

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 26, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 03-0685-FT
STATE OF WISCONSIN**

Cir. Ct. No. 01PR000021

**IN COURT OF APPEALS
DISTRICT IV**

**IN RE THE ESTATE OF ROBERT E. STOLZMAN,
DECEASED:**

AMY S. PLUMMER, PERSONAL REPRESENTATIVE,

APPELLANT,

V.

TINA M. ROBERTS,

RESPONDENT.

APPEAL from an order of the circuit court for Vernon County:
MICHAEL J. ROSBOROUGH, Judge. *Affirmed.*

Before Vergeront, P.J., Deininger and Lundsten, JJ.

¶1 PER CURIAM. Amy Plummer, personal representative of the estate of Robert Stolzman, appeals an order which reinstated a previously reversed

determination that Tina Roberts was a nonmarital child and acknowledged heir of the decedent. We affirm for the reasons discussed below.

BACKGROUND

¶2 This is the second time this matter has come before us on appeal. In *Plummer v. Roberts*, No. 02-0043-FT, unpublished slip op. (Wis. Ct. App. Apr. 11, 2002), we reversed a determination made under WIS. STAT. § 852.05(1)(c) (2001-02)¹ that Roberts was a nonmarital child and heir of Stolzman because we concluded that Roberts had not presented sufficient evidence to overcome the presumption under WIS. STAT. § 891.39(1)(a) that she was the marital child of Rodney Riffle, who had married her mother seven-and-one-half months before her birth. We specifically noted that Roberts had failed to present any evidence showing that it was physically or biologically impossible for Riffle to have fathered Roberts. *Id.*, ¶9. We then remanded the case to the circuit court, without further direction.

¶3 On remand, Roberts filed a motion seeking a “further hearing, or new trial” to allow her to present additional evidence to overcome the presumption that she was Riffle’s child. The trial court denied the motion and dismissed Robert’s original petition to be acknowledged as a child of the decedent, but advised Roberts that the dismissal was without prejudice and that it would be willing to reconsider if she obtained additional evidence.

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

¶4 Roberts subsequently obtained DNA tests which excluded Riffle as her father, and moved for a new trial. The trial court granted the motion, and held a new hearing after which it concluded that the marital child presumption had been overcome and again found that Roberts was an acknowledged child and heir of Stolzman. Plummer appeals.

DISCUSSION

¶5 Plummer contends that the trial court erred in taking additional evidence on the question of whether the marital presumption had been overcome because Roberts had not met the criteria for a new trial based on newly discovered evidence under WIS. STAT. § 805.15(3), and because the doctrine of issue preclusion barred further consideration of the issue. We reject both arguments.

¶6 First, WIS. STAT. § 805.15 is a mechanism by which a party may move to set aside a “verdict.” Section 805.15(1). This, however, was an ongoing probate action. Because there was no verdict to be set aside, we conclude that the criteria in sub (3) for obtaining a new trial based on newly discovered evidence was inapplicable.

¶7 Second, the doctrine of issue preclusion bars relitigation of an issue determined by and essential to a valid final judgment in a prior action by the same parties. *See Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995). The order complained of here did not occur in a new or different action, but in the same ongoing probate action. We therefore conclude that the doctrine of issue preclusion was also inapplicable.

¶8 We are satisfied that WIS. STAT. § 808.08(3) permits Roberts to move for a hearing to present additional evidence upon remand. We are further

satisfied that WIS. STAT. § 806.07(1)(h) authorized the trial court to grant Roberts relief from its initial order denying her motion to present additional evidence, “in the interest of justice,” when presented with DNA evidence excluding Riffle as Robert’s father. In sum, the trial court’s decision to reopen the evidence was within its discretion, and its resulting determination that Roberts was an heir of Stolzman was supported by the expanded record.

By the Court.—Order affirmed.

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

