ORIGINAL

IN THE SUPREME COURT OF OHIO

12-2174

IN THE MATTER OF THE ESTATE OF:	:	On appeal from the Allen
	:	County Court of Appeals,
WILLIAM L.COLLINS, SR.		Third Appellate District
	:	
[LEE TOLBERT, ADMINISTRATOR OF THE ESTATE OF EASTER I. SMITH – APPELLANT].	:	Court of Appeals Case No. 1-11-63
	:	

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT LEE TOLBERT

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Special Administrator of the Estate of William L. Collins, Sr.

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EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST

The Laws of the State of Ohio have evolved over the last forty-plus years in an attempt to address the nuances associated with allowing inheritance from the father by a child born outside a solemnized marriage. The importance of controlling the means of making this determination is best expressed by White v. Randolph, 59 Ohio St. 2d 6, 8, which states, "It has long been recognized in Ohio that proof of paternity, especially after the death of the alleged father, is difficult, and peculiarly subject to abuse. One of the resultants of such abuse would be the instability of land titles of real estate left by intestate fathers of illegitimate children."

While the decision in this case does not deal specifically with land titles, it does deal with the potential abuses of people asserting at a late date that they are the children of a decedent, and the trial court allowing them to present evidence to that effect some twenty years after the ORC §3111.05 statute of limitations has expired. It does deal with a trial court applying ORC Ch. 3111 in a piecemeal fashion which excludes the statute of limitations, and applying ORC §3705.23(A)(3), when it was unable to shoehorn two of the alleged children into ORC Ch. 3111.

In the beginning, no illegitimate children could inherit from the father. Then, an illegitimate child could inherit if it was shown that he was the 'natural' offspring of the father, and the father performed one of five legitimating acts while he was alive.

After 1982, an illegitimate child could proactively prove the father-child relationship through the Uniform Parentage Act (ORC Ch. 3111) and inherit, regardless of whether the child was legitimate.

In the 1960's, an unmarried mother of a child could name anyone as the father on the birth certificate of her child. Now, the only way a father's name is recorded on an illegitimate child's birth certificate is if the father is the Informant or the man executes an acknowledgment of paternity.

If a man does name himself the father by acting as the Informant or executing an acknowledgment of paternity, under ORC Ch 3111 he is presumed to be the 'natural' or putative father; there is a presumption of paternity.

The five historic legitimating acts were: (1) marriage and acknowledgment (ORC §2105.18); (2) acknowledgment in court (ORC §2105.18); (3) designation as an heir-at-law; (4) adoption; and, (5) provision for the child in his will.

Today, one can provide for a child in a will pursuant to ORC Ch. 2107; one can designate an heir-at-law pursuant to ORC §2105.15; one may adopt pursuant to ORC Ch. 3107; however, ORC §2105.18 no longer exists. ORC §2105.18 was amended and renumbered to ORC §5101.314 by 147 v H 352 effective 1/1/1998. ORC §5101.314 was then repealed by 148 v S 180 effective 3/22/2001, which interestingly is the Senate bill that overhauled ORC Ch. 3111.

It is Appellant's contention that the two legitimating factors originally controlled by ORC §2105.18 were swallowed by ORC Ch. 3111, as it was revised in 2001. Therefore, ORC 3111 is the means for proving ALL parent-child relationships, as they apply to inheritance rights.

This case presents an interesting set of facts that will allow this Court to clarify the following:

1. ORC Ch. 3111 is the means for determining all parent-child relationships. Brookbank's contention that "R.C. Chapter 3111 evinces no legislative intent to establish R.C. Chapter 3111 paternity proceedings as the exclusive method by which paternity may be determined or the parent-child relationship effectuated" is inapposite to the definition provided in ORC §3111.01 and the means of establishing the relationship provided in ORC §3111.02.
2. The "facts" provided in a birth certificate are only as reliable as the safeguards in place to assure their legitimacy. The father's name on a birth certificate today is evidence that he is the putative father because he acted as Informant or executed an acknowledgment of paternity.
3. The statute of limitations found in ORC §3111.05 is applicable to all parent-child relationship determinations. Without some prior, formal, court proceeding that occurred within the statute of limitations finding paternity, 40 year old birth certificates and self serving testimony of the alleged children themselves asserting a common law marriage is insufficient to prove heirship.

This case is of public and great general interest because the State has a substantial interest in providing prompt and definitive determination of the valid ownership of property left by decedents. This case will give this Court the

opportunity to clarify the statutory procedures for determining the parent-child relationship since the Uniform Parentage Act was overhauled on 3/22/2001.

