COURT OF APPEALS
DECISION
DATED AND FILED

May 14, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-1560 **Cir. Ct. No. 00-PR-61**

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

IN RE THE ESTATE OF RALPH J. MAJESKI:

TERRI A. BIRT,

PETITIONER-APPELLANT,

V.

ANNE MARIE BONKOWSKI, CYNTHIA OLSHESKE, CATHERINE NETTESHEIM AND JENNIFER OLSHESKE,

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Reversed.*

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. Terri A. Birt appeals from the order of the circuit court which declared her not to be an heir of Ralph J. Majeski. We conclude that

this case is controlled by the doctrine of judicial estoppel. Hence, we reverse the order of the circuit court.

¶2 Majeski died intestate. His nonmarital daughter, Birt, sought to become the sole heir. Majeski's paternity was not established during his lifetime. Under an old statute, which has since been held in disrepute, WIS. STAT. § 52.28 (1969), Majeski had been able to buy his way out of paternity proceedings by paying support and birthing costs.

¶3 After Majeski died and probate proceedings began, Birt filed a claim of heirship. The only known heirs at the time were Majeski's nieces. One of the nieces, Anne Marie Bonkowski, was the personal representative of the estate. Birt asked the court for an order to have DNA tests done to determine whether she was Majeski's daughter and heir. At a hearing on the issue, the parties discussed with the court whether DNA testing would be appropriate. The following exchange took place between counsel for the personal representative and the court:

> [COUNSEL]: First of all, your Honor, I think one important fact is that the decedent dies intestate. So there are no testamentary documents to govern disposition of this estate. The position of the personal representative is that the action 20 years ago amounted to a settlement of a potential liability and that it should not be considered an adjudication of heirship. On the other hand, the personal representative also feels the DNA testings should proceed and quite frankly be determinative of whether [Birt] is considered a child of the decedent.
>
> COURT: So am I to understand then that the personal representative at this point in the proceedings is not objecting to an order being entered by this Court directing that DNA testing by the appropriate parties proceed.
>
> [COUNSEL]: That is correct, your honor.

The guardian ad litem also agreed to the DNA testing. The court then ruled: "The court is going to direct that either a blood test or DNA test as agreed by Ms. Birt and the personal representative take place."

¶4 The order entered by the court stated: "based upon the lack of objection from all parties present, the petitioner/claimant shall be entitled to pursue and conduct a DNA, and or blood test analysis in order to establish her heirship, to the decedent." The order also provides, as the parties had agreed at the hearing, that if the tests established Birt's relationship then the costs of the tests would be paid by the estate.

¶5 On August 13, 2001, the personal representative filed a petition for a hearing on proof of heirship. The petition states that DNA testing established that Majeski was the biological father of Terri Birt and asked the court to hear proof of heirship. An order was subsequently entered approving the proof of heirship and appointing Birt personal representative of the estate.

¶6 The former personal representative, Bonkowski, almost a year later, obtained separate counsel and brought motions before the circuit court seeking relief from this order. The circuit court granted Bonkowski's motion for reconsideration and vacated the previous order. The court concluded that there was no agreement or stipulation between the parties that the DNA testing would establish Birt's right to inherit. The court concluded that WIS. STAT. § 852.05 (1999-2000) prohibited other means of proof of heirship and that Birt was not Majeski's heir. Birt then moved for reconsideration of that order and the circuit court denied the motion and once again declared that Birt was not Majeski's heir. We disagree with this conclusion.

¶7 First we consider our standard of review. In this case, the circuit court reviewed the record as established by the court commissioner. The circuit court read the transcript and drew a conclusion. In fact, the circuit court itself stated that the issue was similar to a summary judgment. This is not a finding of fact to which we owe deference. We also may review the transcript and reach a conclusion.

¶8 We conclude that the estate is prohibited by the doctrine of judicial estoppel from contesting Birt's right to inherit. "Judicial estoppel is an equitable rule applied at the discretion of the court to prevent a party from adopting inconsistent positions in legal proceedings." ***Kopfhamer v. Madison Gas & Elec. Co.***, 2002 WI App 266, ¶24, 258 Wis. 2d 359, 654 N.W.2d 256, *review denied*, 2003 WI 1, 258 Wis. 2d 107, 655 N.W.2d 127 (Wis. Dec. 10, 2002) (No. 01-1384). This doctrine prevents a party from playing "fast and loose" with the courts by asserting inconsistent positions. ***State v. Petty***, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996). In order to apply the doctrine of judicial estoppel, the later position must be clearly inconsistent with the earlier position, the facts at issue must be the same, and "the party to be estopped must have convinced the first court to adopt its position—a litigant is not forever bound to a losing argument." ***Id.*** at 348. In other words, when a party has assumed a certain position in a legal proceeding, and has succeeded in that position, he or she may not thereafter assume a contrary position simply because his or her interests have changed. ***Id.*** at 351.

¶9 We exercise our discretion to apply the doctrine of judicial estoppel to this case. The record demonstrates that the personal representative agreed to the DNA testing to establish Birt's relationship to Majeski and to "be determinative of whether [Birt] is considered a child of the decedent." We disagree with the circuit

court's conclusion that this was merely an agreement for testing and not a stipulation that the testing would establish heirship. The comment was made in the context of a discussion of the disposition of the estate and the adjudication of heirship. Further, the court's order stated that "based upon the lack of objection from all parties" the DNA testing would proceed "in order to establish [Birt's] heirship." We conclude that this was an agreement by the parties to have DNA testing done for the purpose of determining Birt's right to inherit.

¶10 This conclusion is further supported by the personal representative's subsequent actions. After the DNA testing was completed, the personal representative brought the petition for the proof of heirship asserting that the DNA testing had established that Majeski was Birt's father. The court then entered an order finding Birt to be Majeski's heir.

¶11 We conclude that the doctrine of judicial estoppel prohibits the personal representative from asserting a contrary position a year later with different counsel. All of the elements for judicial estoppel have been met: the position the personal representative took before the circuit court was inconsistent with its previous position before the court commissioner; the facts are exactly the same; and the personal representative agreed to the testing as a determination of heirship and brought the petition for proof of heirship. Under these circumstances, the personal representative cannot now be heard to deny that Birt is Majeski's heir.

¶12 We acknowledge, however, that even with judicial estoppel an undisputed nonmarital child may only inherit in the manner prescribed by statute. WIS. STAT. § 852.05 (2001-02). However, parties may agree to something which may not be allowed by statute. *See, e.g.,* ***Bliwas v. Bliwas***, 47 Wis. 2d 635, 637-38, 178 N.W.2d 35 (1970); ***Jacquart v. Jacquart***, 183 Wis. 2d 372, 383, 515

N.W.2d 539 (Ct. App. 1994). In this case, the parties agreed to determine Birt's right to inherit by DNA testing after Majeski's death. The court allowed this and the testing determined that Birt was Majeski's heir. On this record, the personal representative is estopped from later asserting a contrary position. For this reason, we reverse the order of the circuit court which declared that Birt was not Majeski's heir and appointed Bonkowski as personal representative.

By the Court.—Order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.