COURT OF APPEALS
DECISION
DATED AND FILED

July 13, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-2727

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE ESTATE OF DOUGLAS A. DAHLIN, SR., DECEASED:

DOUGLAS DAHLIN, JR.,

APPELLANT,

V.

JAMES B. DAHLIN,

RESPONDENT.

APPEAL from an order of the circuit court for Crawford County: MICHAEL KIRCHMAN, Judge. *Reversed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

¶1 EICH, J. This case arises out of the probate of the estate of Douglas Dahlin, Sr., who died in March 1997. His son, Douglas Dahlin, Jr., appeals an

order declaring the respondent, James Dahlin, to be an heir of Douglas, Sr. and appointing him personal representative of Douglas, Sr.'s estate.

¶2 James Dahlin was born in 1930. His mother, Grace Bollman, was married to Kasimer Kary at the time of his conception and birth, and his birth certificate lists Kasimer Kary as his father. Kary and Bollman were divorced two years later and Bollman married Douglas, Sr. shortly thereafter. Years later, as an adult, James Kary changed his surname to Dahlin. After Douglas, Sr.'s death, James Dahlin, alleging that he was Douglas, Sr.'s biological son, sought to have an unsigned document he claimed was Douglas, Sr.'s will admitted to probate. In the alternative, he asked that Douglas, Sr.'s estate be distributed under the intestate succession laws, and that he be appointed personal representative.

¶3 After an evidentiary hearing, the court declined to admit the unsigned document to probate. It went on to rule, however, that James was Douglas, Sr.'s son and appointed him personal representative of the estate. In reaching that conclusion, the court applied WIS. STAT. § 891.41(1) (1997-98),[1] which provides as follows:

> A man is presumed to be the natural father of a child if … [h]e and the child's natural mother are or have been married to each other and the child is conceived or born after marriage and before the granting of a decree of legal separation, annulment or divorce between the parties.

The court concluded that James had presented sufficient evidence to rebut the statutory presumption that Kasimer Kary was his biological father, and that as a result, both he and Douglas, Jr. were heirs to the estate.

[1] All references to the Wisconsin Statutes are to the 1997-98 version.

¶4 Douglas, Jr.'s challenge to that ruling raises a question of law, ***Estate of Schneider***, 150 Wis. 2d 286, 292, 441 N.W.2d 335 (Ct. App. 1989), which we decide de novo, owing no deference to the circuit court's conclusions. ***Rock Lake Estates Unit Owners Ass'n v. Lake Mills***, 195 Wis. 2d 348, 355, 536 N.W.2d 415 (Ct. App. 1995). Our review of the record in light of the applicable legal authority satisfies us that, as a matter of law, James presented insufficient evidence to rebut the statutory presumption. We therefore reverse the circuit court's order.

¶5 Douglas, Jr. argues first that the court misapplied the statutory burden of proof when it stated at one point in its decision that its conclusion was based on "the great weight of the evidence," because the statutes plainly require proof by "a clear and satisfactory preponderance of the evidence" to overcome the presumption.[2] Our own review of the record satisfies us that the court simply misspoke, for all indications are that it used the appropriate standard in considering the evidence. As indicated, however, we are persuaded that, as a matter of law, James failed to meet the applicable burden of proof.

¶6 Applying the same statutes, we reached a similar result in Estate of Schneider—a case identical in most respects to this one. David Schneider was born to Mary Ann Seng while she was married to Jack Seng. His birth certificate gave his name as David Seng. A few years later, Mary Ann eloped with Arthur

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[2] WISCONSIN STAT. § 891.39(1)(a) states in relevant part:

> Whenever it is established in an action or proceeding that a child was born to a woman while she was the lawful wife of a specified man, any party asserting in such action or proceeding that the husband was not the father of the child shall have the burden of proving that assertion by a clear and satisfactory preponderance of the evidence.