STATEMENT OF THE CASE AND FACTS

The decedent in this case died in 2001 of Mesothelioma. He was survived by his wife. The estate was opened and over the ensuing years, the surviving spouse received several settlements relating to survivorship and wrongful death actions on the decedent's behalf. Throughout the probate proceedings, she had asserted that the decedent had no children

The surviving spouse passed away in early 2009. Her daughter was appointed Administratrix of the decedent's estate later that year. The defendants in the present action filed a motion to remove the daughter asserting that they were his natural children and his natural heirs.

Throughout these proceedings, the trial court has openly held that the 40+ year old birth certificates listing the decedent as the father were sufficient to create a presumption that the decedent was the father of the defendants and heirs to his estate. Notwithstanding the facts that the decedent did not act as Informant on any of the birth certificates, that he never executed an acknowledgment of paternity, that no evidence showed he was ever aware of the 'facts' in the birth certificates.

The Appellant filed a petition to determine heirship and a trial was held in late 2011. The trial court found that all three defendants were heirs to the decedent's estate. In making this determination, it relied on the birth certificates

for varying levels of evidentiary value. It found that a common law marriage existed between the decedent and the mother of the defendants. It found that the decedent acknowledged the defendants as his children.

While it is true that one child was named after the decedent, that he cared for the defendants and numerous other children, and that he lived with the mother of the defendants for many years, the law must be applied strictly. The decedent was shown to be a caring man, but that does not mean these were his children, or that he married their mother. One finds it amazing that so much weight could be given to these 40 year old birth certificates and that a marriage could be found after both alleged parties were dead.

While no evidence of a formal, court proceeding finding paternity was provided by the defendants at any time, the court disregarded the statute of limitations found in ORC §3111.05, but applied ORC §3111.03 in finding paternity of one defendant. In doing so, it reasoned that paternity had already been established within the statute of limitations by the birth certificate listing the decedent as the father and the fact that the mother (Informant) had changed her last name to that of the decedent.

The other two defendants' heirship was more difficult for the trial court to ascertain because the mother was still using her original name at their births. Therefore, the trial court could not successfully apply ORC §3111.03, so it relied upon a vital statistics statute, ORC §3705.23, for the proposition that everything recorded in a birth certificate is prima facie evidence of said fact, even though the father's name would not have been on the birth certificate if the birth had

occurred today because the decedent was not the Informant and did not execute an Acknowledgment of Paternity.

The decision of the trial court was timely appealed. The appeals court affirmed the lower court decision on November 13, 2012. The Appellant timely provides the attached Notice of Appeal to this Court.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: A parent-child relationship, as it applies to inheritance rights, must be determined by the laws outlined in ORC Ch. 3111

Appellant contends that ORC Chapter 3111 provides the appropriate procedure for determining a parent-child relationship as it applies to ORC §2105.06. ORC §3111.01 states,

> "(A) As used in sections 3111.01 to 3111.85 of the Revised Code, "parent and child relationship" means the legal relationship that exists between a child and the child's natural or adoptive parents and *upon which those sections and any other provision of the Revised Code confer or impose rights, privileges, duties, and obligations.* The "parent and child relationship" includes the mother and child relationship and the father and child relationship.
>
> (B) *The parent and child relationship extends equally to all children and all parents, regardless of the marital status of the parents.*
>
> (*emphasis* added.)

Therefore, ORC Chapter 3111 specifically applies to ORC §2105.06 because ORC Ch. 3111 is the mechanism for determining the parent-child relationship for all sections and provisions of the ORC conferring rights and

privileges. Further, it states that the parent-child relationship extends to all children, regardless of the parents' marital status.

ORC §3111.02(A) states in relevant part that, "The parent and child relationship between a child and the natural father of the child may be established by an acknowledgment of paternity as provided in sections 3111.20 to 3111.35 of the Revised Code, and pursuant to sections 3111.01 to 3111.18 or 3111.38 to 3111.54 of the Revised Code." It provides no other means of making the determination; however, subsection (B) does accept other determinations previously made in this state or another state, "regardless of whether the parentage determination was made pursuant to a voluntary acknowledgement of paternity, an administrative procedure, or a court proceeding."

ORC §3111.06 provides jurisdiction to the probate court to make a parent-child relationship, as it applies to probate proceedings. This is the only statute granting jurisdiction to a probate court to make this type of determination, which lends additional strength to the position that an heirship determination must be made pursuant to the statutes found in ORC Ch. 3111.

To support the contention that the ORC Ch. 3111 is applicable to the case at bar, see Beck v. Joliff (1984), 22 Ohio App. 3d 84 (In a will contest and relying on the ORC Chapter 3111, Ohio's Fifth Appellate District holds that a Bastardy determination from 1941 is sufficient to prove a parent-child relationship pursuant to ORC Ch. 3111.)

