
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

**BRIEF AND APPENDIX
OF RESPONDENT DIANN NELSON**

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>
TABLE OF AUTHORITIES	2
STATEMENT OF THE ISSUE	3
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	7
ARGUMENT	
I. Summary of the Argument	9
II. No Prior Parentage Determination	10
III. Timeliness	12
IV. Heirs Must Prove Relationship	12
V. Probate Proceeding Determines Heirs	13
VI. Alternate Methods to Establish Heirship	14
VII. Heirship Where “Presumed Father” Exists	16
VIII. Right to Defend	19
CONCLUSION	21

TABLE OF AUTHORITIES

Page

Cases

<u>In re Estate of Karger v. Karger</u> 253 Minn. 542, 93 N.W.2d 137 (Minn. 1958)	19, 20
<u>In Re Estate of Martignacco</u> 2004, WL 2663148 (Minn. Ct. App.) ...	3, 16, 17, 18
<u>In re Estate of Palmer</u> 658 N.W.2d 197 (Minn. 2003)	3, 14, 20
<u>In re Trust Created by Agreement by Johnson</u> 166 N.J. 340, 765 A.2d 746 (N.J. 2001)	14, 15
<u>In re State of Georgia ex rel. Brooks v. Braswell</u> 474 N.W.2d 346 (Minn. 1991)	3, 17
<u>In the Matter of Lamey</u> 689 N.E.2d 1265 (Ind. Ct. App. 1997)	13
<u>Michael H. v. Gerald D.</u> 149 U.S. 110 (1989)	11
<u>Murphy v. Myers</u> 560 N.W.2d 752 (Minn. Ct. App. 1997)	19
<u>Reynolds v. Reynolds</u> 458 N.W.2d 103 (Minn. 1990)	3, 13
<u>State, Douglas County ex rel. Ward on Behalf of J.M.K. v. Carlson</u> 409 N.W.2d 490 (Minn. 1987)	13
<u>Wingate v. Estate of Ryan</u> 140 N.J. 227, 693 A.2d 457 (1997)	14

Statutes

Minn. Stat. § 524.1-201 (24)	11
Minn. Stat. § 524.2-114	3, 12, 16
Minn. Stat. § 252.51 Laws 1980 C.589	10
Minn. Stat. § 257.55	3, 13
Minn. Stat. § 257.57	3, 10
Minnesota Constitution Article I § 7	3, 13

Secondary Authorities

Transcript Page 12 Line 5 (December 15, 2004)	18
---	----

STATEMENT OF THE ISSUE

Whether, for purposes of intestate succession, the Trial Court can exclude factual evidence of paternity as an affirmative defense and declare parentage, as a matter of law, under the provisions of the Minnesota Parentage Act, denying interested parties the opportunity to rebut the presumption of parentage, where no actual adjudication of parentage has been made under the Parentage Act.

The Trial Court held that factual evidence of paternity was not admissible; the Court of Appeals reversed and remanded the case to the Trial Court.

Apposite Cases & Law

Estate of Martignacco 2004, WL 2663148 (Minn. Ct. App. 2004)

In re Estate of Palmer 658 N.W.2d 197 (Minn. 2003)

Reynolds v. Reynolds v. County of Nicollet v. Sullivan 458 N.W.2d 103 (Minn. 1990)

In re State of Georgia ex rel. Brooks v. Braswell 474 N.W.2d 346 (Minn. 1991)

Constitution

Minnesota Constitution Article I § 7

Statutes

MS § 524.2-114

MS § 257.57

MS § 257.55

STATEMENT OF THE CASE

This matter involves the estate of Leonard Earl Jotham who died, intestate, on June 8, 2004. His second wife, Selma Marie Jotham filed a Petition for Formal Adjudication of Intestacy, Determination of Heirs and Appointment of Administrator. (A.1) The Petition alleged that Leonard Earl Jotham was survived by a wife, Selma Marie Jotham, and two daughters, Diann Nelson and Sandra Barnett. Diann Nelson objected to the Petition, asserting that Sandra Barnett is not a child of Leonard Earl Jotham. (A.2) The matter was assigned to the Honorable Judge Leitner, Judge of Crow Wing County District Court.

