

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY
(In the Jurisdiction of the Register of Wills)

IN RE:)
)
THE ESTATE OF DOROTHY T.) Register of Wills File No. 120958
GILSON, DECEASED.)

MASTER'S REPORT

Date Submitted: August 6, 2001
Draft Report: September 6, 2001
(Final Report stayed pending resolution of other issues)
Final Report: January 31, 2005

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GLASSCOCK, MASTER

FACTS¹

Dorothy Gilson (“Dorothy”) was born on September 8, 1936. At the time of her conception, her mother was unmarried. On April 22, 1936, a few months before Dorothy’s birth, her mother married Robert J. Gilson (Robert). Robert abandoned Dorothy and her mother shortly after Dorothy’s birth, and Dorothy’s mother obtained a divorce from Robert in 1939 on grounds of willful abandonment. Robert had no further contact with Dorothy during her lifetime, and did not provide support for her while she was a child.

Dorothy died intestate in 1999. Robert, after more than 60 years absence, appeared and claimed Dorothy’s estate. Dorothy had no children, and Robert claimed to be her next of kin, entitled to her estate under the laws of intestate succession. According to counsel, the estate consists of more than \$200,000, including over \$100,000 in cash which Dorothy kept in a strong-box in her house. If Robert is not eligible to inherit Dorothy’s estate, the administrator (Dorothy’s cousin) and Dorothy’s aunt are her next of kin.²

¹ The facts in this report are taken in part from the affidavit of Irene Terczak, upon which the movant relies for purposes of this motion. I have stated the facts in the light most favorable to the non-movant, as I am required to do in considering a motion for summary judgment.

²Another cousin may be alive and, if so, is also an heir.

During the pendency of this action, Robert died. His estate has been substituted as the party claimant. For the sake of clarity, I will refer to Robert's estate, the movant here, as "Robert," and to the Dorothy Gilson estate as "the estate."

Robert has moved for summary judgment, seeking a determination that he is Dorothy's sole heir under the statutes of intestate succession. Summary judgment may be granted only if, viewing the evidence in the light most favorable to the opposing party, there is no genuine issue of material fact, and the movant is entitled to a judgment as a matter of law. Court of Chancery Rules, Rule 56(c); *see, e.g., Mitchell v. Diangelo*, Del.Ch., No. 18199, Lamb, V.C. (May 9, 2001)(Mem. Op.) at 2. This summary judgment motion raises three discreet issues: Is Robert Dorothy's natural father? If so, is he her heir under our statutes? If so, is his inheritance barred by the doctrines of unclean hands or equitable estoppel?

DISCUSSION

A. Fatherhood

Robert married Dorothy's mother in April, 1936.³ Dorothy was born on

³ At oral argument, Dorothy's estate submitted Robert's death certificate. The informant on that certificate, apparently the undertaker handling Robert's body, included the assertion that Robert was "never married." While the estate suggests that this raises an issue of fact as to whether a valid marriage ever occurred, the marriage license and divorce decree are in evidence, and therefore, despite the assertion of the undertaker, it is clear that the marriage of Robert and Dorothy's mother in fact took place.

September 8, 1936. Pursuant to 13 Del. C. §804 (a)(1), the husband of the mother at the time of birth is presumed to be the father of the child.⁴ Robert points to the fact that, in addition to his status as husband of Dorothy’s mother, he is listed as Dorothy’s father on her birth and death certificates. Robert seeks summary judgment on the issue of parentage. Dorothy’s estate points to no affirmative evidence in opposition to this motion.⁵ Chancery Court Rules, Rule 56 (e) provides that . . .

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party’s pleading, but the adverse party’s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.”

Dorothy’s estate does, however, point out that Robert’s body, including its DNA which was potentially evidence in this case, has been cremated. At the time of the cremation, the then-attorney for Dorothy’s estate had made at least an informal request for a DNA sample. The estate argues that the cremation amounts to an intentional destruction of evidence, and cites Equitable Trust Co. V. Gallagher, Del.Supr., 102 A.2d 538, 541 (1954) for the proposition that an inference should thus

⁴ The presumption, of course, is rebuttable, but only by “clear and convincing evidence.” 13 Del.C. § 804 (b).

