IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PA

IN RE:	:	
	:	
ESTATE OF	:	Orphans' Court
PHILIP D. AMOROSO,	:	No. 41-00-0611

OPINION AND ORDER

The issue before the court is whether the petitioner, Brooke Lynn Davis, may be given the opportunity to prove she is the biological daughter of the decedent, Philip D. Amoroso, who died intestate on October 31, 2000. Ms. Davis has requested that the deceased's body be exhumed and subjected to DNA testing. The decedent's other daughters contend she should not be given this opportunity because she was born when her mother was married to, but separated from, another man. After close examination of the law, the court agrees with the petitioner, and sees no reason to deny the petitioner the opportunity to prove she is the deceased's biological daughter. The issue of exhumation, however, will be decided after a hearing at which the court may evaluate the evidence petitioner presents to determine whether she has shown reasonable cause for exhumation.

Factual Background

The petitioner was born on May 19, 1975. At the time of her birth her mother, Charlene Davis, was married to Paul Davis. However, the couple had separated in March 1974, Ms. Davis had filed a divorce complaint on May 21, 1974, and a divorce decree was issued on October 28, 1975. The birth record issued by the Williamsport Hospital lists the petitioner's parents as Paul and Charlene Davis. The petitioner contends she will be able to establish that she was reared by her mother, had no contact

whatsoever with Paul Davis, and never received any type of support from him. Instead, she was told by her mother and other relatives that the decedent was her father.

Both parties agree the petitioner first met the decedent in May 1990, when she was fifteen, and the decedent traveled to her home in North Carolina. In the fall of 1990, the petitioner requested that she be permitted to move to Pennsylvania to live with the decedent. From November 1990 until May 1991, she lived with the decedent. The Williamsport Area High School records list the decedent as her father. On May 21, 1991, the petitioner returned to North Carolina to live with her mother, apparently because of a falling out with the decedent. The petitioner contends that during the time she lived with the decedent she was treated as a member of his family, and the decedent acknowledged her as his daughter to numerous people.

The petitioner was notified of the decedent's death by his sister, Andrea Zerfing. The petitioner immediately traveled to Williamsport, Pennsylvania, where she stayed with Ms. Zerfing and participated in funeral activities as a member of the family. She is listed as the decedent's daughter in his obituary.

After the decedent's death, Tina Reighard, one of the decedent's daughters, mailed the petitioner a Renunciation, which she signed in order to permit Ms. Reighard to serve as sole Administratrix of the estate. The Renunciation lists the petitioner as a purported daughter of the decedent. Later, the petitioner received from Ms. Reighard by mail a release together with a check in the amount of $5,000, representing "Settlement." The petitioner refused to execute the release or negotiate the check. She then filed this petition.

Discussion

The statute at issue is 20 Pa.C.S.A. §2107, entitled "Persons born out of wedlock," which states in subsection (c):

> Child of father.—For purposes of descent by, from and through a person born out of wedlock, he shall be considered the child of his father when the identity of the father has been determined in any one of the following ways:
> (1) If the parents of a child born out of wedlock shall have married each other,
> (2) If during the lifetime of the child, the father openly holds out the child to be his and receives the child into his home, or openly holds the child out to be his and provides support for the child which shall be determined by clear and convincing evidence.
> (3) If there is clear and convincing evidence that the man was the father of the child, which may include a prior court determination of paternity.

The Estate argues that the petitioner may not take shelter under this statute because she was not born out of wedlock. Clearly, this statute does not apply to the petitioner, despite her attempt to argue she was born out of wedlock because her mother was separated from Mr. Davis at the time of the petitioner's birth. The phrase "out of wedlock" means exactly what it says. If a child is born while his or her mother is legally married, that child is not born out of wedlock, whether or not the mother happens to be separated from her husband at the time of the birth. The court will not twist the term "out of wedlock" to mean something the legislature did not intend.