See also, Stima v. Armatrout (2002), 2002 Ohio 5493 (In an heirship determination and relying on the ORC Ch. 3111, Ohio's Third Appellate District

holds that a Bastardy determination from 1957 is sufficient to prove a parent-child relationship pursuant to ORC Ch. 3111.)

ORC §3111.03 is entitled Presumption of Paternity and subsection (A)(1) is the only applicable presumption in this case. It states in relevant part that "(A) A man is presumed to be the natural father of a child under any of the following circumstances: (1) the man and the child's mother are or have been married to each other, and the child is born during the marriage... ."

The other subsections are inapplicable to this case because the Defendants failed to produce any acknowledgments of paternity. Further, subsection (C)(1) is inapplicable because the Defendants failed to prove a "presumption of paternity that arose pursuant to this section prior to March 22, 2001...".

In Ohio, the existence of the father's name on a birth certificate, by itself, has never been sufficient to find a presumption of paternity under ORC §3111.03. In previous forms, the alleged father's signature as Informant was considered sufficient; however, that presumption is inapplicable to the present case because the Mother was the Informant.

In 2007 the University of Toledo Law Review published a survey of the treatment of illegitimate child in inheritance schemes in the 50 states and the District of Columbia. Children of Men: Balancing the Inheritance Right of Marital and Non-Marital Children, 39 U. Tol. L. Rev. 1, 32 (Fall, 2007), in relevant part states as follows:

> "For instance, many low-income women may believe that if the father's name is on the birth certificate, the non-marital child has the right to inherit from his or her father. As a result, such women do not bother to file paternity actions as required by most state statutes. In reality, only

two states deem the father's name on the birth certificate as sufficient proof of paternity to permit a non-marital child to inherit from his or her father." FN 227

227 – In both states, the father's name cannot be placed on the birth certificate without his knowledge and consent. Ark. Code Ann. §28-9-209(d)(3) (2004) ("The man's name appears with his written consent on the birth certificate as the father of the child ...."); Ga. Code Ann. §53-2-3(2)(A)(iv) (West 2006) ("The father has signed the birth certificate of the child.").)

It should also be noted that ORC §3111.03(C)(1) does not provide latitude in finding presumptions of paternity in other statutes. It specifically states that only presumptions of paternity that arose under previous versions of this section "shall remain valid". Therefore, it is incorrect to find a presumption of paternity pursuant to any other statute in the ORC.

Specifically, it is incorrect to base the finding of a parent-child relationship on a Vital Statistics statute, such as ORC §3705.23, titled Copies of Vital Records. Without more, the father's name on a birth certificate cannot be considered a fact, as described in ORC §3705.23. Otherwise, the legislature would have made that a presumption of paternity in the statute titled Presumption of Paternity, ORC §3111.03.

At best, the father's name on a birth certificate, with an accompanying signature as Informant on the birth certificate or an accompanying, signed Affidavit of Acknowledgment of Paternity, creates the presumption that the person is the putative father of an illegitimate child.

In the case at bar, the Decedent's name on the birth certificate does not constitute sufficient proof of paternity to designate any of the Appellees as "child"

within the meaning of the Statute of Descent and Distribution, ORC §2105.06, which would allow the person to inherit from the Decedent's estate. In fact, without the signature as Informant or an accompanying, executed Affidavit of Acknowledgment of Paternity, Decedent's name on the Appellees' birth certificates do not even constitute sufficient proof of paternity to designate him as the putative father of any of the Appellees.

In its Judgment Entry, the trial court looked to ORC §3705.23, a vital statistics statute, for direction in determining sufficient proof of paternity, which was incorrect. The laws for legitimating persons in Ohio have changed over the years. While it is true that ORC §3705.23(A)(3) (Effective Date: 9/26/2003) states, "A certified copy of a vital record or of any part of a vital record, issued in accordance with this section, shall be considered for all purposes the same as the original and shall be prima-facie evidence of the facts stated in it in all courts and places.", one must look to other safeguards in the present law that would make that acceptable for determining that the name of the father on a birth certificate is sufficient proof of paternity. ORC §3705.09 (Effective Date: 10/31/2001) and ORC §3111.03 (Effective Date: 3/22/2001) create those safeguards. ORC §3705.09 states in relevant part:

> (F)(1) If the mother of a child was married at the time of either conception or birth or between conception and birth, the child shall be registered in the surname designated by the mother, and the name of the husband shall be entered on the certificate as the father of the child. The presumption of paternity shall be in accordance with section 3111.03 of the Revised Code.
>
> (2) If the mother was not married at the time of conception or birth or between conception and birth, the child shall be registered by the surname designated by the mother. The name of the father of such child shall also be inserted on the birth certificate if both the mother and the father sign an

> acknowledgement of paternity affidavit before the birth record has been sent to the local registrar. If the father is not named on the birth certificate pursuant to division (F)(1) or (2) of this section, no other information about the father shall be entered on the record.

