
NO. A05-438

State of Minnesota
In Supreme Court

In re the Estate of Leonard Earl Jotham
a/k/a Leonard E. Jotham, a/k/a Leonard Jotham

APPELLANT SANDRA BARNETT'S REPLY BRIEF

Timothy D. Kelly (#54926)
KELLY & BERENS, P.A.
80 South Eighth Street
Suite 3720
Minneapolis, MN 55402
(612) 349-6171

James W. Nelson (#12123X)
510 Maple Street
P.O. Box 631
Brainerd, MN 56401
(218) 829-4717

Attorneys for Appellant Sandra Barnett

Raymond A. Charpentier (#16238)
CHARPENTIER & LANGE
718 Front Street
P.O. Box 341
Brainerd, MN 56401
(218) 829-7365

Attorneys for Respondent Diann Nelson

Thomas C. Pearson (#260071)
ERICKSON, PEARSON & AANES
319 South Sixth Street
P.O. Box 525
Brainerd, MN 56401
(218) 829-7852

Attorneys for Selma Marie Jotham

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| I. INTRODUCTION. | 1 |
| II. THE PARENTAGE ACT PRECLUDES DIANN’S CHALLENGE TO SANDRA’S PARENTAGE. | 3 |
| A. The Fact That Leonard Never Had a Timely Action Under the Parentage Act Is Irrelevant. | 3 |
| B. Diann’s Parentage Challenge Has No Support at Law and Is Contrary To Established Policy. | 4 |
| 1. The Standing and Timeliness Restrictions of the Parentage Act Apply to Parentage Challenges in Any Proceeding, Including Intestacy Proceedings. | 5 |
| 2. The Doctrines of Collateral Estoppel and <i>Res Judicata</i> Are Inapplicable to Parentage Challenges By Strangers to the Parent-Child Relationship. | 7 |
| CONCLUSION. | 9 |

TABLE OF AUTHORITIES

Page

CASES

Dorman v. Steffan, 666 N.W.2d 409 (Minn. Ct. App. 2003)..... 6

Estate of Martignacco, 689 N.W.2d 262 (Minn. Ct. App. 2004) 5

Hapka v. Paquin Farms, 458 N.W.2d 683 (Minn. 1990) 4

Haugen v. Swenson, 16 N.W.2d 900 (Minn. 1944) 4

In re Estate of Handy, 672 N.W.2d 214 (Minn. Ct. App. 2003) 8

In re Trust Created by Agreement by Johnson, 765 A.2d 746 (N.J.), cert. denied, 534 U.S. 889 (2001)..... 6

In re the Matter of Horton Irrevocable Trust Dated February, 1981, 668 N.W.2d 208 (Minn. Ct. App. 2003) 5

In the Matter of Lamey, 689 N.E.2d 1265 (Ind. Ct. App. 1997)..... 6, 7, 8

In the Matter of the Trusteeship of the Trust Created Under Trust Agreement Dated December 31, 1974, 674 N.W.2d 222 (Minn. Ct. App.), review denied, 2004 Minn. LEXIS 208 (Apr. 22, 2004)..... 1, 2, 6

Michael H. v. Gerald D., 491 U.S. 110 (1989) 2

Peterson v. BASF Corp., 675 N.W.2d 57 (Minn. 2003) 3

STATUTES

Minn. Stat. § 257.55 (2004) passim

Minn. Stat. § 524.2-114(2) (2004) 6

OTHER AUTHORITIES

Cal. Evid. Code § 621(a) (1989)..... 2
Cal. Evid. Code § 621(b) – (d) (1989) 2

RULES

Minn. R. Civ. App. P. 117, subd. 4..... 3, 4

REPLY

I. INTRODUCTION.

Diann argues that, in the context of an intestacy proceeding, strangers to the parent-child relationship may seek to defeat a statutory and irrebuttable presumption that establishes the relationship, as long as the relationship was never formally “adjudicated” during the life of the decedent. This argument cannot withstand scrutiny.

