IN THE SUPREME COURT OF FLORIDA

CASE NOS. 84,385 and 84,386
(Consolidated)

IN RE: THE ESTATE OF
CHARLES W. SMITH, Deceased

DALE S. WILSON and HAROLD "BUDDY" JIMMISON, CO-PERSONAL REPRESENTATIVES, H.H. ADAMS, FLORA C. JONES, LOUISE G. SMITH, FRANK O. YOUNG, ALMA YOUNG, his wife, CLYDE S. HICKS and HAROLD "BUDDY" JIMMISON, Individually,	)	ON APPEAL FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA
	)	AND
Petitioners,	)	ON DISCRETIONARY REVIEW OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA
vs.	)	
SHIRLEY I. SCRUGGS,	)	DISTRICT CASE NO.: 93-731
Respondent.	)	

PETITIONERS' INITIAL BRIEF ON THE MERITS

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EXPLANATORY NOTE IDENTIFYING PARTIES

This is a consolidated case combining discretionary review by this Court with an appeal based on this Court's mandatory jurisdiction. The petitioners, also the appellants in this Court, are Dale S. Wilson and Harold "Buddy" Jimmison, Co-Personal Representatives of the Estate of Charles W. Smith, and H. H. Adams, Flora C. Jones, Louise G. Smith, Frank O. Young, Alma Young, his wife, Clyde S. Hicks and Harold "Buddy" Jimmison, beneficiaries under the Last Will and Testament of Charles W. Smith. They will all be collectively referred to as "petitioners." The respondent, also the appellee in this Court, is Shirley I. Scruggs, who will be hereafter referred to as "Scruggs."

STATEMENT OF THE CASE AND OF THE FACTS

A. Procedural Posture In This Court.

On September 21, 1994, petitioners filed a notice of appeal invoking this Court's mandatory jurisdiction because the First District Court of Appeal held that section 95.11(3)(b), Florida Statutes (1991), was unconstitutional as applied. Petitioners filed a separate notice to invoke the Court's discretionary jurisdiction because the First District's decision expressly and directly conflicts with the Fifth District's decision in King v. Estate of Anderson, 519 So.2d 67 (Fla.5th DCA 1988).

By order dated September 22, 1994, this Court consolidated the appeal and the discretionary review notice. On February 2, 1995, this Court accepted jurisdiction of both the appeal based on mandatory jurisdiction and the notice invoking discretionary jurisdiction. The Court has set oral argument on these consolidated cases for Monday, June 5, 1995.

B. Proceedings Below And The Facts Of This Case.

Petitioners seek review of the decision of the First District Court of Appeal, In re Estate of Smith, 640 So.2d 1152 (Fla.1st DCA 1994), in which the First District

reversed the trial court's final summary judgment which held that respondent Scruggs had not established any of the three alternatives available under section 732.108(2), Florida Statutes (1991), necessary to prove she was the natural daughter of the decedent, Charles W. Smith ("Decedent"), for probate purposes. (R.166-67).[1]

The First District, citing "both statutory construction grounds and constitutional grounds," held that the trial court erred in concluding that section 95.11(3)(b), Florida Statutes (1991), which requires that actions "relating to the determination of paternity" be brought within four years "with the time running from the date the child reaches the age of majority," barred Scruggs from seeking an adjudication of paternity in Decedent's probate proceeding. Estate of Smith, 640 So.2d at 1156. This Court has jurisdiction. Art. V, § 3(b)(1), Fla. Const.; Fla.R.App.P. 9.030(a)(1)(A)(ii); Art. V, § 3(b)(3), Fla. Const.; and Fla.R.App.P. 9.030(a)(2)(A)(ii) and (iv).

Respondent Scruggs was born out of wedlock in 1932. Her birth certificate lists her parents as "Emily Isabel Johns" and "Charles Smith," age twenty, birthplace "unknown." (R.22). Decedent Charles W. Smith was born in

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[1] "R.____" refers to the record on appeal.

1911 at Altamaha, Georgia, and was twenty-one when Scruggs was born. (R.39). During Decedent's lifetime, Scruggs never made any claim of paternity. Decedent died January 18, 1992. On January 28, 1992, his Last Will And Testament ("Will") was admitted to probate. (R.13). Scruggs was not a beneficiary under the Will. On April 20, 1992, Scruggs filed a "Petition for Revocation of Probate and Letters of Administration" (R.17-22) in which she alleged that Decedent lacked testamentary capacity to make his Will and that the Will was the product of undue influence. For the first time, Scruggs, then sixty years old, alleged that she was the natural daughter of the Decedent and sought to inherit under the intestacy laws if she was successful in revoking the Will.

The personal representatives moved to dismiss the petition for revocation, claiming that Scruggs had no standing to challenge the Will because she was not an heir under the intestacy laws. (R.30-33). The motion contended that Scruggs was precluded from seeking an adjudication of paternity in the probate proceeding because her time to seek such an adjudication had expired under section 95.11(3)(b), Florida Statutes (1991), which provides that such an adjudication must be sought within four years after the

claimant reaches the age of majority.[2] The trial court granted the motion to dismiss holding, inter alia, that "[a]djudication of paternity in this cause is barred by the Statute of Limitations in Florida Statute Section 95.11(3)(b)." (R.39-40).[3]

Scruggs then filed an amended petition (R.42-48), in which she, for the first time, alleged that Decedent had acknowledged paternity in writing (which, if proven, would have been another basis for establishing paternity in probate pursuant to section 732.108(2)(c), Florida Statutes (1991)). Because this new allegation arguably raised factual issues which could not be determined on a motion to dismiss, the trial court permitted both parties to engage in discovery and to submit legal memoranda, including further briefing on the statute of limitations issue. (E.g., R.58-68, 70-71, 86-95, and 142-159). Petitioners then filed a motion for summary judgment (R.119-121) and, after receiving affidavits, additional legal memoranda and conducting a

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[2] Scruggs reached majority in 1953. Estate of Smith, 640 So.2d at 1155. Before 1973, the age of majority in Florida was 21 years of age. Daughtery v. Daughtery, 308 So.2d 24, 25 (Fla.1975). After 1973, age 18 became the age of majority. Ch. 73-21, § 1, at 59, Laws of Fla.

[3] Scruggs moved for rehearing of the trial court's order granting the motion to dismiss. (R.41). After hearing oral argument and considering memoranda of law, the trial court denied Scruggs' motion for rehearing. (R.117-18).

hearing (R.129-130, 138-142, 149-158, and 164-65), the trial court granted the motion for summary judgment:

> [N]one of the three alternatives under Florida Statutes Section 732.108(2) can be met to establish [Scruggs] as a potential heir, and [Scruggs] is not an interested party to challenge decedent's Will because:
>
> (1) There is no genuine factual issue as to [Scruggs'] allegation that the decedent acknowledged paternity of [Scruggs] in writing due to [Scruggs'] failure to submit any substantiation for that allegation;[4]
>
> (2) [Scruggs] has acknowledged that her mother was never married to the decedent and that the decedent was never adjudicated to be her father; and
>
> (3) Adjudication of paternity is barred by the Statute of Limitations. (R.166-67).

The trial court, therefore, entered final judgment in favor of the personal representatives on Scruggs' claims. (R.166-67).

On appeal, the First District reversed:

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[4] Scruggs did not appeal the trial court's holding that she had failed to prove that the Decedent acknowledged her in writing as his daughter. The only issues Scruggs appealed to the First District concerned Scruggs' inability to adjudicate paternity in the probate proceeding pursuant to section 732.108(2)(b), Florida Statutes (1991), and the trial court's refusal to honor Scruggs' birth certificate as conclusive proof of paternity, an issue which the First District did not address.

> Acknowledging that the action to inherit is a separate remedy from a paternity action to establish support, we should not merely assume that the same statute of limitations applies to each. The action to inherit is a distinct statutory cause of action, not within the contemplation of the bar imposed by section 95.11(3)(b). The trial court erred by construing section 95.11(3)(b) as applying to frustrate [Scruggs'] effort to establish paternity solely for the purpose of inheritance. Estate of Smith, 640 So.2d at 1154.

Sua sponte, the First District also addressed the constitutionality, under the "access to courts" provision of the Florida Constitution, of applying the limitations statute to prohibit Scruggs from seeking an adjudication of paternity in the probate proceeding:[5]

> [Scruggs'] right to inherit did not vest until Smith died in 1992. . . . It is well established that a statute of limitations will not begin to run until the occurrence of the last event which gives rise to the cause of action. . . . This maxim is inconsistent with an application of section 95.11(3)(b), since the statute purports to bar the action four years after [Scruggs] attained the age of majority, an event which . . . took place some thirty-five years before [Decedent] died. Preemption of [Scruggs'] claim by use of a statute which never allowed the claim to arise offends the Florida Constitution. We reached this result on access to courts grounds. Id. at 1155-56.