And, in ORC §3111.03, birth certificates are not mentioned as a means of determining a presumption of paternity. In fact, ORC §3111.03, the presumption of paternity statute, makes no mention of birth certificates.

So, under present Ohio law, the father's name can only be placed on the birth certificate if the mother and father are married, or if the mother and father sign an acknowledgment of paternity affidavit. These two statutes under present Ohio law are the safeguards to support a finding that the father's name on a birth certificate is indicative of paternity; however, those safeguards were not in place in the 1960's, and a father's name on a birth certificate alone did not support such a finding in the 1960's.

Further, as mentioned earlier, there is no mention of birth certificates in ORC §3111.03, which is titled Presumption of Paternity. So, it seems entirely inappropriate to rely on ORC §3705.23 or the 1960's version of ORC §3705.05, both vital statistics statutes, for the basis in determining that Decedent's name on the birth certificate, without anything more, creates a presumption of not only a parent-child relationship, but ultimately a legitimating act by the Decedent.

Since ORC §3111.03 is the proper mechanism for determining all parent-child relationships, it also stands to reason that ORC §3111.05 is applicable to parent-child determinations and states in relevant part, "An action to determine the existence or nonexistence of the father and child relationship may not be brought later than five years after the child reaches the age of eighteen." The

statute of limitations for the Defendants expired in 1988, 1989, and 1992, respectively, so any determination of the parent-child relationship in the present case is time barred.

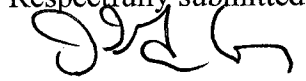
Therefore, regarding Eddies, the trial court's determination of a parent-child relationship pursuant to ORC §3111.03(A)(1) is plain error because the statute of limitations for making that determination expired in 1992. As for Jonathan and William, the trial court's determination of a parent-child relationship is doubly wrong. In addition to being time barred in 1988 and 1989 respectively, ORC §3111.03 is the correct statute, not ORC §3705.23, to make the parent-child determination, and neither Defendant fell into any of the categories showing a presumption of paternity.

Failing to find a presumption of paternity in ORC §3111.03 is not an invitation to seek some other statute in which to shoe horn them. As a matter of law, all Defendants failed to prove a parent-child relationship and the trial court committed plain error when it found that they were heirs of the Decedent.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest. The Appellant requests that this Honorable Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

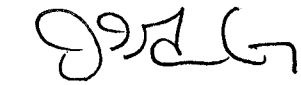
Respectfully submitted,



David K. Goodin
COUNSEL FOR APPELLANT,
LEE TOLBERT

Certificate of Service

I certify that a copy of this Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail to counsel for Appellees, Jonathan Hollingsworth, at 137 North Main Street, Suite 1002, Dayton, Ohio 45402; and Special Administrator, Mark A. Van Dyne, Esq., at 121 W. High St., Suite 905, Lima, Ohio 45801 on December 28, 2012.



David K. Goodin

COUNSEL FOR APPELLANT,
LEE TOLBERT

APPENDIX

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
ALLEN COUNTY

IN THE MATTER OF THE ESTATE OF:

WILLIAM L. COLLINS, SR.

[LEE TOLBERT, ADMINISTRATOR OF THE ESTATE OF EASTER I. SMITH – APPELLANT]

CASE NO. 1-11-63

O P I N I O N

Appeal from Allen County Common Pleas Court
Probate Division
Trial Court No. 2001 ES 213(A)

Judgment Affirmed

Date of Decision: November 13, 2012

APPEARANCES:

David K. Goodin **for Appellant.**

Jonathan Hollingsworth **for Appellees.**

Mark A. Van Dyne, **Admr. of Estate.**

WILLAMOWSKI, J.

{¶1} Plaintiff-appellant Lee Tolbert ("Tolbert") brings this appeal from the judgment of the Court of Common Pleas of Allen County, Probate Division finding William L. Collins, Sr. to be the father of Eddis Jackson fka Eddis Collins, William Collins, Jr., and Jonathon Collins. For the reasons set forth below, the judgment is affirmed.

{¶2} On February 26, 2001, William L. Collins, Sr. ("Collins") died intestate. He was legally married to Easter I. Collins ("Easter") at that time. On April 10, 2001, Easter filed an Application to Relieve the Estate from Administration along with a form identifying herself as the sole known survivor who would inherit under the statutes of descent and distribution. This listing was made despite the fact that Collins' obituary listed Eddis Jackson ("Eddis"), William Collins, Jr. ("William"), and Jonathon Collins ("Jonathon") as his children. The application listed total assets of $254.00 and were distributed to Easter as the surviving spouse.