⁵The Terczak affidavit states only Ms. Terczak’s “belief” that Robert “may not” have been Dorothy’s father.

arise that the evidence would have been unfavorable to Robert (that is, that DNA testing would have demonstrated that he was not Dorothy's father.)⁶ Dorothy's estate also points to the procedural history of this case. The estate has conducted very little discovery in this matter. The estate was represented originally by another attorney; it now asserts that its current attorney would, but for the outstanding summary judgment motion, have pursued a more aggressive discovery strategy which, if permitted, might still yield evidence that Robert was not Dorothy's father. Dorothy's estate argues, in opposition to the presumption of fatherhood, that Dorothy's birth occurred in a time when bearing a child out-of-wedlock entailed a very tangible social stigma, giving Dorothy's mother a motive to marry for the sake of propriety alone, as well as a motive to hide Dorothy's true parentage from both Dorothy and Robert. Dorothy's estate also points out that Robert abandoned the family shortly after Dorothy's birth, an action which the estate argues is inconsistent with actual parentage.⁷

Robert has made a prima-facie showing that he was Dorothy's father. Dorothy's estate has failed to come forward with affirmative evidence which

⁶ Robert's estate concedes that the record is incomplete regarding whether the administrator of Robert's estate knew of the DNA sample request at the time of cremation, while arguing (reasonably enough) that it is unlikely that a decision to cremate a body would be made solely as a litigation tactic.

⁷Sadly, however, the reverse is all too common.

demonstrates an issue of material fact. However, given the procedural background of this matter, justice is best served by deferring a decision on the summary judgment motion, to allow Dorothy's estate to conclude discovery both on the issue of parentage itself, and on the presumption applicable to the "destruction" of Robert's DNA. ". . . [T]his Court has the discretion to defer the decision on a motion for summary judgment in order to provide a party with the opportunity to present additional evidence." Kee v. Allied Chemical Corp., Del.Super., Bifferato, J, (February 6, 1986)(Mem. Op.) at 3 (construing Superior Court Rule 56), *citing* McGuire v. McCollum, Del.Supr., 116 A.2d 897 (1955). Therefore, I will defer decision on this portion of the summary judgment motion until discovery is complete. The parties should enter and submit a stipulated discovery schedule. The schedule should provide that, once discovery is complete, Dorothy's estate shall submit a supplementary brief in opposition to the summary judgment motion, to which Robert may respond. I will then determine whether an issue of material fact remains for trial.

B. The Legal Issues

Assuming Robert is Dorothy's biological father, is he, as father of a child conceived out-of-wedlock but born during the marriage between himself and the mother, entitled to inherit under the laws of intestacy? Under 12 Del.C. § 503(2),

where the decedent leaves no issue or spouse, a surviving parent is entitled to the entire intestate estate. Dorothy's estate argues that, since Dorothy was conceived out-of-wedlock, her biological father is not her "parent" under §503(2).

Chapter 5 of Title 12 is silent concerning the meaning of "parent" of a child born in wedlock. Nevertheless, I am convinced that an individual determined (through evidence or presumption) to be the biological father of a child, who is also married to the mother at the time of birth, is a "parent" under the meaning of §503. The statute makes no distinction between fathers who marry the mother after, as opposed to before, conception, and I find that all such fathers are "parents" under §503(2). That the statute should be thus construed is demonstrated by §508(2), which provides that even a child *born* out-of-wedlock is a child of its natural father for purposes of inheritance if the natural parents marry after the birth, or if they attempt a marriage ceremony before or after birth, but that marriage is void.

Dorothy's estate points to the silence of Chapter 5 concerning the status of a father of a child conceived out-of-wedlock but legitimized by marriage before birth. The estate asserts that at common law such children were considered bastards without fathers;⁸ accordingly, the estate argues, the legislature by its silence must be presumed

⁸The concepts of "bastardy" and "illegitimacy," to the extent they imply a stigma upon the child, are repugnant, and are used here only to resolve the arguments of counsel based upon the common law and Delaware statutes.

to have meant to continue this common law status. Contrary to the assertion of the estate, however, at common-law a child born in wedlock enjoyed the “time-honored” presumption that he was the legitimate offspring of the married couple. Petitioner F. v. Petitioner R., Del.Supr., 430 A.2d 1075, 1077 (1981). The presumption obtained regardless of the date of conception. See Morris v. Morris, Del.Super., 13 A.2d 603, 607(1940)(stating common law rule that “...antenuptial conception does not weaken the presumption of legitimacy arising from postnuptial birth”). Therefore, the construction of §503(2) least derogatory of the common law is that I have adopted above.

