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,

Petitioners,

vs.

SHIRLEY I. SCRUGGS,

Respondent.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

AND

ON DISCRETIONARY REVIEW OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, STATE OF FLORIDA

DISTRICT CASE NO.: 93-731

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EXPLANATORY NOTE

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."

"Scruggs' Br." refers to Respondent's Answer Brief; "Pet. Init. Br." refers to Petitioners' Initial Brief on the Merits.

Unless otherwise noted, all statutory references are to the 1991 Florida Statutes.

INTRODUCTION

The trial court correctly recognized that before Scruggs would be entitled to pursue any undue influence claim in the execution of Decedent's Will, she would first need "standing" to assert such a claim in the Estate as an "interested party." (R.166-67). Because the trial court held that Scruggs had failed to establish herself as a "potential heir," neither it nor the First District reached Scruggs' undue influence allegations. Thus, Scruggs' citation in her brief to her unproven (and false)[1] undue influence and related allegations, e.g., Scruggs' Br. at 2, 7, are irrelevant to the issue before this Court: whether the statute of limitations for actions "relating to the determination of paternity," section 95.11(3)(b), Florida Statutes (1991), barred Scruggs' action, first brought in probate, to adjudicate paternity.

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1 For example, Scruggs fails to note that those beneficiaries of Decedent's Will she accuses of occupying "confidential relationships" with Decedent were either members of his family or other natural objects of his bounty. (R.1-6).

ARGUMENT

In her Answer Brief, Scruggs:

1. Concedes that before Decedent's death "no **written** acknowledgement [of paternity] existed" and "no **proceeding to establish paternity** had been brought" by Scruggs. Scruggs' Br. at 2. (Emphasis in the original).

2. Implicitly concedes that section 95.11(3)(b), which applies to any "action relating to the determination of paternity," on its face applies, but, contrary to all rules of statutory construction, argues that the statute "cannot be analyzed by itself . . . ." Scruggs' Br. at 19.

3. Unpersuasively argues that section 95.11(3)(b), part of the general limitations statute, Chapter 95, is inapplicable in probate proceedings and that actions in probate are not "civil actions or proceedings." Scruggs' Br. at 11-14.

4. Continues to confuse the critically important distinction between the accrual of the right to inherit, which vested, if at all, at the death of the Decedent, and the **accrual of the right to adjudicate paternity,** which vested at the birth of Scruggs. Scruggs' Br. at 9-10, 20, and 34.

5. Takes the untenable position that had Scruggs sought an adjudication of paternity before Decedent's death it would not "have been effective as to her right to inherit." Scruggs' Br. at 36.

6. Relies heavily on inapposite out-of-state cases construing wholly different statutory schemes. Scruggs' Br. at 16-19.

7. "[C]onditionally agree[s]" with petitioners that the First District unnecessarily reached the constitutionality of section 95.11(3)(b) but nevertheless unsuccessfully argues that the statute violates access to the courts and equal protection. Scruggs' Br. at 29.

Scruggs' position is without merit. This Court should quash the First District's decision.

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."

The First District correctly styled Scruggs' claim in probate as "**an action to determine her paternity . . . .**" In re Estate of Smith, 640 So.2d 1152, 1153 (Fla.1st DCA 1994) (emphasis added). Section 95.11(3)(b) applies to an "**action relating to the determination of paternity**"

(emphasis added). The statute could not be more clear or more applicable. No matter how hard she strains or how many creative arguments emerge from her lawyer's fertile mind, Scruggs cannot escape this simple truth. In this Reply Brief, petitioners cannot respond to each of the numerous arguments advanced by Scruggs. There is no need. The statute means what it says.[2]

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

Chapter 95, of which section 95.11(3)(b) is a part, is the general statute of limitations which, by its own terms, applies to any "civil action or proceeding." § 95.011. Nothing in Chapter 95 exempts its application to actions brought in probate. Likewise, nothing in the probate statute exempts it from the reach of Chapter 95.[3] Indeed, the cases affirmatively demonstrate that claims made in

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[2] Because the statute is clear and unambiguous, the Court should decline Scruggs' invitation to resort to legislative history or other statutory construction aids. See Aetna Cas. & Sur. Co. v. Huntington Nat. Bank, 609 So.2d 1315, 1317 (Fla.1992) ("legislative intent must be determined primarily from the language of the statute. . . . The legislative history . . . is irrelevant where the wording of the statute is clear").