As a result of discussion at the Scheduling Conference the Trial Court requested Memorandums and oral argument on the question of whether Sandra Barnett was, as a matter of law, a child of Leonard Earl Jotham. The parties stipulated as to certain facts, essentially as follows:

Leonard Earl Jotham was divorced from Margaret L. Jotham n/k/a Margaret L. Daidone by Findings of Fact, Conclusions of Law and Order for Judgment dated June 6, 1947 determining, among other things, that the parties had a child, namely Diann Jotham, n/k/a Diann Nelson. On March 16, 1948, Sandra Jotham n/k/a/ Sandra Barnett was born to Margaret L. Jotham. Leonard Earl Jotham has died intestate and Sandra Barnett now claims to be the child of Leonard Earl Jotham. No paternity action was ever conducted to determine the father of Sandra Barnett. (A.3)

However, Affidavits of Diann Nelson and Margaret L. Daidone, Sandra Barnett's mother, were offered to the Court with respect to facts to which Sandra Barnett would not stipulate, regarding allegation of a biological father other than Leonard Earl Jotham and her knowledge of that man. (A.4)

The Trial Court issued its order on February 3, 2005, declaring that, as a matter of law, Sandra Barnett is a child of Leonard Earl Jotham, without an evidentiary hearing. Diann Nelson, the adjudicated daughter of Leonard Earl Jotham appealed from that order that declared Sandra Barnett to be, as a matter of law, a child of Leonard Earl Jotham. Intermediate Court of Appeals on October 11, 2005 reviewed and remanded the matter to the Trial Court, holding that the Parentage Act's limitations period for actions to declare the nonexistence of the father-child relationship does not apply to determinations of parentage for purposes of intestate succession, and that the District Court erred by concluding that it could not consider evidence that Nelson had sought to offer to rebut the presumption of decedent's paternity of Barnett. Sandra Barnett filed a Petition for Review by the Supreme Court and Diann Nelson filed an Opposition for that Petition. By Order filed December 13, 2005, the Supreme Court granted Sandra Barnett's Petition for Review.

Contrary to Appellant's statement of the case, Appellant did not allege, at the Trial Court level, nor did she at the Intermediate Appellate Court level, allege that Diann Nelson lacked standing to challenge the paternity of Sandra Barnett. Rather,

the Appellant relied upon the argument that Diann Nelson's challenge was untimely and that the presumption of paternity under the Parentage Act was no longer rebuttable, as a result of the statutes of limitations set forth in the Parentage Act.

STATEMENT OF FACTS

Leonard Jotham and Margaret Daidone were divorced in 1947. On June 6, 1947 Judge Graham M. Torrance issued his Findings of Fact, Conclusions of Law and Order for Judgment. A.41. The Clerk of Court entered the Judgment and Decree five days later on June 11, 1947 (A.43) and 279 days before Sandra Barnett was born on March 16, 1948. A.8. Sandra Barnett chooses, in her Statement of Facts, to selectively pull from the Affidavit of Diann Nelson that she, Sandra Barnett, lived with Leonard Jotham “for a portion of her childhood,” seeking, at the same time, to ignore that balance of the offered Affidavit testimony as irrelevant.

Appellant further states that neither Leonard Jotham nor Margaret Daidone ever took any steps to challenge the “judicial presumption of the parent-child relationship between Leonard (Jotham) and Sandra (Barnett),” but fail to recite that the statute of limitations applicable to the statutory presumption had run, prior to enactment of the Parentage Act, given that Sandra Barnett was 32 (A.8) years old before the Parentage Act was adopted in 1980.

