, 1983, ch. 310, § 1, 1983 N.Y. Laws 1664.

124. 55 Misc. 2d 301, 285 N.Y.S.2d 257 (Fam. Ct. Suffolk County 1967).

statutory provision authorizing a paternity proceeding after the father's death, the proceeding abates on the death of the father.[125] In *Middlebrooks*, a paternity proceeding was brought against the administrator of the putative father's estate. The appellate division dismissed the action on two grounds. First, it recognized that filiation statutes are entitled to liberal construction,[126] but found no authority for maintaining the action.[127] More importantly, the court examined section 4-1.2 of the Estates Powers and Trusts law, which required an order of filiation to be issued during the father's lifetime, if an illegitimate child wished to inherit from his fathers.[128] Reading the statute together with section 513 of the Family Court Act,[129] the court found their meanings "clear and unambiguous in that they both call for the entry of an order of filiation during the lifetime of the putative father."[130]

In *Corbett v. Corbett*,[131] the court was once again asked to provide an order of filiation against the estate of a deceased respondent.[132] Relying on *Middlebrooks*, the respondent argued that EPTL section 4-1.2, recently upheld in *Lalli v. Lalli*, precluded the court from declaring paternity after the death of the father.[133] The court did not accept this argument, holding instead that, since the family court had no jurisdiction over administration of estates, EPTL section 4-1.2 could not prohibit it from entering an order of filiation after the putative father's

125. Middlebrooks v. Hatcher, 55 Misc. 2d 301, 303, 285 N.Y.S.2d 257, 258 (Fam. Ct. Suffolk County 1967). *See also* Corbett v. Corbett, 100 Misc. 2d 270, 275, 418 N.Y.S.2d 981, 985, *aff'd sub nom.* Mary Ellen C. v. Joseph William C., 79 A.D.2d 1024, 1024-25, 435 N.Y.S.2d 738, 738 (2d Dep't 1979) (Proceedings abated upon the death of the putative father.).

126. *See* Schaschlo v. Taishoff, 2 N.Y.2d 408, 411, 141 N.E.2d 562, 563, 161 N.Y.S.2d 48, 50 (1957).

127. Middlebrooks v. Hatcher, 55 Misc. 2d at 302, 285 N.Y.S.2d at 257.

128. N.Y. EST. POWERS & TRUSTS LAW (McKinney 1981). For the complete text of the statute as it existed then, see *supra* note 96.

129. N.Y. FAM. CT. ACT § 513 (McKinney 1983) provides in relevant part: "[A]n order of support or a judicially approved settlement made prior to that parent's death shall be enforceable as a claim against the deceased parent's estate."

130. Middlebrooks v. Hatcher, 55 Misc. 2d at 303, 285 N.Y.S.2d at 258, *aff'd sub nom.* Mary Ellen C. v. Joseph William C., 79 A.D.2d 1024, 435 N.Y.S.2d 738 (2d Dep't 1981).

131. 100 Misc. 2d 270, 418 N.Y.S.2d 981 (Fam. Ct. Queens County 1979).

132. *Id.* at 270-71, 418 N.Y.S.2d at 982.

133. For a discussion of this case, see *supra* text accompanying notes 95-100.

death.[134] Nevertheless, the court relied on the first ground of *Middlebrooks* to dismiss the case.

Concluding that the Family Court Act was "silent with regard to the survival or abatement of the proceeding upon the death of the putative father,"[135] the court held that to extend the non-abatement statute "would effectively be judicial legislation."[136] Reiterating that the right to maintain a paternity proceeding exists only by virtue of statutory authority, the court found nothing "to abrogate the common law rule of abatement upon the death of the putative father."[137] The decision was confirmed in *Mary Ellen C. v. Joseph William C.*.[138] There the court held that a paternity proceeding is instituted "to determine a relationship or status between individuals and, as such, it is purely personal to the parties."[139] Thus the cause of action must have abated prior to the institution of the proceeding.[140]

A notable exception to this general rule was *Gordon v. Cole*.[141] In *Cole*, the petitioner sought an order of filiation against a deceased father for the sole purpose of changing the child's name. The family court considered that purpose "most laudable,"[142] and, basing its decision on the complete agreement of all the involved parties, and the lack of foreseeable harm, granted the order.[143] Unlike *Middlebrooks* and *Corbett*, *Cole* concluded that EPTL section 4-1.2 recognized the power of the family court to issue an order of filiation after the father's death.[144]

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134. Corbett v. Corbett, 100 Misc. 2d at 274-75, 418 N.Y.S.2d at 985.