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[5] While Scruggs had argued due process and unrelated equal protection issues in the First District, Scruggs had never raised an "access to courts" challenge to section 95.11(3)(b), Florida Statutes (1991). See infra p.24.

In what is likely dicta, the First District also expressed concern that applying the limitations period would "place a burden on an illegitimate child seeking to inherit, not shared by legitimate offspring" thereby raising the specter of an equal protection problem. Id. at 1156.

The First District concluded:

> Therefore on both statutory construction grounds and constitutional grounds we hold that section 95.11(3)(b) may not be utilized to bar [Scruggs'] action for inheritance. Since her petition was timely for purposes of the Probate Code, she may proceed. Id. at 1156.

Believing that the First District has erred and that the First District's holding has broad probate, estate planning and constitutional consequences, petitioners ask this Court to quash the decision of the First District and remand the case to the First District with instructions to affirm the final judgment entered by the trial court.

SUMMARY OF ARGUMENT

Born in 1932, neither respondent Scruggs nor anyone acting on her behalf, made a paternity claim against or sought child support from the Decedent, Charles W. Smith, during Scruggs' entire minority. Moreover, when Scruggs reached the age of majority in 1953, she did not at that time make any paternity claim against Decedent. Indeed, at the time that Decedent made his Last Will and Testament in September 1991 (R.1-5), Scruggs, who by that time was fifty-nine years old, **still** had made no claim of paternity. Thus, Decedent made his Will, naming specific beneficiaries, unaware of any paternity claim by Scruggs. Decedent died in January 1992, presumably comforted by the knowledge that his estate would be distributed according to his Will.

It was not until Decedent's considerable estate was probated that Scruggs, **for the very first time**, sought to declare herself "the natural daughter of Decedent," to revoke his Will and to take under the intestacy laws as an heir. (R.17-22). The trial court held that Scruggs' attempt to adjudicate paternity in probate was barred by the statute of limitations for paternity actions, section 95.11(3)(b), Florida Statutes (1991), which requires that adjudications of paternity be brought "within FOUR YEARS" "with the time running from the date the child reaches the

age of majority." The First District erroneously reversed, holding that Scruggs' paternity claim was not time-barred, thereby sanctioning Scruggs' attempt to thwart Decedent's testamentary intent when he is no longer able to reaffirm it or to defend himself from her paternity claim. This Court should quash the First District's decision.

Scruggs attempted to establish paternity "by an adjudication" in the probate proceeding, as provided in section 732.108(2)(b), Florida Statutes (1991). Ipso facto, Scruggs' attempt to establish paternity "by an adjudication" in probate is "[a]n action relating to the determination of paternity" as provided in section 95.11(3)(b), Florida Statutes (1991). Therefore, under the plain language of section 95.11(3)(b), Florida Statutes (1991), Scruggs' paternity action in probate is barred because she first asserted such a claim more than four years (indeed, more than thirty-eight years) after she reached the age of majority.

The First District erred by finding the statute of limitations inapplicable to paternity actions in probate. Nothing in the language of section 95.11(3)(b), Florida Statutes (1991), or elsewhere, suggests that the statute is only applicable to adjudications of paternity under the child support statutes, as the First District held.

The First District unnecessarily reached the constitutional issues of "access to courts" and equal protection as these issues were never raised, briefed, or argued in the trial court. Thus, this Court should find section 95.11(3)(b), Florida Statutes (1991), applicable, quash the First District's decision and decline to reach the constitutional issues. However, if this Court reaches the constitutional merits, the Court should hold that section 95.11(3)(b), Florida Statutes (1991), as applied here, does not violate Scruggs' right of access to courts. Under this statute Scruggs had the right to bring a paternity claim any time from her birth through four years post-majority. Thus, Scruggs had access to courts had she timely availed herself of it. Moreover, Scruggs demonstrated that she did have access to the courts by trying to establish paternity using one of the other alternatives available to her in probate under section 732.108(2)(b); however, she failed to prove that the Decedent had acknowledged paternity in writing. Thus, Scruggs was not denied access to the courts, she was simply unable to prove her claim. Finally, application of this statute of limitations did not retroactively reduce the time which Scruggs had to seek an adjudication of paternity.

Although it is unclear whether the First District's discussion of equal protection is holding or dicta, it is

clear that the First District's equal protection reasoning cannot withstand this Court's scrutiny. Neither the equal protection clause of the federal or Florida Constitution is implicated by this valid statute of limitations. Indeed, without a valid statute of limitations on paternity claims, a decedent would have no way of knowing whether his testamentary plan will be followed because he could never be certain that an alleged child would not make a post-death paternity claim when the decedent is unavailable to defend himself or to reorder his estate. Concomitantly, without a statute of limitations, an adult paternity claimant has no incentive to make a pre-death paternity claim knowing that under Florida law, once the decedent becomes aware of the paternity claim, he can nevertheless determine not to include the alleged child in his will. The adult paternity claimant, free of any statute of limitations, would be better served to wait and first assert paternity after death, when the decedent could not contest it or change his estate plan to exclude the alleged child. This is exactly what Scruggs did here. Thus, the statute of limitations for paternity claims "represents a carefully considered legislative judgment as to how" the balance between the rights of the out of wedlock child and the rights of decedent can "best . . . be achieved." Lalli v. Lalli, 439 U.S. 259, 99 S.Ct. 518, 527 (1978).

This Court should find that section 95.11(3)(b), Florida Statutes (1991), bars Scruggs' belated attempt to adjudicate paternity in probate and should quash the decision of the First District Court of Appeal.

ARGUMENT

I. ON ITS FACE, SCRUGGS' PETITION IN PROBATE TO "ESTABLISH BY AN ADJUDICATION" THAT DECEDENT WAS HER FATHER IS BARRED BY THE STATUTE OF LIMITATIONS, SECTION 95.11(3)(b), FLORIDA STATUTES (1991), WHICH APPLIES TO "AN ACTION RELATING TO THE DETERMINATION OF PATERNITY."

As late as 1974, a child born out of wedlock could not seek an intestate share unless the alleged father had acknowledged the child in writing. § 731.29, Fla. Stat. (1973). Beginning in 1974, several amendments to the probate statutes increased the number of ways by which an out of wedlock child could prove paternity in probate,[6]

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[6] At common law, children born out of wedlock could not inherit from their father. In re Horne's Estate, 149 Fla. 710, 7 So.2d 13, 15 (Fla.1942). It was not until 1933 that the legislature provided that "illegitimate" children could inherit from their father if the father acknowledged in writing his paternity. Ch. 16103, Laws of Fla. (1933). The law essentially remained unchanged until 1974 when the legislature revised and consolidated the laws relating to wills, intestacy and the administration and distribution of estates. In 1974, the legislature created section 732.108(2) which provided that a person born out of wedlock is a child of the father if the parents were married before or after the child's birth or the paternity was established by adjudication. Ch. 74-106, § 732.108, at 220, Laws of Fla. Section 732.108(2) was amended in 1975 by, inter alia, (continued...)

culminating in the present statute, section 732.108(2), Florida Statutes (1991) (hereafter "section 732.108(2)"),[7] which provides three specific ways for an out of wedlock child to prove paternity:

> For the purpose of intestate succession . . . [t]he person is also a lineal descendant of his father and is one of the natural kindred of all members of the father's family, if:
>
> (a) The natural parents participated in a marriage ceremony before or after the birth of the person born out of wedlock, even though the attempted marriage is void.
>
> (b) The paternity of the father is established by an adjudication before or after the death of the father.
>
> (c) The paternity of the father is acknowledged in writing by the father.

Scruggs conceded that her mother had never married the Decedent. In her amended petition, she did allege that "paternity was acknowledged in writing by decedent" (R.42), but the trial court granted summary judgment because there

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[6](...continued)
adding that paternity could be adjudicated before or after the death of the father. Ch. 75-220, § 11, at 511, Laws of Fla. In 1977, the legislature again amended section 732.108(2) by adding that the paternity of the father could be established for inheritance purposes through written acknowledgment by the father. Ch. 77-87, § 7, at 167, Laws of Fla.

[7] Unless otherwise noted, reference is to the 1991 Florida Statutes.

was no evidence to support this claim. (R.166).[8] Thus, the issue came down to whether the statute of limitations, section 95.11(3)(b), Florida Statutes (1991), barred Scruggs from having paternity "established by an adjudication" in the probate proceeding. § 732.108(2)(b), Fla. Stat. (1991). Twice the trial court held that such an adjudication was barred by the statute of limitations. (R.38-40, and 117-18). The First District reversed, finding the statute of limitations both inapplicable and unconstitutional. The issue is now squarely before this Court.

