

**Klemish v Gambale**

2013 NY Slip Op 31445(U)

June 24, 2013

Supreme Court, Suffolk County

Docket Number: 07-23152

Judge: Jerry Garguilo

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SHORT FORM ORDER

INDEX No. 07-23152  
CAL No. 10-00248OT

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 47 - SUFFOLK COUNTY

**PRESENT:**

Hon. JERRY GARGUILO  
Justice of the Supreme Court

MOTION DATE 5-29-13  
ADJ. DATE 6-5-13  
Mot. Seq. # 008 - MD; CASEDISP

-----X

CATHERINE D. KLEMISH,  
  
Plaintiff,

- against -

MICHELE GAMBALE as ADMINISTRATRIX  
of the ESTATE OF PATRICK J. THOMPSON,  
deceased,  
  
Defendant.

-----X

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Attorney for Plaintiff  
110 Washington Avenue  
Holtsville, New York 11742

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Attorney for Defendant  
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MAZZEI & BLAIR, ESQS.  
Attorney for Defendant Michele Gambale  
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Blue Point, New York 11715

Upon the following papers numbered 1 to 13 read on this motion for a preliminary injunction; Notice of Motion/ Order to Show Cause and supporting papers (008)1 - 6; Notice of Cross Motion and supporting papers   ; Answering Affidavits and supporting papers 7-10; Replying Affidavits and supporting papers 11-12; Other 13- So ordered stipulation dated April 24, 2013; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that motion (008) by the defendant, Michele Gambale as Administratrix of the Estate of Patrick J. Thompson, deceased, for a preliminary injunction enjoining and restraining Catherine D. Klemish from enforcing the Supreme Court order dated June 2, 2011, and from holding an inquest for an assessment of damages against the estate of Patrick J. Thompson for alleged past due child support until a DNA test is either ordered by the Surrogate's Court of Suffolk County, or an agreement is voluntarily entered into between her and Alexis Georgette Klemish-Thompson for DNA marker testing, is denied; and it is further

**ORDERED** that pursuant to the so-ordered stipulation dated April 24, 2013, the defendant's fiduciary shall make payment from the decedent's estate within 30 days of the date of this order, by bank

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check payable to the Sallah Law Firm, P.C., as attorney for the plaintiff, in the amount of \$23,000.00, in satisfaction of past child support arrears, as agreed by the parties to be due and owing to the plaintiff.

Pursuant to CPLR 6313, if, on a motion for a preliminary injunction, the plaintiff shall show that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had, a temporary restraining order may be granted without notice. The decision to grant or deny provisional relief is a matter ordinarily committed to the sound discretion of the lower courts (*Doe v Axelrodi*, 73 NY2d 748, 536 NYS2d 44 [1988]). To prevail on a motion for a preliminary injunction, the movant must demonstrate by clear and convincing evidence (1) the likelihood of ultimate success on the merits; (2) irreparable injury absent the granting of the preliminary injunction; and (3) a balancing of the equities in the movants' favor (*Butt v Makik*, 2013 NY Slip Op 3445 [2d Dept 2013]). It is determined that the defendant has not demonstrated by clear and convincing evidence that there is a likelihood of ultimate success on the merits in the underlying Surrogate's Court action, that she will suffer irreparable injury if the preliminary injunction is denied as there are adequate remedies in law available should any damage occur, and a balancing of the equities does not lie in favor the defendant.

By judgment granted February 15, 2006 (Murphy, J), in an action for an uncontested divorce brought in Supreme Court, Suffolk County, under Index No.03-09755, the marriage between Patrick J. Thompson, now deceased, and Catherine D. Klemish-Thompson, was dissolved. The judgment provided that Catherine D. Klemish-Thompson shall have sole legal custody of "of the unemancipated child of that marriage," Alexis Georgette Klemish-Thompson, born August 13, 1994, as set forth in the parties' stipulation of settlement dated September 21, 2006. It was further adjudged that Patrick J. Thompson's basic support obligation was \$226.10 per week, and that pursuant to the parties' stipulation<sup>1</sup>, Patrick J. Thompson agreed to pay child support in the amount of \$225.00 per week commencing October 1, 2005, payable through the Support Collection Unit.

Thereafter, by order dated June 2, 2011 (Garguilo, J.), prior to decedent's death on February 15, 2012, the parties were directed to appear for a hearing for the recalculation of the amount of child support to be paid by Patrick Thompson, as provided for in the stipulation of settlement of September 21, 2005, as the decedent's statement of net worth did not reflect his additional annual gross income from the Board of Elections in the amount of \$37,334.46, or the income from the sale of his auto body business in the amount of \$800,000.

