

## Court Splits the Baby on Whether Woman Is a "Child" for Purposes of Intestate Succession

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Today, the Indiana Court of Appeals decided that a trial court erred when granting summary judgment to a woman on the issue of whether she was entitled to a share of an intestate decedent's estate in *Regalado v. Estate of Regalado*, Case No. 64A05-0911-CV-672. This case addresses a number of issues in which our readers should be interested.

The decedent suffered serious and permanent brain damage as the result of an altercation with officers of the Chicago Police Department. In a lawsuit arising out of these injuries, the decedent's claim was settled for fifteen million dollars. Approximately four years after the settlement, in October 2004, the decedent died intestate. Because the decedent left no surviving spouse or issue, according to I.C. § 29-1-2-1(d)(3) his estate was to be distributed to his surviving parents, brothers, sisters, and issue of his deceased brothers and sisters. The decedent's father, Baltasar, filed a Petition for the Appointment of Administrator and for Supervised Administration, which listed himself, the decedent's brothers, and the decedent's half-sister, Paula, as known heirs.

Paula was born in October 1967 to Carmen Nadine Durea, who is not the decedent's mother. Carmen and Baltasar married in Arizona in April 2003, when Paula was thirty-five years old. During the marriage, Carmen lived in Arizona and Baltasar lived in Indiana. In October 2003, Baltasar signed a birthday card to Paula as "YOUR DAD B.E.R." A March 2007 Siblingship Report stating that Paula and Tony have a 98.1% probability of being half-siblings. The marriage between Baltasar and Carmen was annulled in November 2005 pursuant to an Agreed Order of Annulment that, *inter alia*, stated as follows:

Both parties readily acknowledge that Paula Heffelfinger is their natural daughter, fathered by the Petitioner and born to the Respondent on October 13, 1967.

One of the decedent's brothers, Victor, filed a Petition to Determine Heirship, which alleged that Paula was not Joseph's half-sister and requested a hearing on the matter. Paula moved for summary judgment, to which Victor responded without designating any evidence. The trial court then granted Paula's motion for summary judgment. Victor filed a motion to correct

error. On the day of the hearing on that motion, Victor filed two affidavits. In one affidavit, Baltasar stated that he mistakenly believed he was Paula's father because Carmen informed him that he was listed as such on her birth certificate, but he recently requested a copy of the birth certificate and discovered he was not listed on it. In the other affidavit, Victor stated that Baltasar was not listed on Paula's birth certificate. The trial court denied Victor's motion and he appealed.

On appeal, the Court first addressed whether it could consider Victor's affidavits. It noted that Victor neither requested a continuance under Trial Rule 56(I) or filed an affidavit under Trial Rule 56(F) and concluded that the affidavits were untimely filed as a designation on summary judgment. The Court then concluded that the affidavits could not be considered as newly discovered evidence in his motion to correct error under Trial Rule 59(A)(1) because the affidavits did not set forth the following:

that the evidence could not have been discovered and produced at the summary judgment proceedings with reasonable diligence; that the evidence is material, relevant, and not merely cumulative or impeaching; that the evidence is not incompetent; that he exercised due diligence to discover the evidence in time for the final hearing; that the evidence is worthy of credit; and that the evidence raises a strong presumption that a different result would have otherwise been reached.

Therefore, the Court refused to consider Victor's affidavits in the appeal.

The court then turned its attention to I.C. § 29-1-2-7(b)(4), which governs the intestate succession of children born out of wedlock. That statute provides as follows:

(b)For the purpose of inheritance (on the paternal side) to, through, and from a child born out of wedlock, the child shall be treated as if the child's father were married to the child's mother at the time of the child's birth, if ... (4) The putative father marries the mother of the child and acknowledges the child to be his own.

The Court held that the facts (without considering Victor's affidavits) demonstrated both that Baltasar married Carmen and acknowledged that Paula was his daughter. It then turned to determining whether Paula was a "child born out of wedlock."

The Court discussed a variety of cases that "appear to support a claim that a child must show she is born out of wedlock before application of Section 29-1-2-7(b), in none of these cases was the Court explicitly asked to resolve this issue. Thus, this case presents an issue of first impression."

Paula did not designate any evidence showing Carmen's marital status at the time of Paula's birth. However, the Court held that this was not fatal because it did not matter whether Carmen was married to any person other than Baltasar at the time of Paula's birth. The Court concluded that the term "wedlock" should have the same meaning in the statute that it had under common law, in which that term refers to the status of the biological parents of the child in relation to each other. The Court then examined the evidence designated by Paula. It concluded that Baltasar's acknowledgement of Paula does not alone establish him as her biological father, particularly noting the lack of circumstances that would surround the acknowledgement of parenthood of a young minor. The Court then held that the Siblingship Report of a 98.1% probability of being half-siblings was also insufficient to show that Baltasar is Paula's biological father.

Finally, the Court addressed whether the agreed order of annulment precludes Baltasar or any other heir from challenging Paula's paternity. The Court held that it did not. Although prior cases had addressed the preclusive effect of such a determination on divorced parties has been noted in the context of an heirship determination, the Court distinguished that authority. The prior authority involved a custody dispute. In contrast, the preface to the Agreed Order of Annulment in this case defined its subject matter as property settlement.

Here, the parties' acknowledgment of Paula is gratuitous not only because the subject matter of the agreement, self-defined by the parties, is property settlement, but more importantly, because the annulment court did not and will never determine issues of custody, visitation, and support for Paula. Under these facts, we conclude that Paula's paternity was not determined by the court in the annulment proceedings because the issue was never germane to the action.

Therefore, the Court held that the trial court erred in granting summary judgment in Paula's favor.

There are many lessons that this case can teach. First, when presenting evidence that is only admissible as newly discovered evidence, make sure that you provide a factual basis demonstrating why it should be considered as newly discovered evidence. Second, a child is born out of wedlock (for the purposes of intestate succession) if the parents of the child are not married to each other. Third, a person who is asserting paternity under the intestate succession statutes has a relatively high evidentiary standard that they must meet. Finally, language in a trial court's order that is not germane to the issue that it is resolving has no preclusive effect.

## Lessons:

1. When presenting evidence that is only admissible as newly discovered evidence, you must provide a factual basis demonstrating why it should be considered as newly discovered evidence.
2. A child is born out of wedlock for the purposes of intestate succession if the parents of the child are not married to each other.
3. A person who is trying to establish paternity for the purposes of the intestate succession statutes should plan on meeting the requirements of I.C. § 31-14-7-1.
4. Language in a trial court's order that is not germane to the issue that it is resolving has no preclusive effect.