STATE OF MICHIGAN

IN THE PROBATE COURT FOR THE COUNTY OF WAYNE

In the Matter of the Estate of
ERROL SHAW, File No. 2000-624,788-DE
Deceased.
_____/

OPINION

This matter is before the Court on Phillistine Shaw's Second Motion to Order DNA-Testing. Having reviewed the briefs submitted and a hearing having been held, this Court will grant the Petition for the reasons set forth below.

STATEMENT OF FACTS

Decedent, Errol Shaw ("Shaw"), was shot and killed on August 29, 2000, by members of the Detroit Police Department. The Estate of Errol Shaw has filed a wrongful death claim against the Detroit Police Department and other individuals. That claim is currently pending in Wayne County Circuit Court.

On March 23, 2001, Phillistine Spencer ("Spencer") commenced a paternity action alleging that Shaw was the biological father of her son, Mario Spencer (D/O/B 02/16/89). In conjunction with the paternity action, Spencer contacted the Wayne County Medical Examiner's Office to obtain stock tissue samples from decedent so DNA tests could be performed on the tissue. These tissue samples had been preserved in a solution of "formalin." Spencer then contacted LifeCodes Corporation to arrange for paternity

testing. LifeCodes Corporation advised Spencer that DNA testing cannot be conducted after harvested tissue has been preserved in formalin. LifeCodes Corporation, however, advised that testing of DNA samples from collateral relatives such as decedent's parents would be as conclusive on the issue of paternity as DNA testing of decedent's tissue. DNA testing in non-invasive and merely requires a swab of the inside cheek.

On March 8, 2002, Spencer filed a Second Motion to Order DNA Testing.[1] Spencer argued that, pursuant to MCL 700.2114 and the Court's broad discovery powers, decedent's parents ("Shaw's parents") could be compelled to submit to DNA testing. Citing case law from other jurisdictions which had held that testing of collateral parties could be ordered so as to determine paternity in cases where the father was deceased, Spencer requested that the Court order Shaw's parents to submit to DNA testing.

On April 17, 2002, the Estate filed a Response. It countered that section 6 of Michigan's Paternity Act, MCL 722.711 *et seq*, provides for testing of the mother, child and alleged father, but does not provide for testing of relatives of the alleged father, MCL 722.716. Therefore, the Estate argued, there is no authority to require Shaw's parents to submit to blood testing. The Estate cited case law from other jurisdictions that have examined their paternity statutes and refused to order testing of collateral relatives. The Estate also noted that Spencer was not without recourse, as paternity could be proven pursuant to MCL 700.2114(1)(c)(i)-(iv). The Estate asked the Court to deny Spencer's Second Motion to Order DNA Testing on the ground that, pursuant MCL 722.716, the Court did not have authority to compel testing of collateral relatives.

A hearing was held on April 24, 2002, and the matter was taken under advisement.

[1] Spencer's First Motion, filed October 26, 2001, was dismissed without prejudice.

CONCLUSIONS OF LAW

This case appears to be one of first impression in Michigan and involves balancing the compelling state interest in ensuring and protecting Mario Spencer's rights to determine his parentage and inheritance rights against the privacy rights of Shaw's parents to refuse to submit to DNA testing.

The determination of a decedent's heirs is governed by the statutes in effect at the time of the decedent's death. *In re Jones Estate*, 207 Mich App 544, 553; 525 NW2d 493 (1994). As Shaw was killed on August 29, 2000, the provisions of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*, effective April 1, 2000, govern the determination of his heirs. MCL 700.8101.