135. *Id.* at 275, 418 N.Y.S.2d at 985.

136. *Id.* at 276, 418 N.Y.S.2d at 986 (citing K.K. v. Estate of M.F., 145 N.J. Super. 250, 367 A.2d 466 (1976)).

137. *Id.* at 277, 418 N.Y.S.2d at 986.

138. 79 A.D.2d 1024, 435 N.Y.S.2d 738 (2d Dep't 1981).

139. *Id.*

140. *Id.* at 1025, 435 N.Y.S.2d at 738.

141. 54 Misc. 2d 967, 283 N.Y.S.2d 787 (Fam. Ct. N.Y. County 1967).

142. *Id.* at 969, 283 N.Y.S.2d at 789.

143. *Id. Cf.* Henry v. Rodd, 95 Misc. 2d 996, 997-98, 408 N.Y.S.2d 745, 747 (Fam. Ct. Queens County 1978) (A strict interpretation of the statute precluded the entry of a posthumous order of filiation.).

144. *Id.* Gorden v. Cole, 54 Misc. 2d at 969, 283 N.Y.S.2d at 789. *See also In re* Cirillo's Estate, 114 N.Y.S.2d 799, 802 (Sur. Ct. Queens County 1952).

III. *Joseph A. v. Gina L.*

A. *The Facts*

The respondent, Gina L., gave birth to an out-of-wedlock baby, Jessica, on September 14, 1981. Joseph A., the petitioner, filed a paternity petition on July 20, 1982. In the petition, he swore he was the father of Jessica and that he had provided financial support for the baby. Before a hearing could be held, the petitioner was severely injured in a fire. He died as a result of these injuries on October 2, 1982. On October 13, 1982, the parents of the petitioner, the respondent Gina L. and her mother, appeared before the court. At that appearance, all parties expressed a wish to continue the proceedings and to enter an order of filiation.[145]

In view of these facts, the court appointed a law guardian to represent Jessica. Jessica's law guardian filed a second paternity petition naming Gina L. and Joseph A.'s administratrix as respondents.[146] The law guardian challenged the constitutionality of section 518 of the Family Court Act, which provided for nonabatement of paternity actions in the event of a mother's, but not a father's, death.[147] At almost the same time as the second petition was filed, Gina L. filed a third paternity petition. She named the administratrix of Joseph A.'s estate as respondent. A hearing on these petitions was held in Westchester Family Court. The court examined the constitutionality of section 518 and concluded that the proceeding did not abate upon the death of the putative father.[148] The court then entered an order of filiation declaring Joseph A. to be Jessica's father.[149]

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145. Joseph A. v. Gina L., 126 Misc. 2d 63, 64, 481 N.Y.S.2d 203, 204 (Fam. Ct. Westchester County 1984). Both the respondent and the parent of the deceased petitioner stated that the petitioner had acknowledged paternity of Jessica, given money to support Jessica, and expressed a last wish that Jessica bear his name. *Id.*

146. *Id.*, 481 N.Y.S.2d at 205. Petitioner's mother, Maria A., had by order of the Surrogate of Westchester County, obtained limited letters of administration of the estate of her son. Among the rights conferred by limited letters of administration is the right to enforce or prosecute a cause of action in favor of the decedent or his fiduciary under general or special provisions of the law, and to defend any claim or cause of action against a decedent or his fiduciary. N.Y. SUR. CT. PROC. ACT § 702(1) (McKinney 1967).

147. *Id.* at 66, 481 N.Y.S.2d at 206. For the text of the statute, see *supra* note 8.

148. *Id.* at 68, 481 N.Y.S.2d at 207-08.

149. *Id.* at 69, 481 N.Y.S.2d at 208.