[3] Therefore, the provision of Chapter 95 which excepts a statute from its reach "if a different time is prescribed elsewhere in these statutes," section 95.011, has no application.

probate are subject to the relevant time periods of Chapter 95. E.g., Jones v. Sun Bank/Miami, N.A., 609 So.2d 98, 103 (Fla.3d DCA 1992) (in probate proceeding, claim subject to general statute of limitations, section 95.11); Velzy v. Estate of Miller, 502 So.2d 1297, 1299 (Fla.2d DCA 1987) (holding claim against estate barred by sections 95.11(3)(i) and (j)). Merely because the Probate Code has some of its own procedures and claim limitations periods does not abrogate the applicability of Chapter 95 to actions in probate. Rather, the Probate Code works in para materia with the general limitations periods contained in Chapter 95. E.g., Jones and Velzy, supra; Pet. Init. Br. at 21, n.14.[4]

Similarly, Scruggs is wrong in claiming that section 95.11(3)(b) applies only to paternity actions for child support. Scruggs' Br. at 10. Both Scruggs and the First

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[4] Indeed, many of the provisions of the Probate Code cited by Scruggs to try to show that probate proceedings are not "civil action[s] or proceeding[s]," so as to exempt them from Chapter 95's reach, actually show the opposite. For example, section 731.107, provides that the Florida Rules of Civil Procedure will govern in probate. Section 733.104, provides for the tolling of the statute of limitations in certain probate situations, thereby demonstrating that the statute of limitations otherwise applies. See Briggs v. Estate of Geelhoed, 543 So.2d 332 (Fla.4th DCA 1989). And, section 733.105, provides that the determination of heirs and devisees may be sought by "any interested person" in a "proceeding[]" or "[a] separate civil action" to determine proper beneficiaries. This simply confirms that a claim to determine paternity in probate is "a civil action or proceeding" and therefore governed by the limitations period of section 95.11(3)(b). See § 95.011.

District emphasize that a paternity action during the father's lifetime for child support is distinct from an action to determine paternity in probate. Estate of Smith, 640 So.2d at 1154; Scruggs' Br. at 9. This is true. However, this distinction is of no moment because section 95.11(3)(b) applies to **both** types of these actions "relating to the determination of paternity." Unlike other states, see infra, pp.8-9, Florida has chosen not to enact a special paternity statute of limitations solely for child support. Rather, section 95.11(3)(b), applies to **any** "action relating to the determination of paternity." Indeed, the very function of Chapter 95 is to provide an "umbrella" of limitations coverage over virtually all causes of action in Florida. §§ 95.011, 95.11(3)(p); see generally Charley Toppino & Sons, Inc. v. Seawatch At Marathon Cond. Ass'n Inc., 19 Fla.L.Weekly S571, S572 (Fla.Nov.10, 1994) (referencing the "general time limits set out in Chapter 95").[5]

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[5] Although the legislative history is irrelevant because the statute is unambiguous, it nevertheless supports applying section 95.11(3)(b) in probate proceedings. In 1974 when the legislature revised the paternity statute of limitations, section 95.11(9), Florida Statutes (1973), creating section 95.11(3)(b), and enacted section 732.108(2)(b), it did not limit section 95.11(3)(b)'s applicability solely to child support, nor did it provide a separate paternity statute of limitations in the Probate Code. Ch. 74-382, § 7, at 944, Laws of Fla.; Ch. 74-106, § 732.108, at 220, Laws of Fla. Moreover, the legislature chose not to adopt the Uniform Probate Code's provision which would have permitted Scruggs to prove paternity after death by any means. U.P.C. § 2-109 (1969). The legislature
(continued...)

Scruggs' citation to this Court's decision in Wall v. Johnson, 78 So.2d 371 (Fla.1955), to show that the paternity statute of limitations should only apply in child support, actually proves the contrary. In Wall, this Court held a paternity claim barred by the general "catch-all" limitations of Chapter 95 applicable to any action based "upon a liability created by statute." Id. at 373. Thus,

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[5](...continued)
revisited section 732.108(2) in 1975 adding that paternity could be adjudicated before or after death. Ch. 75-220, § 11, at 511, Laws of Fla. However, though it could have done so, the legislature did not at that time alter or amend section 95.11(3)(b) or create any other statute of limitations concerning paternity. Nor did it do so when it again amended section 732.108(2) in 1977. Ch. 77-86, § 7, at 167, Laws of Fla.