However, the fact that the petitioner cannot come into court under the wing of §2107 does not mean she cannot come into court at all. Section 2107 was not meant to definitively state who could prove paternity and who could not. Instead, it was enacted in response to Trimble et al. v. Gordan et al., 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed. 2d 31 (1977), where the Supreme Court struck down an Illinois statute, similar to the statute in effect in Pennsylvania at the time, which permitted illegitimate children to inherit by intestate succession from their mothers but not their fathers. Section 2107 remedied the equal protection violation by giving children born out of wedlock an opportunity to prove paternity and inherit from their fathers, like children born within wedlock. In short, it was meant to expand intestate inheritance rights—not to contract them. It was not intended to limit which persons can attempt to prove paternity.

Since §2107 does not apply to the petitioner, the question then becomes whether and how she can attempt to prove she is the daughter of a man other than her mother's husband at the time of her birth.[1] As to whether she may prove this, the court sees no reason why she should not have the opportunity to do so. The Intestate Act clearly sets forth which persons are to receive the decedent's property: the decedent's natural children, within the same degree of consanguinity. If the petitioner is a natural child of the decedent, in the same degree of consanguinity as the other two daughters, she deserves an equal share of his property. The only exception the Act makes is for adopted children, who are treated as biological children for this purpose. Since the Act does not exclude natural children who were born while their mothers were married to a different man, this court will not exclude them either. Given the clear intent of the Act, the court can see no justification to deprive the petitioner of the opportunity to prove the decedent was her natural father.

The question then becomes how she may prove it. The obvious barrier here is the presumption of paternity, a long-standing presumption imposed by the courts which states that a child conceived or born in a marriage is the child of the marriage. In order to rebut the presumption, it must be proved by clear and convincing evidence that at the time of conception, the husband either was not physically capable of procreation or had no access to the wife. The public policy behind the presumption of paternity is the concern that "marriages which function as family units should not be destroyed by disputes over the parentage of children conceived or born during the marriage. Third parties should not be allowed to attack the integrity of a functioning marital unit, and members of that unit should not be allowed to deny their identities as parents." Brinkley v. King, 701 A.2d 176, 180 (Pa. 1997).

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[1] After reviewing the relevant case law, neither the court nor the parties could find a case on point. Furthermore, since the cases all involve children born out of wedlock, they shed very little light on the issue at hand.

The presumption of paternity was dramatically altered by the Pennsylvania Supreme Court in Brinkley, supra. In that case, the court stated that in times past, divorce was relatively uncommon and marriages generally remained intact. Applying the presumption, therefore, tended to promote the policy behind the presumption: the preservation of marriages. However, because separation, divorce, and children born to third party fathers during marriage are relatively common now, applying the presumption in all cases is no longer fair. The court therefore concluded the presumption should only be applied in cases where the policies which underlie the presumption will be advanced by its application. Id. at 181. In short, the presumption will be applied only if the marriage is intact at the time of the petition. If there is no marriage to preserve, the policy behind the presumption will not be served, and therefore the presumption will not apply.

Since the presumption of paternity no longer applies in all custody and child support cases, where important issues of child welfare are involved, it makes no sense to apply it to intestate cases, where such issues, if they exist at all, would be minimal. Obviously, when a child born into a family which is no longer intact is shown to be a child of a man other than the husband in an estate proceeding, the child will merely be inheriting money. Since the biological father is dead, the child will not be subject to introducing a stranger into his or her life, who will have the rights and responsibilities of fatherhood.

It could be argued, however, that the presumption of paternity in intestate matters has an additional purpose: to foster the orderly disposition of property at death. While efficiency is something devoutly to be wished, the courts should never promote efficiency at the expense of justice. It is certainly true that proof of paternity is problematic, especially when the purported father is deceased. Still, as the United States Supreme Court has stated, the problems of proving paternity "are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to

shield otherwise invidious discrimination." Trimble, supra, 430 U.S. at 771, 97 S.Ct. at 1466.

