

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ELIZABETH GUANZON RETUYA
a/k/a ELIZABETH DRUMMOND-RETUYA

Plaintiff,

v.

CASE NO. 8:08-cv-00935-T-17MSS

MICHAEL CHERTOFF, et al.,

Defendants.

_____ /

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

Plaintiff's citizenship claim rests on three faulty premises: (1) that a stipulated state court judgment of paternity entered in 2007 satisfies the Immigration and Nationality Act's (INA) act-of-legitimation requirement, (2) that Defendants have refused to recognize this judgment, and (3) that the American embassy in Manila found that Plaintiff had established a biological relationship to Drummond. There has been no act of legitimation; at most, Plaintiff established her inheritance rights under Florida's intestacy statute. And, far from rejecting this judgment, Defendants take no issue with its validity or effect on Plaintiff's intestacy rights. Finally, Defendants have not made any finding with respect to the biological relationship between Plaintiff and Drummond.

1. No act of legitimation

Plaintiff contends that the stipulated adjudication of paternity and the written acknowledgment of paternity referenced therein satisfies the requirement under "old" §

1409(a) of an act of legitimation when the applicant was under 21 years of age.¹ See Mot. to Dismiss at 7-8 (Dkt. 17). While Plaintiff correctly states that the INA defers to the individual states to establish the standards for legitimation, she ignores the only recognized act of legitimation under Florida law: the parents' marriage. Fla. Stat. § 742.091 (1981) (stating that marriage legitimates out-of-wedlock child "in all respects"). Because Plaintiffs' parents never married, she seeks to equate the adjudication and acknowledgment of paternity with an act of legitimation. Florida law, however, treats these three concepts distinctly. Legitimation confers on the child the status in all respects equal to that of a child born in wedlock. The other two concepts are narrower in scope. An adjudication of paternity provides the basis for a court to order child support from a man adjudicated to be the child's father. An acknowledgment of paternity affords the individual certain rights for purposes of intestate succession. See Mot. to Dismiss at 8-9. Thus, at most, the stipulated paternity judgment secured Plaintiff an inheritance right if Drummond dies intestate, but it did not legitimate her under Florida law for purposes of the INA.

Equally fundamental, even if the Court finds that Plaintiff's stipulated adjudication of paternity (and the written acknowledgment of paternity contained in the first paragraph of the stipulation dated November 2, 2007) was an act of legitimation for purposes of the INA, which it was not, it did not occur when Plaintiff was under the age of 21. This fact alone dooms her claim. Mot. to Dismiss at 10-11.

¹The final stipulation states that Drummond was "prepared to present the originals of two letters provided to [Plaintiff] . . . , one of which was written prior to the birth of [Plaintiff] and the other shortly after [Plaintiff's] birth." Compl., Ex. G at p. 2. But there is no indication that the letters were in fact produced to the state court or authenticated in any way.

2. No rejection of the stipulated judgment

Plaintiff misses the mark in asserting that Defendants have “reject[ed] a lawful judgment of the Florida state court.” Defendants take no issue with the judgment’s validity, and readily concede that it establishes paternity for intestacy purposes under Florida law. But concluding that the consent judgment, to which Defendants were not parties, nevertheless binds them with respect to its factual and legal findings is an entirely different proposition. That result can occur only under the doctrines of *res judicata* or collateral estoppel, neither of which applies here. *Res judicata*, also known as claim preclusion, bars a subsequent claim when a final judgment has been entered on the merits of the same cause of action in a prior lawsuit between the parties. Barnhill v. Cheery, No. 8:06-cv-922-T-23TGW, 2008 WL 759322, at *6 (M.D. Fla. Mar. 20, 2008) (citing Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 324-25 (1970)). *Res judicata* requires (1) that a court of competent jurisdiction render a final judgment on the merits of the first action, and (2) that the parties and causes of action in both suits be identical. Richardson v. Ala. St. Bd. of Educ., 935 F.2d 1240, 1244 (11th Cir. 1991). It is inapplicable here because Defendants were not a party to the state court action, and the cause of action therein (adjudication of paternity) is entirely different from the cause of action here (adjudication of a citizenship claim).

Collateral estoppel, also known as issue preclusion, does not require identity of parties but does require that (1) the issue at stake be identical to the one alleged in the prior litigation; (2) the issue was actually litigated in the prior litigation; (3) the determination of the issue was a critical and necessary part of the judgment in the earlier action; and (4) the party against whom the earlier decision is asserted had a full

and fair opportunity to litigate the issue in the earlier proceeding. Hart v. Yamaha-Parts Distribs., Inc., 787 F.2d 1468, 1473 (11th Cir. 1986). Collateral estoppel does not apply here. First, of course, the issue at stake in the two actions is different: legitimation versus an adjudication or acknowledgment of paternity. Second, the paternity issue was not actually adjudicated in the state court action. The state court judgment shows that no actual dispute or adversarial proceeding existed between Plaintiff and Drummond as to their relationship. Rather, the judgment simply ratified their stipulation, unsupported by evidence, that Drummond is Plaintiff's father. See Compl., Exs. C, E & G. Finally, Defendants did not have any opportunity to litigate the issue.

3. No finding of biological relationship by Defendants

Plaintiff asserts that Defendants have previously determined that she established a biological relationship with her father.² The record, however, shows otherwise. On November 28, 2006, in response to inquiry from Senator Robert Byrd, the Department of State explained that, in addition to evidence of an act of legitimation, it "would need to see more information to help establish the biological relationship between" Plaintiff and Drummond. Compl., Ex. B. The Department further

²The biological relationship requirement applies under the old and current versions of § 1409. "Old" § 1409(a) must be read in tandem with 8 U.S.C. § 1401(g), which establishes the requirements for acquisition of citizenship by children born outside the United States. Section 1401(g) applies to "a person born . . . of parents, one of whom is an alien, and the other a citizen of the United States." Thus, requiring a showing of "biological relationship" is how a person would prove that he or she was "born of" a United States citizen parent in order to acquire citizenship under § 1401(g). This citizenship requirement – applicable to all children born outside the United States whether to one or two citizen parents – is reiterated in "new" § 1409(a), which requires that "a blood relationship between the person and the father is established by clear and convincing evidence." 8 U.S.C. § 1409(a)(1).

stated that it would not reach the biological issue until the legitimation issue was first resolved:

The Embassy accepts results of DNA testing to establish biological relationship. We emphasize that such testing is strictly voluntary. However, we do not recommend Mr. Drummond and Ms. Retuya undergo DNA testing until the legitimation issue is resolved.

Id. Subsequently, the Manila embassy denied Plaintiff's application on the legitimation ground without making any finding as to biological relationship. Id., Ex. D.³

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiff's complaint.

Respectfully submitted,

ROBERT E. O'NEILL
United States Attorney

By: s/ Javier M. Guzman
JAVIER M. GUZMAN
Assistant United States Attorney
USAO No. 093
400 North Tampa Street, Suite 3200
Tampa, Florida 33602
Telephone: (813) 274-6342
Facsimile: (813) 274-6200
E-Mail: Javier.Guzman2@usdoj.gov

³Finally, the United States Ambassador to the Philippines must be dismissed as an improper defendant because an action under 8 U.S.C. § 1503(a) may be brought only "against the head of such department or independent agency."

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, and a copy of same along with the notice of electronic filing by first class U.S. mail, postage prepaid, to the following:

Elizabeth Guanzon Retuya
c/o Charles J. Drummond
924 Alpine Drive
Brandon, FL 33510

s/ Javier M. Guzman
Javier M. Guzman
Assistant United States Attorney