Memo: RE: Legal brief with basis proving heirship/paternity

Issue (1): What are the ways that paternity can be proven when the child is born out of wedlock?

Summary

Paternity of a child born out-of-wedlock can be proven:

(1) If the father petitions the superior court of the county of the residence of the child's mother or other party having legal custody or guardianship of the child to legitimate his relationship with the child (see OCGA 19-7-22(a) and 53-2-3(2)(i))
(2) If the father signs the birth certificate (see O.C.G.A § 53-2-3(2)(iii))
(3) If the father enters a sworn statement signed by him attesting to the parent-child relationship (see O.C.G.A § 53-2-3(2)(iv)).
(4) If, during the father's lifetime, he held the child out to be his own, usually through a combination of social and legal actions (see O.C.G.A § 53-2-3(2)(v) and "virtual legitimation", discussed in detail below).
(5) If steps were not taken during the father's lifetime to legitimate the child, a parentage-determination genetic test that establishes at least a 97% chance of paternity can create a rebuttable presumption of paternity (see O.C.G.A § 53-2-3(2)(B)(ii)).

Laws

O.C.G.A § 53-2-3(2) (Probate Code 3.8.3)

(A) A child born out of wedlock may not inherit from or through the child's father, the other children of the father, or any paternal kin by reason of the paternal kinship, unless:

i. A court of competent jurisdiction has entered an order declaring the child to be legitimate, under the authority of Code Section 19-7-22 or such other authority as may be provided by law;
ii. A court of competent jurisdiction has otherwise entered a court order establishing paternity;
iii. The father has executed a sworn statement signed by him attesting to the parent-child relationship;
iv. The father has signed the birth certificate of the child; or
v. There is other clear and convincing evidence that the child is the child of the father.

(B)

i. Subparagraph (A) of this paragraph notwithstanding, a child born out of wedlock may inherit from or through the father, other children of the father, or any paternal kin by reason of the paternal kinship if evidence of the rebuttable presumption of paternity described in this subparagraph is filed with the court before which proceedings on the estate are pending and the presumption is not overcome to the satisfaction of the trier of fact by clear and convincing evidence.
ii. There shall exist a rebuttable presumption of paternity of a child born out of wedlock if parentage-determination genetic testing establishes at least a 97 percent probability of paternity. Parentage-determination genetic testing shall include, but not be limited to, red cell antigen,

human leucocyte antigen (HLA), red cell enzyme, and serum protein electrophoresis tests or testing by deoxyribonucleic acid (DNA) probes.

OCGA 19-7-22 (a): A father of a child born out of wedlock may render his relationship with the child legitimate by petitioning the superior court of the county of the residence of the child's mother or other party having legal custody or guardianship of the child; provided, however, that if the mother or other party having legal custody or guardianship of the child resides outside the state or cannot, after due diligence, be found within the state, the petition may be filed in the county of the father's residence or the county of the child's residence. If a petition for the adoption of the child is pending, the father shall file the petition for legitimation in the county in which the adoption petition is filed.

Issue 1: What weight, if any, does an oral statement made by Grady during his lifetime have on proving paternity? Right now, all that they have is a picture with my client standing next to the child claiming that they look alike, and the oral statements made by Grady to friends prior to his death.

Virtual Legitimation

In *Prince v. Black*, 256 Ga. 79 (1986) the Georgia Supreme Court created an exception to O.C.G.A. § 53-4-4 (now O.C.G.A § 53-2-3(2)) which provides that illegitimate children may inherit from their fathers if they have been *virtually legitimated* although no court order of legitimation exists. A finding of virtual legitimation requires clear and convincing evidence of both (a) paternity and (b) the father's demonstrated intention that the child share in his intestate estate in the same manner as though legitimation had taken place. *Youmans v. Ormandy*, 206 Ga.App. 255, 255 (1992).

Two cases, *Prince v. Black* and *In re Estate of Slaughter,* share similar fact patterns with the instant case. In *Black,* the court addressed a case in which a child was born while the mother was separated from her husband and in a romantic relationship with the child's father. Because the child was born while the mother was still legally married, the husband's name appeared on the child's birth certificate, creating a rebuttable presumption of paternity. In holding that the putative father's relationship with the son rebutted the presumption and met the test for virtual legitimation, the court cited the fact that – in addition to raising the son alone since the son was six years old – the son was the beneficiary of the putative father's insurance policies and the putative father applied for and attained Social Security benefits for himself and the son. The court held that these factors clearly indicate that the child was the natural son of the decedent and that the decedent intended "to allow [the son] to share in his estate as if [the son] had been formally legitimated." *Prince v. Black*, 256 Ga. 79, 81 (1986).