B. *The Decision*

1. *The Current Effect of Family Court Act Section 518*

The court began its analysis by recognizing that section 518 of the Family Court Act suggests the court did not have jurisdiction to hear Joseph A.'s petition.[150] Under section 518, the petition abated when Joseph A. died. Nevertheless, the court noted that the legislature had recently codified several decisions that held that paternity actions do not abate at the death of the mother, notwithstanding the plain meaning of section 518.[151] The court considered that this amendment, coupled with an extension of the time for filing a paternity petition,[152] indicated "a general trend to expand the opportunities for an individual to seek a declaration of paternity."[153] As written, section 518 cut against this trend because it provided for survival of paternity actions when the mother died, but not when the father died.[154] This situation set up a classification subject to scrutiny under the equal protection clause.[155]

In order to withstand scrutiny under the equal protection clause, the challenged classification must be justified by an important governmental objective; and the statute must be shown to be "reasonably related to the achievement of that end."[156] Judge Facelle could not find any justification in caselaw or in the purposes of an order of filiation for the unequal treatment of mothers and fathers under section 518.[157]

The court rejected the precedential value of earlier decisions that held that paternity proceedings must abate on the death of

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150. *See supra* note 8 for the text of the statute. See text accompanying notes 113-44 for a discussion of abatement of paternity proceedings.

151. Act of June 21, 1983, ch. 310, § 1, 1983 N.Y. Laws 1664. The amendment clarified the confusion surrounding the question of whether paternity proceedings could commence as well as continue after the death of the mother. *See supra* notes 116-22 and accompanying text.

152. Act of June 21, 1983, ch. 310, § 1, 1983 N.Y. Laws 1659 (extends to five years the time in which a mother could commence a paternity proceeding).

153. *Joseph A.*, 126 Misc. 2d at 66, 481 N.Y.S.2d at 206.

154. FAM. CT. ACT § 518 (McKinney 1983). *Joseph A.* 126 Misc. 2d at 66, 481 N.Y.S.2d at 205-06.

155. U.S. CONST. amend. xiv, § 2; N.Y. CONST. art I, § 11.

156. *Joseph A.*, 126 Misc. 2d at 66, 481 N.Y.S.2d at 205-06.

157. *Id.* at 68, 481 N.Y.S.2d at 207.

the putative father.[158] These cases were decided at a time when the New York Estate, Powers and Trusts Law denied illegitimate children the right to inherit from a deceased father.[159] Courts at that time reasoned that a child's inability to inherit from his deceased father must require abatement of any paternity action.[160] The EPTL has since been amended giving illegitimate children the right to inherit from a deceased father if specific statutory criteria are met.[161]

Judge Facelle also commented that the cases that required paternity actions to abate on the death of the father paid "too much homage to the support aspects of a paternity proceeding."[162] He observed that while support is a primary purpose of paternity proceedings, it is not the exclusive function.[163] In support of this position, the court cited a number of earlier decisions permitting entry of orders of filiation where support was neither requested nor appropriate.[164] *Joseph A.* also enumerated several ways in which these orders have substantive nonfinancial impact on the lives of the child and third parties.[165]

The court in *Joseph A.* concluded that the better-reasoned decisions emphasize the important nonfinancial benefits of orders of filiation.[166] At the same time, the court could not find any justification for the gender discrimination of section 518.[167] Consequently, to satisfy the constitutional requirement of equal protection, the court extended the benefits of section 518 to all

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158. *Joseph A.*, 126 Misc. 2d at 67-68, 481 N.Y.S.2d at 206-07.

159. For the text of this law see *supra* note 96.

160. *See supra* notes 124-40.

161. *Id.* at 67, 481 N.Y.S.2d at 207. *See supra* note 120.

162. *Joseph A.*, 126 Misc. 2d at 67, 481 N.Y.S.2d at 207.

163. *Id.* at 67-68, 481 N.Y.S.2d at 207. *But see* Czajak v. Vavonese, 104 Misc. 2d 601, 610, 428 N.Y.S.2d 986, 992 (Fam. Ct. Onondaga County 1981) (The primary purpose of article 5 is to procure support.).

