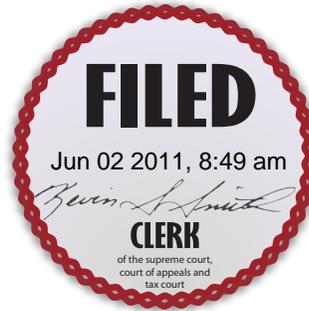


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

IN THE MATTER OF THE ESTATE)
OF MAURICE KENDRICK, SR.)

SUSAN KUSSART as Guardian of)
B.K.,)

Appellant-Respondent,)

vs.)

No. 46A03-1007-ES-361

ESTATE OF MAURICE KENDRICK, SR.,)
CRYSTAL BURKE-POTTS, MAURICE)
KENDRICK, JR., and DARYL KENDRICK.)

Appellees-Petitioners.)

APPEAL FROM THE LA PORTE SUPERIOR COURT
The Honorable Kathleen B. Lang, Judge
Cause No. 46D01-0505-ES-46

June 2, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant-Respondent Susan Kussart in her position as guardian of B.K. appeals the trial court's determination that B.K. failed to prove that she is an heir of the deceased, Maurice Kendrick, Sr. ("the deceased"). Concluding that the trial court abused its discretion in ruling in favor of the adult heirs because its determination that B.K. does not qualify as an heir of the deceased is clearly erroneous, we reverse and remand with instructions.

FACTS AND PROCEDURAL HISTORY

Beginning in approximately 1980, Kussart and the deceased engaged in what was at least an intermittent romantic relationship. In late 1993, Kussart and the deceased were living together when they learned that Kussart was expecting. B.K. was born on May 21, 1994. That same day, Kussart and the deceased signed a paternity affidavit pursuant to Indiana Code section 31-6-6.1-9 (1993) stating that the deceased was B.K.'s biological father. Kussart, the deceased, and B.K. continued to live together following B.K.'s birth up until the time of the deceased's death.

Prior to the deceased's death, the parties were involved in a guardianship proceeding for the deceased in which the trial court ordered that Kussart file the paternity affidavit establishing the deceased as B.K.'s biological father with the court.¹ The deceased died intestate on April 27, 2005. Initially, Kussart was named personal representative of the deceased's estate. On May 13, 2005, Kussart filed an affidavit of heirship in which she stated that in addition to B.K., the deceased left three additional surviving heirs: Darryl Kendrick, Maurice Kendrick Jr., and Crystal Kendrick Burke-Potts (collectively "adult

¹ The record is unclear as to whether Kussart filed the paternity affidavit in the guardianship proceeding.

heirs”). On June 20, 2005, Kussart was removed from her position of personal representative of the deceased’s estate, and on June 28, 2005, Barry McDonnell was appointed as the personal representative of the estate.

On October 31, 2005, McDonnell, as personal representative of the deceased’s estate, filed a petition for determination of heirship, seeking a determination of whether B.K. qualified as an heir of the deceased’s estate. On July 27, 2007, McDonnell, as personal representative of the deceased’s estate, filed kinship test reports which indicated that B.K. was the half sibling of the adult heirs. On December 2, 2008, the trial court issued an order stating that while the burden was on an out-of-wedlock child to establish heirship from a putative father’s estate, the paternity affidavit signed by Kussart and the deceased pursuant to Indiana Code section 31-6-6.1-9 created a rebuttable presumption of paternity, and as a result, the adult heirs have the burden to rebut the presumption of paternity that is created by the paternity affidavit. On December 4, 2005, the trial court issued an order denying a motion to dismiss filed by Maurice Kendrick, Jr. in which Maurice Kendrick, Jr. claimed that B.K.’s paternity claims were not timely filed.

The trial court conducted a hearing on the heirship petition on March 22, 2010. On April 20, 2010, the trial court issued an order in which the trial court concluded that B.K. failed to prove that she is an heir of the deceased, and as a result, is not an heir to his estate. Kussart sought and was granted permission to pursue this interlocutory appeal.

