Matter of Mengoni
2020 NY Slip Op 30728(U)
March 10, 2020
Surrogate's Court, New York County
Docket Number: 2018-784
Judge: Rita M. Mella

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

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In the Probate Proceeding of

FRED MENGONI,

Deceased.

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DECISION and ORDER
File No.: 2018-784

M E L L A, S.:

The court considered the following papers in deciding this motion to strike a notice of appearance and dismiss objections:

Papers	Numbered
Proponent's Notice of Motion to Strike Notice of Appearance and to Dismiss Objections, Affidavit of Anne C. Bederka, Esq., in Support of Motion, with Exhibits A-U, and Memorandum of Law in Support	1,2,3
Affirmation of Leo D. Beitner, Esq., with Exhibits 1-18 and Amended Memorandum of Law in Opposition to Motion to Strike Notice of Appearance and to Dismiss Objections	4,5
Reply Affidavit of Anne C. Bederka, Esq., in Support of Motion, with Exhibit 1 and Reply Memorandum of Law	6,7

Following oral argument on the return date of this motion to strike the notice of appearance and dismiss the objections of Ashley Foisy Mengoni in this contested probate proceeding, on the record, the court granted the motion and indicated that this written decision, further explaining the court's reasoning, would follow.

Background

Fred Mengoni (decedent) died on February 2, 2018, at age 94, leaving a $94 million estate. A petition to probate a purported will of decedent dated January 11, 2017, was filed by Charles Small, Esq. (proponent), decedent's attorney and the drafter of the propounded

instrument, which nominates him as executor.[1] The interested parties identified in his probate petition, as amended, include: (1) the members of the class of nieces, nephews, grandnieces, and grandnephews who proponent asserts are decedent's distributees (EPTL 4-1-1.[a][5]), a total of 23 individuals; (2) a niece (Miranda Mengoni) and two grandnephews (Nazzareno Mengoni and Federico Mengoni) of decedent who were named beneficiaries under a purported penultimate will of decedent dated October 9, 1990; and (3) Ashley Foisy Mengoni, an alleged daughter of decedent whose status is the subject of the instant motion.

Objections to probate of the propounded instrument were filed by the beneficiaries of the penultimate instrument and by Ashley. Thereafter, proponent filed the instant motion to strike Ashley's appearance and dismiss her objections pursuant to CPLR 3211(a)(3), (5), and (7).

Motion to Dismiss

Proponent argues, as the basis for his motion to strike Ashley's appearance and dismiss her objections to probate, that she has no standing to object because she is not decedent's child and thus not a person interested in decedent's estate (*see* SCPA 1410, 1403[1][a]; EPTL 4-1.1, 4-1.2). Proponent maintains that it was fully determined more than 30 years ago in the divorce action between decedent and Christiane De Foisy, Ashley's mother, that "there are no children of the marriage between [them]" (*Christiane De Foisy v Fred Mengoni*, Sup Ct, NY County, signed Dec 16, 1988, entered Jan 12, 1989, Moskowitz, J., Index No. 66958/88, Findings of Fact and Conclusions of Law, ¶ FOURTH) and that decedent was excluded as the father of Ashley (*id.* ¶ FIFTH). He argues that Ashley is bound by that determination and collaterally estopped from

[1] Under Article FOURTH of this instrument, decedent left his entire estate to an individual whom he identified as his executive assistant for more than 20 years.

asserting a contrary position. Proponent additionally argues that the presumption of legitimacy otherwise afforded to Ashley has been conclusively rebutted and, accordingly, she has not demonstrated an entitlement to inherit.

In response to this motion, Ashley contends that she cannot be collaterally estopped from asserting her status as decedent's child because she did not have a full and fair opportunity to litigate her parentage in the divorce action. She additionally argues that the doctrine of equitable estoppel should have been applied in the divorce action to prevent the ordering and/or introduction of the results of a paternity blood test and to prevent that court from concluding she was not decedent's daughter.

Relevant Facts

It is undisputed that decedent and Christiane were married on December 5, 1986, and that Ashley was born 11 days later, on December 16th. The record before the court on this motion also establishes that, approximately 18 months later, in May or June of 1988, Christiane commenced a divorce action against decedent, who answered the complaint and counterclaimed for divorce. The proceedings in the divorce action were protracted and riddled with hostile accusations by Christiane and decedent against one another. Two central disputes in the divorce action were, on the one hand, the validity of a prenuptial agreement entered into by Christiane and decedent[2] and, on the other, whether Ashley was decedent's child.