Michele Gambale, as Administratrix of the Estate of Patrick J. Thompson, now seeks a preliminary injunction enjoining and restraining Catherine D. Klemish from enforcing that order dated June 2, 2011, and from holding the hearing for the assessment of the alleged child support arrears. She avers that it would be violative of her rights and fiduciary duty to the estate if the ordered hearing were permitted to proceed, to the extent that there are issues with regard to the paternity of Alexis Georgette Klemish-Thompson. She avers that the decedent had doubts as to whether he was the father of Alexis in that she found a straw in a plastic baggie labeled "Cathy," and an envelope with a piece of hair taped to

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<sup>1</sup> The stipulation of settlement dated September 21, 2006 survived the judgment of divorce and was not merged into the judgment.

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it with the name "Alexis" written on it. She further asserts that she believes her father was defrauded into believing that he was Alexis' father. However, Gambale has submitted no evidentiary proof which would support such claim. Her allegations consist of pure speculation, conjecture and surmise.

A petition was filed by Michele Gambale in Surrogate's Court, accompanied by her supporting affidavit dated April 23, 2012, wherein she alleges that she is the sole distributee of the Estate of Patrick J. Thompson, that Patrick J. Thompson is not the father of Alexis Georgette Thompson-Klemish, and that Alexis Georgette Thompson-Klemish should be precluded from inheriting from the decedent's estate. In her petition for letters of administration, dated February 27, 2012, Gambale listed Alexis Georgette Thompson-Klemish as a daughter of the decedent. Said letters were granted, but by petition dated April 23, 2012, Gambale then sought to have herself named as the sole distributee of the Estate of Patrick J. Thompson, eliminating Alexis Georgette Thompson-Klemish as a distributee of the decedent's estate. The petition in Surrogate's Court was brought pursuant to EPTL sections 4-1.1 and 4-1.2.

Gambale contends that Alexis Klemish-Thompson was born before the marriage of the decedent to Catherine Klemish-Thompson and that therefore, the decedent is not Alexis's father. EPTL § 4.1-1 sets forth the descent and distribution of a decedent's estate and who may inherit property not disposed of by a will. Pursuant to EPTL § 4.1-2 (a) (2) 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: (c) paternity has been established by clear and convincing evidence which may include, but is not limited to: (ii) evidence that the father openly and notoriously acknowledged the child as his own. Pursuant to section (3), the existence of an agreement obligating the father to support the non-marital child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made or acknowledgment of paternity as prescribed by subparagraph (2). Gambale asserts that an order of filiation has never been issued naming the decedent the father of Alexis. However, EPTL § 4-1.2 (a) (2) specifically exclude the requirement that an order of filiation declaring paternity be made during the lifetime of the father (*see Matter of Sondra S. v Jay O., supra*). Here, the admissible evidence demonstrates that an acknowledgment of paternity was signed by the decedent whose name appears on the birth certificate.

The primary goal underlying the challenged provisions of § 4-1.2 is to provide for the just and orderly disposition of a decedent's property where paternal inheritance by illegitimate children is concerned. an area involving unique and difficult problems of proof (*Lalli v Lalli, Administratrix*, 439 US 259, 99 S. Ct. 518 [1978]). The purpose of a paternity proceeding has traditionally been to insure support for the child born out of wedlock and to provide a procedure for the government to obtain indemnification for the expenses of supporting the child (*Matter of Sondra S. v Jay O., supra*). The law strongly favors maintaining the legitimacy of children (*James BB v Debora AA*, 202 AD2d 852, 609 NYS2d 361 [3d Dept 1994]). The chief purpose of a paternity proceeding is to secure the health, welfare, and happiness of the child. The best interests of the child have been established as the paramount criteria for determining the relationship between the child and her biological parents (*see Ettore I v Angela D*, 127 AD2d 6, 513 NYS2d 733 [2d Dept 1987]). Equitable estoppel bars a father's belated denial of paternity (*Shondel J. v Mark D.*, 7 NY3d 320, 820 NYS2d 199 [2006]). In *Sharon GG v Duane HH*, 95 AD2d 466, 467 NYS2d 941 [3d Dept 1983], the Court determined that estoppel is applicable to a paternity proceeding, as it is to divorce action, where the purpose of the mother's challenge to the paternity was to deprive the father of parental rights and status, with a concomitant loss

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of rights and status for the child (*see also Derrick H v Martha J.*, 82 AD3d 1236, 922 NYS2d 83 [2011] wherein the doctrine of equitable estoppel will be applied only where its use furthers the best interests of the subject child). In the instant action, the defendant offers hearsay statements that her father questioned paternity of Alexis. However, the decedent had multiple opportunities to bring an action or otherwise prove that he was not the father of Alexis, and failed to do so, belying the unsupported hearsay assertions. In fact, he consented to his name appearing on the child's birth certificate and signed an acknowledgment of paternity. Accordingly, the defendant is barred by the doctrine of equitable estoppel from denying that Patrick Thompson was the father of Alexis Klemish-Thompson.