Section 114 of EPIC, MCL 700.2114, states, in pertinent part,

> (c) If a child is born out of wedlock or if a child is born or conceived during a marriage but is not the issue of that marriage, a man is considered to be the child's natural father for purposes of intestate succession if any of the following occur:
>
> > (i) The man joins with the child's mother and acknowledges that child as his child by completing an acknowledgment of parentage as prescribed in the acknowledgment of parentage act, 1996 PA 305, MCL 722.1001 to 722.1013.
> >
> > (ii) The man joins the mother in a written request for a correction of certificate of birth pertaining to the child that results in issuance of a substituted certificate recording the child's birth.
> >
> > (iii) The man and child have established a mutually acknowledged relationship of parent and child that begins before the child becomes age 18 and continues until terminated by the death of either.
> >
> > (iv) The man is determined to be the child's father and an order of filiation establishing that paternity is entered as provided in the paternity act, 1956 PA 205, MCL 722.711 to 722.730.
> >
> > (v) Regardless of the child's age or whether or not the alleged father has died, the court with jurisdiction over probate proceedings relating to the decedent's estate determines that the man is the child's father, using the standards and procedures

established under the paternity act, 1956 PA 205, MCL 722.711 to 722.730.

In this case, Spencer is requesting that the Court order DNA testing of Shaw's parents pursuant to MCL 700.2114(1)(c)(v)[2] in order to determine that Shaw is Mario Spencer's natural father for purposes of intestate succession. This section states that the probate court may, regardless of whether the alleged father has died, determine that the man is the child's father using the standards and procedures established under Michigan's Paternity Act. The applicable sections of the Paternity Act, MCL 722.716, state:

> (1) In a proceeding under this act before trial, the court, upon application made by or on behalf of either party, or on its own motion, shall order that the mother, child, and alleged father submit to blood or tissue typing determinations, which may include, but are not limited to, determinations of red cell antigens, red cell isoenzymes, human leukocyte antigens, serum proteins, or DNA identification profiling, to determine whether the alleged father is likely to be, or is not, the father of the child.
>
> * * *
>
> (5) If the probability of paternity determined by the qualified person described in subsection (2) conducting the blood or tissue typing or DNA identification profiling is 99% or higher, and the DNA identification profile and summary report are admissible as provided in subsection (4), paternity is presumed. If the results of the analysis of genetic testing material from 2 or more persons indicate a probability of paternity greater than 99%, the contracting laboratory shall conduct additional genetic paternity testing until all but 1 of the putative fathers is eliminated, unless the dispute involves 2 or more putative fathers who have identical DNA. [MCL 722.716(1), (5).]

A. Jurisdictions That Permit Genetic Testing of Collateral Heirs

In *Sudwischer v Hoffpauir*, 589 So2d 474 (La, 1991), cert den 504 US 909; 118 L Ed 2d 543; 112 S Ct 1937 (1992), plaintiff Alana Sudwischer sued to establish filiation to

[2] Subparagraph (1)(c)(v) is a new section; it did not exist under the relevant section of the RPC, MCL 700.111(4) (repealed April 1, 2000).

Paul Hoffpauir, whom she alleged to be her natural father. Hoffpauir had died intestate, survived by his widow, an adopted son and a biological daughter, Rosemary Schuh. Sudwischer sought to compel a test of Schuh to aid in proving her filiation. The trial court denied her request on the ground that the applicable statutory section did not authorize blood tests of siblings. The Louisiana Court of Appeals affirmed the trial court's decision. The Louisiana Supreme Court ordered Schuh's blood tested, but granted a request for rehearing. *Id.* Upon rehearing, the Supreme Court held that Schuh could be compelled to submit to testing. The Supreme Court first stated that the applicable statutory section postulates the existence of an alleged living father and did not statutorily authorize the testing sought. However, it also noted that there was no indication that the statutory language expressed a deliberate policy of limitation. *Id.* at 474-475. The Supreme Court also noted that Sudwischer had the burden of proving, by clear and convincing evidence, that Hoffpauir was her father and that, although there was deposition testimony that Hoffpauir recognized Sudwischer as his daughter, scientific evidence would corroborate this evidence. Further, relying on a Louisiana rule of evidence, the Supreme Court stated that parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. *Id.*at 475. The Supreme Court then stated that "the inheritance rights of legitimate and illegitimate children are entitled to equal protection of the law" and declared that Sudwischer had a constitutional right to prove filiation to a deceased father *Id.* at 476 (citing *Trimble v Gordon*, 430 U.S. 762; 97 S Ct 1459; 52 L Ed 2d 31 (1977)). The Supreme Court recognized that this right must be weighed against the invasion of Schuh's privacy. To compel Schuh to submit to testing, Sudwischer's interest in

