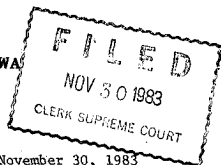


IN THE COURT OF APPEALS OF IOWA



IN THE MATTER OF THE ESTATE)
 OF ELI W. EAST, Deceased;)

Filed November 30, 1983

AGNES WIEHL, EDWIN EAST, ELSIE)
 REUTER, CHRISTINA THOMAS, RICHARD)
 EAST, GEORGIA BYRNE, SAM EAST,)
 VERNON EAST, WILLIAM F. IRVIN,)
 GRACE BRAGHETTA BYRD, JULIA F.)
 STEPHENSON, RUBY ASHBY, BERNADINE)
 MC RAE, and PHYLLIS BEACHAM,)

3-358
 83-375

Appellants.

Appeal from Jasper District Court - Anthony M. Critelli, Judge.

Appellants appeal from the trial court's ruling that appellee Jack Carley is decedent's son and will thus inherit from him. AFFIRMED.

Nathan B. Updegraff, of Selby, Updegraff & Smith, Newton, Iowa, for appellants.

Lewis M. Girdner and Mark A. Otto, of Brierly, McCall, Girdner & Chalupa, Newton, Iowa for appellee, Jack W. Carley.

James L. Tyler, of Matthias, Tyler, Nuzum & Feuerhelm, Newton, Iowa, for the administrators of decedent's estate.

Heard by Oxberger, C.J., Snell and Sackett, JJ.

SACKETT, J.

Decedent's brothers, sisters, nieces and nephews appeal from the trial court's ruling that Jack W. Carley is decedent's son and thus will inherit from him. We affirm.

The decedent, Eli W. East, died intestate in 1979 leaving an estate with a net value in excess of \$100,000. The East estate was opened for administration in Jasper County District Court. The probate inventory was filed, reciting that East died intestate; that he was a widower at the time of his death; and that a son, Jack W. Carley, was his sole and only heir at law.

In March of 1981 a petition to determine heirship was filed on behalf of the brothers, sisters, nieces and nephews of East. The petitioners assert that Jack was not East's son and that therefore they should receive East's entire estate. Jack answered the petition, and a trial was held on the matter.

The evidence produced at trial indicated that Jack's mother was Faye Vargison. Faye married Floyd Carley in 1919. By 1926, four children were born of this marriage. Floyd abandoned Faye and the children in 1926 or 1927. Jack was born to Faye on January 1, 1929. While the birth certificate listed Floyd Carley as Jack's father, the evidence indicated that Floyd had disappeared approximately two years before Jack's birth. After Floyd left Faye and before Jack was born, Eli East began visiting Faye on the weekends at her Des Moines home. There was no evidence of a record of the death of Floyd Carley or his divorce from Faye. There is likewise no record of a marriage between Faye and Eli, although in 1931 Faye and her five children moved to Eli's Newton home where they lived as a family unit. There is no record of an adoption by Eli of Jack or the other four children.

In 1945 Faye obtained a divorce from Eli. The divorce decree stated that Eli East appeared by his attorney, and contained the following language:

It is further ordered, adjudged and decreed that the plaintiff shall have the absolute care, custody and control of the minor child born as the issue of the marriage of plaintiff and defendant, Jack East, born January 1, 1929; and it is further ordered, adjudged and decrees [sic] that the defendant shall, and he is hereby ordered to pay to plaintiff as support money for said child, the sum of \$25.00 per month, payable \$25.00 on August 1, 1945, and \$25.00 on the first day of each month until eleven payments of \$25.00 each are made, when said payments shall cease.

On July 1, 1955, Faye certified that the child support obligation had been fully satisfied.

Some time after her divorce from Eli, Faye returned to Eli's Newton home and they resumed living together as husband and wife until Faye's death in 1972.

In 1977 Eli requested a joint tenancy signature card for a savings account he had at the time. Jack Carley was named as joint tenant. The savings account contained in excess of \$27,000 at the time of Eli's death and passed by operation of joint tenancy ownership to Jack. No similar provisions were made for the other Carley children.

In 1973 Eli executed in his own handwriting a document which recited:

... I will write a will so it will be known how I wanted my Estate to be settled I would like for the kids I raised to have it and any others I will menshind [sic] below
 Floyd Carley ... 2 per cent
 Margaret Campbell ... 2 per cent
 Richard Carley ... 2 per cent
 Luvern Price ... 2 percent
 the rest to
 Jack Carley. Central City, Iowa
 Jack Carley to have full controll [sic] of the estate to do as he sees fit ... This is the way I want it settled ...

Since Eli failed to have the document witnessed, it could not be admitted to probate as his Will. The document was found in Eli's safety deposit box after his death.

A great deal of testimony regarding Jack's paternity was introduced at trial. The trial court noted in its findings of fact and conclusions of law that:

There appears to be a thread that runs through the testimony of the witnesses to the effect that Eli East, Faye and all of the other "Carley" children were knowledgeable of the fact that Jack W. Carley was in fact an "East" but for some reason chose to keep that information and fact from him. Laverne Brue, although called by the Petitioners herein, testified honestly and truthfully in these proceedings that it was the general understanding of the family that such was the case.

The court also noted:

Mildred Carley, Jack R. [sic] Carley's wife since 1945, testified that she had a conversation with Faye in 1946 in which Faye admitted that Jack was the son of Eli East. She asked why Jack was not told and why he didn't use the name "East", and Faye indicated that it was just easier for him in school to use the same name as his brothers and sisters.

