

Matter of Taylor

2018 NY Slip Op 30662(U)

April 13, 2018

Surrogate's Court, New York County

Docket Number: 2001-3975/A

Judge: Rita M. Mella

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SURROGATE'S COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

New York County Surrogate's Court
Date: APRIL 13, 2018

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In the Matter of the Application to Compel Mary Kaye
Crenshaw, Administrator of the Estate of

DECISION
File No.: 2001-3975/A

MICHAEL MORGAN TAYLOR,

to Account pursuant to SCPA 2205.

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M E L L A, S.:

In the context of this contested proceeding to compel the account of the Administrator of the estate of Michael Morgan Taylor, the court held a hearing to determine whether it should order a posthumous genetic marker test. The results of this test may provide evidence of paternity, and could satisfy in part the showing that petitioner Austin Rutherford Colby must make to establish his right to inherit from decedent, and his standing in this proceeding. The Administrator, Mary Kay Crenshaw, is decedent's sister.

This hearing was held in connection with a motion by Colby, who has appeared *pro se* in these proceedings, for the issuance of a court-ordered subpoena directing the New York City Office of the Chief Medical Examiner (OCME) to release any DNA profile or genetic material of decedent in the OCME's possession. This motion was made after more than two years of litigation regarding Colby's status as the alleged son of decedent, and upon the court's determination that more information was necessary in order to decide whether a genetic marker test should be directed in this proceeding. The motion is opposed by the Administrator. In partial opposition to the motion, OCME points out certain defects in Colby's proposed subpoena and seeks assurance that any subpoena that may issue would comply with confidentiality requirements and other safeguards.

The ultimate determination of Colby's status here is governed by the version of EPTL 4-1.2 in effect at the time of decedent's death in 2001, which provided in relevant part that a non-marital child inherits from his father if "paternity has been established by clear and convincing evidence *and* the father of the child has openly and notoriously acknowledged the child as his own" (former EPTL 4-1.2 [a] [2] [C] [emphasis added]). In a prior decision, this court noted that a posthumous genetic marker test that positively matches the non-marital child and the father has been held to satisfy the clear and convincing evidence prong (*Matter of Taylor*, 2016 WL 3882823, at *2 [Sur Ct, NY County, July 13, 2016], citing *Matter of Bonanno*, 192 Misc 2d 86, 88 [Sur Ct, NY County 2002]), and the present motion followed.

In essence, the determination of whether to order genetic testing here requires the balancing of various factors, including whether "genetic marker testing is practicable and reasonable under the totality of the circumstances" (*Matter of Poldrugovaz*, 50 AD3d 117, 123-124, 129 [2d Dept 2008]), and also whether testing would impose undue hardship on decedent's family (*see Matter of Williams*, 26 Misc 3d 680, 684 [Sur Ct, Bronx County 2009]).

At the hearing, Colby called Gwendolyn D. Phillips, his mother, as a witness. She testified as to having a relationship with decedent for a number of years, having met decedent's parents, and having had a sexual relationship with decedent at the time of Colby's conception. She stated her belief that her pregnancy caused the end of their relationship. Phillips further testified as to returning to Texas, where Colby was born in March of 1994, identifying decedent as Colby's father and providing decedent's information on Colby's birth certificate, and having commenced a paternity and support proceeding against decedent within the year following Colby's birth. Colby's birth certificate and a copy of the support petition filed by Phillips in

Texas are part of the record before the court. Also introduced into evidence during Phillips's testimony was a collection of photographs, a few of decedent and others of Colby, for the purpose of demonstrating the resemblance between decedent and Colby.

During cross-examination, Phillips admitted that decedent did not "authorize" her to identify him as Colby's father on Colby's birth certificate. She also conceded that the paternity proceeding was ultimately dismissed following decedent's death in the attacks on the World Trade Center in 2001. She acknowledged that she and Colby had moved to Europe when Colby was a young child and only found out about decedent's death when she received paperwork indicating that the paternity proceeding had been dismissed as a result. On cross-examination, significant questions were raised as to Phillips's general credibility and with respect to the details of any relationship between Phillips and decedent—including its nature and duration. Phillips's claim that decedent is Colby's father, however, has remained consistent: she made this claim at the time of Colby's birth, as demonstrated by the information she supplied on Colby's birth certificate, when she filed the paternity and support petition, and throughout the course of the litigation in this court.

The next witness to testify was Mark Desire, assistant director of the forensic biology laboratory of OCME. Desire, an experienced professional in the forensic biology department and the individual at OCME in charge of mass fatality identification, including those related to the attack on the World Trade Center, described at length and with considerable and helpful detail the process of creating a DNA profile from a reference sample. He also provided information relevant to decedent, reporting that OCME has a bone sample positively identified as decedent's, as well as a DNA profile generated using genetic material collected from decedent's toothbrush,

which had been provided to OCME by decedent's family in the aftermath of the attack. OCME has used this profile to compare it to discovered remains, and has positively identified numerous remains as those of decedent's. All but the aforementioned bone sample have been released to decedent's family for burial. Finally, Desire described the harsh conditions to which remains related to the World Trade Center attack were exposed and explained that not every paternity testing laboratory is equipped to extract material and create a DNA profile from a bone sample, particularly one that is in the degraded condition that these samples may be in.

The next witness, called by respondent, was petitioner. Colby admitted that he did not have personal knowledge as to the circumstances of any relationship between decedent and his mother, and testified that it was his decision to bring the proceedings in this court. When questioned as to why he did not bring a proceeding earlier—he was 20 years old when a petition was first filed in this court—he explained that when he turned 18, he was very focused on his studies and completing high school.

The final witness was respondent, Mary Kay Crenshaw. She expressed the sorrow that she continues to experience from the loss of her brother in this tragic manner. She testified as to the trauma that dealing with the loss of their son and then the contact from Phillips, which decedent's family considered unwanted and inappropriate, caused on her parents. Crenshaw testified to experiencing this request by Colby for OCME to turn over a tissue sample or other genetic material from her brother as a further desecration of his remains, and a reopening of her own emotional wounds. Finally, she testified as to the family's desire for closure after the World Trade Center attacks and the effects that this matter has had on her and her family. Crenshaw did not dispute that decedent knew Phillips and conceded that decedent had some discussion with

Crenshaw's husband and with Crenshaw that may have related to Phillips and her claims regarding decedent's paternity of petitioner. She stated her firm and continued belief in decedent's assertions to her that he was not the father of any alleged child.

Two determinations must be made by this court at this juncture. The first is whether genetic marker testing is reasonable and practicable under the totality of the circumstances here. If the court determines that it is, the second determination the court must make is whether to order such testing prior to the establishment by petitioner of open and notorious acknowledgment of paternity by decedent. In this court's decision issued at the outset of this hearing,¹ it held that, "in the context of discovery motions concerning allegations of paternity by a deceased person," ordering a genetic marker test was not dependent upon first proving open and notorious acknowledgment (*see Matter of Williams*, 26 Misc 3d at 683–685 ["This court is of the opinion that the *Morningstar* rule (17 AD3d at 1060) enunciated by the Appellate Division, Fourth Department, is the better rule for pretrial discovery motions and that the testing should be ordered without requiring the presentation of any proof on the issue of open and notorious acknowledgment."]).