The Estate has advanced the old "slippery slope" argument, better known as the "let's not open a can of worms" defense. In its brief, the Estate has posed some "what if" questions. Some of the questions are difficult, and some are not. As hypothetical issues, this court cannot and will not rule on them. However, we have no doubt the Pennsylvania judiciary is fully capable of addressing any hairy factual situations that may arise. Furthermore, we are convinced that such cases as are currently before the court will be relatively rare. And in any event, difficulty for the courts is no reason to deny individuals the chance to establish paternity for intestate succession purposes.

In short, since there is no marriage to preserve in the case at hand, no presumption of paternity should be applied. The question then becomes what type of proof must be offered in a case such as this, where the petitioner was not born out of wedlock, and to which the presumption of paternity does not apply.

Pennsylvania courts have always imposed a heavy burden on an individual claiming paternity of a deceased father. As the Superior Court has stated, "[C]laims of paternity made after the lips of the alleged father have been sealed by death are in that class of claims which must be subjected to the closest scrutiny and which can be allowed only on strict proof so that injustice will not be done." Estate of Owen S. Hoffman, 466 A.2d 1087, 1089 (Pa. Super. 1983). Judging from the cases, as well the wording of §2107(2) and (3), it seems apparent the burden should be clear and convincing evidence. This standard seems appropriate for cases of this type; the heavy burden should discourage spurious claims of paternity of deceased men, while guaranteeing that petitioners who are truly natural children will have an fair opportunity to prove it.

The final question is how to proceed with the case before us. The petitioner has requested the court to order the decedent's body to be exhumed and subjected to DNA

testing, and to order any other person having a biological connection to the decedent to be required to submit to DNA testing. Clearly, the court has the authority to order testing of the mother, child, and alleged father to submit to tests. 23 Pa.C.S.A. §5104(c), 23 Pa.C.S.A., 23 Pa.C.S.A. §4343(c); Wawrykow v. Simonich, 652 A.2d 843, (Pa. Super. 1994). We also have the authority to order exhumation. Wawrykow, supra. We have no authority, however, to order any other persons to submit to tests.

Obviously, it is best to avoid exhumation if at all possible. For guidance as to when exhumation may be ordered, we look to the case of Wawrykow, supra. In that case, the Superior Court found that "a party seeking DNA testing as a vehicle to supplement his/her arsenal of evidence to prove paternity should not be denied access to such potentially probative evidence, provided, as is the case here, the petitioner satisfies the "reasonable cause" criterion to warrant exhumation." Id. at 847. The court must therefore make a determination of whether the petitioner's evidence regarding paternity either dispenses with or necessitates the exhumation of the decedent's body for DNA testing. This will consist of a two-part inquiry. First, the court will hold a hearing at which both sides have the opportunity to present evidence relating to whether the deceased is the petitioner's father. If the court disbelieves the petitioner's evidence, the need to exhume the decedent is mooted since DNA testing is not conclusive of paternity but merely a factor in a chain of elements. However, if the court believes the evidence offered by the petitioner, and feels the issue of heirship would be advanced by allowing exhumation for DNA testing, the second part of the inquiry must take place, in which the court takes testimony on the question of whether the passage of time or embalming will have a deleterious effect on the retrieval or testing of blood and/or tissue samples. Id.at 848. It is possible, of course, the court will find, after the hearing, that the petitioner has presented clear and convincing evidence the decedent is her natural father. In that event, exhumation will not be necessary.

O R D E R

AND NOW, this _____ day of October, 2003, for the reasons stated in the foregoing opinion, the petition filed by Brooke Lynn Davis is granted and it is ordered that a hearing shall be held on December 5, 2003 at 1:30 p.m. At the hearing, both sides will have the opportunity to present evidence on the issues of: (1) Whether Brooke Lynn Davis is the natural daughter of the deceased, and (2) Whether the passage of time or embalming will have a deleterious effect on the retrieval or testing of blood and/or tissue samples for the purpose of paternity testing.

BY THE COURT,

____

Clinton W. Smith, P.J.

cc: Dana Jacques, Esq., Law Clerk
Hon. Clinton W. Smith
Peter Facey, Esq.
Benjamin Landon, Esq.
Malcolm Mussina, Esq.
Gary Weber, Esq.