A. On Its Face, The Statute Of Limitations Applies.

The general "Limitations of Actions" statutes are found in Chapter 95, Florida Statutes, which by its own terms is applicable to any "civil action or proceeding" and provides that any action or proceeding "shall be barred unless begun within the time prescribed in this chapter." § 95.011, Fla. Stat. (1991).[9] See Reynolds Fasteners, Inc. v. Wright, 197 So.2d 295, 298 (Fla.1967) (where no express

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[8] Scruggs did not challenge on appeal to the First District the trial court's holding that she failed to prove paternity by written acknowledgment.

[9] This same provision provides that a different limitations period is applicable only "if a different time is prescribed elsewhere in these statutes . . . ." Because the time for bringing actions relating to paternity is specifically provided for in Chapter 95 and nowhere else, Chapter 95 applies to bar Scruggs' claim for paternity.

limitation, general limitations act applies). The specific provision concerning limitations on paternity actions, section 95.11(3)(b), Florida Statutes (1991) (hereafter "section 95.11(3)(b)"),[10] provides:

> **Actions other than for recovery of real property shall be commenced as follows:**
>
> . . . .
>
> **(3) WITHIN FOUR YEARS**
>
> . . . .
>
> **(b) An action relating to the determination of paternity, with the time running from the date the child reaches the age of majority.** (Emphasis added).

Ipso facto, the establishment of paternity "by an adjudication" in a probate proceeding, as provided in section 732.108(2)(b), is "[a]n action relating to the determination of paternity" as provided in section 95.11(3)(b). Indeed, the First District itself characterized the question as whether "section 95.11(3)(b), Florida Statutes (1991), bars [Scruggs] from bringing **an action to determine her paternity** for purposes of intestate succession." Estate of Smith, 640 So.2d at 1153 (emphasis added). Therefore, on its face, section 95.11(3)(b) is

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[10] Unless otherwise noted, reference is to the 1991 Florida Statutes.

applicable and bars Scruggs' action in probate to determine paternity.[11]

A long-standing rule of statutory construction provides:

> When the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; **the statute must be given its plain and obvious meaning.**" Holly v. Auld, 450 So.2d 217, 219 (Fla.1984). (Emphasis added).

This Court has recently reaffirmed this rule, which applies here. State v. Jett, 626 So.2d 691, 693 (Fla.1993) ("We agree with the majority below that this language is unambiguous. It is a settled rule of statutory construction that unambiguous language is not subject to judicial construction, however wise it may seem to alter the plain language. . . . We trust that if the legislature did not intend the result mandated by the statute's plain language,

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[11] This is further shown by a reading of section 733.105, Florida Statutes (1991), entitled "Determination of Beneficiaries" which provides that "[w]hen it is necessary to determine who are or were the heirs or devisees," "any interested person" may bring "proceedings" or "a separate civil action" to determine the proper beneficiaries. This confirms that a claim to determine paternity in probate is "a civil action or proceeding" and therefore is governed by the general limitations periods of Chapter 95. § 95.011, Fla. Stat. (1991).

the legislature itself will amend the statute at the next opportunity.").

This Court has not yet had the opportunity directly to determine the applicability of section 95.11(3)(b) to actions to adjudicate paternity in probate. However, the only district court of appeal (besides the First District below) to consider the matter found the statute to be applicable. In King v. Estate of Anderson, 519 So.2d 67, 68 (Fla.5th DCA 1988), the Fifth District held:

> When Willie Anderson died, the appellant, then twenty-six years of age, claimed to be entitled to an interest in the estate as an illegitimate heir, pursuant to section 732.108(2), Florida Statutes. The trial court correctly held that appellant's claim was barred by the four year limitation period in section 95.11(3)(b) for actions relating to the determination of paternity. See Garris v. Cruce, 404 So.2d 785 (Fla.1st DCA 1981), rev. denied, 413 So.2d 876 (Fla.1982).

Thus, the Fifth District held that, because appellant King was more than four years past the age of majority when he attempted to claim an interest in the decedent's estate, his claim was barred by section 95.11(3)(b), the identical statute involved here.[12] Though the King decision was

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[12] The King decision was rendered in 1988, two years after the 1986 amendment to section 95.11(3)(b). See infra p.30. The statute has not been further amended since 1986. Thus, the statute at issue in King was the same version of section 95.11(3)(b) at issue here.

briefed by both parties below, the First District reached a directly opposite result without distinguishing or even citing King.

Thus, under the plain language of section 95.11(3)(b), Scruggs' paternity action in probate is barred because she first asserted such a claim more than four years (indeed, more than thirty-eight years) after she reached the age of majority.[13]

II. THE FIRST DISTRICT ERRED BY FINDING THE STATUTE OF LIMITATIONS INAPPLICABLE TO PATERNITY ACTIONS IN PROBATE.

In finding section 95.11(3)(b) inapplicable to paternity claims in probate, the First District relies heavily on its conclusion that "an action during the father's lifetime to obtain a determination of paternity and support is a separate and distinct remedy from an action to determine paternity for the right to inherit." Estate of Smith, 640 So.2d at 1154, quoting In re Estate of Odom, 397 So.2d 420, 424 (Fla.2d DCA 1981). The First District also found that an action to adjudicate paternity in probate under section 732.108(2)(b) "does not by its terms require

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[13] The statute unambiguously applies and the Court need not inquire further into the legislature's wisdom in passing it. However, the policy rationale of the statute as applied here is discussed infra pp.39-41.

the adjudication of paternity by an action pursuant to chapter 742 [which deals with paternity actions for child support]." Estate of Smith, 640 So.2d at 1154. Petitioners do not dispute either of these conclusions.

However, acknowledging that an action to determine paternity for child support purposes under Chapter 742, Florida Statutes, is distinct from an action to determine paternity under section 732.108(2)(b) for probate purposes, does **not** lead to the First District's conclusion that "the same statute of limitations [does not apply] to each" or to its holding that "[t]he action to inherit is a distinct statutory cause of action, not within the contemplation of the bar imposed by section 95.11(3)(b)." Estate of Smith, 640 So.2d at 1154. Indeed, as already established, section 95.11(3)(b) is part of Chapter 95 which applies to **any** "civil action or proceeding." **Nothing** in the language of section 95.11(3)(b) dictates or even hints that the statute is **only** applicable to adjudications of paternity for child support under Chapter 742. Section 95.11(3)(b) applies to "[a]n action **relating to** the determination of paternity," (emphasis added), and an action in probate under section 732.108(2)(b) for "an adjudication" of "[t]he paternity of the father" is no less "an action relating to the determination of paternity" than is such an action under

Chapter 742. Likewise, nothing in section 732.108(2)(b) provides that proceedings under it are to be exempted from the generally applicable limitations period under section 95.11(3)(b).[14]

The First District says that because the right to adjudicate paternity in probate was not recognized until 1974, the legislature could not have intended that the

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[14] There is no inconsistency between applying section 95.11(3)(b) in a probate action and the provision of section 732.108(2)(b) which permits the adjudication of paternity "before **or after** the death of the father." (Emphasis added). The statutes are both consistently applied: a claimant can seek an adjudication of paternity in probate, so long as the statute of limitations for bringing the claim has not expired. The provision of section 732.108(2)(b) which permits an adjudication of paternity after the death of the alleged father merely recognizes that absent this provision, the claim of a child still in minority or less than four years past majority would be barred simply by the death of the alleged father whose child support obligations are extinguished at his death. See, e.g., section 742.10, Florida Statutes (1991); State of Florida, Dept. of Health and Rehabilitative Services v. West, 378 So.2d 1220, 1222 (Fla.1979); Rogers v. Runnels, 448 So.2d 530, 531-32 (Fla.5th DCA 1984). There is nothing to suggest, however, that this provision of section 732.108(2)(b) was intended to abrogate the statute of limitations generally applicable to paternity actions in probate. See, e.g., Alachua County v. Powers, 351 So.2d 32, 40 (Fla.1977) (statutes which relate to same or closely related subject are regarded in pari materia and should be construed together and in construing them, court should preserve the force of both without destroying their evident intent); Miami Dolphins, Ltd. v. Metro. Dade County, 394 So.2d 981, 988 (Fla.1981) ("Statutes may be read in pari materia without such being specifically directed, because 'laws should be construed with reference to the constitution and the purpose designed to be accomplished, and in connection with other laws though they contain no reference to each other.'").

statute of limitations for paternity claims apply to paternity claims in probate. Estate of Smith, 640 So.2d at 1154. However, when it passed the original version of section 732.108(2)(b) in 1974, allowing adjudications of paternity in probate, the legislature is presumed to have known that a general statute of limitations on paternity claims existed and was applicable. See, e.g., Dickinson v. Davis, 224 So.2d 262, 264 (Fla.1969) (legislature presumed to know existing law when a statute is enacted).[15] Had the legislature intended to exempt the adjudication of paternity claims in probate from the generally applicable statute of limitations, it could have and should have said so when it passed section 732.108(2)(b).