164. *Joseph A.*, 126 Misc. 2d at 68, 481 N.Y.S.2d at 207 (citing Leromain v. Venduro, 95 A.D.2d 80, 466 N.Y.S.2d 729 (3d Dep't 1983); Kordek v. Wood, 90 A.D.2d 209, 457 N.Y.S.2d 156 (4th Dep't 1982); Joye v. Schechter, 112 Misc. 2d 172, 46 N.Y.S.2d 884 (Fam. Ct. Nassau County 1982)). *See supra* notes 41-48 and accompanying text.

165. *Id.* Paternity orders ensure that a child has the right to use his father's name, *supra* notes 141-43 and accompanying text. They also grant rights of custody, visitation and orders of protection, *see* N.Y. FAM. CT. ACT §§ 549, 551 (McKinney 1983). As in this case, a paternity order may also indirectly confer the status of a grandparent, thereby giving a third party standing to seek an order of visitation. *Id.*

166. *Id.*

167. *Id.*

parties, reading its provisions as gender-neutral.[168]

IV. Analysis

A. *Constitutional Analysis*

The court in *Joseph A.* correctly concluded that the present New York non-abatement statute[169] can not withstand the scrutiny imposed by the equal protection clauses.[170] Although this conclusion is ultimately warranted, the court erred when it concluded that the gender distinctions of section 518 served *no* important governmental interest. Once the court decided that the statute failed this threshold requirement of the equal protection clauses, it never considered whether section 518 adopted means that are overly broad. In fact, a gender-neutral reading of the non-abatement statute is compelled because section 518 utilizes means that are not substantially related to achieving important governmental interests.

Joseph A. rejected the argument that the death of a putative father requires abatement of paternity actions by virtue of a supposed connection between adjudicating paternity and establishing a child's right to inherit.[171] Indeed, many of the decisions announcing that paternity actions extinguish on the death of the father were primarily concerned with protecting the estates of putative fathers.[172] In *Middlebrooks v. Hatcher*,[173] the Suffolk County family court observed that, while the statute governing filiation proceedings ought to be construed liberally, the New York State legislature had expressed an intent to avoid post-death litigation.[174] It found this intent expressed in two types of statutes. One limited the enforcement of support orders or judicially approved settlements to those which had been made prior to a parent's death.[175] The other statute provided that the right of a illegitimate child to inherit from his father depended upon

168. *Id.*, 481 N.Y.S.2d at 207-08.
169. N.Y. FAM. CT. ACT § 518 (McKinney 1983).
170. Joseph A. v. Gina L., 126 Misc. 2d 63, 68, 481 N.Y.S.2d 203, 207-08.
171. *Id.* at 67, 481 N.Y.S.2d at 206.
172. *Id.*, 481 N.Y.S.2d at 206-07.
173. 55 Misc. 2d 301, 285 N.Y.S.2d 257 (Fam. Ct. Suffolk County 1967).
174. *Id.* at 302, 285 N.Y.S.2d at 257-58.
175. *Id.* at 302, 285 N.Y.S.2d at 258.

entry of an order of filiation during the lifetime of the father.[176] Commenting that an order of filiation declares the relationship between parties, *Mary Ellen C. v. Joseph William C.*[177] dismissed a paternity proceeding commenced after the putative father's death, citing cases that sought to protect their estates against claims from illegitimate children.[178] Clearly, courts before *Joseph A.* implied that protecting the estates of putative fathers against spurious claims constituted a substantial governmental interest which was sufficient to justify a statute establishing gender-based distinctions.

In its landmark decision, *Lalli v. Lalli*,[179] the United States Supreme Court upheld the right of a state to enact intestacy laws which required that filiation proceedings take place during the lifetime of the father.[180] The Court held that an estate law which treated legitimate and illegitimate children differently was justified by a substantial state interest in protecting the proper disposition of estates.[181] *Lalli* pointed to two aspects of this legitimate governmental interest. First, the statute protected decedents' estates against false claims.[182] Orders of filiation had to be brought during the putative father's lifetime assuring his involvement in discrediting fraudulent accusations.[183] Second, the intestacy law ensured that the estates could be administered with certainty and without undue delay because the identity of distributees would be fixed before a decedent's death.[184]

Joseph A. forthrightly states that it cannot find *any* justification for the gender distinction in section 518.[185] While the legislative history of the statute does not explicate the lawmakers'

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176. *Id.* (citing N.Y. EST. POWERS & TRUST LAW § 4-1.2, *amended by* Act of Apr. 8, 1981, ch. 67, § 2, 1981 N.Y. Laws 1074, 1074-75.

