IN THE MATTER OF
THE ESTATE OF
RUDY JULIAN, Deceased.

A-00-4321-T4

Superior Court, Appellate Division

Submitted May 3, 2000 -- Decided May 25, 2000

Before Judges GRIM, REAPER and MERCY.

A. FONCE D'TOMATO, Attorney General of the State of New Jersey for the appellant (Mr. D'Tomato, of counsel and on the brief).

GEORGE DOUBLEBUSH, attorney for the plaintiff-respondent (Mr. Doublebush, of counsel and on the brief).

REAPER, J.A.D., joined by GRIM, J.A.D.

This case arises from the January 19, 2000 declaratory judgment of the Superior Court, Chancery Division-Probate Part, recognizing that Allison and Rudy Julian, posthumously-conceived biological children of Rudy and Hillary Julian, husband and wife, are the legal heirs of Rudy Julian under the New Jersey intestate statute, N.J.S.A. 3B:5-1 et seq.

We hold, first, that neither Hillary Julian nor her progeny have standing to bring this matter before the Courts of New Jersey. Since Mrs. Julian's primary interest is in securing Social Security benefits for her children, this matter is properly one for the Social Security Administration and the federal courts.

We hold, second, that the legal status of posthumously-conceived children is an issue to be resolved by the Legislature and not the courts.

Finally, we conclude that should Mrs. Julian and her children have standing at this time to challenge the New Jersey intestate succession laws, those laws are constitutional and children born fourteen months after death of Rudy Julian are not his legal heirs.

Accordingly, we reverse.

The Facts

On April 13, 1996, Rudy Julian ("Rudy"), a resident of Lake Parsippany, New Jersey, was diagnosed with leukemia. Rudy was 24 at the time and he and his wife, Hillary ("Hillary"), were just beginning to discuss plans for their family. Rudy's physician, Dr. Alphonse Gourd, advised him that the chemotherapy that he would have to go through would likely render him sterile.

Hillary and Rudy discussed this issue both by themselves and in several of their consultations with Dr. Gourd. He referred them to Dr. Jean Course-Eyen, of the Bill Bradley Sperm Bank and Fertilization Clinic located in Cherry Hill, New Jersey. Dr. Course-Eyen consulted with the Julians and they determined to preserve some of Rudy's sperm for purposes of in vitro fertilization at a later date.

On May 3, 1996, Rudy and Hillary harvested his sperm at the Bill Bradley Clinic. They repeated the process three weeks later. The sperm was frozen and preserved at the clinic.

Rudy's treatment was unsuccessful; he died from the disease on February 2, 1997. His and Hillary's savings were depleted by the costs of his illness; at his death, he was deeply in debt and, therefore, his estate had no assets and no value of any kind.

After Rudy's death, Hillary contacted Course-Eyen and, on what would have been Rudy's 26th birthday, July 5, 1997, went through the in-vitro fertilization process using Rudy's frozen sperm. There is no question as to the source of the sperm used in the in vitro process. On April 3, 1998, Hillary gave birth to twins: a boy, whom she named Rudy after his father, and a girl, named Allison after Rudy's mother.

On May 1, 1998, Hillary filed a claim for social security survivor benefits for Rudy and Allison based on her late husband's work record. A Social Security Administration hearing examiner, I.M. Generous, awarded benefits on October 9, 1998, finding that the children were unquestionably the biological children of a covered worker whose birth had been contemplated at the time of his death. That ruling was set aside by the Appeals Council of the Social Security Administration on July 15, 1999, on the alternative grounds that the children did not fall within the definition of "child" set forth in 42 U.S.C. §416(h)(2)(A) and that they were not dependent on the worker for support at the time of the worker's death.

On September 1, 1999, Hillary filed a declaratory judgment action in the Superior Court, Chancery Division-Probate Part, Morris County, seeking a determination that the children could inherit from Rudy under this State's intestate laws so as to bring the twins within the definition in 42 U.S.C. §416(h)(2)(A). Her complaint challenged the constitutionality of N.J.S.A. 3B:5-8 to the extent that the statute did not permit the twins to inherit as Rudy's legal heirs. Since Rudy died penniless and there is no value whatsoever to his estate, Hillary's sole purpose, as stated in her complaint, is to strengthen her appeal in federal court from the Appeals Council's determination. See Complaint at paragraphs 7-9:

> "7.The Appeals Council of the Social Security Administration has denied dependent benefits to Rudy and Allison Julian contending although Mr. Julian's biological children, they did not meet the threshold statutory requirement of being children who were dependent upon their father at the time of his death.
>
> 8. Section 216 of the Social Security Act [42 U.S.C. §416] provides, inter alia, that '[c]hild's insurance benefits can be paid to a child who could inherit under the State's intestate laws.'
>
> 9. Plaintiff seeks a declaration that her son and daughter, posthumously conceived utilizing the late Rudy Julian's stored sperm, are among the class of persons who are his intestate heirs so as to pursue her claim for child's insurance benefits on behalf of the decedent's children under the Social Security Act."