While it is true that some of the sparse legislative history of section 95.11(3)(b) has mentioned child support issues, this does not mean that it is inapplicable in probate. See Pet. Init. Br. at 18-24. Indeed, in 1986 when the legislature amended section 95.11(3)(b), it kept the broad "relating to the determination of paternity" language. Ch. 86-220, § 139, at 1716, Laws of Fla. Even after the Fifth District, in King v. Estate of Anderson, 519 So.2d 67 (Fla.5th DCA 1988), held section 95.11(3)(b) applicable to paternity claims in probate, the legislature, knowing full well the existing law and the Florida courts' interpretation thereof, continued to sanction the application of section 95.11(3)(b) in probate. Finally, Scruggs' argument that before the 1986 amendment to section 95.11(3)(b), the statute was void ab initio because of this Court's decision in State of Florida, Dept. of Health and Rehabilitative Services v. West, 378 So.2d 1220 (Fla.1979), is without merit. West did not declare the predecessor section 95.11(3)(b) void ab initio but merely held that it violated equal protection to the extent that it denied minor children the right to bring a paternity action for child support for non-accrued support claims. Id. at 1228. See Pet. Init. Br. at 35-37. In any event, Scruggs' argument is irrelevant because she received the benefit of the lengthened (and constitutional) limitations period under the 1991 version of section 95.11(3)(b) (although it was still not long enough to benefit her).

the genesis of paternity limitations periods springs from the general limitations period on any liability created by statute, rather than from a specific child support framework. While later codifications of the limitations period began to refer to paternity actions by name (see Pet. Init. Br. at 29-30), they were never limited to paternity actions brought solely for child support. Indeed, the language of the applicable limitations statute, section 95.11(3)(b), "actions **relating to** the determination of paternity," could not be more inclusive.[6]

Finally, Scruggs argues that because other states have also adopted versions of the Uniform Probate Code, ipso facto, decisions from those states apply here. However, none of the states upon which Scruggs relies have a comparable statutory scheme. For example, in the North Dakota case relied upon by both Scruggs and the First

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[6] If Scruggs was correct that section 95.11(3)(b) was only applicable to child support paternity determinations, Scruggs' paternity claim in probate would still be barred by the "catch-all" limitations period, section 95.11(3)(p), relating to "[a]ny action not specifically provided for in these statutes." See, e.g., Wall, 78 So.2d at 373. The Probate Code itself provides no limitations period for paternity claims. Scruggs' argument that the ninety day claims or revocation periods of sections 733.109 and 733.702 provide such a limitation is incorrect. Indeed, under Scruggs' reasoning, any claim against the Decedent previously barred during his lifetime by a statute of limitations would be resurrected if filed within ninety days of notice of administration. This makes no sense and also would result in an unconstitutional revival of a previously barred claim. See Wiley v. Roof, 641 So.2d 66 (Fla.1994); Pet. Init. Br. at 31-32.

District, the paternity statute of limitations is in the same chapter as the provision concerning the mother's right to adjudicate paternity for support and explicitly applies to "[p]roceedings to enforce the obligation of the father of a child born out of wedlock." C.L.W. v. M.J., 254 N.W.2d 446, 448-50 (N.D.1977). This is contrasted with the placement of section 95.11(3)(b) in the general Florida limitations statute. Likewise, Pennsylvania's paternity statute of limitations is in its child support chapter, Chapter 43, "Support Matters Generally," and is expressly limited to proceedings **"under this chapter** [Chapter 43]." In re Estate of Greenwood, 587 A.2d 749, 752 (Pa.Super.Ct.1991) (emphasis in the original). Indiana's Probate Code has its own specific probate provision which requires a child to establish paternity within five months after the father's death. See Woods v. Harris, 600 N.E.2d 163 (Ind.Ct.App.1992). Scruggs also relies on Wood v. Wingfield, 816 S.W.2d 899 (Ky.1991), but the issue in Wood, decided under Kentucky's unique statutory framework, was what overall limitations period applied to **any** person's claim against a decedent's estate. Id. at 905, n.8. Thus, these cases and statutes are inapposite to Florida's statutory scheme.

III. THE FIRST DISTRICT UNNECESSARILY REACHED CONSTITUTIONAL ISSUES.[7] IN ANY EVENT, SECTION 95.11(3)(b), FLORIDA STATUTES (1991), IS CONSTITUTIONAL.

A. In Arguing Access To the Courts, Scruggs Continues To Confuse The Critically Important Distinction Between The Accrual Of The Right To Inherit And The Accrual Of The Right To Adjudicate Paternity.