In Minnesota, most parent-child relationships (the exception being those involving adoptions) never require or involve adjudications in an adversary proceeding. They are legally established by virtue of common-law or statutory presumptions—most notably those applicable to children born during or within 280 days after a marriage.¹ Because of the social importance of family stability and harmony, these presumptions may only be challenged by a very limited group of persons, and only during a limited time frame. *See In the Matter of the Trusteeship of the Trust Created Under Trust Agreement Dated December 31, 1974 (“In re December 1974 Trust”),* 674 N.W.2d 222, 231 (Minn. Ct. App.), *review denied*, 2004 Minn. LEXIS 208 (Apr. 22, 2004). Once the time to challenge

¹ *See* Minn. Stat. § 257.55 (2004).

the presumption passes, “the presumption becomes irrebutable.” *Id.* (emphasis added); see also *Michael H. v. Gerald D.*, 491 U.S. 110, 119-20 (1989).²

If adopted, Diann’s argument would turn on its head Minnesota’s law and policy regarding challenges to conclusively established parent-child relationships, as illustrated by the following examples:

Example 1: Child is born during a six-month marriage between Man and Woman, a fact later referenced within a divorce decree. Following Woman’s death, Man dies intestate. Man has a sibling (Uncle) who, except for Child, is Man’s sole heir. Under Diann’s argument, Uncle is precluded from challenging Child’s parentage because of the “adjudication” of the parent-child relationship in the divorce decree.

Example 2: Child is born during a happy, forty-five year marriage between Man and Woman. Following Woman’s death, Man dies intestate. Man has a sibling (Uncle) who, except for Child, is Man’s sole heir. Under Diann’s argument, because Child’s longstanding relationship with Man has never been “adjudicated” (it has never been at issue), Uncle is free to challenge Child’s parentage and does so.

² Diann attempts to distinguish *Michael H.* by claiming that the California statutory presumptions at issue were “conclusive,” a term not specifically used by the Minnesota Parentage Act. Resp. Br. at 11. While the California statute refers to a “conclusive” presumption (Cal. Evid. Code § 621(a) (1989)), other subsections of the same provision make it clear that the “conclusive” presumption is rebuttable, ***but (as in Minnesota) only by persons with standing to do so and only within a limited period of time.*** Cal. Evid. Code § 621(b) – (d) (1989); see also *Michael H.*, 491 U.S. at 115 (“The presumption may be rebutted by blood tests, but only if a motion for such tests is made, within two years from the date of the child’s birth, *either by the husband or, if the natural father has filed an affidavit acknowledging paternity, the wife.*”) (emphasis added). Thus, the statutory procedure in *Michael H.* is the same as Minnesota’s Parentage Act—there is a limited time for which certain persons may seek to rebut a presumption of parentage, and once that time expires, “the presumption becomes irrebutable,” precluding any challenges to parentage. Compare *In re December 1974 Trust*, 674 N.W.2d at 231, with *Michael H.*, 491 U.S. at 115.

As a practical matter, Child in Example 2 would be forced to conduct DNA tests to prove her relationship to Man (presumably by exhuming Man's corpse). If Man has been cremated, Child may be unable to prove the biological relationship, potentially defeating her status as Man's heir. This result would be absurd. It would render the presumptions and procedures the Legislature established to govern all parentage challenges wholly ineffective.

II. THE PARENTAGE ACT PRECLUDES DIANN'S CHALLENGE TO SANDRA'S PARENTAGE.

A. The Fact That Leonard Never Had a Timely Action Under the Parentage Act Is Irrelevant.

Diann points to the fact that, since the Minnesota Parentage Act was adopted decades after Sandra's birth, Leonard could not have utilized the Act's procedures to challenge his parentage of Sandra. To the extent Diann is arguing that the Parentage Act does not apply to children in being as of the date of its enactment, the argument (rejected by both the district court and the Court of Appeals³) is not properly before the Court because Diann never requested cross-review of the Court of Appeals' ruling on this issue. Minn. R. Civ. App. P. 117, subd. 4; *see also Peterson v. BASF Corp.*, 675 N.W.2d 57, 67 (Minn. 2003) (with respect to Appellate Rule 117, "a party should bring issues ripe for review to the supreme court's attention with specificity, or waive the opportunity to have

³ As both the district court and Court of Appeals correctly noted, the Legislature—both by inclusion of language in the Act and the repealer of then-existing laws for establishing paternity—clearly contemplated that the Parentage Act applies to persons born before the Act's effective date. *See* A.12-A.14; A.18-A.19.

them reviewed”); *Hapka v. Paquin Farms*, 458 N.W.2d 683, 686 (Minn. 1990) (refusing to consider an issue not raised within party’s Rule 117 submission).