177. 79 A.D.2d 1024, 1025, 435 N.Y.S.2d 738, 738 (2d Dep't 1981).

178. *Id.* at 1025 (citing People v. Polep, 233 A.D. 450, 253 N.Y.S.2d 253 (4th Dep't 1931) (denying petition to reopen filiation proceeding after death of the putative father where petition sought support from the father's estate for the illegitimate child); Middlebrooks v. Hatcher, 55 Misc. 2d 301, 285 N.Y.S.2d 257 (Fam. Ct. Suffolk County 1967); *supra* notes 124-30 and accompanying text.

179. 439 U.S. 259 (1978).

180. *Id.* at 275-76.

181. *Id.* at 271-74.

182. *Id.* at 271.

183. *Id.* at 271-72.

184. *Id.*

185. *Joseph A.*, 126 Misc. 2d at 68, 481 N.Y.S.2d at 207.

intent, there may have been concern about spurious paternity claims and about protecting final distribution of estates. These interests are substantial and would justify a law which treats men and women differently.

Although there are substantial state interests justifying the gender discrimination in section 518, it is equally apparent that the statute is impermissibly broad. The final result achieved in *Joseph A.* can be supported by an analysis which demonstrates that section 518 adopts a method which is not sufficiently related to achieving the presumed legitimate governmental objectives.

In *Caban v. Mohammed*,[186] the Supreme Court announced that a gender-based distinction withstands scrutiny under the equal protection clause only if the classification is structured to achieve the legislative goal and avoids "over-broad generalization."[187] There the Court held that a statute was unconstitutional because it gave an unwed mother the right to withhold consent to adoption of her illegitimate child, but denied the child's father that same right.[188] This blanket prohibition was overbroad because the state could enact a more narrowly drawn statute protecting its interest in promoting the adoption of certain illegitimate children.[189] Similarly, the gender classification in section 518 which creates an absolute abatement of paternity actions on the death of the putative father is overly broad.

The need to protect against spurious paternity claims is satisfied by requiring petitioners to make a substantial showing of evidence in support of their allegations. Petitioners in paternity proceedings have traditionally been held to a burden of establishing paternity by clear and convincing evidence.[190] This standard "evolved because it has long been recognized that a charge of paternity is easy to make and hard to disprove."[191] Applica-

186. 441 U.S. 380 (1979).

187. *Id.* at 391, 394.

188. *Id.* at 394.

189. *Id.* at 391-92.

190. *See, e.g.*, Lopez v. Sanchez, 34 N.Y.2d 662, 663, 311 N.E.2d 652, 652, 355 N.Y.S.2d 581, 581 (1974); Seeberg v. Davis, 84 A.D.2d 262, 263, 447 N.Y.S.2d 168, 169 (1st Dep't 1982). *See also supra* notes 67-92 and accompanying text.

191. Czajak v. Vavonese, 104 Misc. 2d 601, 609 n.6, 428 N.Y.S.2d 986, 991 n.6 (Fam. Ct. Onodaga County 1981) (citing Drummond v. Dolan, 155 A.D. 449, 450-51, 140 N.Y.S. 307, 307-08 (1913)).

tion of this standard denies relief whenever evidence is uncertain, susceptible of more than one interpretation or indefinite. In fact, the requisite "clear and convincing evidence" demanded in paternity proceedings is a heavy burden for any petitioner to meet and goes directly to the issue of defeating spurious paternity claims.[192]

A blanket prohibition of paternity actions after the death of the putative father will unnecessarily eliminate meritorious petitions such as the request in *Joseph A.*. If the legislature concludes that the burden of proof established in the case law does not sufficiently protect against false claims, it is within its power to amend section 518. A provision which is much narrower than an absolute prohibition against non-abatement could be modeled on EPTL 4-1.2(a)(2)(C) which permits out-of-wedlock children to inherit from their fathers if "paternity has been established by clear and convincing evidence and the father of the child has openly and notoriously acknowledged the child as his own."[193] This recent amendment to EPTL demonstrates that the legislature has already determined that a "clear and convincing" standard of proof protects adequately against false paternity claims.