Though there is no controlling case from this Court, the case law from the district courts (even prior decisions of the First District) supports the applicability of section 95.11(3)(b) to adjudications of paternity in probate

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[15] In 1974, the legislature enacted section 95.11(3)(b), Florida Statutes (Supp.1974) (which was a recodification of long standing statutes of limitations on paternity claims), as well as section 732.108(2)(b), Florida Statutes (Supp.1974). The legislature again revisited section 732.108(2) in 1975 when it added that paternity could be adjudicated before or after the death of the father. Ch. 75-220, § 11, at 511, Laws of Fla. However, though it could have done so, the legislature did not alter, or amend section 95.11(3)(b), or create any other statute of limitations concerning paternity, nor did it do so when the legislature amended section 732.108(2) again in 1977.

proceedings. See King v. Estate of Anderson, 519 So.2d 67 (Fla.5th DCA 1988) (discussed supra p.18); Garris v. Cruce, 404 So.2d 785, 786 (Fla.1st DCA 1981), rev. denied, 413 So.2d 876 (Fla.1982) (First District itself holds that predecessor to current section 95.11(3)(b) barred declaratory judgment action to establish paternity after death of alleged father: "[o]ur concern is whether appellant has timely asserted her claim for paternity. . . . [S]ince appellant reached her majority on September 15, 1972, the limitation period prescribed by Section 95.11(3)(b) had run by the time she filed her suit on April 17, 1980."); Rogers v. Runnels, 448 So.2d 530, 532 (Fla.5th DCA 1984) (characterizing First District's holding in Garris to be "that the statute of limitations barred the [paternity] action [after death of alleged father] because the plaintiff waited longer than four years after attaining majority to bring the action"). See also, J.E.W. v. Estate of Doe, 481 So.2d 921 (Fla.1st DCA 1984) ("The instant case is one for declaratory judgment of paternity with no benefits sought or other relief claimed. It is a pure paternity action and barred by section 95.11(3)(b), Florida Statutes (1981). The appellant cannot seek support from the estate of his deceased father."); Thomas E. Allison, Litigation Under Florida Probate Code § 2.2 (Fla.Bar 2d ed. 1991) (Chapter entitled "Establishing Paternity" provides:

"Actions related to determination of paternity are subject to a four-year statute of limitations, which begins to run when the child reaches the age of majority. F.S. 95.11(3)(b).").

Though the First District holds that "on its face," section 95.11(3)(b) is not applicable to paternity actions in probate, it goes well beyond the "face" of the statute to try to support its conclusion, contrary to established rules of statutory construction. However, the First District's holding is belied by the plain language of both the probate statute and the statute of limitations, as well as the case law. This Court should quash the First District's decision.

III. THE FIRST DISTRICT UNNECESSARILY REACHED CONSTITUTIONAL ISSUES. IN ANY EVENT, SECTION 95.11(3)(b), FLORIDA STATUTES (1991), IS CONSTITUTIONAL.

A. The First District Unnecessarily Considered the Constitutionality of Section 95.11(3)(b).

The First District alternatively held that section 95.11(3)(b) unconstitutionally deprived Scruggs of "access to courts." Estate of Smith, 640 So.2d at 1155-56. It also expressed concern that the statute might implicate the equal protection clause. Id. at 1156. The First District's constitutional excursion is perplexing because the issues of

whether section 95.11(3)(b) violated "access to courts" or equal protection were never raised, briefed or argued in the trial court.[16] Moreover, neither party **mentioned**, much less argued, "access to courts" in their briefs in the First District. Thus, the First District erroneously considered constitutional issues which had not been preserved in the trial court and which were not properly presented to it on appeal. See Sanford v. Rubin, 237 So.2d 134, 138 (Fla.1970) ("There being no fundamental error, the District Court of Appeal . . . improperly considered the constitutionality of [the statute]. This objection having been waived, this Court at this late date will not pass upon the constitutionality of [the statute]."); McGurn v. Scott, 596 So.2d 1042, 1043 n.2 (Fla.1992) (this Court declined to address issue not raised in trial court). Cf. Cantor v. Davis, 489 So.2d 18, 20 (Fla.1986) (Because of intervening change in the law, this Court considered constitutionality issue which had not been raised in trial court. Nevertheless, Court reaffirmed that "[p]rudence dictates that issues

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[16] While it is true that Scruggs did raise an equal protection issue on rehearing from the trial court's order granting the motion to dismiss, that equal protection argument concerned whether the birth certificate should be deemed conclusive proof of paternity (R.64-66) and was unrelated to the First District's equal protection discussion regarding section 95.11(3)(b). Scruggs also argued on rehearing that section 95.11(3)(b) violated her due process rights, but never raised an access to the courts argument. (R.87-88).

such as the constitutionality of a statute's application to specific facts should normally be considered at the trial level to assure that such issues are not later deemed waived.").

Indeed, it is unclear why the First District thought it necessary to address these constitutional issues when it had already determined (albeit erroneously) that the statute of limitations was inapplicable to Scruggs' claims. Estate of Smith, 640 So.2d at 1154. This Court traditionally looks askance at such unnecessary constitutional holdings. See Singletary v. State, 322 So.2d 551, 552 (Fla.1975) (court should not pass on constitutionality of statute when case may be disposed of on other grounds).

Thus, this Court should find section 95.11(3)(b) applicable, quash the First District's decision and decline to reach the constitutional issues.

B. If This Court Reaches The Constitutional Merits, The Court Should Hold That Section 95.11(3)(b), Florida Statutes (1991), As Applied Here, Does Not Violate Scruggs' Right Of Access To The Courts.

There was good reason why Scruggs did not argue the access to the courts issue either in the trial court or in the First District. This is not an access to the courts

case. Rather, section 95.11(3)(b) simply reflects the legislature's placement of legitimate statutory conditions upon a claimant's right to adjudicate paternity. It does not deprive a claimant of access to the courts any more than any other valid statute of limitations deprives a person who fails to file a timely claim from proceeding with that claim. Here, Scruggs had the right to bring a paternity claim any time from her birth through her minority. See Bastardy Act of 1878. Had she done so and prevailed, the adjudication of paternity would have been conclusive when she sought to make a later claim in probate against her father's estate. § 732.108(2)(b), Fla. Stat. (1991). Once Scruggs reached majority, she had an additional four year opportunity to adjudicate and establish paternity. See, e.g., Rogers v. Runnels, 448 So.2d 530 (Fla.5th DCA 1984); Garris v. Cruce, 404 So.2d 785 (Fla.1st DCA 1981), rev. denied, 413 So.2d 876 (Fla.1982). Thus, Scruggs had sufficient access to the courts had she availed herself of it in a timely manner. The statute of limitations in no way violated Scruggs' right to have the "courts . . . be open to [her] for redress . . . ." Art. I, § 21, Fla. Const. E.g., Cates v. Graham, 451 So.2d 475, 476 (Fla.1984) (statute which merely curtails time within which suit must be filed does not bar access to courts).

Additionally, though Scruggs did not timely secure an adjudication, she had alternatives available to her to establish herself as an heir in the probate proceeding. Under section 732.108(2), establishing heirship by adjudication of paternity is only one avenue available to a claimant. That statute permits establishment of paternity by two other means, showing a marriage between the alleged father and mother, or showing a writing by the alleged father acknowledging paternity. Indeed, Scruggs attempted to show in the trial court that the Decedent had acknowledged paternity in writing (R.42, 52-68, 72-74, 129-130, 145, and 157-58), but she was unable to do so. (R.117-18 and 166-67). Thus, Scruggs was not denied access to the courts, she was simply unable to prove her claim.

Corollary to the First District's flawed "access to courts" reasoning, is its unfounded concern that allowing section 95.11(3)(b), which was last amended in 1986, to bar Scruggs' claim constituted an invalid retroactive application of a statute of limitations. Estate of Smith, 640 So.2d at 1154-55. However, the 1986 amendment to section 95.11(3)(b), which amended the paternity limitations period from "FOUR YEARS" to "FOUR YEARS . . . with the time running from the date the child reaches the age of majority," was merely a codification of long standing law that a statute of

limitations could not run against a minor. E.g., Commercial Building Co. v. Parslow, 93 Fla. 143, 112 So.378, 384 (Fla.1927); Garris, 404 So.2d at 786. The law had effectively always provided Scruggs four years from the time she reached majority to adjudicate paternity. Thus, the 1986 amendment did not affect her substantive rights. In any event, it is hard to see how a **lengthening** of a limitations period (albeit not enough to help Scruggs) can be said to harm the interests of Scruggs.