{¶3} On July 5, 2001, Easter filed a motion to reopen the estate and to convert it to a full administration. This was done to give Easter authority to negotiate a settlement of an asbestos claim. The Standard Probate Form 1.0 again listed Easter as the sole beneficiary of the estate. Easter was appointed administrator of the estate on July 13, 2001.

{¶4} On February 11, 2004, Easter, acting as administrator of Collins' estate, filed an application to approve the settlement and to distribute the wrongful death and survival claim on behalf of Collins. No notice was given to any other persons. However, Easter now identified Charles Conley ("Charles") and Fred Conley ("Conley") as nephews of Collins who might have an interest. She claimed that she had no knowledge of the nephews' whereabouts. Eddis, William, and Jonathon were still not identified to the court. The first settlement was approved on April 1, 2004, and the net amount of $13,311.19 was distributed to Easter as the surviving spouse. On April 1, 2005, a second settlement application was filed. The amount of $33,400.96 was distributed to Easter as surviving spouse on April 12, 2005. Both settlement orders were to distribute payments for a wrongful death claim. On June 5, 2008, the trial court, at Easter's request, changed those orders to be allocated as benefits from a survivor claim.

{¶5} In June of 2008, a third application to approve a settlement and distribute the funds was filed. Notice by publication was given to the nephews via The Lima News. The trial court approved the distribution of $4,430.24 as a survival claim to Easter. Easter then filed on August 13, 2008, a motion to dispense with further notice to Charles and Fred concerning future settlements. The motion was granted on August 14, 2008.

{¶6} On September 17, 2008, Easter filed her first partial account of the estate with the trial court. The account claimed that the sole amount of $5,530.24 was distributed to her, but not the remaining $46,712.15, even though it had passed through the estate.

{¶7} On January 13, 2009, Easter died. Her obituary identified Eddis, William, and Jonathon as her step-children. On August 14, 2009, Easter's daughter, Gloria Shurelds ("Shurelds") applied to be appointed as the successor administrator of Collins' estate. Letters of authority were issued on August 20, 2009. On November 17, 2009, Eddis filed a motion to remove Shurelds as the successor administrator. Eddis then filed her own motion to be named administrator of Collins' estate on December 23, 2009. By agreement of the parties, Mark Van Dyne ("Van Dyne"), a local attorney, was appointed by the court to serve as a special administrator pending litigation concerning the administration of Collins' estate.

{¶8} Tolbert is the administrator of Easter's estate and the fiancé of Easter's daughter. On behalf of Easter's estate, Tolbert filed a complaint to determine heirship under R.C. 2123.06 on March 19, 2010. An amended complaint was filed on August 10, 2010. The matter proceeded to trial on August 18 and 19, 2011. At the conclusion of the trial, the trial court determined that Collins' heirs at law pursuant to R.C. 2105.06 were Easter, Eddis, William, and

Jonathon. Tolbert appeals from this judgment and raises the following assignments of error.

First Assignment of Error

The trial court erred as a matter of law, by not properly applying the entirety of [R.C. 3111] and misapplying [R.C. 3705.23(A)(3)], when determining the parent-child relationship between the Decedent and the Defendants.

Second Assignment of Error

The trial court lacked sufficient evidence to find that a common law marriage existed.

Third Assignment of Error

The trial court erred as a matter of law, by finding that a common law marriage existed after the statute of limitations for proving a civil contract had expired.

Fourth Assignment of Error

Since the Defendants were neither parties to the marriage contract, nor intended third (sic) beneficiaries to the marriage contract, the Defendants are precluded from bringing an action on said contract.

Fifth Assignment of Error

The Defendant's attempt to prove a common law marriage is barred by the equitable defense of laches.

Sixth Assignment of Error

The trial court erred as a matter of law when it denied [Tolbert's] motion for summary judgment.

In the interests of clarity, the assignments of error will be addressed out of order.

{¶9} In the sixth assignment of error, Tolbert claims that the trial court erred in denying his motion for summary judgment. When reviewing a motion for summary judgment, courts must proceed cautiously and award summary judgment only when appropriate. *Franks v. The Lima News* (1996), 109 Ohio App.3d 408, 672 N.E.2d 245. "Civ.R. 56(C) provides that before summary judgment may be granted, it must be determined that (1) no genuine issues as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the nonmoving party." *State ex rel. Howard v. Ferreri* (1994), 70 Ohio St.3d 587, 589, 639 N.E.2d 1189. When reviewing the judgment of the trial court, an appellate court reviews the case de novo. *Franks,* supra.

