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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HAROLD BEELER Justice PART 9

Brown, Jerry

v.

Dreyfus, Jack

INDEX NO. 350023/08

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is denied, for reasons stated on the record in open court.

Dated: 4/11/08

Harold B. Beeler

HAROLD BEELER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

At IAS Part 9 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 71 Thomas Street, New York, New York on the 11th of April, 2003.

PRESENT: **HON. HAROLD B. BEELER,**
Justice

JERRY BROWN,

Petitioner,

-against-

JACK DREYFUS,

Respondent.

INDEX NUMBER 350623/02
Motion Sequence 001
DECISION & ORDER

This is a case of apparent first impression. The novel question presented is whether an "adult" child (one over the age of 21) has a right to compel the person he claims to be his father to submit to a court-ordered DNA test to determine paternity and the child's future right to inherit under the State's intestacy laws.

Petitioner Jerry Brown moves to compel respondent Jack Dreyfus to submit to such a court-ordered DNA test to determine whether respondent is petitioner's biological father. Respondent moves to dismiss the petition, *inter alia*, for failure to state a cause of action (CPLR 3211(a)(7)) and as time-barred (CPLR 3211(a)(5)).

Petitioner is 40 years old, born July 1, 1962 in Peru, Indiana, to Sara Brown a/k/a Sarah Smith who avers that she had a "romantic relationship" with respondent Jack Dreyfus which began in 1961 and which "lasted many years." Ms. Brown claims she was 17 at the time of her son's birth and was not married at the time. She states she has visited respondent many times

over the past forty years at his home in Manhattan but offers no other information about her personal life. At a meeting in March, 2002 she claims that respondent voluntarily agreed to submit to **DNA** testing to determine petitioner's paternity but later withdrew his consent.

Petitioner avers that his mother is currently unmarried, that she had married when he was 15 years old but that his mother and her then husband never represented to petitioner nor to anyone else that her husband was petitioner's father. According to petitioner, his mother did not reveal to him the identity of his biological father until only recently. He claims that lack of a determination of paternity "subjects me to uncertainty over the identity of my biological father, in inheritance rights as well as the advisability and utilization of medical treatment." He claims to have been diagnosed with thyroid cancer but offers no expert opinion in support of this diagnosis nor in support of how knowledge of his paternity would assist any medical treatment.

Respondent, founder of the Dreyfus Fund, is 89 years old and reputedly very wealthy. He states that he knew Ms. Brown in the early 1960s, but did not see her again until the aforementioned meeting in approximately March 2002. Until that time, he was never told she was pregnant or had given birth to a child believed to be his, and does not believe their relationship "result[ed] in her becoming pregnant." He claims never to have agreed to submit to a DNA test to determine the paternity.

Respondent, moreover, avers that he has a duly-executed and valid will in which there is no provision made for any bequest to a class of "children," "issue" or any other term which could include petitioner. (Pursuant to New York Estates, Powers and Trusts Law ("EPTL") §2-1.3(3) a disposition of property in a will to "issue" or "children" includes non-marital children

entitled to inherit under the intestacy provisions of EPTL§4-1.2.) Respondent further avers that on October 23,2002 he executed a codicil to this will in which he specifically excluded petitioner Jerry Brown and any other child of Sarah Smith from inheriting any share of his estate.

Petitioner brings this proceeding pursuant to EPTL §4-1.2(a)(2)(D) which reads: "A non-marital child is the legitimate child of his father so that he and his issue inherit from his father and his paternal kindred if . . . a blood genetic marker test had been administered to the father which together with other evidence establishes paternity by clear and convincing evidence."

Both parties agree that were the petitioner under the age of 21 the Family Court would have the authority to order the requested DNA testing. The Family Court Act ("FCA") 9511 provides that the Family Court has exclusive original jurisdiction of all paternity actions concerning non-marital children. FCA §532(a) further authorizes the Family Court to order the putative father to submit to a genetic marker or DNA test in connection with such a paternity proceeding. However, pursuant to FCA 9517, a proceeding to establish the paternity of a child "shall not be brought after the child reaches the age of twenty-one years, unless paternity has been acknowledged by the father in writing or by furnishing support."