In 2000, the Georgia Court of Appeals applied the virtual legitimation test in *In re Estate of Slaughter*, 246 Ga.App. 314 (2000). The *Slaughter* court addressed a case in which a daughter was born of an extramarital affair while the mother was still married. In holding that the illegitimate daughter had met the test of virtual legitimation, the court noted that the putative father had "told his mother and friends that [the child] was his daughter"; had attended the illegitimate daughter's childbirth; and he had "told his family and neighbors that [the child born to the illegitimate daughter] was his grandson*." Id* at 314. The court noted that, in addition to evidence proffered by the illegitimate child and the illegitimate child's mother, "three other witnesses testified that, notwithstanding the fact that [the putative father] never took steps to legitimate [the daughter], he acknowledged her as his biological child and acknowledged [her son] as his grandchild." *Id* at 315.[1]

Alleged statements made to friends

The facts of the instant case could not be more different than those presented in *Black* and *Slaughter*. The courts in *Black* and *Slaughter* dealt with substantiated and/or concrete evidence of paternity: evidence that the decedents were in fact the paternal fathers of the illegitimate children was backed up with trustworthy statements from friends, family members, and coworkers and/or clear actions taken on behalf

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[1] Note that the court in *Slaughter* did not order the decedent's sister (who contested paternity) to undergo parentage-determination genetic testing even though a DNA analysis of the decedent's sister could have accurately determined paternity. ("Walker maintains that Boggs did not meet her burden of showing she was Slaughter's biological child. In support of this claim, she argues that … there was never any genetic testing performed which would establish that he was Cynthia's biological father." *In re Estate of Slaughter* at 316.)

of the putative father to hold the child out as his own either socially or legally. In the instant case, the alleged illegitimate son's argument rests solely on unsubstantiated rumors by the decedent's friends that the decedent had acknowledged that he might be the child's father. Unlike the statements made by the decedent father in *Slaughter,* these statements are not substantiated by anyone – not by any member of the decedent's family, his co-workers, or anyone else in decedent's life. In addition to not holding the child out as his own socially, the decedent also made no attempt to hold the child out as his own legally – he did not have custody of the child at any point during the child's life, he did not name the child as a beneficiary on any insurance policies and there is no evidence that he ever submitted any documentation alleging that he was the child's father.

Photograph

Unless the decedent carried around this picture in his wallet and showed it to friends and family as evidence that the child was his, this picture means nothing (see *Youmans v. Ormandy,* 206 Ga.App 255 at 257 (1992), where the court considered testimony from decedent's co-workers that "he carried photographs of the [illegitimate child] and her daughter on his person" in supporting a finding of virtual legitimation).

Conclusion

The instant case does not meet the necessary requirements for virtual legitimation. Unsubstantiated rumors and a picture showing a possible resemblance do not establish (a) that the alleged illegitimate son is the natural son of the decedent or (b) that it was the decedent's intention for the child to share in his intestate estate. There is no clear and convincing evidence that the decedent is the father of the alleged illegitimate son.

Issue 2: If DNA is considered, must the paternal father be tested, or can the DNA of the paternal father's other child be used to create a match? Note that Mr. Grady was cremated and no DNA from him remains. The minor's counsel is threatening to request my client's DNA to make the match. I don't think that it will work that way. I am looking for confirmation of my belief.

Compelled DNA collection and analysis

In *In re Estate of Warren*, the Georgia Supreme Court addressed the issue of whether "'parentage-determination genetic testing' by DNA probes, as set forth in OCGA § 53-2-3(2)(B)(ii), is limited to direct comparison of DNA samples taken from the born-out-of-wedlock child and the deceased putative father." *In re Estate of Warren*, 300 Ga. App. 408, 413(2009). In *Warren*, the illegitimate daughter of the decedent used DNA samples taken from her mother and the legitimate son of the decedent to prove shared paternity.[2] On appeal, the son contested use of this DNA testing, arguing that it did not meet the requirements of the statute because the DNA sample was not collected from the deceased father. The court held that the DNA analysis at issue was "parentage-determination genetic testing" under the statute because testing that would establish a paternal relationship is not limited to direct comparison of DNA samples from the illegitimate child and the decedent father. *Id* at 413. In parentheticals next to this holding, the court supported its argument by stating that O.C.G.A. § 53-2-27 "allow[s] court order to obtain DNA samples from the remains of the decedent *and* 'from any party in interest whose kinship to the decedent is in controversy.'" (emphasis added). *Id* at 413.

The *Warren* decision incorporates an incorrect interpretation of O.C.G.A. § 53-2-27. OCGA § 53-2-27(a) reads, in full:

> When the kinship of any party in interest to a decedent *is in controversy* in any proceeding under this article, a superior court may order the removal and testing of [DNA] samples from *the remains of the decedent* and from *any party in interest whose kinship to the decedent is in controversy* for purposes of comparison and termination of the statistical likelihood of such kinship.

