

RENDERED: July 7, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-000736-MR

DOTTIE CROUCHER

APPELLANT

v. APPEAL FROM MADISON CIRCUIT COURT
HONORABLE JULIA HYLTON ADAMS, JUDGE
ACTION NO. 99-CI-00181

DOROTHY CLARK, Individually
And As Personal Representative
And Administratrix Of The Estate
Of CHARLES CLARK

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: HENRY AND VANMETER, JUDGES; BUCKINGHAM, SENIOR JUDGE.¹

BUCKINGHAM, SENIOR JUDGE: Dottie Croucher appeals from an order of the Madison Circuit Court granting summary judgment in favor of Dorothy Clark, individually and in her capacity as personal representative and administratrix of the estate of her deceased husband, Charles Clark. We affirm.

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

In early 1999, Croucher filed a civil complaint against Dorothy Clark, seeking to establish her right as a daughter of Charles Clark to a share of the proceeds of a wrongful death suit brought by Clark's estate against the Chrysler Corporation. Croucher also sought compensatory damages for expenses and attorney fees as well as punitive damages.

After blood tests indicated that Croucher was the child of Charles Clark, the court entered a judgment establishing that fact. The court also ordered that Croucher recover her share of the wrongful death recovery pursuant to KRS² 411.130. However, the court granted Dorothy Clark's summary judgment motion and dismissed Croucher's breach of fiduciary duty claim against her. Croucher's appeal herein followed.

Charles and Dorothy Clark were married on March 8, 1971. Before they were married, Charles fathered a child out-of-wedlock. That child is Dottie Croucher.

Croucher's mother never attempted to establish through the courts that Charles was the father. Although Charles never explicitly admitted that Croucher was his child, he did not deny it. Throughout Charles's marriage to Dorothy, rumors and opinions existed that Croucher was Charles's daughter. In fact, Dorothy admitted that someone expressed an opinion to that effect to her.

² Kentucky Revised Statutes.

Charles was killed in a car crash on October 14, 1993. A week later, the Rockcastle District Court appointed Dorothy as executrix of Charles's estate. She administered the estate for the next three years. During that time, Croucher did not come forward with her claim that she was Charles's daughter.

During the administration of the estate, Dorothy filed a products liability and wrongful death action against the Chrysler Corporation in the U.S. District Court for the Eastern District of Kentucky. The jury in that case unanimously found in favor of the estate, and it returned a verdict of \$471,258.26 in compensatory damages and \$3 million in punitive damages. The jury also determined that Charles and Chrysler were each 50% at fault. The final judgment in Charles's favor amounted to \$3,235,629.13.

Shortly thereafter, Croucher came forward claiming that she was the daughter of Charles Clark and therefore entitled to a statutory portion of the wrongful death recovery. See KRS 411.130. Dorothy resisted her claim, and Croucher filed her complaint in February 1999 in the Madison Circuit Court. Therein, Croucher alleged that she was an heir at law of Charles Clark and that Dorothy Clark had violated her fiduciary duty as personal representative of Charles's estate by not notifying Croucher of the verdict and protecting her rights under the statute. Croucher sought a declaratory judgment that she was

the daughter of Charles Clark, a determination of her right to share in the proceeds of the wrongful death action, and compensatory and punitive damages against Dorothy Clark for breach of fiduciary duty.

In October 2000, the court granted Croucher's motion to have Charles's body exhumed for DNA testing. Croucher obtained laboratory results that showed the probability of paternity to be 99.87%. Thereafter, the case lay dormant until September 2003, when the court entered a notice that a hearing had been set to address the court's motion to dismiss the case for lack of prosecution. That motion prompted the case to again move forward.

In October 2004, Dorothy Clark received the results of DNA testing by her expert, which confirmed that the probability of paternity was 99.945%. A few days later, Dorothy stipulated that Croucher was the biological daughter of Charles.