identifying her father must outweigh Schuh's expectation of privacy. The Court noted that Sudwischer had an overriding emotional and financial interest in knowing her father's identity. The Court also understood that Schuh had a financial interest in opposing Sudwischer's claim, but that she presented no physical or religious objection to submitting to the blood test. The Louisiana Supreme Court found that the invasion of Schuh's privacy was minimal. Further, the Supreme Court found that Schuh had the alternative of conceding a relationship to Sudwischer. As such, the Louisiana Supreme Court held that the trial court erred in denying Sudwischer's motion to compel testing of Schuh, her alleged father's daughter. *Id.*

In *Succession of Robinson*, 654 So2d 682 (La, 1995), which followed *Sudwischer v Hoffpauir*, decedent's legitimate son, Robinson, requested DNA testing of three women Robinson had previously acknowledged as his daughters. The three women objected to the testing on the ground that decedent had acknowledged them in a prior will. The Louisiana Supreme Court agreed with the Louisiana Court of Appeals that DNA testing was relevant. *Id.* at 682-683. Citing *Sudwischer*, the *Robinson* Court stated that "the general rules of discovery may authorize blood tests where such tests are likely to produce relevant evidence." *Id.* at 684. Specifically, "the information sought through blood tests would produce evidence relevant to paternal filiation. In facilitating a determination of paternity, blood tests are highly reliable and unequaled in evidentiary value. Additionally, blood tests may even aid in determining paternity posthumously." *Id.* at 685. The *Robinson* Court, like the *Sudwischer* Court, conducted a constitutional analysis and similarly concluded that, although the womens' right to privacy was implicated, the invasion was minimal and was outweighed by the State's interest in

ensuring the just and orderly distribution of decedent's estate. *Id.* at 686. As in *Sudwischer*, the *Robinson* Court also held that "to avoid the invasion, the intervenors have the option of acquiescing the lack of biological relationship with decedent." *Id.*

In *M.A. v Estate of A.C.*, 643 A2d 1047 (NJ Super Ch, 1993), the New Jersey Superior Court affirmed an order requiring decedent's children and their mother to undergo blood tests in order to determine if decedent was M.A.'s father. The New Jersey court noted that the issue of ordering collateral relatives to undergo genetic testing was one of first impression in New Jersey and that it involved "balancing the compelling state interest in ensuring and protecting plaintiff's interests by helping him determine his parentage against privacy rights of decedent's heirs and their mother to refuse submitting to blood testing." *Id.* at 1047. The appellate court looked at New Jersey's Paternity Act, which permitted testing of the child, mother and alleged father. The appellate court stated that, although the statute did not statutorily authorize the testing of siblings and collateral relatives, the statute also did not prohibit testing under other circumstances. *Id.* at 1048. The appellate court specifically stated:

> On the other hand, the statute does not purport to prohibit blood testing in other situations. There is no indication that the statutory language expresses a deliberate policy of limitation. Therefore, this Court concludes that the statute is not controlling in this case, and the general rules of discovery and a court's inherent right to compel production of evidence must be applied. [*Id.* (citing *Sudwischer v Hoffpauir*, 589 So2d 474 (La, 1991)).]