Schneider, taking David with her. When Schneider died, David sought to inherit his estate as a nonmarital child whom, he claimed, Schneider had acknowledged as his son. The trial court dismissed David's petition and we affirmed, holding that the evidence was insufficient as a matter of law to overcome the "presumption of legitimacy and paternity" contained in WIS. STAT. §§ 891.39 and 891.41. In so ruling we noted that while the presumption is rebuttable, is it nonetheless "one of the strongest presumptions known to law." ***Id.*** at 291. We went on to state that, under "[w]ell-established Wisconsin law," there are four categories of "proper and sufficient" evidence that can be offered to rebut the presumption—evidence that the husband was:

> (1) incompetent; (2) entirely absent, so as to have no intercourse or communication of any kind with the mother; (3) entirely absent at the period during which the child must, in the course of nature, have been begotten; or (4) only present under such circumstances as afford clear and satisfactory proof that there was no sexual intercourse.

Id. at 292. These four categories, we said, contemplate the admission of "virtually any evidence that it was physically or biologically impossible for the husband to be the father." ***Id.***

¶7 The circuit court in this case relied on the following evidence in ruling that James had successfully rebutted the statutory presumption: letters written by Douglas, Sr. acknowledging both Douglas, Jr. and James as his sons; testimony from family members that Douglas, Sr. referred to James as his son; and a baptismal certificate showing Douglas Dahlin as James's father. Beyond that, James offered the testimony of Alice Olson, who was a close companion to Douglas, Sr. for the last twenty years of his life. Olson testified that, during their time together, Douglas, Sr. told her that James and Douglas, Jr. were both his sons. According to Olson, Douglas, Sr. told her that he and James's mother, Grace, were

childhood sweethearts, but had not married because Dahlin felt he did not have enough money to support a wife—and that Grace then moved away and married Kasimer Kary. He told her that, sometime thereafter, Grace became dissatisfied with her marriage and moved back to her parents' hometown, where she and Douglas, Sr. became "reacquainted" and began a relationship which eventually resulted in Grace's pregnancy and James's birth. When asked whether Douglas, Sr. had ever talked about why James's birth certificate listed Kary as his father, rather than himself, she said that he never discussed the subject, "other than the fact that it would have been socially unacceptable, maybe even legally unacceptable in that day and age."

¶8 There is nothing else in the record on the subject, other than documentary evidence showing that James was born in 1930 and that Grace and Douglas, Sr. were married in 1932. James offered no evidence that Kary was incompetent or "entirely absent so as to have no intercourse or communication of any kind with [Grace]"—or on any of the other factors discussed in Estate of Schneider. All James's evidence tends to show is the existence of a father-son relationship between himself and Douglas, Sr. As we said in Schneider, that is not enough.

> David offered no evidence that it was physically or biologically impossible for Mary Ann's husband to be the father of the son born to her during the marriage. Most of his evidence dealt with Arthur's acknowledgments of paternity and the nature of his relationship with David. This evidence, however, is premature. While it might be relevant to bolster the implication reasonably to be drawn from evidence falling into the [four] categories, standing alone it is insufficient….
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> The evidence offered tended to show a strong emotional bond between David and Arthur, but no absence of a biological bond between David and Jack Seng. The

> evidence simply was insufficient to rebut the presumption that David is a marital child.

Id. at 292-93.

¶9 The same is true here. The statutes require that, in order to rebut the presumption of Kary's paternity, James must put forth evidence to disprove the existence of a biological relationship between himself and Kary; this he did not do.

¶10 As we have noted above, the circuit court also appointed James personal representative of Douglas, Sr.'s estate, finding, among other things, that Douglas, Jr. had been guilty of a breach of fiduciary duty by converting estate funds to his own uses. As Douglas, Jr. points out, based on the parties' own stipulation, his conduct was not before the court—the issues to be decided at the hearing were limited to the validity of the unsigned will and James's heirship. Even so, WIS. STAT. § 856.21 states that domiciliary letters are to be granted in the following order: first to "[t]he executor named in the will;" second, to "[a]ny person interested in the estate …;" and, third, to "[a]ny person whom the court selects." Because Douglas, Sr. was found to have died intestate (and that ruling is not challenged on this appeal), there is no will naming an executor. And because, as we have ruled above, James is not an heir of Douglas, Sr.—and thus not a "person interested in the estate," his appointment as personal representative is void.

By the Court.—Order reversed.

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