A clear reading of the statute supports the conclusion that the court is justified in ordering the removal and testing of DNA samples from two parties: the decedent, and the party whose kinship to the decedent is "in controversy." In *Warren*, the court conflates the terms "controversy" and "[interested]." An interested party can have a legitimate, proven relationship with the decedent, i.e. a relationship that is not "in controversy." The statute does not anticipate the compulsory collection of DNA samples from "interested" parties, only parties who must prove their relationship (and therefore their legal rights) to the decedent.

In the instant case, the legitimate son is an interested party. However, as he was the decedent's legitimate son, his relationship to the decedent is not in controversy, therefore the court is not justified in ordering him to submit to DNA analysis. According to a clear reading of the statute, the only person who the court can compel to submit to DNA testing is the alleged illegitimate son claiming paternity, because his is the relationship that is in controversy.

Further, the statute doesn't anticipate the DNA analyses of relatives to the decedent – the statute only references removal of DNA from the decedent. As the bodies of people who are legally dead are often unavailable – through disappearance or cremation – if the legislature had intended for relatives of the

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[2] The DNA analysis showed a 99.65 percent chance that the legitimate son and born-out-of-wedlock daughter were half-siblings.

decedent to fall under the statute, they would have included them. The statute clearly does not anticipate the removal of DNA from anyone other than the decedent and the party who is claiming an unproven relationship and the court's interpretation in *Warren* is incorrect.

Finally, the issue before the court in *Warren* is not whether a court can compel an interested party to submit to DNA analysis, but whether a court can consider DNA analysis from a source other than the decedent putative father.[3] As the parenthetical statement made by the *Warren* court concerning a court's authority to compel interested parties under O.C.G.A. § 53-2-27 to submit to DNA analysis was not relevant to resolving the issue before the court, it is properly classified as dictum and not binding as legal authority in subsequent cases.

Fourth Amendment Analysis

If the instant court proceeds on a *Warren*-esque misreading of the statute, the legitimate son may have a Fourth Amendment defense against a court order to undergo a DNA test. "[U]sing a buccal swab on the inner tissues of a person's cheek in order to obtain DNA samples is a search" under the Fourth Amendment. *Maryland v. King*, 133 S. Ct. 1958, 1968 (2013). In the instant case, the buccal swab would be categorized as an administrative search as it is "conducted for a purpose other than criminal law enforcement, pursuant to a policy authorized by a politically accountable law-making body." *Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000).

In all instances, Fourth Amendment searches must be reasonable in order to be constitutional. In *City of LA v. Patel,* the Supreme Court held that an administrative order for a search is only reasonable if it affords the respondent an opportunity for review. "[A]bsent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." *City of L.A. v. Patel*, 135 S.Ct. 2443, 2453 (2015). OCGA § 53-2-27(b) states, in pertinent part, that an order of removal of DNA in a proceeding where kinship of any party in interest to a decedent is in controversy, "may be made only on *motion for good cause shown* [….]. Such motion, when made by a party in interest, shall be supported by affidavit setting forth […] [the] factual basis for a reasonable belief that the party in interest whose kinship to the decedent is in controversy is or is not so related (…)." In the instant case, the alleged 0illegitimate son should submit a motion setting forth facts that support a reasonable belief that he is the decedent's son and the legitimized son should have the opportunity to respond before the court would be justified in issuing an order for the legitimate son's DNA removal and analysis.

Putting forth a reasonable factual basis for the illegitimate son's relationship to the decedent would be difficult in this case for a number of reasons. First, the child was conceived during marriage and the mother's husband signed the birth certificate—both of these facts create a rebuttable presumption that the mother's husband is the father of the child. Also, there seem to be no *facts* supporting the unproven relationship: only unsubstantiated rumors and a picture which may or may not show a family resemblance. The decedent never held the child out as his own and never made any steps to legally legitimize the child. If the court ordered DNA testing in this case – in a case where the child has been legitimized by his mother's husband and there is no reliable evidence to rebut the presumption of paternity – they would be setting a precedent that would allow for harassment, the pursuit of dishonest and fruitless claims, and a general waste of court time. Without more, it is unreasonable and unconstitutional to compel the collection of DNA from the legitimate child in this case. Any DNA

[3] The *Warren* court makes no reference to whether the DNA analysis of the legitimate son and the mother was compelled by the court or undergone voluntarily by the parties before the court proceedings.

removal and analysis compelled by the court would be a violation of the legitimate son's Fourth Amendment right against unlawful searches and seizures.