As to the first of these determinations, after hearing the testimony of Phillips, the OCME's forensic expert, and respondent, the court concludes that it is reasonable and practicable to direct a genetic marker test using the DNA profile for decedent in the possession of OCME and a DNA sample from petitioner, under specified conditions. Directing release of the DNA profile in the possession of OCME would not be unduly burdensome and, in contrast to the

¹The written decision memorializing the court's determination from the bench on the return date of this motion was issued on June 22, 2017.

release of decedent's bone sample, which would be at least partially destroyed in the process of extracting material for a DNA sample, is minimally intrusive. In conjunction with the procedural safeguards and the confidentiality provisions attendant to an appropriate subpoena served on the OCME, the court is satisfied that such procedural safeguards and confidentiality provisions minimize any hardship that decedent's family may experience in this process. Finally, an affidavit from someone with authority at the laboratory designated by petitioner confirming that they will follow those safeguards and accept the OCME's DNA profile for comparison with a sample from petitioner will ensure the reliability and accuracy of any test results (*see Matter of Poldrugovaz*, 50 AD3d at 129).

The second determination requires the court to use its discretion to establish the most efficient way to resolve the question of Colby's status as decedent's child.

The court is mindful of the particular tragedy inextricably bound to the memories of decedent, and cognizant that these circumstances are among the factors that this court must weigh in determining the proper course in the matter before it. It is also the case here that, ultimately, petitioner bears the significant burden of establishing any right to inherit. The parties have not yet engaged in discovery related to the open and notorious acknowledgment prong of the applicable version of EPTL 4-1.2(a)(2)(C), and it is yet to be seen what that disclosure will reveal. In light of the court's determination that a genetic marker comparison of decedent and petitioner could reliably, reasonably, and practically be made, it concludes that the better course here is to direct testing before any effort and expense is incurred in such discovery (*see Matter of Williams*, 26 Misc 3d 680, *supra*; *cf. Matter of Seekins*, 194 Misc 2d 422 [Sur Ct, Westchester County 2002] [court not satisfied that genetic material sought for testing came from reliable

source or was amenable to accurate testing and would not rule on propriety of DNA evidence unless and until acknowledgment prong resolved in petitioners' favor]).

The results of a genetic marker test could dispose of the proceeding here, if there is not a match, as petitioner would not be able to show clear and convincing evidence of paternity. If, on the other hand, there is a match, the result of the test could establish clear and convincing evidence of paternity, but petitioner then would have the additional burden, pursuant to the applicable version of EPTL 4-1.2, to prove open and notorious acknowledgment. Postponing disclosure as to acknowledgment, which may include depositions of the parties and other witnesses and extensive document discovery, with the expense and time attendant to these efforts, until the results of the posthumous genetic marker test are ascertained is an appropriate exercise of the court's discretion in supervising discovery (*see Matter of Santos*, 196 Misc 2d 972, 973 [Sur Ct, Kings County 2003] ["This court has every desire to have the most exhaustive quantum of probative information available to arrive at a just decision"]; *see also Matter of Williams*, 26 Misc 3d at 683–685).

The search for truth should be the court's guidepost when it comes to determining the scope of disclosure that could clarify a question of paternity (*see Poldrugovaz*, 50 AD3d at 130). There is no statute of limitations on establishing paternity under EPTL 4-1.2, and to foreclose petitioner's opportunity to seek relevant discovery, including through posthumous genetic marker testing is anathema to the purpose of these statutory provisions.

Accordingly, an appropriately drafted judicial subpoena directing production by OCME of the DNA profile of decedent Michael Morgan Taylor to an accredited lab will issue. The court will further issue an order directing the lab chosen by petitioner to conduct a test using that

profile and a sample to be properly submitted by Colby. The results of any such test shall be filed with the court. All costs associated with this testing are to be borne by Colby.

Petitioner is directed to submit an affidavit from an individual with authority at the testing laboratory designated by petitioner stating that the laboratory: (1) will accept the DNA profile from OCME for comparison with a sample provided by petitioner, and (2) will follow routine chain-of-custody and confidentiality protocols. The above-mentioned order and subpoena will not issue until the court is in receipt of this affidavit.

This decision constitutes the order of the court.

Clerk to notify.

Dated: April 13, 2018



SURROGATE