Decedent, in paragraph 12 of his Verified Answer and Counterclaim in the divorce action (dated July 19, 1988), asserted that "Ashley Foisey, born on or about December 16, 1986, . . .

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[2] The prenuptial agreement is dated December 2, 1986, and, among its provisions, are articles relating to maintenance and spousal support and child support.

upon information and belief was not fathered by [decedent]." Initially, Christiane claimed that Ashley was a child of her and decedent's marriage. The court, by Decision and Order dated July 26, 1988, on Christiane's motion seeking pendente lite maintenance, child support and additional payments, noted that there was one child of the marriage (Ashley), and awarded Christiane temporary custody, maintenance, and child support, and directed decedent to make certain other payments, including those related to the marital residence and medical and dental care for Christiane and Ashley.

In August 1988, decedent moved for, inter alia, renewal of Christiane's pendente lite motion and an order upon Christiane that she and Ashley submit to blood tests pursuant to CPLR 3121(a) to determine paternity of Ashley. Decedent's motion was based on new information that he had allegedly received from individuals known to Christiane and decedent who stated that they were aware, from Christiane, that Ashley was not decedent's child. Thereafter, Christiane, in a sworn affidavit dated September 9, 1988, acknowledged that Ashley was not decedent's biological child, but claimed that decedent had married her with full knowledge of that fact, and, after Ashley's birth, had treated her as his child. Decedent denied those allegations and maintained that he had become aware that Ashley was not his daughter only in July 1988. The court granted decedent's motion to renew to the extent indicated on the record on September 30, 1988, and directed that an order to such effect be settled. No transcript of that court appearance was located by the parties and no order was issued by the court. Instead, it appears that the parties settled their differences, signing and acknowledging a Modification Agreement and Stipulation

of Settlement dated December 16, 1988.[3] Therein, it is recited that there are no children born of the marriage of Christiane and decedent and that "Christiane has represented and acknowledged that . . . Ashley was not fathered by [decedent]" (Modification Agreement, at 2 & 18).

The Modification Agreement and other joint exhibits were filed with the court, including the results of Rh and HLA blood tests (hereinafter referred to as "paternity blood tests"), which excluded decedent as the father of Ashley. Upon the parties' agreement and the joint exhibits, the Supreme Court, by decision and order also dated December 16, 1988, determined that decedent and Christiane were entitled to a judgment of divorce, based on Findings of Fact and Conclusions of Law issued by the court the same day. No law guardian or attorney for Ashley was appointed or appeared in the divorce action.

The record in the present proceeding reflects that there was no contact between decedent and Ashley following the divorce of Christiane and decedent.

Collateral Estoppel

At the outset, the court rejects any notion that the doctrine of collateral estoppel bars Ashley from claiming that she is decedent's daughter. Collateral estoppel may be invoked to prevent a party, or one in privity with a party, from relitigating an issue decided against it, upon the satisfaction of two requirements: (1) "the party seeking the benefit of collateral estoppel must prove that the identical issue was necessarily decided in the prior action and is decisive in the present action" and (2) "the party to be precluded from relitigating an issue must have had a full

[3] In the Modification Agreement, the Child Support Article of the Prenuptial Agreement was stricken in its entirety and replaced by an article titled "Waiver of Maintenance and Support by [Decedent] and Christiane" (Modification Agreement, at 16). Thereafter, decedent expressly waives all rights to visit and be in contact with Ashley, and agrees that he will not assert any parental rights in the future or attempt to see or contact Ashley (*id.* at 28).

and fair opportunity to contest the prior determination" (*D'Arata v New York Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990], citing *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985]). Lastly, collateral estoppel is a highly flexible doctrine, grounded on concepts of fairness, and should not be rigidly or mechanically applied (*id.* at 664; *Matter of Kaori*, 144 AD3d 911[2d Dept 2016]; *Schwartz v Public Adm'r of County of Bronx*, 24 NY2d 65, 73 [1969]).

To be sure, collateral estoppel would bind decedent and Christiane to the Supreme Court's determination in the divorce action regarding parentage of Ashley; that identical issue was before that court, was raised by the parties in sworn statements to that court, and was expressly addressed in their settlement agreement and in the resulting decision of the court (*see Matter of Timothy J.T. v Karen J.H.*, 251 AD2d 1036 [4th Dept 1998] [father estopped from pursuing paternity proceeding where, in prior divorce action, he had denied paternity and the matter settled, accepting his position as to paternity and incorporating the stipulation of settlement into divorce decree]; *Crouse v McVickar*, 207 NY 213 [1912] [as to conclusiveness, decree resulting from parties' stipulation no different from judgment rendered after hearing evidence]; *Jeanne M. v Richard G.*, 96 AD2d 549 [2d Dept 1983]; *Matter of Susan UU v Scott VV*, 119 AD3d 1117 [3d Dept 2014]).