Appellant mis-states that “until his (Leonard Jotham) death, he was her (Sandra Barnett) father from all legal perspectives.” The accurately stated fact is that he was not even the “presumed” father of Sandra Barnett until the Parentage Act was

adopted and she was, then, age 32. A.8. Even at that juncture, she was only the presumptive child of Leonard Jotham and she has never been adjudicated as the child of Leonard Jotham.

ARGUMENT

I. Summary of the Argument

In Minnesota, as in many other jurisdictions, it has long been recognized that inheritance laws and paternity laws have served two very different functions. Historically we have also been very limited in the scope of scientific evidence available to determine biological parentage. The lack of scientific evidence was further exacerbated by the potential of minor children being stigmatized as being “illegitimate,” in a society that acted scandalized by that term.

Science has progressed and social norms have changed.

Today, science can and does determine parentage with amazing accuracy.

And, from a social perspective, the term “family” has blurred and long-term relationships have become less the norm than the “blended family.”

This is the real context in which we live.

We have available to us, the ability to determine the truth and the obligation to utilize that ability without resorting to fictions. We are not abrogating res judicata because the matter of Sandra Barnett’s paternity has never been litigated.

We posit to the Court, that had Sandra Barnett’s paternity been adjudicated, as was the case with Diann Nelson, the concepts of res judicata and collateral estoppel would apply.

Certainly the Parentage Act serves to ensure social responsibility for the care of minors, whether it be by assigning responsibility for child support or to protect that child in wrongful death claims or in workers compensation claims. It also serves to provide certainty, where parentage is actually adjudicated.

Here, where no adjudication has occurred, and where the issue is one of inheritance, rather than social responsibility for a minor, the goal under the probate code should be to determine the truth and establish the true heirs of Leonard Jotham.

II. No Prior Parentage Determination

As we stated to the Intermediate Appellate Court, our beginning point in this case is that no judicial determination of parentage has ever been made with respect to Sandra Barnett. No determination of her parentage could have been made under the Parentage Act. The statute was adopted decades after her birth¹ and the statute of limitations for determination of her parentage under the Act had expired long before the enactment date². Sandra Barnett was 32 years old before the Parentage Act was enacted. Neither she nor Leonard Earl Jotham could have used the Parentage Act to establish the existence or non-existence of a parent-child relationship.

¹MS § 252.51 Laws 1980 C.589

²MS § 257.57

The Appellant now raises, for the first time, the issue of standing. In doing so, she cites to Michael H. v. Gerald D. 491 U.S. 110, 119-120 (1989)³ as support for the proposition that a third party cannot challenge paternity. While it is not proper, at this state of the proceedings to, for the first time, raise the issue of standing, nonetheless, our case is clearly and easily distinguishable from the case cited by the Appellant. The case considered by the U.S. Supreme Court dealt with a portion of the California law that holds that: “the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage” Michael H. v. Gerald D. 491 U.S. 110, 115 (1989)⁴. The key, of course, is that the California statute specifically recites that the presumption in California is conclusive. Minnesota’s Parentage Act contains no language making a presumption of parentage conclusive.

We also must note that standing to litigate an issue under the Parentage Act is not the same as standing to litigate an issue in a probate case. Diann Nelson has never sought to invoke any portion of the Parentage Act in her defensive response to Sandra Barnett’s attempt to inherit under the Minnesota probate code. Diann Nelson, however, as the adjudicated daughter of Leonard Jothan, certainly has standing under the probate code⁵.

³Michael H. v. Gerald D., 491 U.S. 110, 119-120 (1989)

⁴See *Id.* at 115

⁵Minn. Stat. § 524.1-201 (24)

III. Timeliness

The timeliness issue should not, then, be analyzed in the context of the Parentage Statute but rather in the context of the probate code.