On January 19, 2000, following arguments at which the statute's constitutionality was defended by the Attorney General, Superior Court Judge James Tax Florid ruled that Rudy and Allison were the biological children of Rudy Julian, and that N.J.S.A. 3B:5-8 could not be read constitutionally to deny their status as heirs. The trial court concluded that posthumously-conceived children could not be treated differently from children conceived during marriage and that to distinguish between the two classes would be to create a suspect class entitled to constitutional protection.

The Attorney General filed a notice of appeal to this Court on March 6, 2000.

Discussion

We conclude that the issue as framed by the plaintiff in this case is nonjusticiable. Standing before the courts of this State requires "a substantial likelihood of some harm visited upon the plaintiff in the event of an unfavorable decision." In re Baby T., 160 N.J. 332, 340 (1999). To sustain a declaratory judgment action, there must be a justiciable controversy between the parties where the operative facts are not prospective, uncertain or contingent and the court is not asked to render what is essentially an advisory opinion. See UMC/Stamford v. Allianz Underwriters Ins. Co., 276 N.J. Super. 52, 66 (App. Div.1994); N.J.S.A. 2A:16-50 et seq.; R. 4:42-3. Since there are no assets nor property of value in the estate of Rudy Julian, there is nothing that would make the case justiciable in New Jersey. An opinion on this matter would constitute an advisory opinion.

The Social Security Act was created by the United States Congress, and regulations pursuant to the Act were adopted by the Social Security Commissioner. Redress for grievances is properly channeled through administrative hearings and appeals and finally to the federal court system. This Court cannot expand the meaning of this State's intestate statutes to provide this plaintiff with a state court ruling that may or may not be helpful to her as she pursues her federal claims against a federal administrative agency before the

federal courts.[1]

Moreover, the issue of the legal status of posthumously-conceived children is a difficult one that is properly committed to the Legislature. There are many different approaches that can be and have been taken to decide the question[2] and there are no "judicially discoverable and manageable standards for resolving it." Baker v. Carr, 369 U.S. 186, 211 (1962). Unless the course chosen by the Legislature here contravenes constitutional standards, that choice must stand.

We find that the New Jersey statutory intestacy scheme does not contravene constitutional standards and that the trial court erred in finding otherwise.

N.J.S.A. 3B:5-8 exists for the purpose of defining who may legally inherit from an estate should the decedent die intestate. The statute serves the dual purpose of settling the estate in a timely manner and offering repose to the identifiable heirs. It permits a child born after the death of a decedent to inherit if "conceived before [the decedent's] death." The law has traditionally held the class of persons entitled to take from the decedent open long enough to allow a child who was being carried in his or her mother's womb at the time of the decedent's death to receive a share of the property. See Estate of Wolyniec v. Moe, 94 N.J.Super. 43 (Ch. Div. 1967); Chemical Bank & Trust Company v. Godfrey, 29 N.J.Super. 226 (Ch. Div. 1953). A child is presumed to have been conceived during the life of a deceased married father if born to the decedent's wife within 300 days of the death of the decedent. See N.J.S.A. 9:17-43(a)(1).

Because the parents can choose when and how after-born children will enter this world, classification based on date of conception is not a classification based on immutable characteristics. Therefore, the intestacy scheme is not subject to either strict scrutiny, San Antonio School District v. Rodriguez, 411 U.S. 1 (1973), or to intermediate scrutiny. Craig v. Boren, 429 U.S. 190 (1976). The classification of posthumously-conceived children is wholly unlike prior classifications of illegitimate children. The Fourteenth Amendment is not designed to protect the rights of children not yet conceived. See Trimbel v. Gordon, 430 U.S. 762 (1977); M.A. v. Estate of A.C., 274 N.J. Super. 245, 255 (Law Div. 1993). Further, the administration of estates is a substantial state interest. See Lalli v. Lalli, 439 U.S. 239, 270-71 (1978).