In contrast, Ashley did not have an independent, full and fair opportunity to participate in and litigate that issue in the divorce action (*see Michaella M.M. v Abdel Monem El G.*, 98 AD2d 464 [2d Dept 1984] [court presiding over divorce action should appoint a special guardian to represent and safeguard interest of child and then conduct hearing, where paternity of child raised]). In addition, this court cannot conclude that Ashley was in privity with Christiane on the issue of paternity because, in the context of the divorce action, their interests were not identical

and were possibly in conflict (*cf. Matter of Slocum v Joseph B.*, 183 AD2d 102, 107 [3d Dept 1992] [in dictum, court noted that "compromise paternity suit settlements between the child's mother and the putative father should not be given preclusive effect on the child's right to claim paternity in subsequent proceedings, where the child lacked separate representation or at least court approval of the prior settlement"]).

Although this court concludes that Ashley is not bound by the Supreme Court's determination in the divorce action that decedent was not her father, she cannot, in this forum, avoid the evidence supplied to this court from the record of that action or the conclusions that the court may draw from such evidence. After all, here she has had the opportunity to challenge that evidence and to present her arguments as to her status as decedent's child. Nor, as discussed more fully below, can Ashley ask this court to impose on that action, concluded decades ago in another court, a determination that, at that time, decedent should have been estopped from seeking paternity blood testing to ascertain whether Ashley was his biological child or from denying paternity of Ashley.

Presumption of Legitimacy

On the record before this court, proponent has established that the presumption of legitimacy otherwise afforded to Ashley—by virtue of her birth during the marriage of her mother and decedent—has been rebutted.

As aforementioned, the issue here is whether Ashley is decedent's child for purposes of entitlement to object to probate of a purported will of decedent (*see Matter of Ludwig*, 1996 WL 34574885 [Sur Ct, New York County], *affd* 239 AD2d 122 [1st Dept 1997]). Initially, to assert her standing and interest in decedent's estate, Ashley proffered a copy of her birth certificate,

which lists decedent as her father. The birth certificate, in conjunction with the undisputed fact of Ashley's birth during the marriage of her mother and decedent, afford her the presumption that she is a child of decedent's with the right to inherit.

The presumption of legitimacy, as historically recognized in the Surrogate's Court, served as a stand-in for establishing the biological or "blood" relationship between a child and her father prior to the ease and reliability of genetic testing, and for general purposes of establishing rights of inheritance (*Matter of Findlay*, 253 NY 1, 7 [1930] [in determining intestate distributees of decedent and entitlement to serve as administrator of decedent's estate, court considered application of presumption of legitimacy]; *see Matter of L.M. v J.S.*, 6 Misc 3d 151, 154 [Fam Ct, Kings County 2004] ["The presumption of legitimacy, while still serving a laudable purpose, is nonetheless just another legal presumption to be used in the absence of conclusive evidence to the contrary"]).

Clear and convincing evidence may rebut the presumption, however, and the results of a properly administered blood test[4] which excludes the husband's paternity has repeatedly been found sufficient to rebut it (*Matter of Ludwig*, 239 AD2d 122, *supra* [quoting *Ghaznavi v Gordon*, 163 AD2d 194 (1st Dept 1990)]; *Dawn B. v Kevin D.*, 96 AD2d 922, 923 [2d Dept 1983]). Other evidence has been considered by the courts as tending to rebut the presumption, including repeated written declarations by the mother that her husband is not her child's father,

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[4] In her opposition to the instant motion, Ashley does not challenge the results of the blood tests, and, in fact, her counsel acknowledges that "the [blood] tests prove that the decedent was not Ashley's natural father" (Am Mem of Law in Opp'n to Mot to Strike Notice of Appearance and to Dismiss Objections, at 24). Her counsel's attempts to change positions at oral argument by insinuating into the proceeding a challenge to the propriety of the test, or the reliability of the results, are unavailing.

judicial admissions in a couple's divorce proceeding that there are no children of the marriage, the absence of any child support ordered in a divorce action, and the mother's admissions to her family (*see Matter of Ludwig*, 239 AD2d at 123; *see also Matter of Walegur*, NYLJ, Aug 7, 2017, at 22 [Sur Ct, NY County]).