IV. Heirs Must Prove Relationship

In every instance of intestacy, the burden is upon those seeking to be declared next of kin to prove they are related.⁶ Most often, the claim is not challenged. A wife claims to be a wife and a child claims to be a child.

When a challenge arises, each alleged heir has the burden of going forward. A marriage license may seem convincing, but pales next to a divorce decree. A birth certificate may seem convincing, but pales next to a blood test.

Appellant cites to a multitude of cases that deal with conclusive presumptions or wrongful death actions or worker's compensation issues or even trust issues, all distinguishable from the case now before this Court. The public policy issues of protecting minor children from attacks on their parentage from third party tortfeasors is easily understood.

Applying *res judicata* where an adjudication has occurred is also understandable and distinguishable from this case.

⁶MS § 524.2-114

The Appellant, for instance, cites to In the Matter of Lamey⁷ to support denial of blood testing evidence. Appellant fails to state to the Court that in the Lamey decision, paternity had already been established by a divorce decree,⁸ between the decedent and the decedent's former wife.

V. Probate Proceeding Determines Heirs

We must recognize that the probate proceeding for Leonard Earl Jotham's estate was not initiated for purposes of proving the non-existence of anyone's parentage. However, once an allegation of heirship is put forth, opposing parties have the right to litigate and raise defenses.⁹ Our Supreme Court, in Reynolds v. Reynolds¹⁰ citing to State v. Carlson¹¹ said, "Even if the right to bring an action for a declaration of the nonexistence of the father and child relationship presumed under section 257.55, subd. 1, clause (a), (b), or (c) has been foreclosed by the lapse of time, nothing in the Parentage Act either precludes a presumed father from denying paternity or obstructs the disclosure of the true facts of parentage."

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

⁸See *id.* at 1266

⁹Minnesota Constitution Article I § 7

¹⁰Reynolds v. Reynolds 458 N.W.2d 103, 105 (Minn. 1990)

¹¹State, Douglas County ex rel. Ward on Behalf of J.M.K. v. Carlson 409 N.W.2d 490, 493 (Minn. 1987)

VI. Alternate Methods to Establish Heirship

The Palmer¹² case clearly states that parentage for purposes of intestate succession may be established either through the Parentage Act or through clear and convincing evidence. Since no determination of Sandra Barnett's parentage has ever been made, she is afforded the opportunity to establish her parentage by clear and convincing evidence. This does not mean that other interested parties should be estoppel from presenting evidence, including DNA evidence, that refutes her contention that she is a child of Leonard Earl Jotham.

The Appellant seeks to cast doubt upon the wisdom of the Palmer case or any logical extension of the case because of its reliance upon its citation to Wingate¹³. This is done by way of the more recently decided case of In re Trust Created by Agreement by Johnson 765 A.2d.746 (N.J. 2001).

At first blush and without close analysis, the narrow quote provided by the Appellant with emphasis added where the Appellant would like emphasis added seems to add credence to her position.

If we review the decision and include the balance of the cited paragraph and the first sentence of the next paragraph of the decision, we see a different vision of the Court's decision.

¹²In re Estate of Palmer 658 N.W.2d 197 (Minn. 2003)

¹³Wingate v. Estate of Ryan 140 N.J. 227, 693 A.2d 457 (1997)

That more inclusive snapshot reads:

“Because those amendments authorize a potential heir of a decedent to contest a will or a trust in the context of a probate proceeding, the Appellate Division here reasoned that third parties in a like proceeding may collaterally attack an adjudication of parentage made in an earlier divorce action. We reject that reasoning. **755 We interpret *Wingate* and the amendatory enactments more narrowly to apply principally to parties seeking to establish or confirm their parentage, as opposed to those seeking to defeat the established parentage of others. See *Wingate, supra*, 149 N.J. at 240, 693 A.2d 457 (noting that legislative approach reflected in Probate Code is intended “to make it easier, not harder or impossible, for persons born out of wedlock to establish heirship”).