{¶10} The short version of the above is that in order for Tolbert to be granted summary judgment, there can be no questions of fact. Tolbert filed his motion for summary judgment on July 29, 2011, less than one month prior to trial. The underlying question in this case is whether Eddis, William, and Jonathon are the children of Collins. Tolbert argued that as a matter of law, Eddis, William, and Jonathon, could not prove that they were the children of Collins for various reasons. However, in their response, Eddis, William, and Jonathon alleged that

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they had already been established as the children of Collins and that the arguments presented by Tolbert were affirmative defenses that he had to prove at trial. Eddis, William, and Jonathon, also allege that since Tolbert filed the complaint to determine who is a legal heir, he has waived the right to preclude anyone from presenting evidence that they are heirs. Eddis, William, and Jonathon presented numerous questions of fact to be resolved by the trial court. Therefore, the trial court did not err as a matter of law by denying the motion for summary judgment. The sixth assignment of error is overruled.

{¶11} In the third and fourth assignments of error, Tolbert alleges that Eddis, William, and Jonathon cannot use the common law marriage between Collins and their mother, Mary Collins ("Mary"). Tolbert claims in the third assignment of error that they cannot use the marriage because it has been more than 20 years since the marriage "contract" ended. The fourth assignment of error is based upon a claim that since Eddis, William, and Jonathon were not parties to the civil contract of marriage, they cannot enforce the provisions of it. These arguments might be relevant if Eddis, William, and Jonathon were attempting to enforce the provisions of the marriage contract. They are not. Instead, they are merely using the fact that the common law marriage existed to help prove paternity. The trial court was not asked to enforce any provision of the contract, but merely to recognize the existence of it. This would be no different than asking

the court to recognize a traditional marriage as existing. A marriage contract is not a traditional contract where terms are set forth in writing prior to the parties entering the "contract." Instead, it is a legal relationship requiring a legal proceeding to be terminated. Tolbert has presented no legal basis for excluding the existence of the common law marriage. Thus, the third and fourth assignments of error are overruled.

{¶12} Tolbert alleges in the first assignment of error that the trial court did not correctly apply R.C. 3111 and R.C. 3705.23(A)(3). "The parent and child relationship extends equally to all children and all parents, regardless of the marital status of the parents." R.C. 3111.01. In cases where paternity is in question, the proponent may present all relevant evidence on the issue. R.C. 3111.10. In addition to the methods presented by R.C. 3111 for establishing parentage, there are other methods. *Brookbank v. Gray*, 74 Ohio St.3d 279, 282 (1996), quoting *White v. Randolph*, 59 Ohio St.2d 6 (1979). A natural father may legitimize a formerly illegitimate child by subsequently marrying the mother and acknowledging the child as his. *Id.*

{¶13} Tolbert argues that the alleged children are prohibited from establishing paternity because more than five years have passed since they respectively turned 18 years of age. R.C. 3111.05. However, the trial court determined that the determination of parentage occurred prior to the expiration of

the statute of limitations. In support of its claim, the trial court points to the facts. First, all three of the birth certificates in question list Collins as the father. "A certified copy of a vital record * * * issued in accordance with this section, shall be considered for all purposes the same as the original and shall be prima-facie evidence of the facts stated in it in all courts and places." R.C. 3705.23. Contrary to the argument presented by Tolbert, the statute does not limit which facts the certificate of birth represents as factual to the fact of birth. The only portion that is limited is that the portion for health and medical use shall not be used in the certified copies. R.C. 3705.23(A)(4)(a). All other information, including the identification of the parents, is included in a certified copy making it part of the prima facie evidence. R.C. 3705.23(A)(3). Additionally, there was testimony that Collins and the mother of Eddis, William, and Jonathon held themselves out as married for several years, that Collins claimed the children as his, and that after the death of their mother, the children were raised by Collins as his children without any formal establishment of guardianship.[1] At no time did Collins question whether the children were his biological children or object to the accuracy of the birth certificate. Until this proceeding, no one questioned whether Eddis, William, or Jonathon were the biological children of Collins. The statement that Collins is the father on the three birth certificates is not disputed in

[1] No guardianship would be necessary for the children to reside with their biological father after the death of their mother.

any way.[2] Thus, there is prima facie evidence that paternity was established by agreement of the parties well before the statute of limitation expired.