To the extent Diann is arguing that Leonard was not Sandra’s presumed father until the Parentage Act was enacted, and thus did not have an opportunity to rebut the presumption that Sandra is his child and heir, Diann is simply wrong. Under Minnesota law, Leonard has always been Sandra’s presumed father. *See Haugen v. Swenson*, 16 N.W.2d 900, 902 (Minn. 1944) (child born after parties’ divorce but conceived while parties were married is presumed to be the legitimate child of the husband). Leonard could have taken steps at any time during the 32 years before the enactment of the Parentage Act to challenge the presumption that Sandra was his natural child. He never did so. Similarly, he could have made a will disinheriting Sandra at any time prior to his death in 2004. He did not do that either.

B. Diann’s Parentage Challenge Has No Support at Law and Is Contrary To Established Policy.

Diann acknowledges that her challenge to Sandra’s parentage is not “defensive” as that term is used in case law involving issues of parentage.⁴ Resp. Br. at 12, 20. This acknowledgment highlights the policy issue raised in this appeal—whether the now-irrebuttable presumption of Sandra’s parentage has any meaning or effect outside of cases brought specifically under the Parentage Act.

⁴ A denial of paternity is defensive only when asserted by the presumed father in an action seeking to enforce a legal duty that exists by reason of the parentage at issue. *See* discussion, Appellant’s Br. at 19-20.

Compared to the numerous decisions cited by Sandra barring any parentage challenges by persons not directly involved in the parent-child relationship (whether such challenges are made in the context of heirship or other proceedings),⁵ Diann is *unable to cite a single reported decision* where such a challenge has been permitted. The reason is obvious—permitting such challenges contravenes strong public policies favoring the preservation of family harmony, stability and privacy. Diann provides no reason why this Court should permit her to undermine such policies for the sole purpose of seeking a larger portion of Leonard’s estate.

1. The Standing and Timeliness Restrictions of the Parentage Act Apply to Parentage Challenges in Any Proceeding, Including Intestacy Proceedings.

Diann asserts that the Parentage Act’s standing and timeliness restrictions do not preclude her parentage challenge because her challenge is made in an intestacy proceeding.⁶ She presents no statutory or decisional support for this position.⁷ The

⁵ See Appellant’s Br. at 10-12.

⁶ Diann also claims that the issue of standing was not addressed below and should not be a part of the appeal. This is inaccurate. The Court of Appeals clearly addressed standing (albeit incorrectly) in its analysis of the “appropriate action” language from Subdivision 2 of Section 257.55 of the Parentage Act, when it concluded that this subsection “does not limit who may rebut a presumption of paternity. . . .” A.21. Moreover, Minnesota law is clear that the question of standing cannot be waived and may be raised at any time. *In re: the Matter of Horton Irrevocable Trust Dated February, 1981*, 668 N.W.2d 208, 212 (Minn. Ct. App. 2003) (appellate courts are required to address the issue of standing “even if the courts below have not passed on it, and even if the parties fail to raise the issue before us”) (citations omitted).

⁷ The *Martignacco* case cited by Diann is inapposite here. In that case, a child was permitted to offer evidence to **establish** his relationship with a parent. *Estate of Martignacco*, 689 N.W.2d 262, 267-68 (Minn. Ct. App. 2004). It is well settled that

Probate Code confirms that the provisions of the Parentage Act apply to intestacy proceedings: one way a parent-child relationship may be established in intestacy proceedings is via the presumptions contained within the Parentage Act. Minn. Stat. § 524.2-114(2) (2004). Where a relationship is established by presumption from the Parentage Act (as is the case here), it defies logic and sound policy to conclude that the Act's limitations on challenges to the very presumption at issue do not also apply. Nor would it make any sense to permit a father's relative or other child (such as Diann) to challenge the parentage of one of the father's children when the father himself could not do so because of a time bar.

Uniform case law rejects efforts to evade limits on challenging a statutory presumption of parentage, regardless of whether such attempted challenges are made in an intestacy proceeding or another type of action. *See, e.g., In the Matter of Lamey*, 689 N.E.2d 1265, 1269 (Ind. Ct. App. 1997) (rejecting argument by decedent's relative that action merely sought to determine heirship, as opposed to challenging parentage); *In re December 1974 Trust*, 674 N.W.2d at 228 (recognizing action by trustees as a collateral

actions to establish a parent-child relationship are subject to different procedures compared to those seeking to defeat a parent-child relationship. *See, e.g., Dorman v. Steffan*, 666 N.W.2d 409, 412 (Minn. Ct. App. 2003); *In re Trust Created by Agreement by Johnson*, 765 A.2d 746, 749 (N.J.), *cert. denied*, 534 U.S. 889 (2001). The *Johnson* decision confirms the policy that parentage laws are designed to foster, not thwart, parent-child relationships. Therefore, actions seeking to establish parentage are viewed and treated differently from those seeking to defeat parentage. *Johnson*, 765 A.2d at 754. Diann makes no effort to address the different policy considerations involved with these two distinct types of cases.

attack on parentage, even though the action was brought under statute permitting trustees to seek instructions).

