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Colonial Heights Circuit Court
2/6/2006 CO CHANCERY

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF COLONIAL HEIGHTS

DONALD L. GUNTER Petitioner

v. Case No. CH05-48

ROBBIE S. MARTIN, individually and
in her capacity as Administrator of
the Estate of George F. Martin Defendant

ORDER

On August 4, 2005, and February 6, 2006, came the Defendant, by counsel, and the Petitioner, in person and by counsel, to be heard upon the Defendant's Motion to Dismiss the Petition filed herein by the Petitioner and upon the Motions subsequently filed by the Petitioner.

WHEREFORE, after hearing the arguments of counsel for the Defendant and counsel for the Petitioner, and after considering the contents of the Petition and the various Motions, as well as the authorities cited by counsel, the Court is of the opinion that the requirements of Virginia Code Section 64.1-5.1 have not been met with regard to the filing, within one year of the date of death, of an affidavit alleging parenthood and an action seeking adjudication of parenthood, and it is accordingly ADJUDGED, ORDERED AND DECREED as follows:

1. The Petition and the Motions of the Petitioner are dismissed.

2. The prayer in the Defendant's Motion to Dismiss that the Petitioner be required to pay the costs and attorney's fees incurred herein by the Defendant is denied.

CH05-48

3. The Clerk of this Court is directed to send attested copies of this Order to counsel for the Defendant and counsel for the Petitioner.

4. This matter is removed from the docket of this Court.

I ask for this:

Samuel P Johnson III

Samuel P. Johnson, III
Shell, Johnson, Andrews & Baskervill, P.C.
Counsel for the Defendant

Seen and objected to for the reasons stated in the arguments of the undersigned at the hearings on August 4, 2005, and February 6, 2006, and in the November 14, 2005, letter from the undersigned to the Court:

James E. Evans

James E. Evans
Gilliam & Evans, P.L.C.
Counsel for the Petitioner

Enter this:

_____ Judge

Date: 2-6-06

November 9, 2009

FILE COPY

David G. Hubbard, Esquire
LEISER, LEISER & HENNESSY, PLLC
8229 Boone Boulevard, Suite 310
Vienna, Virginia 22182

Samuel P. Johnson, III, Esquire
SHELL, JOHNSON, ANDREWS & BASKERVILL, P.C.
P.O. Box 3090
Petersburg, Virginia 23805

Re: Donald L. Gunter v. Robbie S. Martin, Case No. CL09-162

Dear Counsel:

The parties were before the Court on September 28, 2009, for a hearing on the Defendant's Plea of *Res Judicata*. The Court took the matter under advisement to review the parties' arguments, as well as the applicable case law.

On June 30, 2009, Plaintiff filed Complaint to Quiet Title & For Allotment or Sale of Real Property in Lieu of Partition in this Court, in which he sought partition of two parcels of real estate in Colonial Heights which had been owned by decedent, who died intestate on June 1, 2004. Decedent was survived by widow, who is the Defendant in this case. In his Complaint, Plaintiff alleges that he is decedent's illegitimate son, and he should, therefore, have co-ownership of the real estate with decedent's widow.

A proper claim of *res judicata* prevents "relitigation of the same cause of action, or any part thereof, which could have been litigated between the same parties and privies." Smith v. Ware, 244 Va. 374, 376, 421 S.E.2d 444, 446 (1992). For *res judicata* to be applicable to litigation, four factors must exist: (1) identity of the remedy sought; (2) identity of the cause of action; (3) identity of the parties; and (4) the identity of the quality of the persons for or against whom the claim is made. Id.

In support of her plea of *res judicata*, Defendant argues that all the relevant factors have been met. Plaintiff notes that Defendant filed a previous suit in this Court,

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case# CH05-48. In that case, Plaintiff sued Defendant individually and administrator of decedent's estate. Defendant alleges that in the previous case, Plaintiff sought to have Court determine that Plaintiff was biological son of decedent and determine the rights of the parties in accordance with the administration of the estate.In the previous case, the Court, upon Defendant's motion, dismissed Plaintiff's suit on the grounds that Plaintiff failed to comply with the requirements of Virginia Code §64.1-5.1(4) for not filing an affidavit of parenthood within one year after decedent's death.