With regard to genetic testing, the New Jersey Superior Court specifically stated that "a court has inherent powers to order anyone within its jurisdiction to submit to such tests when they are needed to adjudicate a genuine issue before it." *Id.* at 1051. However, before a trial court could order genetic testing, the appellate court felt that some form of

evidence, other than the mere filing of a complaint, must be presented. *Id.* at 1048. With respect to the balancing test, the appellate court stated:

> It is noted that at least one court has gone so far as to hold that a putative child of a decedent has a constitutional right to require that the decedent's acknowledged child submit to a blood test, in order that DNA could be compared for paternity purposes where the emotional and financial interests of the putative child overrode invasion of the acknowledged child's right to privacy . . . [I]t is clear that the inheritance rights of legitimate and illegitimate children are entitled to equal protection under the law. . . To prevent M.A. from obtaining court ordered blood testing of decedent's heirs and their mother may deprive him of relevant evidence necessary to establish his right to be treated equally under the law. [*Id.* at 1052.]

The appellate court went on further to state that the invasion of privacy was minimal. As well, the appellate court stated that the heirs had the alternative of conceding a relationship to M.A. if they did not want to undergo testing. *Id.* at 1053. The New Jersey Superior Court concluded:

> ...that fundamental fairness prohibits decedent's heirs and their mother from keeping this potentially relevant evidence from the court, which must ultimately decide plaintiff's claim, which was supported by a prima facie showing of filiation between M.A. and the decedent, resulting in a contest between competing claimants to the succession [of] assets. The state has a legitimate interest in insuring this fundamental fairness by ordering the relevant testing requested by the plaintiff. [*Id.* at 1053 (citations omitted).]

In *In re Estate of Pino*, 858 P2d 426, 427 (NM App, 1993), the New Mexico Court of Appeals affirmed a district court order requiring decedent's parents to undergo a blood test to determine the paternity of the child where the putative father had been killed. The appellate court stated that the "Pinos do not assert any religious, moral or other compelling reason to distinguish the blood test order here from [other] general discovery orders." *Id.* at 428.

In *Weber v Anderson*, 269 NW2d 892 (1978), the Minnesota Supreme Court held that a paternity action may be commenced after the death of the putative father in order to allow inheritance. The Supreme Court reasoned: "Our paternity statute . . . does not contain a specific provision for the survival of the action after the death of the putative father. However, although our paternity statute is also in derogation of the common law, we follow the principle that the statute should not be strictly construed but instead should be liberally construed to give effect to its remedial and humanitarian purposes." *Id.* at 894-895.

In *Lach v Welch*, 1997 Conn Super LEXIS 2218 (1997),[3] the Connecticut Court found that decedent's mother was an indispensable party to the paternity action brought by decedent's alleged daughter after his death. The Connecticut Court stated:

> By refusing to accede to DNA tests, collateral persons withhold evidence that is highly probative and often determinative. Equity demands that those seeking to profit from a denial of paternity not be allowed to withhold crucial evidence that could prove paternity. Although the question of decedent's estate is not at issue in the present case, [the decedent's mother's] interest in the paternity action is that her share in the intestate succession of her deceased son's estate will be affected if [the child] is found to be the daughter of [the decedent]." [*Id.* (citations omitted).]

In *Taylor v Martin*, 2000 Conn Super LEXIS 243 (2000),[4] the Connecticut Court allowed a paternity action to continue following the death of putative father and ordered that the executor of decedent's estate be impleaded. The Court cited *Lach* for the proposition that DNA testing could be used following the death of the putative father in order to prove paternity and stated that the child's "interest in establishing paternity is a

[3] This case is unreported.
[4] This case is unreported.

fundamental state and federal constitutional liberty interest [which] the judicial system must afford the child an opportunity to exercise." *Id.*

B. Jurisdictions That do Not Permit Genetic Testing of Collateral Heirs

The Estate cites *In re Estate of Sanders*, 2 Cal App 4th 462 (1992) and *William M v Superior Court*, 225 Cal App 3d 447 (1990), for the proposition that genetic testing cannot be performed on collateral heirs. However, *Sanders* was based on the California Probate Code that was in effect at the time. Section 6408(c)(2)[5] specifically required that an acknowledgment of paternity must have been filed during the father's lifetime. The *Sanders* Court interpreted the applicable section to prevent the use of DNA testing of collateral heirs because the attempt to establish paternity was requested post-death. *Sanders, supra* at 469-475. The *Sanders* Court specifically stated that

> Subdivision (c)(2), with its may language, merely allows other provisions of the Uniform Parentage Act to be used to establish a natural parent-child relationship provided that a court decree declaring paternity was entered while the father was alive or there is clear and convincing evidence that the father, while alive, had openly and notoriously held out the child as his own." [*Id.* at 471.]