N.J.S.A. 3B:5-8 offers a bright line test for determining the identity of a decedent's heirs. By declaring N.J.S.A. 3B:5-8 unconstitutional, we would be establishing a new horizon for the settlement of estates. Genetic material can remain viable for years in its cryogenic state. Considering only today's technological capabilities and not tomorrow's potential advances, we would vastly extend the time it takes to identify the legal heirs and

1. There is, of course, no guarantee that a finding that these children are entitled to an intestate share of their father's estate would qualify them for Social Security benefits in light of the Appeals Council's finding that they were not dependent on their father's support at the time of his death.
2. Compare Va. Code Ann. section 20-156 et seq. with La. Civ. Code Ann. 1474 and N.D. Cent. Code § 14-18-01.

close an estate by according heir status to posthumously-conceived children. The impracticality of such an open-ended scheme for posthumously-conceived heirs is apparent. The courts would be embroiled in each case in controversy concerning the likelihood and potential number of such after-born heirs, the dates on which they could be expected to appear, and how to provide for their interests.

Intestacy statutes assume that they are following the intent of the decedent. No decedent could reasonably wish for his or her estate to remain unsettled for many years. It is illogical that a statute designed to create repose should be construed to do exactly the opposite.

There is no doubt that the children in this case are the biological children of Rudy Julian. There is no doubt that, during his lifetime, Rudy strongly desired children of his own. However, these children were born 14 months after his death. Under the current statutory intestacy scheme, only children conceived prior to the death of the father have a right to inherit. Although the Court would like to provide an easy answer for these children, there are other parties whose interests must be considered.[3] The Legislature has spoken on this matter in a statutory system that is not unconstitutional. We must therefore uphold the law of the State.

REVERSED.

MERCY, J.A.D., dissenting

I respectfully disagree with my colleagues and would affirm the decision of the trial court.

It is clear to me that Hillary Julian and her children are proper plaintiffs in this declaratory judgment action. The extensive discussion of standing in N.J. Home Builders Ass'n v. Div. of Civil Rights, 81 N.J. Super 243 (Ch. Div.1 963), aff'd sub nom. David v. Vesta Co., 45 N.J. 301 (1965), makes it clear that "...the threat of a possible claim, disturbing the peace of the plaintiffs' freedom by casting doubt or uncertainty upon their rights or status, establishes the requisite condition of justiciability. ... In fact, an action under the Declaratory Judgments Law is ordinarily limited in its application to 'cases where rights had not yet been invaded or wrongs yet committed to the extent of actionable damage.' Id. at 251, citations omitted. As our Supreme Court made clear in In re Quinlan, 70 N.J. 10, 34-34 (1976), "New Jersey courts commonly grant declaratory relief. ... And our courts hold that where the plaintiff is not simply an interloper and the proceeding serves the public interest, standing will be found."

3. Rudy Julian's parents are still alive, as are a sister and the sister's two children. The entitlement of each of those persons to certainty as to his or her own right of intestate succession given the existing family structure is not to be ignored. Their interest clearly outweighs any illusory prospect that the twins might eventually inherit by intestacy from one or more of those relatives.

While a proper determination of the heirship status of these children under New Jersey law might not be dispositive of their rights under federal Social Security law, it would be unfortunate for those federal tribunals to reach a result based in part upon an incorrect determination of New Jersey law. Therefore, it would be appropriate for this Court to interpret New Jersey statutory law as it applies to Allison and Rudy Julian, Jr. Section 216 of the Social Security Act provides benefits to "a child who could inherit under the State's intestate laws." Clearly, we are shirking our responsibility in not making a decision that the Social Security Administration can look to for guidance. If we leave the question of Allison and Rudy's status as heirs unanswered, we are potentially negating rights they ought to have under the Social Security Act. We have a compelling interest to act on behalf of citizens of New Jersey. Not only are the rights of the children in the present case at stake, but so also are the rights of children born to similar circumstances in the future.[4]

It is important to remember that the interpretation of New Jersey statutes and the determination of what New Jersey law is are primarily the responsibility of New Jersey courts. Indeed, federal law is clear that state courts have the right to construe their own statutes, Beal v. Missouri Pac. R. R. Corp., 312 U.S. 45(1941), and that federal courts are bound by that construction. Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass'n., 426 U.S. 482 (1973).