Dorothy then filed her motion for summary judgment on Croucher's remaining claims. In awarding summary judgment to Dorothy on those claims, the court stated as follows:

The burden of proof rests upon the one claiming the right to inherit from the putative father's estate. The proper standard is that of clear and convincing evidence. Fykes v. Clark, 635 S.W.2d 316 (Ky. 1982). Therefore, the personal representative does not have to simply accept the claims of a possible heir at face value. Those claims must be supported by

more than a mere claim of right. The claim must be proven by the Plaintiff. Here, the claim was proven when the DNA tests conclusively showed that Charles Clark was Dottie Croucher's father. Until that point, Dorothy Clark owed no particular duty to Dottie Croucher. Once this fact was proven and Dottie Croucher's interest was determined, only then was Dottie Croucher owed a duty by the personal representative. The actions prior to the determination that Charles Clark was Dottie Croucher's father amounted to no more than protection of the estate by the personal representative and the Court can find no duty imposed by law upon the defendant to send notice to the plaintiff that a wrongful death action had been instituted.

That summary judgment dismissing Croucher's remaining claim led to her appeal herein.

Croucher articulates several sub-arguments to support her claim of breach of fiduciary duty. She argues that Dorothy Clark owed her a fiduciary duty as executrix of the estate to investigate her as a possible heir, to notify her of the wrongful death recovery, and to distribute one-half of the proceeds to her.³ Croucher further argues that Dorothy did not exercise utmost good faith, which is required of a personal representative of an estate. Croucher also claims the trial court erroneously ruled that DNA evidence is required to establish paternity. Further, she maintains that there was enough evidence of a conflict of interest to amount to a breach

³ Apparently, the verdict against the Chrysler Corporation remains on appeal. Thus, the estate has received no money as of the time of this appeal.

of fiduciary duty and to thus preclude summary judgment.

Finally, she claims that Dorothy Clark's role as a fiduciary of the estate required her to treat Croucher as a potential heir.

Illegitimate children have the right to inherit from their biological father. See Trimble v. Gordon, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977), and Fykes v. Clark, 635 S.W.2d 316 (Ky. 1982). However, "[t]he burden of proof rests upon the one claiming the right to inherit from the putative father's estate." Fykes, 635 S.W.2d at 317. An illegitimate child claiming a right to inherit from the putative father's estate must prove paternity by clear and convincing evidence. Id. at 318.

In this case, the court held that until Croucher established paternity, Dorothy Clark owed her no fiduciary duties. The court stated, "the claim was proven when the DNA tests conclusively showed that Charles Clark was Dottie Croucher's father. Until that point, Dorothy Clark owed no particular duty to Dottie Croucher." Croucher deduces from that language that the court held DNA evidence is required to establish paternity.

Regardless of the court's language, it was not established in this litigation that Charles Clark was the father of Dottie Croucher until Dorothy Clark, as personal representative of Charles's estate, stipulated that fact. Even

after DNA testing, the matter of paternity had not been established. The DNA test results were merely proof in support of the allegation. We do agree with the court, however, that the results of DNA testing appeared to conclusively prove paternity.

Croucher argues that Dorothy Clark had the duty to investigate rumors that Croucher was Charles's daughter. She cites no Kentucky case to support her argument. The burden was on Croucher to establish that Charles was her father. See Fykes, supra. Croucher was required to prove paternity by clear and convincing evidence. Id. at 318. Although there were apparently a number of people who had the opinion that Charles Clark was the father of Croucher, paternity had not been established until Dorothy Clark entered the stipulation. The estate had the right to complete discovery and have its own DNA testing. In our view, Clark's fiduciary duty arose no earlier than at least that time.

Croucher apparently never made any claim during the life of Charles Clark that she was his daughter. Furthermore, during the three years that his estate was administered, Croucher never made such a claim against the estate. Only when the estate received a jury verdict for over \$3 million did Croucher come forward and seek to establish paternity.

As executrix of Charles's estate, Dorothy owed a fiduciary duty to protect the estate's assets. The burden was on Croucher to establish paternity, and we conclude that Dorothy Clark had no fiduciary duty to seek Croucher out as a potential heir or to concede the truth of Croucher's allegation until she was given the opportunity to exercise her legal rights in this litigation, including having an expert of her own choosing to conduct DNA testing. Once the testing was completed and appeared to conclusively show that Charles was Croucher's father, Dorothy Clark promptly stipulated that fact. We hold that until that time, there was no fiduciary duty owed.

The order of the Madison Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas R. Hays
Lexington, Kentucky

BRIEF FOR APPELLEE:

James T. Gilbert
Richmond, Kentucky