[5] Moreover, we agree with the trial court that the Parentage Act essentially forecloses a third-party attack on Jenia’s parentage. The Act broadly accepts proof of paternity as “adjudicated under prior law,” N.J.S.A. 9:17-41b, as well as in a host of other settings.”¹⁴

¹⁴In re Trust Created by Agreement by Johnson 166 N.J. 340, 355, 765 A.2d 746, 754-755 (N.J. 2001)

We now see that the Court is addressing a situation where parentage has been already adjudicated and the Court is really applying settled concepts of res judicata and collateral estoppel.

VII. Heirship Where “Presumed Father” Exists

We then turn our attention to In Re Estate of Martignacco 2004, WL 2663148 (Minn. Ct. App.). The “threshold issue” described in the Martignacco case was whether the statute of limitations set forth in the Parentage Act should be applied to bar determination of parentage for intestate succession under Minn. Stat. § 524.2-114 of the probate code. In the Martignacco case, the Court allowed Robert Reed to move forward and establish that he was the biological son of Adolph L. Martignacco, even though Mr. Reed had a “presumed father,” Harold Reed, by whom he had been raised. In that case the Court specifically said, “We hold that conclusive genetic proof can establish parentage under the probate code for purposes of intestate succession.”¹⁵

Sandra Barnett contends that Leonard Earl Jotham is her “presumed father.” She and her attorneys have sought to distinguish Martignacco from the case now on appeal. The argument seems to be that a person should be allowed to establish parentage for intestate succession under M.S. § 524.2-114, but that no affirmative defense should be allowed because Sandra Barnett claims that Leonard Earl Jotham

¹⁵ In Re Estate of Martignacco 2004, WL 2663148 (Minn. Ct. App.) Page 5

is her “presumed father.” Sandra Barnett and her attorneys apparently believe that if no determination of Parentage has been made under the Parentage Act, the Courts should apply the “presumptions” of the Parentage Act, without ever allowing an opportunity for such a “presumption” to be tested by fact evidence. In In re State of Georgia ex rel. Brooks v. Braswell 474 N.W.2d 349 (Minn. 1991) this Court said:

“[1][2] At the outset we note that the disposition of this matter has been complicated by the failure of the parties and of both lower courts to distinguish between an action for the purpose of declaring the nonexistence of the father and child relationship pursuant to section 257.57, subd. 1(b) and the denial of paternity asserted to rebut the presumption of paternity created by Minn.Stat. § 257.55, subd. 1(a) (1990), despite our identification and discussion of the differences between offensive and defensive application of a denial of paternity in *State ex rel. Ward v. Carlson*, 409 N.W.2d 490 (Minn. 1987).”

It is also impossible to square such logic with the Court’s conclusions in the Martignacco¹⁶ case. The Trial Court, in the case now before the Court, has not considered testimony of the biological mother or any other person nor has it provided an opportunity for DNA testing of the parties. Yet in the Martignacco case, Mr. Reed had a “presumed father,” and the Court accepted and weighed testimony that

¹⁶See id.

contradicted the statutory “presumption.” Even if Leonard Earl Jotham is the “presumed father” of Sandra Barnett, the Court should accept and weigh testimony as to whether the “presumption” can be rebutted.

In the Martignacco¹⁷ case we are left, somewhat, to speculate as to what would happen if Mr. Reed’s “presumed father” had later died intestate. Having already inherited from Mr. Martignacco’s estate, as a biological child, could he then rely on the “presumption” to bootstrap himself into a second inheritance?

We can only conclude that when the Court in Martignacco said that conclusive genetic proof could establish parentage under the probate code, as cited above, that it did not intend to establish a policy that barred conclusive genetic testing from refuting parentage as an affirmative defense. Thus such testing and such other relevant testimony as might be available should be considered in determining the relationship of Sandra Barnett to Leonard Earl Jotham. Already the Trial Court has been offered affidavit testimony from the biological mother that refutes any presumption. (A.4) The Trial Court has also been alerted to the failure of Sandra Barnett to respond to requests for admissions, though her counsel argued that they didn’t, by that failure, intend to admit anything.¹⁸

¹⁷See id.