Even though the *Sanders* Court was "fully cognizant that the restrictive nature of section 6408, subdivision (c)(2), in establishing rules for proof of paternity in probate proceedings has a harsh effect on children born out of wedlock," *Id.* at 475, especially "in light of the scientific advancement of recent years," and the court felt that there were strong public policy arguments in favor of lifting the restrictions of section 6408, subdivision (c)(2), *Id.* at 477, the Court was forced to decline to order the requested

[5] This statute was amended in 1991 and the numbering changed to (f)(2). *In re Estate of Sanders*, 2 Cal App 4th 462, 470 (1992).

genetic testing because of the applicable Probate Code section which did not allow for determining paternity post-death. *Id.* at 471-472.[6]

In *William M*, the California Court held that the paternal grandparents, either in their individual capacity or as parents of deceased putative father, were not proper party defendants to an action to establish paternity pursuant to California's Paternity Act. *William M*, *supra* at 452. In that case, paternity testing was not ordered because the paternal grandparents did not have standing.[7]

In *Cheyanna M. v A.C. Neilson Co*, 66 Cal App 4th 855, 862, 874 (1998), the Court noted that: "Effective January 1, 1994, Probate Code section 6408, subdivision (f)(2) [the statute upon which *Sanders* was based], was repealed. To replace it, the Legislature enacted Probate Code section 6453. Section 6453, unlike its predecessor, includes a third means of proving paternity--by clear and convincing evidence if " '[i]t was impossible for the father to hold out the child as his own.' " *Cheyanna M.*, *supra* at 875 (citations omitted). Further, the *Cheyanna M.* Court noted that "the legislative history indicates that the "impossibility" provision was enacted to cover the situation now before the court--where the father dies before the child is born." *Id.*, at 877.

In *Cheyanna M.*, the California appellate court stated that, under the relevant statute (Probate Code § 6453), if the deceased could have held the minor out as his "child," and there was clear and convincing evidence that he had done so, the minor would be an heir under the intestacy laws. *Id.* at 874-875. However, if it were impossible for the deceased to hold the minor out as his "child," she would be an heir if there was clear and convincing evidence of the deceased's paternity. The appellate court

[6] The statutory section upon which this holding was based, section 6408, subdivision (c)(2), was repealed in 1994. See *Cheyanna M. v A.C. Neilson Co*, 66 Cal App 4th 855, 862, 874 (1998).
[7] In this case, there is no question that the Shaws are proper parties in this probate proceeding.

noted that under both alternatives in the statute, the minor was required to present evidence that was clear and convincing. The first alternative required proof of a specific act--that the deceased held the minor out as his "child." The second alternative simply required proof that the deceased was the minor's biological father; it did not require proof of any specified conduct, *nor did it limit the type or source of permissible evidence*, provided the evidence was clear and convincing. *Id.* at 867 (emphasis added). However, the *Cheyanna M.* Court did not specifically address the issue of whether DNA testing of the grandparents, which was requested by the petitioner, could be ordered. *Id.* at 877.

In *Congdon v Sullivan*, 1992 US Dist LEXIS 13114 (ED Penn, 2002), the District Court held in an application for social security benefits case that if the "New York legislature had provided that grand-parental testing be a criteria for the determination of paternity in intestacy proceedings, it would have so provided in the intestacy statute." Because the legislature had not so provided, the District Court concluded that the courts of New York would not accept grand-parental genetic testing as a valid substitute for the requirement of § 4-1.2(D), which states that a blood genetic marker test have been administered to the father, which together with other evidence, establishes paternity by clear and convincing evidence for purposes of intestate succession of a child born out of wedlock. See also *In re Estate Janis*, 210 Ad2d 101 (NY App, 1994) (§ 4-1.2(D) clearly does not contemplate the administration of genetic testing post-death).