Gambale seeks the stay of the proceeding and enforcement of the order dated June 2, 2011 on the basis that, in the Surrogate's Court proceeding, she is seeking DNA marker tests of herself and Alexis Georgette Klemish-Thompson, as she believes that Alexis is not the daughter of the decedent. She avers that there should be finality in a determination concerning who is the father of Alexis, and if the decedent is not Alexis's father, that the order providing for child support should be negated and the decedent's estate should be permitted to recoup all past child support payments made. In *Natalie N v Jerome W.*, 29 AD3d 912, 815 NYS2d 268 [2d Dept 2006], the DNA marker test was denied and the child was adjudicated to be the child of the appellant where the appellant believed himself to be the father of the child, held himself out as the father of the child, signed an acknowledgment of paternity at the time of the child's birth, established a viable and ongoing parent-child relationship, and is the only father the child has ever known. The evidentiary submissions establish that such is the case herein.

It has been nineteen years since the birth of Alexis Georgette Klemish-Thompson, and Gambale now seeks a declaration that she is the only child of the decedent and the only distributee to inherit from the decedent's estate. She supports this claim with merely surmise, conjecture, and speculation to negate the decedent's prior admission to Justice Murphy that he is the father of Alexis, and to nullify his actions with regard to the child by agreeing to pay child support on her behalf, and holding himself out to be her father. Conjecture, surmise, and speculation nineteen years after Alexis' birth is insufficient to negate the clear and convincing evidence of open and notorious actions by the decedent during his lifetime demonstrating that he is the father of Alexis, and his admission of paternity to the Court (*Matter of Constance S. v Steven A.*, 130 AD2d 493, 515 NYS2d 77 92nd Dept 1987; *Matter of Sondra S. v Jay O.*, 126 Misc2d 322, 482 NYS2d 660 [Fam. Ct. Queens County 1984]; *see also Matter of Anne R. v Estate of Francis C, deceased*, 167 Misc2d 343, 634 NYS2d 339 [Sup. Ct. Queens County 1995]), in addition to consenting to his name appearing on Alexis's birth certificate, and his signing the acknowledgment of paternity.

Alexis Klemish-Thompson was born August 13, 1994. Her birth certificate sets forth Patrick J. Thompson as her father. The decedent was the owner of an auto body shop, Gaios, Kings Park, where Catherine Klemish was employed as a secretary during her pregnancy. The date of the marriage between Catherine Klemish and Patrick Thompson has not been established, however the judgment of divorce is dated February 15, 2006, when Alexis was approximately twelve years of age. The decedent entered into a child support payment schedule, and obtained liberal visitation of the child. In opposing this application, Catherine Klemish-Thompson avers that the decedent was present at the birth of Alexis. Thereafter, the decedent signed a duly acknowledged acknowledgment of paternity dated August 15, 1994, wherein he gave his consent to have his name appear on the certificate of birth for Alexis

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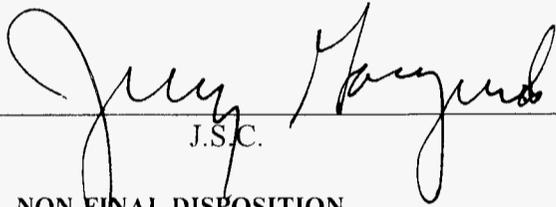
Georgette Thompson-Klemish, and which acknowledgment has been submitted as proof of paternity to establish that decedent Patrick J. Thompson is the father of Alexis Georgette Klemish-Thompson. At no time prior to his death did the decedent dispute his paternity or commence an action for a determination that he is not Alexis's father. In fact, the admissible evidence establishes clearly and convincingly that Patrick J. Thompson is the father of Alexis Georgette Klemish-Thompson.

Based upon the foregoing, Michele Gambale has demonstrated no basis for a preliminary injunction staying the hearing for recalculation of child support, or stay of enforcement of the order dated April 24, 2013. She has not demonstrated a likelihood of success on the merits in the underlying action based upon the evidentiary proof submitted. Nor has she demonstrated irreparable harm, or a balancing of the equities in her favor.

Accordingly, motion (008) is denied in its entirety.

By stipulation dated April 24, 2013, the parties agreed that in the event the Court denied the defendant's motion to stay enforcement of the order of June 2, 2011, that the past child support due and owing from the defendant's estate is deemed to be \$23,000.00, defendant's fiduciary shall make payment within 30 days by bank check payable to the Sallah Law Firm, P.C., as attorney. Accordingly, in that this motion has been denied, the defendant's fiduciary must now abide by said stipulation and make payment within thirty days of the date of this order, as provided therein.

Dated: 6/24/13

  
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J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION