

STATE OF MINNESOTA
COUNTY OF CARVER

DISTRICT COURT
PROBATE DIVISION
FIRST JUDICIAL DISTRICT

In re the Estate of Prince Rogers Nelson,
Deceased.

Type: Special Administration
Judge: Kevin W. Eide
File No. 10-PR-16-46

**MEMORANDUM OF LAW IN SUPPORT
OF DARCELL GRESHAM JOHNSTON'S
OBJECTION TO PROTOCOL
PRIOR TO GENETIC TESTING**

The Minnesota Uniform Probate Code (the "Probate Code") found at Minnesota Statute Chapter 524, provides guidance and instruction about how to determine heirs in an intestate Probate proceeding. Bremer Trust, the Special Administrator ("Bremer"), contrary to the requirements of the Probate Code and Minnesota common law, proposed a protocol filtering all claims of heirship through the statutory scheme of the Minnesota Parentage Act (the "Parentage Act") found at Minnesota Statutes §§ 257.01 through 257.75.

I. Facts

In a Protocol Prior to Potential Genetic Testing (the "Protocol"), Bremer applies the Parentage Act in contravention to the Probate Code and Minnesota common law as part of the process of determining the heirs to the Estate of Prince

Rogers Nelson.¹ The Protocol is a set of questions drawn from the Parentage Act. As requested, Darcell Gresham Johnston (“Johnston”) provided an Affidavit in response to the Protocol.² By letter to counsel, Bremer informed Johnston that the evidence she presented is insufficient to warrant genetic testing.³ To make a determination whether Johnston should undergo genetic testing to learn if she is an heir, Bremer relied both upon presumptions of paternity contained in the Parentage Act and the Minnesota Supreme Court’s decision *In re Estate of Jotham*, 722 N.W.2d 447 (Minn.2006).

II. The Probate Code is the only statutory scheme necessary to distribute an intestate decedent’s real and personal property.

When someone dies intestate, the Probate Code provides a complete remedy for disposing of that person’s estate. Minn. Stat. Ch. 524. It is not necessary or required to look to any other statutory scheme designed by the legislature for other purposes. Under Minnesota law, in an intestate proceeding, if the decedent is not the parent of any living children (or their descendants), then the decedent’s siblings and half-siblings (and the descendants of deceased siblings and half-siblings) may be determined to be heirs. Minn. Stat. § 524.2-103(3). To be a sibling or half-

¹By Orders dated May 18, 2016 and June 6, 2016, the Court approved the Protocol proposed by Bremer, subject to objections to be filed no later than June 20, 2016 in preparation for a hearing scheduled for June 27, 2016.

²Johnston’s Affidavit and the response from Bremer are attached at Tab E to correspondence submitted on Bremer’s behalf, and filed under seal by Order dated June 20, 2016.

³Three of Johnston’s siblings also submitted Affidavits to Bremer.

sibling, a potential heir must share at least one genetic parent with a decedent. *Id.*

Minnesota law defines a genetic parent as being “a child’s genetic father or genetic mother.” Minn. Stat. § 524.1-201(24). A genetic father is “the man whose sperm fertilized the egg of the child’s genetic mother.” Minn. Stat. § 524.1-201(22). Under circumstances where, if a father-child relationship is established under the presumption of paternity under chapter 257, “genetic father” will mean only the man for whom that relationship is established. *Id.* A genetic mother is “the woman whose egg was fertilized by the sperm of a child’s genetic father.” Minn. Stat. § 524.1-201(23).

The Probate Code defines a parent-child relationship with genetic parents to be “[e]xcept as otherwise provided in section 524.2-114, 524.2-119, or 524.2-120, a parent-child relationship exists between a child and the child’s genetic parents, **regardless** of the parents’ marital status.” Minn. Stat. § 524.2-117 (emphasis added).⁴ And the effect of a parent-child relationship means that “[e]xcept as otherwise provided in section 524.2-119, subdivisions 2 to 5, if a parent-child relationship exists or is established **under this part**, the parent is the parent of the child and the child is a child of the parent for the purpose of intestate succession.” Minn. Stat. § 524.2-116 (emphasis added).

No provision of the Probate Code has ever mandated the use of the Parentage Act to determine heirs in an intestate Probate proceeding.