¹⁸Transcript Page 12 Line 5 (December 15, 2004)

VIII. Right to Defend

Appellant has held out to the Court that Diann Nelson's objection to the probate petition is not defensive in nature and seeks to distinguish this case from an affirmative defense in a paternity action.

This case, of course, must be analyzed in the context of probate law and not in the context of paternity law.

At least as far back as In re Estate of Karger v. Karger 253 Minn. 542, 93 N.W.2d 137 (Minn. 1958) our Courts have been drawing distinct differences between the legislative purpose of paternity statutes and the legislative purpose for inheritance statutes. In analyzing the statutes that were predecessors to the current probate code and the current Parentage Act, the Court said in Karger, "In ascertaining to what extent the legislature has conferred inheritance rights upon illegitimates, we cannot construe § § 525.172 and 257.23 with reference to each other since these two statutory sections are wholly unrelated in basic purpose and are not in pari materia with each other."¹⁹

The legislative purpose addressed for the paternity statute reviewed in Karger has not changed with the adoption of the Parentage Act and that purpose was reiterated in Murphy v. Myers 560 N.W.2d 752, 754 (Minn. Ct. App. 1997) when the

¹⁹In re Estate of Karger v. Karger 253 Minn. 542, 549, 93 N.W.2d 137, 143 (Minn. 1958)

Court held, “Nothing in Minnesota case law differentiates this state from others in these regards. The purpose of a paternity action is not to punish the father, but rather to impose a duty on the father to support the child, to ensure [that] the mother does not bear full financial responsibility for the child, and to protect the public by preventing the child from becoming a public charge.” Similarly the purpose of the intestacy statute continues to be the determination of heirs for inheritance purposes. And, just as the Court in Karger²⁰ had drawn a distinction between these different purposes, the Court in Palmer reaffirmed the distinction in 2003 saying, “The distinct purposes of probate and family law justify the legislature’s decision not to make the Parentage Act the sole means of establishing paternity for the purposes of probate.”²¹

When viewed as a probate case, one must arrive at a different definition of what it means to be defensive than in a paternity case, just as a “defense” in a criminal battery may be different than a defense in an intentional tort action arising out of the same factual event.

Diann Nelson is certainly put to a defense of her right to inherit from Leonard Jotham by the allegations of the probate petition presented to the Trial Court. She should thus be allowed to present admissible evidence to defend her right to inherit from Leonard Jotham.

²⁰See *id.*

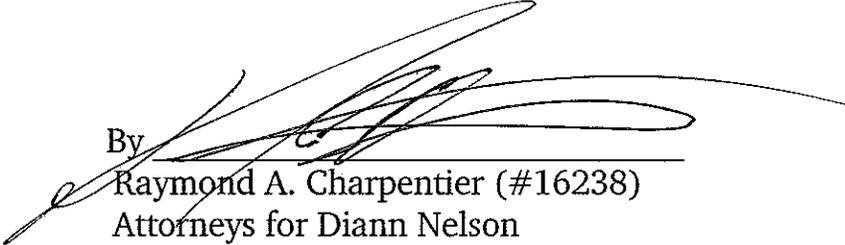
²¹In re Estate of Palmer 658 N.W.2d 197 (Minn. 2003)

CONCLUSION

We, therefore, submit to the Court that the decision of the Intermediate Appellate Court should be affirmed.

Respectfully submitted,
CHARPENTIER & LANGE

Dated: Feb 9, 2006

By 
Raymond A. Charpentier (#16238)
Attorneys for Diann Nelson
718 Front Street
PO Box 341
Brainerd, MN 56401
(218) 829-7365

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).