

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 9, 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. 03-1120-FT
STATE OF WISCONSIN**

Cir. Ct. No. 03PR000004

**IN COURT OF APPEALS
DISTRICT III**

**IN THE MATTER OF THE ESTATE OF THOMAS M. BAYS,
JR., DECEASED:**

THOMAS J. DWYER,

APPELLANT,

V.

CHARLES B. BAYS AND MARGARET ANNE THEOBALD,

RESPONDENTS.

APPEAL from an order of the circuit court for Rusk County:
FREDERICK A. HENDERSON, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 CANE, C.J. Thomas Dwyer appeals a circuit court order denying him a paternity proceeding for purposes of establishing his heirship to Thomas Bays because it was time-barred by WIS. STAT. § 893.88.¹ Consistent with this court's recent holding in *In re Estate of Thompson*, 2003 WI App 70, 261 Wis. 2d 723, 661 N.W.2d 869, we reverse the order and remand the matter for further proceedings.

BACKGROUND

¶2 Dwyer was born on November 27, 1960, in Chicago, Illinois. Dwyer's current birth certificate lists his biological father as Timothy Dwyer and his biological mother as Geraldine Kulchycki. There is no question Kulchycki is Dwyer's biological mother. At the time of Dwyer's conception and birth, however, Kulchycki was separated from her husband, Timothy Dwyer. During this time, she and Thomas Bays were sexually involved in an exclusive relationship. Bays was present at Dwyer's birth, checked Dwyer out of the hospital following his birth, and took him home. Kulchycki broke off her relationship with Bays shortly thereafter because she and Timothy Dwyer had reconciled.

¶3 Kulchycki then changed Dwyer's last name from "Bays" to "Dwyer" and listed Timothy Dwyer as Dwyer's father on his birth certificate. Dwyer alleges, and Kulchycki confirms, his original birth certificate reflected Bays as his biological father, but this document was destroyed in a fire over thirty years ago.

¹ This is an expedited appeal under WIS. STAT. RULE 809.17 (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

Timothy Dwyer raised Dwyer as his son and Dwyer grew up believing Timothy Dwyer was his biological father.

¶4 Around the age of sixteen, Kulchycki revealed to Dwyer that his true biological father was Bays. A few years later Dwyer met Bays, who immediately acknowledged Dwyer as his son. From then on, Bays and Dwyer maintained a regular father-son relationship. Dwyer continued to visit Bays two to three times a year for the next twenty years. During this time, Bays always introduced Dwyer as his son and eventually acknowledged Dwyer's children as his grandchildren. All of Bays' friends and acquaintances knew Dwyer as his son. For Bays' family, however, it was a different matter. Apparently Bays had little, if any, contact with his siblings, Margaret Anne Theobald or Charles Bays. After Bays died unexpectedly on January 25, 2003, the siblings did not believe Dwyer was Bays' son. Bays apparently did not have any other children and died intestate.

¶5 Because Bays died unexpectedly, the county coroner drew a blood sample. Dwyer petitioned the court for an order to release Bays' blood sample for DNA testing to conclusively establish he is Bays' sole heir. Bays' siblings challenged the order, claiming it was an action to establish paternity posthumously and therefore was time-barred by WIS. STAT. § 893.88. The trial court agreed with Bays' siblings and denied Dwyer's motion. Dwyer appeals.

DISCUSSION

¶6 Whether WIS. STAT. § 893.88 applies to a given set of circumstances to foreclose further proceedings to determine paternity is a legal issue we review de novo. *Estate of Thompson*, 261 Wis. 2d 723, ¶23.

¶7 Subsequent to the circuit court’s decision in this case, we held in *Estate of Thompson* the paternity statute of limitations does not apply to probate proceedings. *Id.* There, we distinguished between an “action” and a “motion” for determining paternity. We noted the statute of limitations for paternity proceedings, WIS. STAT. § 893.88, applied only to actions, not motions, for establishing paternity. Thus, if a party seeks to establish paternity by means of a motion, the paternity statute of limitations does not apply. *Id.*, ¶28.

¶8 In the instant case, Dwyer is not seeking an action to determine paternity in a paternity proceeding. Rather, he narrowly wants to establish paternity in probate proceedings to establish his heirship as a non-marital child for intestate succession. *Estate of Thompson* allows Dwyer to do so. Therefore, we reverse and remand the matter for further proceedings.

By the Court.—Order reversed and cause remanded.

Not recommended for publication in the official reports.