Here, the evidence in support of rebuttal includes the acknowledged and witnessed agreements and representations of Christiane and decedent in their Modification Agreement and Stipulation of Settlement, which were incorporated into the Judgment of Divorce and the Findings of Fact and Conclusions of Law made by the court in the divorce action, before which the parties had also jointly submitted as evidence a paternity test result excluding decedent as Ashley's father.

Equitable Estoppel

In opposition to this motion, Ashley fails to offer any cognizable legal theory, even viewing the facts in the light most favorable to her, that advances her claim that she is decedent's daughter for purposes of entitlement to inherit from his estate. Ashley's central argument is that decedent's estate should be equitably estopped from disclaiming his paternity. The application of this doctrine fails here for at least two significant reasons.

Codified only in the last few decades —and subsequent to the conclusion of the divorce of Christiane and decedent—in Family Court Act sections 418 (addressing parental support proceedings) and 532 (paternity proceedings), the doctrine of equitable estoppel has an extensive history of application by the courts "to prevent inequitable filiation determinations [of minor children] (. . .), despite the possibility, or even the certainty of, contrary scientific proof" (Professor Merril Sobie, Practice Commentaries, McKinney's Cons Laws of NY, Fam Ct Act §

418, Equitable Estoppel [note: online version]). As provided in the Family Court Act, in the context of a paternity dispute, a court may decline to order a genetic marker or DNA marker test of the child and alleged father but only "upon a written finding by the court that it is not in the best interests of the child on the basis of . . . equitable estoppel . . . " (Family Ct Act §§ 418[a]; 532[a]).

The Court of Appeals has recognized that "[t]he purpose of equitable estoppel is to preclude a person from asserting a right after having led another to form the reasonable belief that the right would not be asserted, and [where] loss or prejudice to the other would result if the right were asserted" (*Matter of Shondel J. v Mark D.*, 7 NY3d 320, 326 [2006]). In *Shondel J.*, for instance, a man who had mistakenly represented himself as a minor child's father was estopped from denying paternity—and made to pay child support—because the child justifiably relied for four-and-a-half years on the man's representations, to the child's detriment if the man had been allowed to disclaim paternity. This principle, as applied in *Shondel J.*, now governs (*see, e.g.*, *Matter of Juanita A. v Kenneth Mark N.*, 15 NY3d 1 [2010]).

To the extent that Ashley argues that equitable estoppel should have been applied at the time of the divorce proceedings between her mother and decedent to prevent resort to the paternity blood testing that contributed to the determination in the divorce judgment that there were no children of the marriage, such position is untenable. This court cannot revisit or reopen the decades' old decision and judgment of another court. In any event, as discussed above, Ashley is not bound, as a matter of collateral estoppel, by the divorce judgment itself. Nor could this court determine (after a hearing or otherwise) that some other outcome would have resulted had an equitable estoppel argument been advanced before the Supreme Court in the divorce

action.[5]

Ashley asks this court to adopt the equitable estoppel doctrine to return her to the status that she enjoyed prior to the divorce of Christiane and decedent—*i.e.*, that of a marital child. However, the only context in which the court could consider whether such doctrine is available to Ashley is the present one—in which Ashley is an adult, her mother and decedent had been divorced more than 30 years by the time decedent died, and the interests here at issue are limited to rights of inheritance.

There is no authority or rationale that this court can find to extend the application of the doctrine of equitable estoppel to the situation of an adult child who seeks to assert inheritance rights from a deceased alleged father (*see Abreu v Colvin*, 152 F Supp 3d 166, 174 [SDNY 2015] ["Intestacy law is designed to determine with finality the identity of the heirs of the decedent at the time of death, thereby facilitating distribution of the estate. . . . Family law, by contrast, is intended to advance the best interests of the child."]). As the Court of Appeals observed in *Shondel J.* (7 NY3d at 327 [citations omitted]), "The courts 'impose equitable estoppel to protect the status interests of a child in an already recognized and operative parent-child relationship.'" Where the doctrine is applied, it is to protect a relationship on which a minor child in need of support and guidance has relied (*see Walker v Covington*, 287 AD2d 572 [2d Dept 2001] [doctrine of equitable estoppel did not bar ordering blood test to determine paternity where presumption of legitimacy rebutted and there was no parent-child relationship between child and

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[5] In fact, in light of Christiane's admissions in her verified complaint in the divorce action that decedent had very little relationship with Ashley, it is not a foregone conclusion that equitable estoppel would have been applied to prevent the ordering and admissibility of the results of genetic testing.

the man who was her mother's husband at the time of her birth]).