A central premise of Scruggs' position is that "[s]ince . . . a statute of limitations can only work upon rights which have vested" and because Scruggs' right to inherit did not vest until Decedent's death, "the statute of limitations for paternity actions contained within F.S. § 95.11(3)(b) cannot apply . . . to probate proceedings, to rights which have not yet arisen." Scruggs' Br. at 20. See also Scruggs' Br. at 9-10, 34. This argument is flawed. **In applying the paternity statute of limitations, the question is not when Scruggs' right to inherit vested, but rather when her right to adjudicate paternity vested.**

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[7] Scruggs has, in effect, conceded that she failed to raise access to the courts in either the trial court or the First District. Scruggs' Br. at 29. Scruggs also implicitly admits that she failed to argue below that applying section 95.11(3)(b) violates her rights of equal protection. Scruggs' Br. at 31. These issues do not constitute fundamental error and this Court should decline to consider them. See Sanford v. Rubin, 237 So.2d 134, 137-38 (Fla.1970) (issues of alleged unconstitutionality of a statute waived by failure to raise issue in trial court); Picchione v. Asti, 354 So.2d 954 (Fla.3d DCA 1978) (court refused to consider argument that the statute of limitations for filing claims against a probate estate was unconstitutional because the issue was first raised on appeal); Pet. Init. Br. at 24-26.

Scruggs wrongly argues that she "had no such right [to adjudicate paternity until] . . . October 1, 1986" when Chapter 742 was amended to explicitly permit fathers and children to bring paternity proceedings. Scruggs' Br. at 35. However, under the Bastardy Act of 1828, Scruggs had the right and ability to adjudicate paternity from the day she was born and her claim for paternity accrued at that time. See B.J.Y. v. M.A., 617 So.2d 1061, 1063 (Fla.1993); Estate of Smith, 640 So.2d at 1155, n.4. See also Gammon v. Cobb, 335 So.2d 261 (Fla.1976); Kendrick v. Everheart, 390 So.2d 53, 59-61 (Fla.1980); Rogers v. Runnels, 448 So.2d 530, 532 (Fla.5th DCA 1984). And, once Scruggs reached majority, she had an additional four year opportunity to adjudicate paternity either by action for unaccrued child support, West, 378 So.2d at 1228, or by declaratory judgment action. See, e.g., Rogers, 448 So.2d at 532; Garris v. Cruce, 404 So.2d 785 (Fla.1st DCA 1981), rev. denied, 413 So.2d 876 (Fla.1982). Had she availed herself of those opportunities and prevailed, that paternity adjudication would have been conclusive when she later sought to make a claim in probate against Decedent's estate. Although Scruggs makes the untenable argument that "no prior adjudication of paternity would have been effective as to her right to inherit" (Scruggs' Br. at 36) (would she be saying this if she had adjudicated paternity before

Decedent's death?) this is belied by section 732.108(2)(b) itself, which permits an heirship claimant to establish paternity "by an adjudication **before** or after the death of the father."[8] (Emphasis added). Thus, Scruggs' confusion (adopted by the First District) between the accrual of Scruggs' right to adjudicate paternity, which vested at her birth, and the accrual of her right to inherit, which did not vest, if at all, until Decedent's death, has led both to err. 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 can establish a right to inherit, has been barred by the statute of limitations.[9]

B. Applying Section 95.11(3)(b) Does Not Implicate Equal Protection Concerns.

Relying on an Ohio trial court decision with no precedential value,[10] Scruggs contends that Lalli v. Lalli,

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[8] 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). See Pet. Init. Br. at 21, n.14.

[9] Dickson v. Simpson, 807 S.W.2d 726 (Tex.1991), does not help to salvage Scruggs' access to the courts claim. Scruggs' Br. at 40. In Dickson, an equal protection case, it was not until 1976 that a child born out of wedlock in Texas had the right to adjudicate paternity for any purpose. Not so here -- Scruggs had the right, since her birth, to adjudicate paternity.

[10] Alexander v. Alexander, 537 N.E.2d 1310 (Ohio Prob.1988), was mooted while on appeal and has no precedential value in Ohio, much less in this Court. Alexander v. Alexander, 560 N.E.2d 1337 (Ohio.Ct.App.1989).

439 U.S.259, 99 S.Ct.518 (1978), has lost its vitality with the advent of DNA testing.[11] However, courts around the country have continued to apply Lalli's teachings. Indeed, Prudential Ins. Co. of America v. Moorhead, 916 F.2d 261, 264-65 (5th Cir.1990), recognized that the issue of the reliability of proof in paternity determinations is as relevant today as it was when Lalli was decided. See also Martin v. Daily Express, Inc., 878 F.Supp.91 (N.D.Ohio 1995) (court found Lalli reasoning still persuasive in denying equal protection claim of child born out of wedlock). Though criticizing petitioners' "doomsday argument" (Scruggs' Br. at 28), Scruggs does not refute the other strong policy considerations espoused by the United States Supreme Court in Lalli which support the legislature's determination that the paternity statute of limitations applies in probate. See Pet. Init. Br. at 37-41. Among other things, section 95.11(3)(b) protects a Florida decedent from post-death assertions of paternity which have the effect of delaying the orderly disposition of his estate (inter alia, possibly requiring his disinterment for DNA testing) and ruining the decedent's testamentary plan when