C. Genetic Testing of Collateral Heirs in Michigan

In *In re Jones Estate*, 207 Mich App 544, 553; 525 NW2d 493 (1994), the Michigan Court of Appeals addressed the constitutionality of MCL 700.111(4) and determined that it did not violate the Equal Protection Clause. The *Jones* Court stated

that the statutory requirements contained within the provision were substantially related to an important state interest – that of the just and orderly disposition of property in an intestate decedent's estate. *Jones Estate*, *supra* at 552. The Court also stated in its analysis that one method of proving paternity in that case was to utilize a DNA profile by using the child's tissue and the tissue of either decedent or *decedent's mother*. *Id.* at 553 (emphasis added).

In *In re Estate of Berdys*, unpublished opinion per curiam of the Court of Appeals, decided 10/03/00 (Docket No. 214462) (citing *Jones Estate*, *supra* at 553), the Court of Appeals alluded to the idea that DNA testing of collateral heirs has been allowed to establish paternity, and the resulting right to inherit, even after the death of the putative father. In *Berdys*, the child born out of wedlock presented sufficient evidence that she had a mutually acknowledged parent-child relationship with the deceased. As such, the *Berdys* Court refused to grant decedent's sister's request for DNA testing on the ground that the child's right to inherit under MCL 700.111(4) did not have to be confirmed with DNA testing. The *Berdys* Court did note, however, "that DNA testing has been allowed to establish paternity, and the resulting right to inherit, when that right could not be established through the applicable section of the probate code." *Id.*, slip op at 2. Contra *In re Estate of Vellenga*, 120 Mich App 699; 327 NW2d 340 (1982) (Court of Appeals held that express statutory requirements for considering a man to be the natural father of a child born out of wedlock implicitly exclude all other circumstances under which he might be so considered).

D. Spencer's Motion to Compel

This Court finds that DNA testing of the Shaws, Mario Spencer's alleged grandparents, can be ordered pursuant to this Court's inherent right to compel discovery and is authorized by the applicable sections of EPIC.

1. Court's Inherent Right to Compel Discovery

In *M.A. v Estate of A.C.*, the New Jersey Superior Court recognized that New Jersey's Paternity Act specifically stated that the court could order testing of the child, mother and putative father. However, the court found no indication that the statutory language expressed a deliberate policy of limitation. The court stated that although the New Jersey statute did not statutorily authorize the testing of siblings and collateral relatives, the statute also did not prohibit testing under other circumstances. *Id.* at 1048. The New Jersey appellate court did not order DNA testing pursuant to the Paternity Act. Instead, the court said:

> On the other hand, the statute does not purport to prohibit blood testing in other situations. There is no indication that the statutory language expresses a deliberate policy of limitation. *Therefore, this Court concludes that the statute is not controlling in this case, and the general rules of discovery and a court's inherent right to compel production of evidence must be applied.* [*Id.* (emphasis added) (citing *Sudwischer v Hoffpauir*, 589 So2d 474 (La, 1991)).]

In Michigan, discovery rules are to be liberally construed in order to further the ends of justice. *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 346; 497 NW2d 585 (1993); *Ostoin v Waterford Twp Police*, 189 Mich App 334, 340; 471 NW2d 666 (1991). "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending litigation." MCR 2.302(B)(1). See *Linebaugh, supra* at 344 (materials which are not privileged and which are relevant to the

subject matter of the suit are freely discoverable upon request). See also *Sudwischer*, *supra* at 475 (Schuh's "testing would produce relevant evidence which could be considered by the trier of fact with other evidence in evaluating" Sudwischer's claim and, pursuant to the applicable Louisiana court rule "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending litigation."). Therefore, in order to proceed with discovery, a plaintiff need only show that the matter being sought is relevant and not privileged. *Yates v Keane*, 184 Mich App 81, 82; 457 NW2d 693 (1990).