Petitioner concedes that no paternity proceeding can be brought in Family Court because petitioner is over the age of 21 and respondent has neither acknowledged paternity of the petitioner nor paid any support on his behalf. Petitioner further concedes that no paternity hearing can be instituted in the Surrogate's Court to determine petitioner's status as a distributee under EPTL §4-1.2(a)(2)(D) inasmuch as the respondent is living.

Petitioner asserts, however, that the Supreme Court has jurisdiction to determine petitioner's future rights to inherit under EPTL §4-1.2(a)(2)(D). Petitioner argues that the

purpose of the statute is to afford inheritance rights to non-marital children and that there is no logical reason to conclude that the legislature intended to benefit only those non-marital children identified as such through a Family Court-ordered DNA test administered prior to their reaching the age of 21. Petitioner cites the language of EPTL §4-1.2(a)(2)(D) which refers in the past tense to a blood genetic marker test as one that "***had*** been administered to the father" (emphasis added) and which contains no specific language limiting the administration of the test to a time during the minority of the child in the course of a Family Court paternity proceeding. By analogy, petitioner refers to the elimination (Chapter 75 of the Laws Of 1981) of any statute of limitations, other than during the lifetime of the father, for the issuance of an order of filiation under EPTL §4-1.2(a)(2)(A).[1]

Petitioner further relies on ***Matter of Janus,*** 210 AD2d. 101 (1st Dep't 1994) in which the Court held that EPTL §4-1.2(a)(2)(D) contemplates the administration of a valid blood genetic marker test only during the putative father's lifetime and does not allow for the exhumation of the body to conduct posthumous DNA testing. According to petitioner, unless this court has the authority to order a DNA test at his behest during respondent's lifetime, petitioner's "right," as well as the "right" of all non-marital children over 21 to inherit from their putative biological father under EPTL §4-1.2(a)(2)(D) would be without an adequate remedy. According to

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'EPTL §4.1.2 provides that a non-marital child may inherit from his father only if he can establish one of four proofs: **(1)** An order of filiation or **an** acknowledgment of paternity under Publish Health Law §4135-b (subparagraph(a)(2)(A)); (2) ***An*** acknowledgment of paternity by the father, filed with the Putative Father's Registry (subparagraph(a)(2)(B)); **(3)** Open and notorious acknowledgment by the father of the child as his own along with clear and convincing evidence of paternity (subparagraph(a)(2)(C)); **(4)** A blood genetic marker test along with other clear and convincing evidence of paternity (subparagraph(a)(2)(D)).

petitioner, the Legislature could never have intended to exclude such a large class of out-of-wedlock children from protection under EPTL $4-1.2(a)(2)(D).

In this Court's view, the petitioner is really seeking a court-ordered DNA test in the course of an *intewivos* paternity proceeding. EPTL §4-1.2(a)(2)(D) as well as EPTL §4-1.2 (a)(2)(A), (B) and (C) govern only the inheritance rights of non-marital children fi-om their father upon a decedent's death. These provisions apply to the distribution of an estate where the decedent has *died* intestate. Only the Family Court has authority to order a living putative father to undergo a DNA test in a proceeding to determine paternity (FCA §532(a)) and such a proceeding can only be commenced before the child reaches the age of 21 (FCA $517). EPTL $4-1.2 (a)(2)(D) simply does not authorize a court-ordered DNA or genetic marker test of the putative father. EPTL §4-1.2(a)(2)(D) just *recognizes* the results of such a test provided the test was conducted pursuant to other valid authority, such as in the course of a Family Court paternity proceeding, or was voluntarily obtained upon the consent of the putative father any time during his lifetime. The Court, therefore, finds that the petition fails to state a cause of action under EPTL §4-1.2(a)(2)(D) and is time-barred under FCA § 517.