{¶14} There is also evidence that Mary and William Collins Sr. considered themselves to be in a common-law marriage. In addition to the testimony of the children and Collins prior wife that Collins introduced Mary as his wife and the children as his children, there is also the fact that Mary signed Eddis' birth certificate as "Mary Collins." Mary's death certificate was completed with information provided by Collins and listed Mary's name as Mary Collins. Mary's obituary, presumably completed by Collins, listed Collins as her husband. If Mary and Collins were married via common law, then there is evidence that Collins acknowledged the children after the marriage as his and thus legitimized them. Given all the evidence before it, the trial court correctly applied the law. The first assignment of error is overruled.

{¶15} The second assignment of error alleges that the trial court's ruling was not supported by sufficient evidence. Sufficient evidence has been described by the Ohio Supreme Court as "a test of adequacy." *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶11 (quoting *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997)). The question to be asked by the Appellate Court is that viewing the evidence in a light most favorable to the verdict, is there some competent, credible

[2] Tolbert does not argue that Eddis, William, and Jonathon are the children of anyone but Mary and William Collins Sr. Instead, he argues that they have not established paternity in a timely manner.

evidence to support the verdict. When reviewing the sufficiency of the evidence, the appellate court does not weigh the evidence or consider the credibility of the witnesses. *Id.* To do so would be to review the manifest weight of the evidence. *Id.*

{¶16} A review of the evidence in this case indicates that there is more than sufficient evidence to support the trial court's findings. The evidence established that Jonathon, Eddis, and William were all born to Mary and Collins as set forth in their birth certificates. No question of paternity was ever raised by anyone and no one, including Collins, objected to the designation of Collins as their father. Mary and Collins cohabitated for many years. At some point in time, Mary started going by the name Mary Collins. She signed Eddis' birth certificate using the last name Collins. The reputation of the couple in the community was that they were husband and wife and that they introduced each other in that manner. Upon Mary's death in 1977 from a car accident, Collins provided information for the death certificate indicating that Mary's last name was Collins. Mary's obituary listed her last name as Collins and listed William as her husband. After her death, Collins continued to raise the children as his own and signed all school papers as the parent of the children.

{¶17} William's second wife, Delores Collins ("Delores") indicated that she had always believed that Collins and Mary were married. She testified that

she had been a guest in their home and they were recognized as husband and wife in the community. Delores also testified that Collins acknowledged Eddis, William, and Jonathon as his children and introduced them as such.

{¶18} Upon the death of Collins in 2001, Easter helped draft the obituary. Collins' obituary listed Eddis, William, and Jonathon as his children. Upon Easter's death in 2009, her funeral arrangements and obituary were completed by her children and Eddis. The obituary listed Eddis, William, and Jonathon as step-children. In addition, Collins' death certificate, which had Easter as the informant, listed his name as "William Leon Collins, Sr.". This same name was used to identify Collins in both his obituary and in Easter's obituary. Although Collins' birth certificate was not part of the record, the trial court could reasonably presume that the designation of Sr. as part of Collins' name was not part of his birth name and instead designated that he had a son with the same name. The obituary in fact identifies a "William L. Collins, Jr." as one of his children. Most notably, Tolbert presented no evidence that Collins was not the father of Eddis, William, or Jonathon, or that anyone ever questioned their parentage.

{¶19} The trial court reviewed all of this evidence and made the following conclusions.

> **In summary, William Collins, Sr. was identified on their birth records at the time of their births (over 44 years ago) as the father of Eddis, Jonathon, and William, Jr. That designation was never challenged or questioned from the time of their birth**

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and through the death of both their mother and father. William Collins, Sr. during his lifetime never challenged the fact that he was their father. Mary Alice Collins, the mother and ultimately his wife, during her lifetime never challenged the fact that William, Sr. was their father. If any of those persons had reason to challenge the paternity of William, Sr., they could have done so. The conclusion is that they did not challenge it because none of the principals involved ever questioned it. The birth records of each reflected that William, Sr. was their father, a common law marriage existed between the mother and father, the community recognized and acknowledged him as their father and there was no need or purpose to be served by initiating any action to either challenge or confirm the accuracy of the birth records. It was not challenged until someone outside their immediate family circle (the Administrator of the estate of William's third wife, whom he had married thirteen years after Mary Alice' death) questioned it another nine years after the death of William, Sr. with the filing of the instant Complaint to Determine Heirship. That challenge has not been supported by any evidence to suggest that William, Sr. is not, in fact, their father.