As referenced in Sandra's initial brief,⁸ the facts in *Lamey* are strikingly similar to the present case. To distinguish *Lamey*, Diann offers a single sentence: "Appellant fails to state to the Court that in the *Lamey* decision, paternity had already been established by a divorce decree, between the decedent and the decedent's former wife." Resp. Br. at 13. This fact, however, **played no role** in the *Lamey* court's refusal to permit the decedent's brother from challenging the parentage of the decedent's child as part of an heirship proceeding. Instead, the *Lamey* court precluded the challenge based upon the brother's lack of standing to question the then-irrebuttable presumption of parentage that had arisen from the birth of the child during the decedent's marriage. *Lamey*, 689 N.E.2d at 1268-69. This same lack of standing precludes Diann's challenge here.

2. The Doctrines of Collateral Estoppel and *Res Judicata* Are Inapplicable to Parentage Challenges By Strangers to the Parent-Child Relationship.

Diann recognizes that there must, as a matter of public policy, be limits upon parentage challenges in proceedings not brought under the Parentage Act, but argues that the "concepts" of collateral estoppel and *res judicata*—as opposed to the Parentage Act's standing and timeliness restrictions—determine whether such a collateral attack on parentage may be made. Resp. Br. at 9. Diann then fails to explain how these "concepts" can or do limit such collateral attacks. Collateral estoppel and *res judicata* cannot

⁸ Appellant's Br. at 11-12; 15-16.

prevent a third-party's collateral attack upon the "adjudication" of parentage as part of a divorce decree; these doctrines bind only parties to the prior litigation (or, in some cases, those in privity). See *In re Estate of Handy*, 672 N.W.2d 214, 220 (Minn. Ct. App. 2003). As explained by the *Lamey* court, the establishment of paternity via a divorce decree only binds the parties to it,⁹ not siblings or strangers who seek to gain by challenging the parentage confirmed within the divorce decree.

The flaws with Diann's argument regarding collateral estoppel and res judicata are illustrated by an example:

Child A is born during Man's first marriage, which lasts six months. The marriage ends in divorce, and Child A's parentage is "adjudicated" as part of the divorce decree. Man remarries. During the third year of Man's second marriage—which lasts thirty years—Child B is born. Man later dies intestate.

Under Diann's argument, Child A could challenge Child B's parentage during the intestacy proceeding, but Child B could not challenge Child A's parentage, because Child B would be "estopped" by virtue of the divorce decree. Apart from being an incorrect application of law (persons not in being at the time of an adjudication cannot be barred by collateral estoppel or *res judicata*¹⁰), such a result would be wholly illogical, and contrary

⁹ *Lamey*, 689 N.E.2d at 1269.

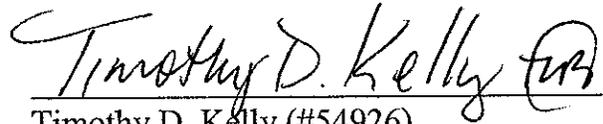
¹⁰ Assuming parentage challenges were permitted outside the restrictions established by the Parentage Act, Sandra could challenge *Diann's* parentage, because Sandra had not been born at the time of the divorce decree between Leonard and Margaret, and thus not barred by collateral estoppel or *res judicata*. This "open season" on parentage challenges further demonstrates the Pandora's Box that would be opened by permitting such challenges beyond the limitations of the Parentage Act.

the sound policies the Parentage Act and Minnesota common law have long sought to advance.

CONCLUSION

For the reasons set forth above, Appellant respectfully requests that this Court reverse the Court of Appeals' decision and reinstate the district court's order.

Dated: February 22, 2006

Handwritten signature of Timothy D. Kelly in cursive, with a circled 'TB' to the right.

Timothy D. Kelly (#54926)
KELLY & BERENS, P.A.
80 South Eighth Street
Suite 3720
Minneapolis, MN 55402
(612) 349-6171

James W. Nelson (#12123X)
P.O. Box 631
510 Maple Street
Brainerd, MN 56401
(218) 829-4717

Attorneys for Appellant Sandra Barnett