All of the cases cited by petitioner are inapposite. None of the cases support a compelled DNA test to establish paternity while the putative father is alive. They all refer to assertions of inheritance rights in the Surrogate's Court under EPTL §4-1.2 after the decedent's death. See e.g. *Estate of Sandler*, 160 Misc 2d 955 (Sur Ct NY County 1994) (a proceeding pursuant to EPTL §4-1.2(a)(2)(c) where the parents of the decedent were permitted to undergo voluntary DNA testing in support of an after-born non-marital claim of inheritance); *Estate of Nassert*, NYLJ, p. 20, October 1,2002 (Sur Ct Richmond County 2002) (where in a proceeding brought

under EPTL §4-1.2(a)(2)(C) the decedent's genetically-identical twin voluntarily submitted to a DNA test in order to establish the non-marital child's claim of paternity); and, ***Estate of*** *Bonanno*, 192 Misc 2d 86 (Sur Ct ***NY*** County 2002) (where in another proceeding under EPTL §4-1.2(a)(2)(C) existing blood samples retained by the Office of the Medical Examiner after an autopsy were allowed to be used to exclude a claim of inheritance by an alleged non-marital child).

The Court finds that the disparity between the rights of a child under 21 and of an adult over 21 to compel blood testing to establish paternity reflects sound public policy. It is entirely rational for the Legislature to have provided for court-compelled DNA testing to establish the paternity of a non-marital child only in a Family Court proceeding and not thereafter once the child reaches adulthood.

There is undoubtedly a compelling state interest in providing appropriate financial support for children until the age of 21 and in identifying the responsible party for such support through DNA testing in a Family Court paternity proceeding. No comparable state interest exists to provide for court-ordered DNA tests at the behest of non-marital children 21 years of age or older in order to establish their future right to inherit under the State's intestacy laws. Financial and estate arrangements among adults are essentially private matters. New York law does not provide an absolute right of inheritance for children. Under the law, a child, unlike a spouse, has no right to an elective share of her husband's estate (see EPTL §5-1.1 Right of Election by Surviving Spouse). Also, a child has no right to inherit unless the parent dies intestate or names his children, either specifically or as a class, in his will (EPTL §4-1.2 and EPTL §2-1.3(3)). Inasmuch as a non-marital child has no vested right to inherit from his

biological father, it is eminently reasonable that the Legislature did not provide an adult child with the right to compel a DNA test to establish paternity for purposes of intestacy inheritance.

Petitioner also asks the Court to exercise its equitable powers in granting his petition in the event the Court finds no specific statutory basis for the relief requested. Petitioner, however, fails to provide sufficient factual detail to warrant the Court ordering a DNA test of respondent on equitable grounds. The petition itself is threadbare. There is no explicit mention of a physical or sexual relationship between Ms. Brown and respondent, only a reference euphemistically to a "romantic relationship." Petitioner does not declare that respondent is his father or even state a belief to that effect. Nowhere is it stated whether respondent had exclusive sexual access to Ms. Brown at the time of conception.

It is unknown whether any men ever provided financial support for petitioner and, except for a brief reference to his mother's husband who it is averred she married when petitioner was 15 and who never held himself out as his father, petitioner never denies that he knew any other man as his father. He never convincingly explains why during the approximately twenty years of his adult life he has never sought out respondent or in any way attempted to establish a relationship with him.

Respondent is **89** years of age and has arranged his affairs in reliance on his belief that he knows all of his heirs. Petitioner suddenly appears to upset these plans, providing only the most minimal of details surrounding his and his mother's life over the past **40** years. Moreover, in view of respondent's will and newly-executed codicil, it is most unlikely that the respondent will die intestate or that petitioner will ever inherit from him. Respondent's estate may not even be probated in New York under the EPTL. Which jurisdiction's estate law will govern will be

known only at the time of respondent's death. At this late date, it would be most unfair to respondent to allow this proceeding to go forward where petitioner's objective is simply to establish standing to be a party to file objections to respondent's will upon his death. It would also set a dangerous precedent for other belated, opportunistic claims of paternity.

Accordingly, for all the aforesaid reasons, based upon the law and equity, the petition is dismissed. This constitutes the decision and judgment of the Court.

Date: April 11,2003

E N T E R :

Harold B Beeler

HAROLD B. BEELER, J.S.C.

HAROLD BEELER