B. *The Non-Support Order of Filiation*

Joseph A. held that "abatement should never be measured solely in terms of financial considerations."[194] It developed a cogent argument for abandoning a rule which inextricably links paternity orders with requests for financial support. Having already demonstrated the fallacy of making orders of filiation contingent on the right to inherit, *Joseph A.* highlighted a number of well-reasoned decisions which emphasize the important nonfinancial benefits of a paternity order. Nonetheless, it must be conceded that these cases represent a clear departure from precedent.

It cannot be disputed that non-support orders of filiation confer important social benefits. In *Kordek v. Wood*, the Appel-

192. *See supra* notes 67-92 and accompanying text.

193. N.Y. EST. POWERS & TRUSTS LAW § 4-1.2(a)(2)(C) (McKinney 1981).

194. Joseph A. v. Gina L., 126 Misc. 2d 63, 67, 481 N.Y.S.2d 203, 207 (Fam. Ct. Westchester County 1984).

late Division of the Fourth Department took the unusual action of reinstating a nonsupport order of filiation stating "the child's needs for support no longer bears a nexus to the granting of . . . an order [of filiation]."[195] In doing so, the court attached great importance to the rights which may accompany orders of filiation, including orders of custody or visitation, rights of inheritance, rights to recover benefits, and the right of notice of adoption proceedings.[196] In addition to these substantive rights, courts have come to value the emotional and social benefits that follow an adjudication of paternity. *Brooks v. Willie* underscores the obvious benefit to a child of removing the social stigma of illegitimacy by allowing him to use his father's name.[197] The court in *Joye v. Schechter* gave voice to the growing contemporary view that proceedings to establish paternity need not be linked with proceedings to compel support.[198] This position finds support from a plain reading of article 5 of the Family Court Act. That portion of the statute confers authority on a court, adjudicating paternity, to grant custody, visitation and support orders. However, article 5 may be interpreted as granting the discretion to make any of these orders rather than mandating consideration of any one of them.

Despite all of the arguments for permitting nonfinancial orders of filiation, *Commissioner of Public Welfare v. Koehler*[199] remains good law in New York. There, the Court of Appeals stated that *the* purpose of orders of filiation is to fix an obligation to support the child.[200] As long as adjudication of paternity remains linked with a father's financial obligations to his child, there is a reason to question the validity of non-support orders of filiation and to fear that post-death paternity orders may give rise to inequitable claims against his estate.

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195. 90 A.D.2d 209, 213, 457 N.Y.S.2d 156, 159 (4th Dep't 1982).

196. *Id.* at 212, 457 N.Y.S.2d at 158-59.

197. 117 Misc. 2d 640, 645-46, 458 N.Y.S.2d 860, 863-64 (Fam. Ct. Suffolk County 1983).

198. 112 Misc. 2d 172, 178, 446 N.Y.S.2d 884, 888 (Fam. Ct. Nassau County 1982).

199. 284 N.Y. 260, 30 N.E.2d 587 (1940).

200. *Id.* at 266-67, 30 N.E.2d at 590-91.

V. Conclusion

Through a gender-neutral reading of Family Court Act section 518, *Joseph A. v. Gina L.* extended the jurisdiction of the family court to commence and continue paternity proceedings after the death of the putative father. The court validly recognized that recent decisions have focused upon the non-financial aspects of paternity actions granting orders of filiation without the accompanying support orders.

But a gender-neutral reading of section 518 is not enough. The door is now open for both the *Joseph A.* type of paternity proceeding and a proceeding which seeks support as well. In the aftermath of *Joseph A.*, the legislature must provide more specific guidelines for paternity proceedings which are commenced or which continue after the death of the putative father. The courts and those who practice before them must understand when demands for support in paternity petitions are necessary, appropriate or superfluous. This clarification is an essential next step in the evolution of modern paternity proceedings.

Amy Baldwin Littman