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[11] Of course, any DNA testing here would require the disinterment of Decedent's body.

he is not available to defend it or change it.[12] These factors are as important today as when Lalli was decided.[13]

CONCLUSION

As seen, Pet. Init. Br. at 39-41, numerous policy considerations support the legislature's determination to enact section 95.11(3)(b). Nevertheless, if the legislature

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[12] Scruggs' argument that the testator is free to omit a child from the will whether that child is legitimate or born out of wedlock, misses the point. If the testator is **unaware** of the purported child or that the purported child intends to make a post-death claim, he has no ability to plan for that eventuality or to rely on the intestacy laws. Similarly, the limitations period of section 733.109 for contesting wills is of no benefit to the decedent for if the purported child makes her claim even one day after the decedent has died, but within the time provided by section 733.109, the decedent is still powerless to respond.

[13] Scruggs cannot find support in In re Estate of Burris, 361 So.2d 152 (Fla.1978), for her equal protection complaints. In Estate of Burris, this Court held that the predecessor to section 732.108(2), section 731.29(1), Florida Statutes (1973), was unconstitutional because the statute only allowed an "illegitimate" child to inherit if the father had acknowledged paternity in writing and in the presence of a witness. Estate of Burris was based on Trimble v. Gordon, 430 U.S.762, 97 S.Ct.1459 (1977), which held unconstitutional an Illinois statute which allowed inheritance by an illegitimate child from his father only if the parents had married. In Trimble, paternity had actually been adjudicated before the father's death. The statute in Trimble and section 731.29(1), Florida Statutes (1973), acted as a complete bar from inheritance even when paternity had been adjudicated. (The legislature has since amended section 732.108(2) to permit paternity to be proven by adjudication. The amended statute applied to Scruggs.) Thus, this Court recognized that barring the child born out of wedlock from inheriting, even after the child had adjudicated paternity, did not further any important state interest like those discussed in Lalli. Of course, Scruggs neither sought nor obtained any such pre-death adjudication of paternity. Additionally, no statute of limitations issue was raised in Estate of Burris.

became convinced that countervailing policy concerns required a change in the statute, it can amend it at any time. However, this Court must deal with the statute as it is now. While applying section 95.11(3)(b) bars Scruggs from adjudicating paternity, this is precisely what a statute of limitations does. There is no inherent unfairness in barring Scruggs' paternity claim which she waited sixty years to assert and then only after Decedent had died and his substantial estate was probated.

This Court should 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.[14]

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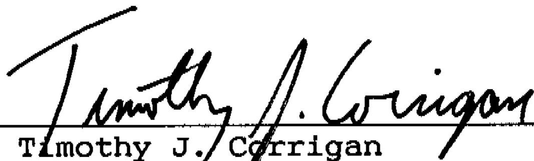
[14] In a last ditch effort, Scruggs argues that the trial court's refusal to accept her birth certificate as conclusive proof of her heirship was an equal protection violation. Scruggs' Br. at 43. This is of no constitutional significance. (Indeed, this was not even an issue which the First District thought important enough to address.) Ensuring reliability of paternity is an important state interest. See § 382.013(6)(b), Fla.Stat. (1993) (in cases of unwed mothers, law now requires **consent of person to be named as father or adjudication of paternity before listing father on birth certificate)**. However, at the time of Scruggs' birth no reliability safeguards were in place. Indeed, her birth certificate information was provided by her mother, was incomplete and did not identify Decedent as the father. Pet. Init. Br. at 3-4. Thus, Scruggs' cannot now be heard to complain that she is being treated unfairly for as Scruggs would have it every financially successful man's estate would be fair game because a mother could list any man as the father on the birth certificate and, being dead, he would be hard pressed to contest the birth certificate. Moreover, if Scruggs had timely and successfully adjudicated paternity, she would have been permitted to submit her birth certificate as prima facie evidence of paternity regardless of her birth status.

Respectfully Submitted,

BEDELL, DITTMAR, DeVAULT & PILLANS
Professional Association



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Barry J. Fuller, Esquire, 2301 Park Avenue, Suite 404, Orange Park, Florida 32073, by U.S. Mail, this 8th day of May, 1995.

Attorney