Defendant argues that the "identity of parties" prong of the *res judicata* test has been met. In response to Plaintiff's contention that there was a difference in the identity of parties between the two suits, Defendant counters that the plaintiffs and defendants in the first case were also the same plaintiffs and defendants in the second case. Furthermore, Defendant argues that the plaintiffs and defendants in the second case must have been opponents in the first case and in the same capacities. While the Defendant was sued as an administrator and an individual in the first case, she was sued only as an individual in the second case. In both cases, the Defendant was sued, in part, as an individual. Furthermore, this Court finds it compelling that both parties are the only parties involved in both suits and Plaintiff and Defendant are the same in both cases.

Under *res* judicata, a final judgment on the merits prevents a party from relitigating that claim. State Water Control Board v. Smithfield Foods, 261 Va. 209, 214 (2001). Plaintiff argues that the prior case was dismissed simply because the statutory requirements of Virginia Code §64.1-5.1 were not met. Therefore, Plaintiff argues that the Court never reached the merits in determing the issue of paternity. In support of his position, Defendant notes that in the first case, the Court stated that it was "not going to reach the merits...I'm not making any decision as to what action the Court would take upon hearing that evidence (of paternity)." (Page seven of Court transcript) As such, Plaintiff argues that in the previous case, the Court did not decide the issue of paternity on the merits.

In response the Defendant contends that the Court decided the issue of paternity on the merits when it granted Defendant's Motion to Dismiss. Defendant asserts that the Court's prior decision to dismiss the previous case on the grounds that Plaintiff failed to comply with requirements of Virginia Code §64.1-5.1(4) is nonetheless a determination of the issue of paternity on the merits. The Court agrees with Defendant's position.

A sustained demurrer which denies the Plaintiff right to recover on the cause of the action alleged is a decision on the merits. Brunner v. Cook, 134 Va. 266, 272 (1922). Furthermore, if a court sustains a demurrer upon a party's inability to state a case, then that demurrer goes to the merits and *res judicata* will apply to later cases in which the same parties and issues are involved. Gimbert v. N.S.R.R. Co., 152 Va. 684, 689 (1929). The previous case was dismissed; Defendant's Motion to Dismiss in the previous case was analogous to a demurrer. Thus, the Court views the granted Motion to Dismiss as a decision on the merits of the case.

Plaintiff further argues that the "identity of remedy sought" prong of the *res judicata* test is not satisfied because the statute of limitations for Virginia Code §64.1-5.1(4) barring Plaintiff's claims against the estate of the decedent was not the same as a subsequent action for partition against the surviving spouse. In response, the Defendant counters that the character of remedies for these two cases is the same; in both cases the Plaintiff sought the determination of paternity in order to determine ownership interest in decedent's property and assets.The "identity of remedy sought" prong of the *res judicata* test is satisfied because the essential remedy of both cases, that is the adjudication of paternity, is the same. It is the adjudication of paternity that is at issue in both cases.

Res judicata applies if the cause of action asserted by the Plaintiff in the second case is the same cause of action asserted by the Plaintiff in the first case. Smith, 244 Va. at 376. A cause of action may be viewed as specific rights, which have arisen out of a "definable factual transaction." Bates v. Devers, 214 Va. 667, 672 (1974). As of 2006, the Commonwealth of Virginia adopted the "same transaction or occurrence rule" as promulgated by Rule 1:6 of the Supreme Court of Virginia. This rule codified the understanding that the same cause of action would arise from the same transaction or occurrence.

The Court believes that both cases involve the same cause of action since they arise out of the same transaction or occurrence, the paternity-status of the decedent. Furthermore, Plaintiff's claims hinge on the same factual determination of whether Plaintiff is adjudicated to be decedent's son. This essential element is central to both cases and consequently both causes of action.

Finally, both Plaintiff and Defendant rely on Jenkins v. Johnson, 276 Va. 30, 661 S.E.2d 484 (2008), in their analyses. Decided in 2008, Jenkins held that certain provisions of Virginia Code §64.1-5.2, namely the need to file an affidavit within one years of decedent's death, were not required because the statute "does not apply to the determination of heirs to, and the partition of, real property passing by intestate succession." 276 Va. at 36. As mentioned before, in the first case, Plaintiff's suit was dismissed when he failed to comply with the affidavit provision of the rule. Hence, the Court's investigation of Jenkins, as it pertains to this case, is necessary

Plaintiff interprets that Jenkins was the formation of a new right, and argues that the formation of litigant's new rights may block *res judicata*. Mowry v. City of Virginia Beach, 198 Va. 205, 211, 93 S.E.2d 323, 327 (1956). In contrast, the Defendant argues that Jenkins did not create any new rights or rules; rather, the Supreme Court of Virginia was clarifying the provisions of Virginia Code §64.1-5.2.