Further, the children stand to inherit assets from other family members if their legal status as heirs is confirmed. As the majority noted, see note 3 above, these children have grandparents, an aunt and cousins. The determination of Allison and Rudy Jr.'s legal status as heirs is appropriate to determine any rights they might have over assets that pass from their father's parents or his collateral relatives should any of those persons die intestate. Certainly, we should determine their status in order to identify their rights under the wills of their father's relatives. In this case, there is a sister with dependants who stands to inherit from her parent's estate.[5]

That the children might stand to inherit by intestacy from their grandparents is not a whimsical notion unworthy of judicial attention. Rudy's parents, Al and Allison, supported their son and daughter-in-law's decision to harvest Rudy's sperm for use later for in vitro fertilization should Rudy's treatment leave him sterile. Evidence presented at trial established Rudy's understanding of his parents' position in the form of a letter, expressing his gratitude for his parents' support and for their assurance that they would help Hillary care for any children she conceived by this method. Inter alia, the letter stated:

> "...We also appreciate the support you have shown us concerning the possibility of Hillary conceiving children during my illness or, even, God forbid,

4. See generally Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 Loy. L.A. L. Rev. 251 (1999); Jimenez v. Weinberger, 417 U.S. 628, 635 (1974).
5. Indeed, it appears that one of the main reasons that the State has chosen to defend against these children's claim so vigorously is the vehement opposition to their recognition as heirs by Mrs. Krysti Whichman, Rudy's sister, who was heard to remark on several occasions "no test-tube bastards were going to cheat [her] or [her] kids out of [their] inheritance."

> after my death. Please don't forget your promise to us that you will treat these children as your grandchildren, with all the same love and affection that you would show children conceived in the natural way. Thank you, so much, for your love and understanding..."

Indeed, when it came time for Hillary to complete the fertilization procedure, Rudy's parents paid for it. Though it would be comforting to believe that the grandparents would take legal action to protect their grandchildren through a will, the evidence further establishes the antipathy of the elder Mr. and Mrs. Julian to lawyers and legal documents, making the intestate disposition of their considerable assets (they are wealthy realtors) a virtual certainty.

For these reasons, it is imperative that this Court establish the legal rights of Rudy Julian's biological children, and their inability to otherwise secure such a determination certainly "cast[s] doubt or uncertainty upon their rights or status, [and] establishes the requisite condition of justiciability." N.J. Home Builders Ass'n v. Div. of Civil Rights, supra, 81 N.J. Super. at 251.

Once past the procedural hurdle of justiciability, it is equally clear to me that the New Jersey intestacy scheme establishes a classification based exclusively on the nature and timing of a child's conception. Nothing will ever change the fact that these children were born more than nine months after their father's death: this is "an immutable characteristic determined solely by the accident of birth." Frontiero v. Richardson, 411 U.S. 677, 686 (1973). It has the effect of denying legal status to an entire group of children based on a condition they cannot change, and it does so without regard to the actual intent of their parents and exclusively in the name of administrative convenience. The strict scrutiny test requires the state to show a compelling interest to validate its disparate treatment of like classes. The convenience of the courts in administering intestate estates and the mere financial interests of the parties do not constitute a compelling state interest validating the discriminatory classification of these children as "non-people" for inheritance purposes.

The evidence establishes beyond question that Rudy had, on several occasions, contemplated the prospect of his wife's posthumous conception of his children by in vitro fertilization and he assigned to his wife the rights to use his sperm after his death. The record further establishes clearly and convincingly establish that the sperm used in the fertilization process was in fact the same material harvested by the Julians. To me, that evidence is more than sufficient to establish that these children are his children and that he intended to acknowledge paternity and his support for any posthumous child resulting from his wife's artificial insemination. Cf. J.B. v. M.B., 2000 N.J.Super. LEXIS 216 (App. Div. June 1, 2000).

The only thing that bars these children from their support as Rudy's legal heirs is a statute that clearly has not taken this type of conception into consideration.The circumstances of Allison and Rudy's birth have never been contemplated by the drafters of the relevant legislation. Existing statutes are ill-quipped to address their unconventional conception and birth. See generally Andrea Corvalan, *Fatherhood after Death: A Legal*

and Ethical Analysis of Posthumous Reproduction, 7 Alb. L.J. Sci. & Tech. 335 (1997). The courts must step in and, with evidence such as we have here of the father's intent and the children's biological paternity, should provide the children with a determination of their legal status.

In my opinion, the plaintiff and her children have standing to bring their issues to the New Jersey Courts, these issues are justiciable, and -- far from having a compelling reason to deny them their rights as Rudy's children -- New Jersey has a compelling interest in determining the rights of these children as heirs of their biological father. Therefore, I would affirm the trial court's decision.

IN THE SUPREME COURT
OF THE STATE OF NEW JERSEY

A-00-522

IN THE MATTER OF	:	
	:	
THE ESTATE OF	:	**ORDER**
	:	
RUDY JULIAN, Deceased.	:	
_____	:	

The June 1, 2000 appeal of this matter by the appellant is, on this 5th day of June, 2000, hereby docketed as to all appropriate issues. Simultaneous briefing is directed and both parties are to file briefs with this Court on or before July 17, 2000.

STEPHEN W. TOWNSEND, Clerk
For the Court