Additionally, the 1991 version of section 95.11(3)(b) (which reflects the 1986 amendment) is entirely consistent with the statutes of limitations which have applied to paternity claims for over seventy years, well before Scruggs was born in 1932. Under the Bastardy Act of 1828, Scruggs had the right and ability to adjudicate paternity from the day she was born. Thus her claim for paternity accrued at that time. See B.J.Y. v. M.A., 617 So.2d 1061 (Fla.1993). And, as established by this Court's decision in Wall v. Johnson, 78 So.2d 371, 373 (Fla.1955), during Scruggs' minority and early majority, a three-year statute of limitations applied to paternity claims. This time limit was expanded to four years in 1959, section 95.11(9), Florida Statutes (1959), and was modernized in 1974 but remained essentially unchanged. Ch. 59-188, § 1, at 331,

Laws of Fla.; § 95.11(3)(b), Fla. Stat. (Supp.1974). It then was amended in 1986 to specifically provide that the four years runs from the date the claimant reaches the age of majority. See Ch. 86-220, § 139, at 1716, Laws of Fla.; Estate of Smith, 640 So.2d at 1154. Thus, the 1991 version of section 95.11(3)(b), under which the trial court found Scruggs' claim barred, is entirely consistent with the statutes of limitations which were in effect at the time Scruggs was born, at the time she reached majority, and in the intervening years thereafter. There simply has been no retroactive **reduction** of the limitations period for Scruggs' paternity action, which accrued sixty years ago and expired thirty-eight years before she filed it.[17]

The First District also incorrectly reasoned that the 1974 amendment to section 732.108(2), which provided for the first time a right to adjudicate paternity in probate, preceded the 1986 amendment to section 95.11(3)(b) and therefore "trumped" the statute of limitations. Estate of Smith, 640 So.2d at 1154. However, if the First District is

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[17] The First District's opinion demonstrates confusion between the accrual of Scruggs' right to adjudicate paternity, which began at her birth, and the accrual of her right to inherit, which did not vest, if at all, until the Decedent's death. Obviously, Scruggs maintains her right to inherit if she can prove entitlement, but her right to adjudicate paternity, which may be one method by which she establishes her right to inherit, has been barred by the statute of limitations.

correct that the "first statute in time" controls over a later statute, then the statute of limitations for paternity, which, as just demonstrated, see supra pp.29-30, has been in existence since well before Scruggs was even born, extinguished her claim long ago. The First District perhaps is saying that the 1974 amendment of section 732.108(2) somehow "revived" Scruggs' long-extinguished paternity claim. If so, the First District runs afoul of this Court's very recent decisions holding that once a claim has been extinguished, a party becomes vested with a right not to be sued over that claim. Wiley v. Roof, 641 So.2d 66 (Fla.1994); Firestone Tire & Rubber Company v. Acosta, 612 So.2d 1361 (Fla.1992). This Court has held in no uncertain terms that while the legislature may appropriately determine and modify the period of time for filing actions, it may not revive a cause of action that has already been barred by expiration of a preexisting statute of limitations. Wiley, 641 So.2d at 67.

In Wiley, plaintiff filed her complaint in 1991 alleging that she was sexually abused in 1973. At the time her cause of action accrued, the general four year statute of limitations for torts, section 95.11(3)(o), Florida Statutes (1991), applied and barred her action for abuse. While the case was pending before the district court, the

legislature amended the statute of limitations and specifically provided for intentional torts based on abuse which would have, if applied, revived plaintiff's previously barred cause of action. This Court held that, "[o]nce barred, the legislature cannot subsequently declare that 'we change our mind on this type of claim' and then resurrect it. Once an action is barred, a property right to be free from a claim has accrued." Wiley, 641 So.2d at 68. Thus, this Court concluded that the defendant's property interest to be free from a claim of damages accrued long before plaintiff filed her lawsuit and to apply the new statute would deprive the defendant of a constitutionally protected property interest, in violation of Fla. Const. art. I, § 9. Id. at 68-69. See also Mason v. Salinas, 643 So.2d 1077, 1078 (Fla.1994) (once an action is barred a property right to be free from a claim has accrued and legislature cannot subsequently resurrect it); Firestone, 612 So.2d at 1364 (same).[18]

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[18] The First District's token reliance on this Court's decision in Diamond v. E.R. Squibb & Sons, Inc., 397 So.2d 671 (Fla.1981), see Estate of Smith, 640 So.2d at 1156 n.7, is misplaced. Besides being inapplicable to this case, if Diamond retains any vitality at all, later decisions of this Court have limited Diamond to its facts, a DES "latent injury" personal injury context. See, e.g., Kush v. Lloyd, 616 So.2d 415 (Fla.1992) (upholding statute of repose in the face of an access to the courts challenge, even though the claim was barred before it accrued.) Also, this is not like a "latent disease" case where Scruggs was unaware of her (continued...)

C. If The Court Reaches The Constitutional Merits, The Statute Of Limitations Does Not Violate The Equal Protection Clause.

Although not clear whether the First District's discussion of equal protection is holding or dicta,[19] it is clear that the First District's equal protection reasoning cannot withstand this Court's scrutiny. The First District's concern that upholding the statute of limitations would "place a burden on an illegitimate child seeking to inherit, not shared by legitimate offspring" does not implicate the equal protection clause. First, both this Court and the United States Supreme Court have recently recognized that not every distinction made by the law creates an equal protection claim. E.g., Lite v. State, 617 So.2d 1058, 1060 (Fla.1993); Nordlinger v. Hahn, 112 S.Ct. 2326, 2331 (1992). It is true that Florida, like all other states, requires more of children born out of wedlock than of legitimate children before they can inherit under their

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[18](...continued)
injury until many years later. Here, Scruggs, from the moment she was born, had the known right and incentive to pursue adjudicating paternity.

[19] "We reach this result on access to courts grounds. We note, however, that . . . ." Estate of Smith, 640 So.2d at 1155-56.

father's estate.[20] True, section 95.11(3)(b) does impose a limitation on the length of time an out of wedlock child has to adjudicate paternity, a limitation which obviously does not apply to legitimate children who have no need to prove paternity. However, this distinction, in and of itself, has no equal protection or constitutional significance.

The First District also observed that the statute of limitations, as applied here, "treats similarly situated illegitimate children with disparity" because a child whose alleged father dies during the child's minority, or less than four years after the child reaches majority, would have a claim in probate, while the child whose alleged father does not die until after four years post-majority, would be barred from bringing such a claim. Estate of Smith, 640 So.2d at 1156. This is simply not so because any out of wedlock child, from the date of birth, has an accrued paternity claim which can be asserted until four years post-majority. Thus, **all** out of wedlock children have an equal amount of time, until four years post-majority, to assert

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[20] At common law, children born out of wedlock were barred from taking from the estate even if they proved paternity. See In re Horne's Estate, 149 Fla. 710, 7 So.2d 13, 15 (Fla.1942). Section 732.108(2) itself, which provides three ways for children born out of wedlock to prove the right to share in their father's estate, does not impose the same requirement on legitimate children seeking to take in probate. However, this does not make section 732.108(2) unconstitutional.

their paternity claim and the date of the alleged father's death is irrelevant. Therefore, there is no issue of equal protection.

In any event, the legislature is entitled to balance competing interests and enact laws to effectuate those interests. Simply because some people will fall on each side of a limitations period is of no constitutional moment. If the legislature, rather than picking four years post-majority as the bar date for bringing paternity claims, had selected a two year post-majority date or ten years or twenty years, there would still always be some whose claims would be barred and others whose would not. Of course, to benefit Scruggs, the legislature would have had to permit paternity claims up to **forty years** post-majority. The equal protection clause simply does not prohibit these legislative policy judgments.

The only authority cited by the First District to support its equal protection analysis, this Court's decision in State of Florida, Dept. of Health and Rehabilitative Services v. West, 378 So.2d 1220 (Fla.1979), does not apply. In West, this Court declared that the predecessor section, 95.11(3)(b), Florida Statutes (1975), denied equal protection only to the extent that it required

"illegitimate" children to bring paternity actions for child support within four years of their birth. Id. at 1228.

This Court recognized that "statutes of limitations are enacted to bar stale claims which have been dormant for a number of years but which have not been enforced." Id. at 1227. However, this Court found that the state also had a competing interest because "it also wants to children to be maintained from the resources of their natural parents so that the burden on the public welfare system . . . will be lessened." Id. at 1227. The Court determined that the "only proper application of the statute of limitations to child support claims would be to those claims that have accrued in the past but which are not adjudicated. . . . However, since the duty of support continues throughout the minority of the child, new causes of action are being created each day . . . ." Id. at 1228. Thus, this Court's decision in West, while dealing with the predecessor of the same statute of limitations at issue here, is limited to the unique considerations of child support claims and whether it was constitutional to allow the statute of limitations to run on a minor who is not sui juris.