The situation was exacerbated in 2001 when William's surviving spouse chose to omit Eddis, Jonathon and William Jr. from Standard Probate Form 1.0 when filed on April 10 and July 5, of that year. She also did not file a Complaint to Determine Heirship to resolve any issues regarding inheritance at that time, leaving Eddis, Jonathon and William, Jr. with no notice that the estate was being administered or their heirship questioned. Easter Collins' omission left them with no knowledge that the estate was even being administered, and no opportunity to assert their claims to a right to participate in the distribution of estate assets. When the Applications to Approve settlement and Distribution of the wrongful death or survivor claims were filed (in 2004 and 2005) they were not identified as possible next of kin or heirs and were therefore not provided notice and an opportunity to assert any claim of a right to participate in the settlement proceeds, even though they had been long recognized to be the children of William, Sr., and even identified as such in his obituary. With the Amended Application to Approve the

> **Second Wrongful Death Settlement (filed on April 5, 2005) Easter Collins as fiduciary chose to attempt to provide notice to two persons she identified as being nephews of William, Sr., but not the three persons who had been identified (with her input and assistance) in his obituary as his surviving children. * * ***
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> * * *
>
> **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that on the date of his death, the heirs at law of William Collins, Jr. (sic) under Ohio Revised Code Section 2105.06 were as follows:**
>
> **A) his surviving spouse, Easter Irene Collins**
> **B) his daughter, Eddis Jackson**
> **C) his son, William Collins, Jr.**
> **D) his son, Jonathon Collins.**

October 25, 2011, Judgment Entry, 9-11. The trial court's findings are supported by competent, credible evidence. Therefore, the evidence is sufficient to support the judgment and the second assignment of error is overruled.

{¶20} In the fifth assignment of error, Tolbert claims that the doctrine of laches prevents Eddis, Jonathon and William from being named heirs. This court notes that laches is an affirmative defense that must be proven by the party raising it. Civ.R. 8(C). In order to prevail upon a claim of laches, the proponent must prove 1) that the opposing party was unreasonably delayed in pursuing the claim and 2) that the proponent was materially prejudiced by the delay. *Wiley v. Wiley*, 3d Dist. No. 9-06-34, 2007-Ohio-6423, ¶14. To invoke the doctrine of laches, the

proponent must have clean hands. *Id.* at ¶15. A delay, in and of itself, does not constitute laches. *Id.* at ¶19.

{¶21} A review of the record in this case shows that the doctrine of laches does not apply. First, the initial petition to relieve the estate from administration was filed in 2001. It listed Collins probate assets as $254. The Standard Probate Form 1.0 only listed Easter as a surviving heir, not the children. Thus, they were given no notice of the administration of the estate. Even if they had been given notice, the entire estate would have been appropriately distributed to Easter under the laws of descent and distribution. However, in 2004 a motion to reopen the estate was filed and a full administration was ordered due to a wrongful death settlement. Standard Probate Form 1.0 was again filed with only Easter's name on it. Thus, again, Eddis, Jonathon and William were given no notice that the estate was once again open and that there were assets to be distributed. The same thing occurred in 2005, except this time, Easter listed Collins' nephews as potential heirs. The children, who were known to Easter at that time, were not listed. The repeated actions of Easter and by her subsequent administrator to deny notice to the children or to request a determination of heirship earlier meant that the children were not given notice of the estate. In fact, the children testified that they learned about their father's estate from a third party after the death of Easter in 2009. That was the first notice of the estate they received. Until that time, they

did not know there was a claim to protect because they believed the matter to be resolved in 2001 soon after Collins' death. The real cause of the delay was not the actions of Eddis, Jonathon, and William, but the actions of Easter and her subsequent administrators, including Tolbert. Since Tolbert does not come to the court with clean hands, he cannot receive the equitable remedy of laches. Therefore, the fifth assignment of error is overruled.

{¶22} Having found no error prejudicial to Appellant, the judgment of the Court of Common Pleas of Allen County, Probate Division, is affirmed.

Judgment Affirmed.

SHAW, P.J. and PRESTON, J., concur.

/jlr

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
ALLEN COUNTY

IN THE MATTER OF THE ESTATE OF:

WILLIAM L. COLLINS, SR.

[LEE TOLBERT, ADMINISTRATOR OF THE ESTATE OF EASTER I. SMITH - APPELLANT].

CASE NO. 1-11-63

JUDGMENT ENTRY

For the reasons stated in the opinion of this Court, the assignments of error are overruled and it is the judgment and order of this Court that the judgment of the trial court is affirmed with costs assessed to Appellant for which judgment is hereby rendered. The cause is hereby remanded to the trial court for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this Court's judgment entry and opinion to the trial court as the mandate prescribed by App.R. 27; and serve a copy of this Court's judgment entry and opinion on each party to the proceedings and note the date of service in the docket. See App.R. 30.

PRESTON, J., Concurs in Judgment Only

SHAW, J., Concurs in Judgment Only

DATED: NOVEMBER 13, 2012

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