DISCUSSION AND DECISION

I. Standard of Review

On appeal, we generally review interlocutory orders under an abuse of discretion standard. *In re Estate of Long*, 804 N.E.2d 1176, 1178 (Ind. Ct. App. 2004). An abuse of discretion may occur if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the trial court has misinterpreted the law. *Id.*

II. Whether the Trial Court's Determination is Clearly Erroneous

B.K. contends that the trial court's determination that she is not an heir of the deceased is clearly erroneous. Where, as here, the trial court entered specific findings of fact and conclusions thereon, we employ a two-tiered standard of review, first determining whether the evidence supports the findings, and second, whether the findings support the judgment. *Bandini v. Bandini*, 935 N.E.2d 253, 258 (Ind. 2010).

We will not reverse the trial court's findings and judgment unless they are clearly erroneous. [*Mueller v. Karns*, 873 N.E.2d 652, 657 (Ind. Ct. App. 2007).] Findings of fact are clearly erroneous where, without reweighing the evidence or judging witness credibility, the record lacks any facts or reasonable inferences from the evidence to support them. *Id.* The judgment is clearly erroneous when it is unsupported by the findings of fact and conclusions entered on the findings, *id.*, or where it relies upon an incorrect legal standard, *Menard Inc. v. Dage-MTI, Inc.*, 726 N.E.2d 1206, 1210 (Ind. 2000). While we defer substantially to findings of fact, we do not do so for conclusions of law, which we review de novo. *Mueller*, 873 N.E.2d at 657.

Id. A judgment may also be found to be clearly erroneous where, "although there is evidence to support the trial court's decision, the record leaves the reviewing court with the definite and firm conviction that a mistake has been committed." *Young v. Bryan*, 368 N.E.2d 1, 2 (Ind. Ct. App. 1977).

In its April 20, 2010 order, the trial court found that the deceased died intestate on April 25, 2005. At the time of his death, the deceased had three adult children. He was also

engaged in a long-term relationship with Kussart. The trial court further found that it was undisputed that Kussart and the deceased were engaged in a romantic relationship both prior to and following the birth of B.K., that Kussart and the deceased lived together at the time of B.K.'s birth, that both Kussart and the deceased signed a paternity affidavit pursuant to Indiana Code section 31-6-6.1-9 asserting that the deceased was B.K.'s biological father, and that until his death, the deceased lived with B.K. and treated her as his daughter. The trial court additionally made certain procedural findings relating to the ongoing estate proceedings, including the finding that a petition for heirship was filed in which the adult children sought a determination of whether B.K. qualified as an heir of the deceased. These findings are supported by the record.

In light of these findings, the trial court concluded that for the purpose of the estate proceedings, the deceased, who again signed a paternity affidavit pursuant to Indiana Code section 31-6-6.1-9, was presumed to be the biological father of B.K., and that the adult heirs had the duty to rebut the presumption of paternity flowing from the paternity affidavit signed by the deceased. While the trial court concludes that the paternity affidavit has been referred to and designated as evidence by the parties during the course of the estate proceedings, including the proceedings related to the determination of heirship, it subsequently makes the seemingly inconsistent conclusion that the paternity affidavit was not before the court merely because it was not re-offered into evidence during the March 22, 2010 heirship hearing by either party. This second conclusion, however, is erroneous, as it is clear from review of the record that the paternity affidavit had been designated as evidence during the course of the

heirship proceedings and, as a result, was part of the record that should be considered by the trial court.

The trial court further concluded that satisfactory proof has not been presented to prove that B.K. is an heir of the deceased, and as a result, B.K. is not an heir of his estate. However, the trial court did not make any findings or conclusions specifying what evidence the adult children presented that would be sufficient to rebut the statutory presumption of paternity that flowed from the paternity affidavit that, again, was signed by the deceased and designated as evidence by the parties during the course of the heirship proceedings. Thus, this conclusion is not supported by the facts, and, as a result, is clearly erroneous. Having determined that the trial court's conclusion that B.K. is not an heir of the deceased is clearly erroneous, we conclude that the trial court abused its discretion in ruling in favor of the adult heirs, and we accordingly reverse the determination of the trial court that B.K. does not qualify as an heir of the deceased and remand to the trial court with the instruction that the trial court find that B.K. qualifies as an heir of the deceased.²

The judgment of the trial court is reversed and remanded with instructions.

BAKER, J., and MAY, J., concur.

² Having found this issue dispositive, we need not reach the merits of B.K.'s remaining challenges to the trial court's order. Moreover, to the extent that the adult heirs contend that the trial court erroneously denied Maurice Kendrick Jr.'s motion to dismiss, we affirm the trial court's denial of the motion to dismiss in which the trial court found that the heirship determination was not time-barred.