The Court agrees with Defendant's interpretation of Jenkins; in it's analysis of the case, the Supreme Court of Virginia parsed through the statutory language and distinguished when the provisions of the rule applied and when they did not apply. At no point did the Supreme Court create a new right or change any law. Therefore, Plaintiff's contention that the issues can be revisited because new rights have accrued is erroneous.

In light of Jenkins, the Plaintiff may view this Court's ruling in the first case as incorrect; however, that question may not be properly considered in the present case. A judgment on the merits, fairly rendered, by a court of competent jurisdiction, having cognizance both of the parties and the subject matter, however erroneous it may be, is conclusive on the parties and their privies until reversed or set aside in a direct proceeding for that purpose, and is not amenable to collateral attack. Wheeler v. Thomas, 116 Va. 259, 271, 81 S.E. 51, 56 (1914). "In the absence of fraud, accident or surprise, a judgment, when entered and no appeal is taken, is conclusive, even though the judgment is manifestly wrong in law or fact." Carpenter v. Ingram, 152 Va. 27, 36 146 S.E. 193, 195 (1929). Therefore, the previous decision cannot be reversed through the present action.

For the reasons above, the Court grants the Defendant's Plea of *Res Judicata* and dismisses Plaintiff's Complaint.

The Court orders Mr. Johnson to draft a sketch order memorializing these rulings, send it to Mr. Hubbard for endorsement, and on to the Court within 10 days.

FILE COPY

Sincerely,

Herbert C. Gill, Jr.
Judge

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF COLONIAL HEIGHTS

DONALD L. GUNTER Plaintiff

v. Case No. CL09-162

ROBBIE S. MARTIN Defendant

ORDER

This matter came on September 28, 2009, to be heard upon the Defendant's Plea of Res Judicata to the Complaint filed herein by the Plaintiff.

Wherefore, after considering (A) the oral arguments of counsel for both parties; (B) the contents of the Complaint, the Plea of Res Judicata, the Plaintiff's Reply to Plea of Res Judicata, the Defendant's letter memorandum in response to the Plaintiff's Reply to Plea of Res Judicata, the Plaintiff's letter memorandum in supplement to the oral argument of his counsel, and the documents in this Court's file in Case No. CH05-48, said file having been made an exhibit in this Case during the oral argument of Defendant's counsel; and (C) the authorities cited by counsel by both parties and such other authorities as the Court deemed relevant, the Court is of the opinion, for the reasons set forth in the Court's November 9, 2009 letter to counsel, that the Defendant's Plea of Res Judicata should be sustained.

Accordingly, it is ADJUDGED, ORDERED AND DECREED as follows:

1. The Defendant's Plea of Res Judicata is sustained.
2. The Plaintiff's Complaint is dismissed with prejudice, and this matter

is removed from the docket of this Court.

3. The Clerk of this Court is directed to send attested copies of this Order to counsel for the Defendant and counsel for the Plaintiff.

I ask for this:

Samuel P. Johnson, III
Shell, Johnson, Andrews & Baskervill, P.C.
Counsel for the Defendant

Seen and Objected to: (1) The Court's finding that the "identity of parties" prong of the res judicata test has been met; (2) The Court's finding that the court's prior decision in case #CH05-48 to dismiss that case for failure to comply with the requirements of Virginia Code § 64.1-5.1(4) is a determination on the merits of the issue of paternity and thus is applicable to this case; (3) The Court's finding that the "identity of remedy sought" prong of the res judicata test has been met because the Court finds that the remedy sought in both the prior case and in the case at bar is merely an adjudication of paternity; (4) The Court's finding that the "identity of cause of action" prong of the res judicata test has been met because the Court finds that transaction or occurrence at the root of each case is the same – the paternity-status of the decedent; (5) The Court's ruling that Jenkins v. Johnson, 276 Va. 30, 661 S.E.2d 484 (2008) did not create or form a new right, and thus the exception to or blocking of res judicata as carved out in Mowry v. City of Virginia Beach, 198 Va. 205, 211, 93 S.E.2d 323, 327 (1956) does not apply in the case at bar; and (6) The Court's granting of the Defendant's Plea of Res Judicata and the dismissal of the Plaintiff's Complaint.