In this case, the DNA evidence being sought is relevant to the issue of whether Errol Shaw is Mario's father for purposes of intestate succession and is not privileged information. DNA testing is "highly regarded and unequaled in evidentiary value." See *Sudwischer, supra* at 685. As such, the DNA evidence is discoverable. Further, the Shaws are not strangers to these proceedings, they are interested persons as defined by EPIC. See 700.1105(c). See also MCR 5.125(C)(3) (persons interested in a petition to determine heirs are the heirs). The Shaws are seeking to withhold this potentially relevant evidence from the court while they compete with Mario as potential successors of Errol Shaw's estate. Therefore, the general rules of discovery, including this Court's inherent right to compel discovery, see *People v Johnson*, 356 Mich 619, 744; 97 NW2d 739 (1959) (recognizing "the inherent power of the trial court to control the admission of evidence so as to promote the interests of justice"), combined with concepts of fundamental fairness, (see *M.A. v Estate of A.C.*, *supra* at 1053 "fundamental fairness prohibits decedent's heirs and their mother from keeping this potentially relevant evidence from the court."), mandate that the Shaws, as interested persons, must submit to

DNA testing to assist the Court in determining whether Mario may inherit from this estate.

2. MCL 700.2114(1)(c)(v)

The second question to be decided is whether MCL 700.2114(1)(c)(v) limits the authority of the Court to order DNA testing to those person identified in the Paternity Act. Prior to EPIC, the mechanism for illegitimate children to establish their right to inherit via intestate succession from their fathers was found at MCL 700.111(4). One of four methods could be used: 1) the man joined with the mother in completing an acknowledgement of paternity as prescribed in the Acknowledgement of Paternity Act, 2) the man joined with the mother in a written request for a corrected birth certificate that results in the issuance of a substituted certificate, 3) the man and child had a mutually acknowledged relationship of parent and child that began before the child became age 18 and continued until the death of either, or 4) an order establishing paternity had been entered as provided in the Paternity Act.

These provisions were designed to guard against specious claims against an estate by requiring the father to make some acknowledgement, during his lifetime, that a claimant was his child. *Jones Estate,* supra at 550-551. However, these mechanisms were insufficient for illegitimate children to establish their right to intestate succession where the father and mother were unwilling or unable to take the necessary steps to validate the child's status as an heir. This led to harsh results, notably in cases like *In re Estate of Scharenbroch*, 191 Mich App 215; 477 NW2d 436 (1991) and *Vellenga, supra.* In *Scharenbroch* the father of the minor child died thirty-two days after the child was born, while in *Vellenga*, the minor child was born six days after the death of his father.

The courts found in those cases that the statutory methods of establishing that a child was an heir-at-law of a deceased father did not provide a mechanism for these illegitimate children to establish their status as an heir, even when actual paternity was not seriously contested.

Recognizing these unfair, harsh results, as well as scientific advances that effectively weed out specious claims, the Legislature, when adopting EPIC, added an additional mechanism, based solely on science, to establish a child's right to intestate succession. The new section provides that the standards and procedures of the Paternity Act may be utilized *regardless of whether the putative father is deceased.* MCL 700.2114(1)(c)(v) (emphasis added). Unlike the other mechanisms in the statute, the child's right to inherit via intestate succession did not depend on whether his parents took the necessary steps to validate the child's parentage.