Moreover, even if the estate were correct in its assertion of the common law prior to the enactment of Chapter 5, I would decline the construction urged by the estate, because it assumes that the legislature intended a patently absurd result. “It is the well-settled law of this state that statutes should be construed [to] avoid an absurd or mischievous result.” Lewis v. State, Del.Supr., 626 A.2d 1350, 1356 (1993). The construction urged by Dorothy’s estate would allow a natural father to inherit from a child where he marries the child’s mother *after* the birth, but not if he marries the mother *before* the birth. Even more unlikely, the construction would provide that a natural father who enters a valid marriage with the mother before the child’s birth may *not* inherit from the child; but if that marriage proves to have been *void*, the father may

inherit. Such a result cannot have been intended by the legislature. Chapter 5 does not distinguish between natural fathers of children born during marriage based upon whether the marriage occurred before or after conception, because in either case the child is the legitimate offspring of the father. *See* 13 Del.C. §1301.⁹ Therefore, if the record establishes that Robert was the natural father of Dorothy, Robert inherited Dorothy's entire estate before his death.

C. The Equitable Defenses

Dorothy's estate argues that summary judgment is inappropriate based on the existence of factual issues related to legal doctrines which, it argues, may prevent inheritance by Robert's estate. In essence, Dorothy's estate argues that Robert's reprehensible conduct as Dorothy's father disqualifies him as her heir. The estate argues that Robert's conduct implicates one of two doctrines. First, Dorothy's estate argues that Robert (and thus, his estate) should be disqualified by the doctrine of unclean hands from inheriting from Dorothy, due to Robert's abandonment of Dorothy when she was an infant. It is true that this proposition has a certain moral suasion. Certainly (upon the facts assumed for purposes of this motion) Robert's

⁹ §1301 provides that "a child conceived out of wedlock shall be legitimate if the parents shall marry before the birth of the child. . . ."

actions were reprehensible: he may have been Dorothy's father in a legal and biological sense; ethically, he completely failed in that role. The doctrine of unclean hands is inapplicable here, however. The doctrine provides that one who seeks the exercise, on his behalf, of the equitable powers of this court, must not be guilty himself of unequitable behavior with respect to the matter at issue. *See Bodley v. Jones*, Del.Supr., 59 A.2d 463, 469 (1947). Here, the question is simply who is the legal heir of Dorothy. Robert's estate seeks no equitable relief. Any inheritance through Robert will arise by operation of statute, not through the exercise of equity.

Put another way, while the statutes of descent are based on the presumed intention of most intestate decedents, the statutes do not represent a (rebuttable) presumption on the part of any *individual* decedent. Assuming Robert establishes that he is next of kin under 12 Del.C. Chapter 5, he is Dorothy's heir by operation of law. Robert's conduct, reprehensible as it may have been, has nothing to do with the creation or operation of the statute, and thus the unclean hands doctrine does not apply.¹⁰

Dorothy's estate also argues that Robert should be estopped from asserting Robert's parentage of Dorothy. To establish an estoppel, the asserting party must

¹⁰If this Court did have the equitable power, and inclination, to ignore the statute and, based on the doctrine of unclean hands, attempt to ensure that only deserving relatives inherit decedents' estates, it would be entering a dense and thorny ethical thicket more amenable to metaphysics than to law.

demonstrate that he lacked knowledge (and the means to gain that knowledge) of the facts in question, that he relied on the conduct of the party to be estopped, and that he was prejudiced thereby. *E.g.*, Mitchell (Mem. Op.) at 4. Since an equitable estoppel results in a forfeiture of rights, each element must be established by the proponent through clear and convincing evidence. Id.

The theory of Dorothy's estate is that Robert (knowing, of course, that he was in fact alive) misled Dorothy, by never contacting her during her lifetime, into thinking that he was dead. Upon this misrepresentation, argues Dorothy's estate, she relied to her detriment by failing to make a will, under the assumption that her property would descend to her aunt and cousin. The estate seeks the opportunity to discover additional evidence in support of this estoppel theory. Since I have deferred a decision with respect to summary judgment on the factual issue of parentage in order to permit further discovery, it is appropriate to allow discovery to proceed on this issue as well.

CONCLUSION

For the reasons above, I reserve a recommendation on summary judgment on the factual issues presented, and recommend that a partial summary judgment be entered with respect to the legal issues under 12 Del.C. Chapter 5 only. All

exceptions to this report are preserved until resolution of the remainder of the motion. The parties should present a stipulation providing for discovery as described earlier in this report.

Master in Chancery

oc: Register of Wills (NCC)