Furthermore, equitable estoppel in the context of paternity and support proceedings is applied where its use furthers the *best interests of the child*, meaning a minor child (*see Matter of Sharon GG. v Duane HH.*, 95 AD2d 466, 469 [3d Dept 1983]; *see also Matter of Felix M. v Leonarda R.C.*, 118 AD3d 886 [2d Dept 2014]). Under sections 418 and 532 of the Family Court Act, parties to a child support or paternity proceeding may be entitled to a hearing concerning whether, in the best interests of the child, equitable estoppel, or another basis provided by statute, should preclude the otherwise presumptive ordering of genetic testing in every proceeding in which paternity is disputed. The underlying considerations in these proceedings are the support and legitimacy needs of the child. A narrower set of interests is at issue where an adult child seeks to establish inheritance rights from a putative father.

Interestingly, any relief available to Ashley for purposes of determining inheritance rights would arise under EPTL 4-1.2, which provides for the inheritance rights of non-marital children, and, in particular, with subsection (a)(2)(C)(ii), under which, after a putative father's death, paternity may be established by clear and convincing evidence that the father openly and notoriously acknowledged the child as his own.[6] But, of course, Ashley cannot establish on this

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[6] This provision was added to EPTL 4-1.2 to protect the rights of non-marital children in circumstances where the putative father had treated the child as his own, a corollary to the purpose of equitable estoppel codified in the Family Court Act, but here for the specific purposes of establishing inheritance rights (*see* Mem of Law Revision Commn, 1980 NY Legis Doc No 65[B], at 1, *quoted in Matter of Davis*, 27 AD3d 124, 127 [2d Dept 2006]; *accord* Family Ct Act § 519, which provides that a paternity proceeding may be continued or even commenced after the death of the putative father where, *inter alia*, the putative father has openly and notoriously acknowledged the child as his own).

The unexplained mention of an estoppel in *Matter of Bonanno* (192 Misc 2d 86, 88 [Sur Ct, NY County 2002]), a case on which Ashley relies for the principle that an estoppel theory is available to her in this proceeding, does not support Ashley's position. In *Bonanno*, the court

record that she is a non-marital child entitled to inherit.

Even if equitable relief were available to Ashley at this time, she has failed to offer support for any theory by which she could be recognized as decedent's child for purposes of inheritance. The record is devoid of any allegations or evidence that Ashley and decedent maintained a parent-child relationship, or that Ashley in any way relied to her detriment on decedent's acting in such a manner. Indeed, the record suggests that Ashley and decedent essentially had no contact or communication following his divorce from Ashley's mother (*cf. Matter of Commissioner of Social Servs. v Victor C.*, 91 AD3d 417, 418 [1st Dept 2012] [putative father estopped from denying paternity where child considered him to be her father, enjoyed visiting with him, and had a familial relationship with his relatives, including his mother and other children; child called putative father "dad," and the latter never dissuaded her from doing so]; *Richard B. v Sandra B.B.*, 209 AD2d 139 [1st Dept 2005] [ex-husband equitably estopped from pursuing paternity challenge based on newly discovered evidence where he had encouraged development of a father-child relationship for over three years and agreed to provide for child's support and share in her custody in the couple's separation agreement]).

In view of proponent's successful rebuttal of the presumption of legitimacy and Ashley's failure to offer any theory under which she would be found to be a child of decedent's entitled to inherit from his estate, the court concludes that Ashley lacks standing to object to the probate of the propounded instrument (*see, e.g.*, *Matter of Ludwig*, 1996 WL 34574885 [Sur Ct, New York

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denied the petitioning child's application to prove his right to inherit through open and notorious acknowledgment of paternity, under the former version of EPTL 4-1.2 (which required clear and convincing evidence of paternity and evidence of acknowledgment), after the results of a genetic marker or DNA test showed a 0% probability that petitioner was decedent's biological child.

County], *affd* 239 AD2d 122 [1st Dept 1997]; SCPA 1410, 1403[1][a]). The motion to strike her appearance and dismiss her objections is, accordingly, granted.

This decision, together with the transcript of the June 11, 2019 oral argument, constitutes the order of the court.

Dated: March 10, 2020

SURROGATE