West does not speak to the applicability of the statute of limitations in probate actions, where none of the same child support concerns expressed by this Court in West are

present. Indeed, the First District itself in Garris v. Cruce, 404 So.2d 785, 786 (Fla.1st DCA 1981), rejected an equal protection challenge to the application of a predecessor of section 95.11(3)(b) to a post-death paternity claim. See J.E.W. v. Estate of Doe, 481 So.2d 921 (Fla.1st DCA 1984) (distinguishing West as being "concerned with support of the minor child during the life of the father" and finding it inapplicable to action to determine paternity after the death of the alleged father). Though West was not decided in the probate context, its teaching is entirely supportive of the validity of the "four year post-majority" statute of limitations applied by the trial court to bar Scruggs' claim.[21]

Any lingering doubt whether section 95.11(3)(b) poses equal protection concerns under either the federal or Florida Constitution is erased by the decision of the United States Supreme Court in Lalli v. Lalli, 439 U.S. 259, 99 S.Ct. 518 (1978), which upheld a New York statute requiring that to be eligible to take under the estate of the

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[21] Indeed, partially as a result of this Court's decision in West, the legislature amended the statute to provide that all paternity claimants, whether they be seeking child support or estate inheritance, would have until four years post-majority to bring a paternity claim. See Ch. 86-220, § 139, at 1716, Laws of Fla. It was the statute as amended which the trial court applied here to bar Scruggs' claim.

decedent, the paternity of the father had to be established before the father's death.[22] Id. at 524.

The Supreme Court recognized that the primary legislative goal of the New York statute was

> **to provide for the just and orderly disposition of property at death. We long have recognized that this is an area with which the States have an interest of considerable magnitude. . . .** This interest is directly implicated in paternal inheritance by illegitimate children because of the peculiar problems of proof that are involved. Id. at 524-25. (Emphasis added).

The Supreme Court also noted the difficulty of achieving "finality of decree in any estate when there always exists the possibility however remote of a secret illegitimate lurking in the buried past of a parent . . . ." Id. at 526. The Court stated that "[b]ecause of the particular problems of proof, spurious [paternity] claims may be difficult to expose. . . . Fraudulent assertions of paternity will be much less likely to succeed, or even to

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[22] Although Lalli is a plurality opinion, courts around the country have followed in its wake and continue to apply its teachings. See, e.g., Prudential Ins. Co. of America v. Moorhead, 916 F.2d 261, 265 n.4 (5th Cir.1990) (acknowledged need for quick and efficient distribution of a decedent's estate implicates compelling governmental interests); Martin v. Daily Express, Inc., _____ F.Supp. _____, 1995 WL 91380, at *5 (N.D.Ohio Feb. 28, 1995) (classification scheme rationally related to legitimate state purpose of assuring efficient disposition of property at death while avoiding spurious claims).

arise, where the proof is put before a court of law at a time when the putative father is available to respond, rather than first brought to light when the distribution of the assets of an estate is in the offing." Id. at 526.

Finally, the Supreme Court noted its

> **inquiry under the Equal Protection Clause does not focus on the abstract 'fairness' of a state law, but on whether the statute's relation to the state interests it is intended to promote is so tenuous that it lacks the rationality contemplated by the Fourteenth Amendment.**
>
> . . . .
>
> We conclude that the requirement imposed [by the New York statute] on illegitimate children who would inherit from their fathers is substantially related to the important state interests the statute is intended to promote. We therefore find no violation of the Equal Protection Clause. Id. at 527-28.[23] (Emphasis added).

Many of the same policy considerations present in Lalli apply here. While the legislature is rightfully concerned for the inheritance rights of children born out of wedlock, as evidenced by section 732.108(2)(b), the legislature is also aware of the need for the "just and orderly disposition of property at death." Lalli, 99 S.Ct. at 524. The statute

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[23] The Supreme Court does not apply the "strict scrutiny" test to classifications based on legitimacy, but rather uses the more relaxed standard of whether the law bears a substantial relationship to permissible state interests. Lalli, 99 S.Ct. at 523.

of limitations, section 95.11(3)(b), is manifestation of that concern. In Florida, no child, legitimate or born out of wedlock, has an absolute right to share in their parent's estate because there is no elective share for children under Florida law. Cf. § 732.201, Fla. Stat. (1991) (providing an elective share for spouses). A Florida citizen should be able to make his will or rely on the intestacy laws without being concerned about "the possibility however remote of a secret illegitimate lurking in the buried past." Lalli, 99 S.Ct. at 526. If Scruggs, born out of wedlock, was not motivated during her minority by the need for child support or the desire to have Decedent acknowledge her as his child, then, without a statute of limitations, there was no obligation or incentive for Scruggs to seek an adjudication before the Decedent's death. Indeed, if Scruggs had established the paternity of Decedent while he was alive, he nevertheless would have been entitled to leave her out of his Will. Thus, without a statute of limitations, Scruggs was better off making her first paternity claim **after** Decedent died, when he could not contest it or exclude her from his testamentary plan.

Post-death assertions of paternity are not favored because the decedent is not available to defend himself and has ordered his estate without taking into account a

paternity claim of which he had no knowledge before he died. Indeed, by the time Scruggs first made her paternity claim in probate, the two best witnesses, her mother and the Decedent, had died. Thus, section 95.11(3)(b) "represents a carefully considered legislative judgment as to how" the balance between the right of the out of wedlock child, such as Scruggs, and the right of the Decedent can "best . . . be achieved." Lalli, 99 S.Ct. at 527. It therefore does not violate the equal protection clause of either the Florida or federal Constitution.

CONCLUSION

This Court should hold:

(A) That section 95.11(3)(b), Florida Statutes (1991), applies to actions to adjudicate paternity brought in probate and bars the claim of respondent Scruggs who first made her paternity claim some thirty-eight years after she reached the age of majority.

(B) That the First District erred in reaching constitutional issues which were not preserved in the trial court. If the Court reaches the constitutional merits, the Court should hold that the application of section 95.11(3)(b), Florida Statutes (1991), in this case does not violate the "access to courts" provision of the Florida Constitution or the equal protection clause of the federal or Florida Constitution.

This Court should therefore quash the decision of the First District Court of Appeal and remand to the First District with instructions to affirm the final judgment entered by the trial court in favor of petitioners.

Respectfully Submitted,

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Attorneys for Petitioners

INDEX TO APPENDIX

IN THE CIRCUIT COURT FOR
CLAY COUNTY, FLORIDA
PROBATE DIVISION
FILE NO.: 92-14-CP
DIVISION: C

IN RE:
ESTATE OF CHARLES W. SMITH, Deceased

SHIRLEY I. SCRUGGS,
PETITIONER

v.

DALE S. WILSON AND HAROLD "BUDDY" JIMMISON,
CO-PERSONAL REPRESENTATIVES, H.H. ADAMS,
FLORA C. JONES, LOUISE G. SMITH,
FRANK O. YOUNG, ALMA YOUNG, his wife,
CLYDE S. HICKS and HAROLD "BUDDY" JIMMISON,
Individually,
RESPONDENTS
_____/

FINAL JUDGMENT

THIS cause coming to be heard upon Respondents', DALE S. WILSON and HAROLD "BUDDY" JIMMISON, Motion For Summary Judgment and counsel for both parties being present and before the Court, and the Court having heard the arguments of counsel and being fully advised in the premises finds that none of the three alternatives under Florida Statutes Section 732.108(2) can be met to establish Petitioner as a potential heir, and Petitioner is not an interested party to challenge decedent's Will because:

1. There is no genuine factual issue as to Petitioner's allegation that the decedent acknowledged paternity of the Petitioner in writing due to Petitioner's failure to submit any substantiation for that allegation;

2. Petitioner has acknowledged that her mother was never married to the decedent and that the decedent was never adjudicated to be her father; and

3. Adjudication of paternity is barred by the Statute of Limitations.

It is thereupon,

ADJUDGED THAT:

1. Respondents' Motion For Summary Judgment is hereby granted.

2. Petitioner's First Amended Petition For Revocation Of Probate And Letters Of Administration is hereby dismissed with prejudice and final judgment is entered for Respondents.

DONE AND ORDERED at Green Cove Springs, Clay County, Florida this 8th day of ~~January~~ February, 1993.

/s/ L. THOMAS McANNALLY

CIRCUIT JUDGE

Copies furnished to:

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In re ESTATE OF Charles W. SMITH, Deceased.

Shirley I. SCRUGGS, Appellant,

v.

Dale S. WILSON and Harold "Buddy" Jimmison, Co–Personal Representatives, H.H. Adams, Flora C. Jones, Louise G. Smith, Frank O. Young, Alma Young, his wife, Clyde S. Hicks and Harold "Buddy" Jimmison, Individually, Appellees.

No. 93–731.

District Court of Appeal of Florida, First District.

June 29, 1994.

Rehearing Denied Aug. 23, 1994.

Alleged daughter filed petition for revocation of probate against personal representatives of deceased to determine paternity for intestate succession. The Circuit Court, Clay County, L. Thomas McAnnally, J., granted summary judgment to representatives, and alleged daughter appealed. The District Court of Appeal, Kahn, J., held that statute of limitations applicable to paternity proceedings to establish support does not apply to actions to establish paternity for purposes of intestacy.