⁴Minn. Stat. §§ 524.2-114, 524.2-119, and 524.2-120 concern individuals related through two lines of relationship, adopted children, and adopted children’s genetic parents.

III. Minnesota common law confirms the Probate Code is to be used to determine heirs.

Bremer relies upon *In re Estate of Jotham*, 722 N.W.2d 447, 455-56 (Minn.2006) for additional support for the conclusion “that the evidence presented by Darcell Dessie Gresham Johnston is insufficient to warrant genetic testing.”⁵ The *Jotham* case does not support Bremer’s use of the Parentage Act as the tool by which to determine the legal heirs of the Estate of Prince Rogers Nelson.

The *Jotham* decision is the third in a line of cases decided by the Minnesota Supreme Court and Court of Appeals between 2003 and 2006. The cases are *In re Estate of Palmer*, 658 N.W.2d 197 (Minn.2003), *Estate of Martignacco*, 689 N.W.2d 262 (Minn.Ct.App.2004) *review denied* (Minn. January 26, 2005) and *Jotham*. Each Court addressed the question of how to determine heirs in an intestate Probate proceeding. None of the three Courts held that it was mandatory to use the Parentage Act to do so. As noted earlier, when *Palmer*, *Martignacco*, and *Jotham* were decided the Probate Code contained language stating “the parent and child relationship may be established under the Parentage Act, sections 257.51 to 257.74.”⁶

The issue before the Court in *Palmer* was “whether parentage for the purposes of intestate succession may be established by clear and convincing

⁵See Tab E attached to the correspondence submitted on Bremer’s behalf, and filed under seal by Order dated June 20, 2016.

⁶See earlier iterations of Minn. Stat. 524.2-114 from 1994, 2005, and 2008.

evidence apart from the Parentage Act and its time limitation on bringing actions to determine paternity.” *Palmer*, 658 N.W.2d at 197. Examining the language of the statute, the Court noted that the use of the word “may” in the statute was permissive and found that “the probate code through the use of the term “may” explicitly provides that the Parentage Act is not the exclusive means of determining parentage for the purposes of intestate succession.” *Id.* at 199-200.

Although the statute at question in *Palmer* no longer exists, the dicta of the case is instructive. Examining a decision by the New Jersey Supreme Court regarding proving parentage for purposes of intestate succession, the Minnesota Supreme Court found the rationale applicable to Minnesota law. *Id.* at 200. Quoting the section of the decision explaining the differences between the New Jersey Parentage Act and Probate Code, the Minnesota Supreme Court noted:

The Parentage Act and the Probate Code are independent statutes designed to address different primary rights. The purpose of the Parentage Act is to establish “the legal relationship * * * between a child and the child’s natural or adoptive parents, incident to which the law confers or imposes rights, privileges, duties, and obligations.” Child support is the major concern under the Parentage Act. The purpose of the Probate Code, on the other hand, is to determine the devolution of a decedent’s real and personal property.

Id. quoting *Wingate v. Estate of Ryan*, 149 N.J. 227, 693 A.2d 457 (N.J.1997).

Palmer further states that the separate purposes of probate and family law justify a decision by the legislature *not* making the Parentage Act the sole method to establish paternity for probate matters. *Palmer*, 658 N.W.2d at 200 (emphasis

added). The guidance *Palmer* gives to future determinations of heirship is this: under the Probate Code, parentage for purposes of intestate succession may be established by clear and convincing evidence and use of the Parentage Act to do so is permissive at best.

In *Martignacco* the Minnesota Court of Appeals examined the question of intestate succession. The decision of that Court relied upon and reinforced the *Palmer* holding. In *Martignacco* the district court applied the clear and convincing evidence standard from *Palmer*, and determined the respondent to be the decedent's sole heir. *Martignacco*, 689 N.W.2d at 266. On appeal, the appellant claimed the district court erred by failing to apply the time limitations of the Parentage Act. The Court of Appeals disagreed and upheld the decision of the district court. *Id.* at 267-68.