Michigan's Supreme Court has repeatedly said that the foremost rule of statutory construction for the courts is to "effect the intent of the Legislature." *Roberts v Mecosta County General Hospital,* 466 Mich 57, 63; 642 NW2d 663 (2002). In matters of the orderly disposition of property in an intestate decedent's estate, the Legislature has clearly expressed its intent. In EPIC, the Legislature expressly directed that: "This act shall be liberally construed and applied to promote its underlying purposes and policies..." MCL 700.1201. These purposes and policies expressly include promoting a "speedy and efficient system for liquidating a decedent's estate and making distribution to the decedent's successors." MCL 700.1201(c).

MCL 700.2114(1)(c)(v) does not require that an action be commenced under the Paternity Act, unlike the other mechanisms in subsection (c) that direct the parties to take

action under the Acknowledgement of Paternity Act, the Paternity Act or the laws relating to the issuance of a corrected birth certificate. The new provision permits the use of the standards and procedures of the Paternity Act. The standards and procedures of the Paternity Act expressly provide for DNA testing to determine paternity and state that, if that testing establishes a probability of paternity greater than 99%, paternity is presumed and either party may move for summary disposition. MCL 722.716(5) and (6).

This new provision in EPIC has no words of limitation as to who might be tested and does not require that paternity be proven pursuant to the Paternity Act, although that is another option under MCL 700.2114(1)(c)(iv). EPIC simply permits courts to use the standards and procedures of the Paternity Act to determine a child's right to intestate succession. In the Paternity Act, the interested parties are the father, mother, and child, while in a decedent's estate the interested parties are the heirs. MCR 5.125(C)(3). Unlike the Paternity Act, in proceedings under EPIC, the interested persons are widely varied and far-reaching, and could include brothers, sisters, cousins, aunts, uncles, grandparents, nieces, nephews and so forth. It thus follows that the people involved in the two proceedings will generally be different.

In giving the liberal construction to EPIC as commanded by the Legislature, as well as the stated purpose of EPIC to determine the rightful heirs of a decedent, this Court concludes that DNA testing of appropriate interested persons in decedent estates is permissible.

It has also been suggested that paternity could be established by using one of the other mechanisms. However, EPIC does not require the use of one mechanism over the other. The fact is that DNA testing is the speediest, most reliable and most efficient

method to determine Mario's inheritance rights. In this case, DNA testing is clearly the preferred method under the statute because it is most consistent with the Legislature's directive that speed and efficiency guide the liquidation of a decedent's estate.

Therefore, the Court concludes that MCL 700.2114(1)(c)(v) permits the court to order DNA testing of collateral heirs when the putative father's tissue cannot be utilized for DNA testing.

3. Balancing Test

The Court recognizes that Mario's right to inherit through his father must be balanced against the Shaws' right to privacy. The Court notes that Michigan has a compelling state interest in the just and orderly disposition of property in an intestate decedent's estate. *Jones Estate, supra* at 552. The Court also acknowledges that the Shaws have a right to privacy and cannot, without substantial reason rationally related to a compelling state interest, be required to submit to DNA testing. However, the invasion of their privacy is minimal. Unlike some of the prior cases in which testing was permitted and blood had to be drawn, in this case, the Shaws will have to submit to a mere swab of their inner cheek in order to collect the DNA matter. The Court also notes that the Shaws have presented no moral or religious grounds as the basis for their objection to the testing. Furthermore, the Shaws stand to gain financially if it is not determined that Mario is Errol Shaw's natural child for purposes of intestate succession. *Robinson, supra* at 686; *Sudwischer, supra* at 476; *M.A. v Estate of A.C., supra* at 1053. As such, when balancing Mario Spencer's interest in determining his paternity and inheritance rights with the Shaws right to privacy, the scales clearly weigh in Mario Spencer's favor. *Sudwischer, supra* at 476; *M.A. v Estate of A.C., supra* at 1053.

Based on the reasons set forth above, the Court orders the Shaws to submit to DNA testing at LifeCodes Corporation. In accordance with the decision of this Court, an Order is to be presented pursuant to MCR 2.602.

JUL 03 2002
Date

JUDGE MILTON L MACK, JR
Milton L. Mack, Jr.
Judge of Probate