Reversed and remanded.

1. **Children Out-of-Wedlock** ⇐30

Statute, which provides that illegitimate child is lineal descendant of father for inheritance purposes if paternity of father is established by adjudication before or after death of father, does not require adjudication of paternity by action under statute setting out procedure for adjudication of paternity for support under Domestic Relations chapter; paternity may properly be adjudicated in probate proceeding. West's F.S.A. §§ 732.108(2)(b), 742.10 et seq.

2. **Children Out-of-Wedlock** ⇐38

Limitation of Actions ⇐4(2), 6(1)

Limitations period applicable to statute providing for establishment of paternity for support under Domestic Relations law is not applicable to actions to establish paternity for inheritance purposes, as this would allow pre-emption of claim which never accrued, in violation of state constitution, would bar claim unknown to state law at time bar attached, and would treat similarly situated illegitimate children, and similarly situated legitimate and illegitimate children, disparately. U.S.C.A. Const.Amend. 14; West's F.S.A. Const. Art. 1, § 21; West's F.S.A. §§ 95.11(3)(b), 732.108(2)(b), 742.10 et seq.

3. **Limitation of Actions** ⇐6(1)

Absent clear legislative intent to contrary, presumption is against retroactive application of statute of limitations.

4. **Action** ⇐1

Constitutional Law ⇐328

Limitation of Actions ⇐6(10)

State's guarantee of access to courts restrains legislature from abolishing pre-exist-

ing statutory or common-law cause of action without providing alternative form of redress. West's F.S.A. Const. Art. 1, § 21.

5. Limitation of Actions ⇐4(2), 6(1)

Cases which analyzed constitutionality of statutes of repose also apply to analysis of statute of limitation when statute as applied by trial court acts as statute of repose, barring cause of action long before it ever accrued.

6. Limitation of Actions ⇐6(1)

Support claim that has not yet accrued cannot be barred, and unaccrued future support, available to legitimate offspring, cannot be denied to those born out-of-wedlock. U.S.C.A. Const.Amend. 14; West's F.S.A. Const. Art. 1, § 21; F.S.A. §§ 95.11(3)(b); 732.108(2)(b), 742.10 et seq.

7. Children Out-of-Wedlock ⇐85

Alleged illegitimate offspring's right to inherit did not vest until father died. West's F.S.A. § 732.101(2).

8. Limitation of Actions ⇐43

Statute of limitations will not begin to run until occurrence of last event which gives rise to the cause of action. West's F.S.A. § 95.031.

Barry J. Fuller, Orange Park, for appellant.

Bruce D. Johnson of Donahoo, Donahoo & Ball, Jacksonville, for appellees.

KAHN, Judge.

Shirley I. Scruggs appeals from a final summary judgment in which the trial court determined that the statute of limitations in section 95.11(3)(b), Florida Statutes (1991), bars her from bringing an action to determine her paternity for purposes of intestate succession. We find that Ms. Scruggs may institute an action to establish her paternity in a probate proceeding and reverse.

Ms. Scruggs was born out of wedlock in 1932. Her birth certificate lists her parents as Emily Isabel Johns and Charles Smith. Charles W. Smith died January 18, 1992. On January 28, 1992, his will was admitted to probate, and appellees Dale S. Wilson and Harold "Buddy" Jimmison were appointed personal representatives. Ms. Scruggs was not a beneficiary under the will. On April 20, 1992, Ms. Scruggs filed a Petition for Revocation of Probate and Letters of Administration in which she alleged that Smith lacked testamentary capacity to make his will and that the will was the product of undue influence. Ms. Scruggs maintained that she was the natural daughter of Smith and would inherit under the laws of intestacy if the trial court revoked the will. The personal representatives moved to dismiss for lack of standing. The trial court granted the motion to dismiss, finding that Ms. Scruggs' claim was barred by the statute of limitations for adjudication of paternity, section 95.11(3)(b), Florida Statutes (1991).[1] Ms. Scruggs filed a motion for rehearing which was denied. Ms. Scruggs then filed an Amended Petition for Revocation of Probate and Letters of Administration in which she alleged that Smith had acknowledged paternity in writing. The personal representatives filed a Motion for Summary Judgment which the trial court granted after determining that there was no factual issue as to the allegation that Smith acknowledged paternity of Ms. Scruggs since Ms. Scruggs failed to submit any proof of the allegation. The trial court also reiterated its prior ruling that the statute of limitations bars Ms. Scruggs from adjudicating her paternity.

[1] An illegitimate child is a lineal descendant of the father if "[t]he paternity of the father is established by an adjudication before *or after* the death of the father." § 732.108(2)(b), Fla.Stat. (1991) (e.s.). Prior to the effective date of this provision in 1976, an illegitimate could only inherit from the father if the father had acknowledged the child in writing. § 732.29, Fla.Stat. (1973).[2]

1. Section 95.11(3)(b), Florida Statutes, provides that an "action relating to the determination of paternity" must be brought within four years, "with the time running from the date the child reaches the age of majority."

2. This provision was held unconstitutional because it violated an illegitimate child's right to equal protection. *In re Estate of Burris*, 361 So.2d 152 (Fla.1978).

Section 732.108(2)(b) does not by its terms require the adjudication of paternity by an action pursuant to chapter 742. To the contrary, it would seem to us that inclusion in the Probate Code, chapter 732, of a provision allowing intestate succession by the illegitimate child of a father indicates that the issue of paternity may be properly adjudicated in the probate proceeding. Indeed, chapter 742 confirms our view:

> This chapter provides the primary jurisdiction and procedures for the determination of paternity for children born out of wedlock. *When the establishment of paternity has been raised and determined within an adjudicatory hearing brought under the statutes governing inheritance, dependency under workers' compensation or similar compensation programs, or vital statistics,* it shall constitute the establishment of paternity for purposes of this chapter.

§ 742.10, Fla.Stat. (1991) (e.s.).

[2] Since establishment of paternity may be accomplished "under the statutes governing inheritance," we must determine whether the limitations provision relied upon by the trial judge, section 95.11(3)(b), applies to the present action, brought pursuant to section 732.108(2)(b).

Before its 1986 amendment, section 95.11(3)(b) provided merely that an action relating to the determination of paternity must be brought within four years. This provision had existed since 1974. § 95.11(3)(a), Fla. Stat. (Supp.1974). Its antecedent in the lineage of current section 95.11(3)(b) was enacted in 1959 as section 95.11(9), Florida Statutes (1959), and was the first statute of limitations made specifically applicable to paternity actions.[3] This law provided that an action to establish paternity must be brought before the child reaches the age of four years or within four years of the last payment of support by the alleged father. On its face, then, the precursor statute fits within the framework of an action for support.

In further exploring the applicability of the statute of limitations, it is useful to examine the derivation of the Probate Code section under which appellant seeks her remedy. Before 1974, an illegitimate child could not inherit from her father unless the father had acknowledged the child in writing. § 731.29, Fla.Stat. (1973). The present section 732.108(2)(b) emanates from chapter 74–106, Laws of Florida. Since an illegitimate who could not prove written acknowledgement could not inherit before passage of this law, we may safely conclude that during such time a paternity statute of limitations could never have been applied to bar determination of the right to inherit, nor could such an application have been contemplated by the legislature.

After the enactment of section 732.108(2)(b), a court observed that the "legislature clearly intended that an action could be maintained for the determination of paternity for inheritance purposes...." *In re Estate of Odom*, 397 So.2d 420, 422 (Fla. 2d DCA 1981). The same court approved the holding of *C.L.W. v. M.J.*, 254 N.W.2d 446 (N.D. 1977), in which the North Dakota Supreme Court held "that the mother's right to bring an action during the father's lifetime to obtain a determination of paternity and support is a separate and distinct remedy from an action to determine paternity for the right to inherit." 397 So.2d at 424. The North Dakota court said, and we now agree, "The two are separate remedies for separate purposes." 254 N.W.2d at 450.

Acknowledging that the action to inherit is a separate remedy from a paternity action to establish support, we should not merely assume that the same statute of limitations applies to each. The action to inherit is a distinct statutory cause of action, not within the contemplation of the bar imposed by section 95.11(3)(b). The trial court erred by construing section 95.11(3)(b) as applying to frustrate appellant's effort to establish paternity solely for purposes of inheritance.