The court then concluded:

[T]he Respondent, Jack W. Carley has carried his burden of proof to the effect that in spite of the absence of records in support of same Floyd C. Carley and Faye I. Carley were in fact divorced, that Faye Carley and Eli W. East were married, one to the other, and, important to these proceedings, Jack W. Carley was the product of the marriage of Eli W. East and Faye I. East.

The petitioners filed a timely notice of appeal and now allege that the trial court erred in finding: (1) that Floyd Carley and Faye Carley were divorced; (2) that Eli East and Faye Carley were married to each other; and (3) that Jack Carley was the son of Eli East.

We will address the first two issues presented only as necessary to determine the third issue presented, i.e., whether Jack Carley was the son of Eli East. On our de novo review, Iowa Code section 633.33, we conclude: that the presumption of paternity by Floyd Carley was rebutted; that Eli East's paternity was established; and that Jack was legitimized through Eli's marriage to Faye. Accordingly, we affirm.

I. Presumption of Legitimacy

At the time of Jack's birth, Faye named Floyd Carley as Jack's father. As noted above Faye and Floyd were married in 1919 and there is no record of a

divorce between Faye and Floyd. There was evidence, however, that Floyd disappeared some two years prior to Jack's birth. Furthermore, there was testimony by several family members that Floyd was not the father of Jack. Jack's last name is Carley, and the evidence showed that, prior to Eli's death, Jack believed he was the son of Floyd Carley.

A child born in wedlock is presumed to be legitimate, although the presumption may be rebutted by clear, strong and satisfactory evidence. In re Estate of Hawk, 329 N.W. 2d 660, 662 (Iowa 1983).¹ We believe that Jack, through the evidence presented at trial, has successfully rebutted the presumption that Floyd was his father.

II. Effect of Illegitimacy

The mere showing that Jack is not the son of Floyd Carley does not establish his right to inherit from Eli East. Jack must further establish (1) that he is the son of Eli and (2) either that he was openly and notoriously recognized by him as his son (Iowa Code section 633.222), or legitimized by the marriage of Eli and Faye (Iowa Code section 595.18). See In re Estate of Hawk, 329 N.W. 2d at 662.

A. Evidence of Eli's paternity.

A showing of paternity requires only a preponderance of the evidence. In re Marriage of Schneckloth, 320 N.W. 2d 535, 536 (Iowa 1982). We find the evidence presented at trial supports Jack's claim that Eli is his natural father. Eli was spending his weekends with Faye at the time Jack was conceived, and Eli continued those visits during Faye's pregnancy and after Jack was born. There was a strong physical resemblance between Jack and Eli which was not shared with Faye's other children. There was testimony by various family members of their knowledge that Eli, rather than Floyd, was the father of Jack. Jack, unlike his brothers and sisters, was named joint tenant of a savings account in Eli's name.

¹ Because the facts in the instant case are similar to those in Hawk, we employ the same rationale here as did the supreme court in Hawk.

Jack was also to be the recipient of the bulk of Eli's estate under a holographic will discovered after Eli's death. Most compelling, however, is the fact that in the 1945 divorce between Faye and Eli the court found Eli to be the father of Jack, and Eli subsequently satisfied the court-imposed child support obligation under the terms of the decree.

Upon examination of the whole record, we conclude that a preponderance of the evidence supports Jack's claim that Eli East was his father.

B. The effect of the marriage.

Iowa Code section 595.18 provides:

[Illegitimate children become legitimate by the subsequent marriage of their parents. Children born of a marriage in violation of section 595.3 [license provisions] or 595.19 [void marriages] are legitimate.]

Because we have found Jack's father to be Eli East rather than Floyd Carley, we must now determine whether Jack was "legitimized" under section 595.18 by the marriage of Eli and Faye. For purposes of section 595.18 a finding that a common-law marriage existed between the natural parents of Jack is enough; thus, the lack of a ceremonial marriage between Faye and Eli will not defeat Jack's legitimacy if a common-law marriage existed. See In re Estate of Hawk, 329 N.W. 2d at 663. A common-law marriage exists where there is: (1) intent and agreement in praesenti to be married by both parties; (2) continuous cohabitation; and (3) public declaration that the parties are husband and wife. In re Marriage of Winegard, 278 N.W. 2d 505, 510 (Iowa 1979). The trial court record clearly reflects the existence of a common-law marriage between Eli and Faye. Jack was legitimized by this common-law marriage under section 595.18.

C. Recognition.

Iowa Code section 633.222 provides:

Unless he has been adopted, an illegitimate child shall inherit from his natural father when the paternity is proven during the father's lifetime; or when the child has been

recognized by the father as his child; but such recognition must have been general and notorious, or else in writing.
[emphasis added]

Even if we were to find that Jack was not legitimized under section 595.18, there is sufficient evidence in the record to support a finding that Eli's recognition that Jack was his son was "general and notorious." Because Jack has satisfied the requirements of section 633.222, he is entitled to inherit from Eli, his natural father.

Because we find that the presumption of paternity by Floyd Carley was rebutted, Eli East's paternity was established and Jack was legitimized through Eli's marriage to Faye, we conclude that Jack has established his right to share in the estate of Eli East and accordingly affirm the trial court.

AFFIRMED.