The *Martignacco* Court also examined Minn. Stat. § 524.2-114 and relying upon *Palmer* found that the permissive nature of the word "may" in the probate code means that the district court did not err by applying the clear and convincing evidence standard to determine that respondent is the sole heir of the decedent. *Id.*

Finally, in *Jotham* the Minnesota Supreme Court refined its interpretation of Minn. Stat. 524.2-114 and restricted the factual circumstances that will allow the use of the Parentage Act to determine heirs in a probate matter. *Jotham's* widow identified Nelson and Barnett as his daughters in a Petition for Formal Adjudication of Intestacy, Determination of Heirs, and Appointment of

Administrator. *Jotham*, 722 N.W.2d at 449. Nelson was born to Jotham's wife Margaret during their marriage. *Id.* Barnett was born to Margaret 279 days after judgment of divorce was entered dissolving Jotham and Margaret's marriage. *Id.* Both Nelson and Barnett benefitted from a presumption of paternity found in the Parentage Act. *Id.* at 449-50. However, Nelson objected to the identification of Barnett as Jotham's child and sought to introduce evidence that Jotham was not Barnett's father. *Id.* at 449.

Taking the opportunity to clarify when it is appropriate to use either a Parentage Act presumption or the clear and convincing evidence standard stated by *Palmer*, the Court found that in a situation where a party benefits from a Parentage Act presumption of paternity, and relies upon that presumption in a probate proceeding, the party has made a decision to establish paternity under the Parentage Act as permitted by statute and common law. *Id.* at 452. And in that situation "the provisions of the Parentage Act must apply in their entirety." The Court stated:

Our holding in *Palmer* thus does not give probate courts license to pick and choose among the provisions of the Parentage Act when ascertaining parentage for probate purposes. Accordingly, we conclude that when a party benefits from a presumption of paternity found in the Parentage Act and relies on that presumption to establish paternity in a probate proceeding, the probate court must apply the Parentage Act in its entirety to determine paternity for purposes of intestate succession.

Id. at 452-53.

Jotham does not support a conclusion that the Parentage Act is to be applied

to the claims of heirship asserted by Johnston and her siblings. *Jotham* only refines the application of the *Palmer* clear and convincing evidence standard, and restricts the use of the Parentage Act in intestate succession matters to situations where a party claiming to be an heir benefits from a presumption of paternity found in the Parentage Act, including limitations on the time an action could have been brought challenging a presumption of paternity.

Johnston's claim of heirship is not based upon a presumption of paternity under the Parentage Act and it must be subjected to the clear and convincing evidence standard set forth in *Palmer* and upheld in *Martignacco*.

IV. Conclusion

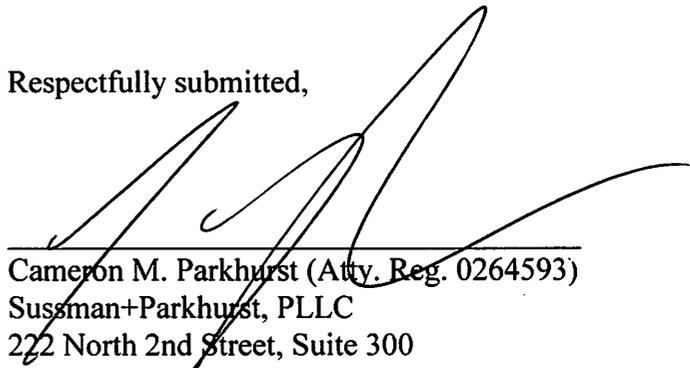
The Probate Code has never mandated the use of the Parentage Act as a tool to determine heirs in an intestate Probate proceeding. And when the question has been examined by Minnesota appellate Courts in the *Palmer*, *Martignacco*, and *Jotham* cases the Courts have deferred to what was at the time, permissive language placed in the Probate Code by the legislature, but since removed from the statute in 2010. Read together with the changes to the Probate code made in 2010 removing the permissive use of the Parentage Act language, it is evident that when determining the heirs in an intestate proceeding the *Palmer* standard of clear and convincing evidence is what Bremer must use.

Johnston requests that the Court issue an Order stating that the Parentage Act does not apply to the determination of heirs in this matter, that Bremer is to

revise the Protocol to apply the clear and convincing evidence standard from *Palmer*, and that, Johnston and her siblings are to undergo genetic testing immediately.

Respectfully submitted,

Dated: June 20, 2016



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