[3, 4] Moreover, having examined this matter in light of the Florida Constitution, we question the trial court's use of a 1986 statute to bar a cause of action which, under

3. Prior to 1959, a "bastardy" proceeding was subject to a three year statute of limitations under former section 95.11(5)(a) which applied to "a liability created by statute." *Wall v. Johnson*, 78 So.2d 371, 373 (Fla.1955).

the terms of the statute, would have expired in 1957, four years after appellant attained her majority. Absent clear legislative intent to the contrary, the presumption is against retroactive application of a statute of limitations. *Durring v. Reynolds, Smith & Hills*, 471 So.2d 603 (Fla. 1st DCA 1985). Here, since Mr. Smith did not die until 1992, retroactive application of the statute would violate Ms. Scruggs' constitutional right of access to the courts in contravention of article I, section 21 of the Florida Constitution. *Overland Constr. Co., Inc. v. Sirmons*, 369 So.2d 572, 573 (Fla.1979).[4]

[5] We recognize that *Durring* and *Overland Constr. Co.* tested the constitutionality of statutes of repose, and not statutes of limitation. These cases nonetheless apply to our analysis. This is so because in the present case the statute, as applied by the trial court, acts as a statute of repose, barring appellant's cause of action long before it ever accrued. *See Whigham v. Shands Teaching Hosp. and Clinics, Inc.*, 613 So.2d 110, 112, n. 4 (Fla. 1st DCA 1993) ("A statute of limitations normally governs the time within which legal proceedings must be commenced after the cause of action accrues. A statute of repose, however, limits the time within which an action may be brought and is not related to the accrual of any cause of action....").

[6] In 1979 the supreme court in *State, Department of Health and Rehabilitative Services v. West*, 378 So.2d 1220 (Fla.1979), found section 95.11(3)(b), Florida Statutes (1975),[5] to be unconstitutional under the state and federal constitutions. The court weighed the state's objective to avoid stale claims against the impact of the statute upon illegitimates deprived of their right to support. The observations of the *West* court, striking down the statute on equal protection grounds, are instructive today:

> Although proof of paternity may become more difficult with the passage of time, this mere possibility cannot be allowed to work an unconstitutional discrimination against illegitimate children.
>
> * * * * * *
>
> The only proper application of the statute of limitations to child support claims would be to those claims that have accrued in the past but which are not adjudicated. The state could properly say that a claim for child support not made within a certain time after it accrued is barred. However, since the duty of support continues throughout the minority of the child, new causes of action are being created each day that the natural father does not provide support. This duty of future support cannot be barred for illegitimate children if it is allowed for legitimate children.

378 So.2d at 1227–1228. The court thus addressed, and rejected, a policy argument based upon reducing stale claims. Further, although the court spoke in the idiom of equal protection, its resolution of the issue is germane to access to courts analysis—a support claim that had not yet accrued could not be barred. Thus unaccrued future support, available to legitimate offspring, could not be denied those born out of wedlock.

[7, 8] Ms. Scruggs' right to inherit did not vest until Smith died in 1992. § 732.-101(2), Fla.Stat. (1991); *Garris v. Cruce*, 404 So.2d 785 (Fla. 1st DCA 1981), *rev. denied*, 413 So.2d 876 (Fla.1982). It is well established that a statute of limitations will not begin to run until the occurrence of the last event which gives rise to the cause of action. § 95.031, Fla.Stat. (1991); *Keller v. Reed*, 603 So.2d 717 (Fla. 2d DCA 1992); *Hynd v. Ireland*, 582 So.2d 772 (Fla. 4th DCA 1991). This maxim is inconsistent with an application of section 95.11(3)(b), since the statute purports to bar the action four years after the child attained the age of majority, an event which, as we have observed, took place some thirty-five years before Smith died. Preemption of appellant's claim by use of a statute which never allowed the claim to arise offends the Florida Constitution. We

4. Florida's constitutional guarantee of access to courts restrains the legislature from abolishing a pre-existing statutory or common-law cause of action without providing an alternative form of redress. *See Kluger v. White*, 281 So.2d 1 (Fla. 1973). The right to prove paternity in court was originally established by the Bastardy Act of 1828. *B.J.Y. v. M.A.*, 617 So.2d 1061 (Fla.1993).

5. This is the same statute as section 95.11(3)(a), Florida Statutes (Supp.1974), *supra*.

reach this result on access to courts grounds. We note, however, that a decision otherwise would place a burden on an illegitimate child seeking to inherit, not shared by legitimate offspring. *West, supra. But see, Lalli v. Lalli*, 439 U.S. 259, 99 S.Ct. 518, 58 L.Ed.2d 503 (1978) (Supreme Court without majority opinion upheld a New York statute which allowed an illegitimate child to inherit only if a court, during the father's lifetime, has entered an order declaring paternity).[6] As applied below, the statute also treats similarly situated illegitimate children with disparity—for the child whose father dies during the child's minority, the right to seek inheritance is always preserved; for the child who is twenty-two or older at her father's death, the right would never be preserved.

Section 95.11(3)(b), as crafted by the legislature and applied by the trial court, would retroactively bar an action over three decades before the action accrued.[7] It would also bar an action that was unknown to Florida law at the time the supposed bar attached. We conclude that the legislature, when it last amended the statute in 1986, neither anticipated nor intended its applicability to the facts at bar. Therefore on both statutory construction grounds and constitutional grounds we hold that section 95.11(3)(b) may not be utilized to bar appellant's action for inheritance. Since her petition was timely for purposes of the Probate Code, she may proceed.

REVERSED and REMANDED.

ERVIN and JOANOS, JJ., concur.

6. Although we note the result in *Lalli*, we need not share the United States Supreme Court's concern with the availability of the putative father as "a substantial factor contributing to the fact-finding process." 439 U.S. at 271–272, 99 S.Ct. at 526 (Powell, J. with two justices concurring). In Florida, the legislature has already decided that paternity may be proven after the father's death. § 732.108(2)(b); *West*, 378 So.2d at 1225, n. 5.

7. In *Doe v. Shands Teaching Hospital and Clinics, Inc.*, 614 So.2d 1170 (Fla. 1st DCA), *rev. denied*, 626 So.2d 204 (Fla.1993), we upheld the medical malpractice statute of repose, section 95.11(4)(b), Florida Statutes (1983), in the face of an access to courts challenge, even though the claim in that case was barred before the plaintiff knew or could have reasonably known she had an injury. As we specifically noted, however, a different analysis could be made where a new statutory enactment intervened to abolish an existing cause of action. 614 So.2d at 1171. Here the 1986 statute came into being many years after appellant surpassed four years beyond the age of majority. The right of action in the present case is more like that in *Diamond v. E.R. Squibb & Sons, Inc.*, 397 So.2d 671 (Fla.1981).

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399
Telephone No. (904)488-6151

August 23, 1994

CASE NO: 93-00731

L.T. CASE NO. 92-14 CP

In Re: Estate of Charles W. Smith, Deceased

v. Dale S. Wilson and Harold "Buddy" Jimmison, et al.

Appellant(s),

Appellee(s).

BY ORDER OF THE COURT:

Appellee's motion for rehearing, filed July 14, 1994, is DENIED.

Appellee's suggestion of direct conflict and suggestion of question of great public importance, filed July 14, 1994, is DENIED.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Jon S. Wheeler

JON S. WHEELER, CLERK

By: Sondra Joyner
Deputy Clerk

DISTRICT COURT OF APPEAL STATE OF FLORIDA FIRST DISTRICT SAT CITO SI RECTE

Copies:

Barry J. Fuller

Bruce D. Johnson

Willie KING, Appellant,

v.

ESTATE OF Willie ANDERSON, deceased, Appellee.

No. 87-249.

District Court of Appeal of Florida, Fifth District.

Jan. 28, 1988.

Claimant appealed adverse decision of the Circuit Court, Orange County, Gene Williams, J., retired, on his claim of entitlement to interest in estate as illegitimate heir. The District Court of Appeal held that claim was barred by four-year statutory limitation period for actions relating to determination of paternity.

Affirmed.

Descent and Distribution ⇐71(2)

Claim of entitlement to interest in estate as illegitimate heir was subject to four-year limitation period for actions relating to determination of paternity and was thus barred. West's F.S.A. §§ 95.11(3)(b), 732.108(2).

Gavin D. Lee, Altamonte Springs, for appellant.

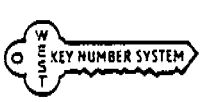
James E.C. Perry of Perry & Lamb, P.A., Sanford, for appellee.

PER CURIAM.

When Willie Anderson died, the appellant, then twenty-six years of age, claimed to be entitled to an interest in the estate as an illegitimate heir, pursuant to section 732.108(2), Florida Statutes. The trial court correctly held that appellant's claim was barred by the four year limitation period in section 95.11(3)(b) for actions relating to the determination of paternity. *See Garris v. Cruce*, 404 So.2d 785 (Fla. 1st DCA 1981), *rev. denied*, 413 So.2d 876 (Fla. 1982).

AFFIRMED.

SHARP, C.J., and DAUKSCH and COWART, JJ., concur.



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Barry Fuller, Esquire, 2301 Park Avenue, Suite 404, Orange Park, Florida 32073, by U.S. Mail, this 27th day of March, 1995.

Attorney