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Counsel for the Plaintiff, Donald L. Gunter

Enter this:

_____ **Judge**

Date: November 18, 2009

ASSIGNMENTS OF ERROR

I. THE TRIAL COURT ERRED IN FINDING THAT THE "IDENTITY OF THE QUALITY OF THE PERSONS FOR OR AGAINST WHOM THE CLAIM IS MADE" PRONG OF THE RES JUDICATA TEST WAS MET, THEREBY RESULTING IN THE GRANTING OF THE DEFENDANT'S PLEA OF RES JUDICATA AND THE DISMISSAL OF THE PLAINTIFF'S COMPLAINT. (Preserved at App. 78).

II. THE TRIAL COURT ERRED IN FINDING THAT THE "IDENTITY OF REMEDY SOUGHT" PRONG OF THE RES JUDICATA TEST HAS BEEN MET BECAUSE THE COURT FOUND THAT THE REMEDY SOUGHT IN BOTH THE PRIOR CASE AND IN THE CASE AT BAR WAS MERELY AN ADJUDICATION OF PATERNITY, THEREBY RESULTING IN THE GRANTING THE DEFENDANT'S PLEA OF RES JUDICATA AND THE DISMISSAL OF THE PLAINTIFF'S COMPLAINT. (Preserved at App. 78).

III. THE TRIAL COURT ERRED IN FINDING THAT THE "IDENTITY OF CAUSE OF ACTION" PRONG OF THE RES JUDICATA TEST HAS BEEN MET BECAUSE THE COURT FOUND THAT THE TRANSACTION OR OCCURRENCE AT THE ROOT OF EACH CASE WAS THE SAME – THE PATERNITY-STATUS OF THE DECEDENT, THEREBY RESULTING IN THE GRANTING OF THE DEFENDANT'S PLEA OF RES JUDICATA AND THE DISMISSAL OF THE PLAINTIFF'S COMPLAINT. (Preserved at App. 78).

IV. THE TRIAL COURT ERRED IN RULING THAT JENKINS V. JOHNSON, 276 VA. 30, 661 S.E.2D 484 (2008) DID NOT CREATE OR FORM A NEW RIGHT, AND THUS THE EXCEPTION TO OR BLOCKING OF RES JUDICATA AS CARVED OUT IN MOWRY V. CITY OF VIRGINIA BEACH, 198 VA. 205, 211, 93 S.E.2D 323, 327 (1956) DID NOT APPLY IN THE CASE AT BAR THEREBY RESULTING IN THE GRANTING OF THE DEFENDANT'S PLEA OF RES

JUDICATA AND THE DISMISSAL OF THE PLAINTIFF'S COMPLAINT. (Preserved at App. 78).

STATEMENT OF THE NATURE OF THE CASE AND OF THE MATERIAL PROCEEDINGS IN THE TRIAL COURT

In March of 2005, the Plaintiff below and Appellant herein, Mr. Donald L. Gunter filed a claim as an out-of-wedlock child against the Estate of George F. Martin in Colonial Heights, Virginia. (App. 80). The trial court dismissed the petition, with prejudice, for failure to comply with the requirements of Section 64.1-5.1 of the 1950 Code of Virginia. (App. 125, 158-159). That decision prevented Mr. Gunter from inheriting any personal or real property from the Estate of George F. Martin.

In the fall of 2008, Mr. Donald L. Gunter learned of this court's opinion in *Jenkins v. Johnson,* 276 Va. 30, 661 S.E.2d 484 (2008). In that case, an out of wedlock heir filed for partition, and the trial court dismissed the claim for failure of the plaintiff to meet the requirements of Section 64.1-5.1 of the 1950 Code of Virginia, just as had been the case with Appellant Gunter. This Court reversed that decision, holding that the affidavit requirements of the requirements of Va. Code § 64.1-5.1 only apply to personal property, not real estate. Accordingly, Appellant Gunter filed suit against Ms. Robbie S. Martin