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STATE OF MINNESOTA

COUNTY OF CARVER

DISTRICT COURT
PROBATE DIVISION
FIRST JUDICIAL DISTRICT
Court File No.: 10-PR-16-46
Judge Eide

Estate of

Prince Rogers Nelson,

Decedent.

SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF VENITA JACKSON LEVERETTE'S OBJECTION TO PROTOCOL PRIOR TO GENETIC TESTING

INTRODUCTION

Ms. Venita Jackson Leverette[1] ("Jackson Leverette") contends she is a half-sibling of the Decedent Prince Rogers Nelson ("Decedent'). In its Memorandum previously submitted to the Court, the Special Administrator correctly recognizes that the Minnesota Probate Code ("Probate Code") controls the determination of who are the heirs of the Estate of Prince Rogers Nelson ("Estate"), and further recognizes that siblings and half-siblings must equally share the estate. The Special Administrator also recognizes that in order to be a sibling or half-sibling of the Decedent, a person must share a "common genetic parent with Decedent." See Special Administrator's Memorandum dated June 24, 2016, at page 2.

In spite of recognizing each of these underlying principles, the Special Administrator, through its counsel to date, has disregarded any reliance on genetics, and instead, selectively relied on the legal presumptions found in the Minnesota Parentage Act ("Parentage Act") to determine who may be an heir of the Decedent. The Special Administrator's counsel has asked the Court to accept a two-pronged argument that: (1) as a matter of law, John Louis Nelson is

[1] Venita Jackson Leverette is the half-sister of Alfred Jackson Jr., whom no one disputes is Decedent's half-brother, and could be established as Decedent's whole brother, if the Court permits genetic testing of Jackson Leverette, and others claiming a similar relationship, including requiring such testing for the presumptive heirs.

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Prince's "genetic father" within the meaning of Minn. Stat. § 524.1-201(22); and (2) thus, only those persons claiming to be descendants of John Louis Nelson should be eligible for genetic DNA testing to prove heirship. In essence, the Special Administrator has unilaterally determined that, unless your last name is "Nelson" or you are claiming to be a child of the Decedent, you don't have any right under any circumstances to prove you are genetically related to Decedent. Moreover, the Special Administrator made this premature determination in spite of the fact that Jackson Leverette has offered to pay for her own genetic testing, at no cost to the Estate or anyone else.

The Court heard initial oral arguments on this issue at a hearing on June 27, 2016. At the hearing the parties vigorously disputed whether the genetic testing protocol established by counsel for the Special Administrator was based upon a correct application of Minnesota law. In light of this controversy, the Court issued an order permitting parties to submit post-hearing briefs on the issues of heirship determination and DNA testing protocol.

Ms. Jackson Leverette contends that the Special Administrator's application of the Parentage Act and the interim genetic testing protocol, currently approved by the Court, is woefully flawed, and should be set aside for the following reasons:

1. The Special Administrator's protocol, which is based upon the Parentage Act, fails to recognize that the Probate Code and the Parentage Act serve distinctly different purposes:

    a) The Probate Code is used to establish a genetic link (via bloodlines) between a decedent and another individual who may be a relative of a decedent:

    b) The Parentage Act is used for the primary purpose of establishing a relationship between a parent and child, and also to determine child support obligations.

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2. The Special Administrator's protocol relies upon an incorrect interpretation of *In re Jotham*, 722 N.W.2d 447 (Minn. 2006);

3. The Special Administrator's protocol erroneously uses the definition of "genetic father" found in the current version of the Probate Code as a basis for precluding testing of persons who may be genetically linked to Decedent;

4. The Special Administrator's protocol creates preferential treatment for a limited group of potential heirs;

5. The Special Administrator's protocol fails to include opportunities for independent testing;

6. Whether the Parentage Act applies (and it does not), there is nothing in the Probate Code, Parentage Act, or Minnesota common law that prohibits this Court from permitting Jackson Leverette to obtain a blood test to determine if she is Decedent's half-sibling; and

7. Ordering Jackson Leverette to undergo a blood test causes no harm to Decedent's presumptive heirs, the Special Administrator, or anyone else.

LEGAL ARGUMENT

I. THE SPECIAL ADMINISTRATOR'S PROTOCOL FAILS TO RECOGNIZE THAT THE PROBATE CODE AND THE PARENTAGE ACT SERVE DISTINCTLY DIFFERENT PURPOSES:

The Special Administrator's belief that requirements of the Parentage Act control every aspect of the Probate Code is completely without support. The legislative history of the Parentage Act indicates that its purpose is to serve as "[a]n act relating to family law; changing certain custody, paternity, adoption, child support, medical support, and maintenance provisions; [and] changing a family court appeal provision." See Laws of Minnesota 2006, Chapter 280, S.F. No. 3199. The Parentage Act serves its intended purpose of identifying natural fathers so that child support obligations may be ordered and enforced.

Conversely, the underlying purposes of the Probate Code are to: (1) simplify and clarify

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the law concerning the affairs of decedents, missing persons, protected persons, minors and incapacitated persons; (2) discover and make effective the intent of a decedent in distribution of property; (3) promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to successors; and (4) make uniform the law among the various jurisdictions. See Minn. Stat. §524.1-102.

The legislature has never stated that either law was intended to deemphasize genetic testing, or that legal presumptions set forth in the Parentage Act were intended to supplant the Probate Code. As recognized by the Minnesota Supreme Court in *In re Estate of Palmer*, 658 N.W.2d 197 (Minn. 2003),

> The Parentage Act and the Probate Code are independent statutes designed to address different primary rights. The purpose of the Parentage Act is to establish "the legal relationship * * * between a child and the child's natural or adoptive parents, incident to which the law confers or imposes rights, privileges, duties, and obligations." Child support is the major concern under the Parentage Act. The purpose of the Probate Code, on the other hand, is to determine the devolution of a decedent's real and personal property.

See *Palmer*, 658 N.W. 2d at 200 (internal citation omitted).

As a result, it should be clear that both acts fulfill distinct roles. The Probate Code relies heavily on bloodlines to establish heirship, while the Parentage Act contains statutory presumptions to assist with the determination of child support obligations. In this case, the Parentage Act should not be allowed to control Jackson Leverette's claim that she may be Decedent's half-sibling, or whether she is entitled to receive genetic testing.

II. THE SPECIAL ADMINISTRATOR'S PROTOCOL RELIES UPON A CONVENIENT, BUT ERRONEOUS INTERPRETATION OF *IN RE JOTHAM*:

In support of its argument, the Special Administrator's relies heavily on *In re Estate of Jotham*, 722 N.W.2d 447 (Minn. 2006). The *Jotham* court recognized that its previous holding in *Palmer* – that parentage may be established by clear and convincing evidence apart from the

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Parentage Act – remained viable. See *Jotham*, at 451.

More importantly, however, *Jotham* made clear that the Parentage Act should only be applied in probate proceedings to parties who seek to invoke a presumption of paternity to their benefit. Both the *Palmer* and *Jotham* opinions state that parties who do not invoke a presumption of parentage should have the opportunity to establish their claim by other clear and convincing evidence apart from the Parentage Act. In this case, Jackson Leverette is one such party who is not invoking a presumption of paternity to establish a relationship with the Decedent. Rather, she is trying to establish her genetic bloodline relationship with the Decedent. Thus, this Court should allow her to establish her relationship as Decedent's half-sibling by clear and convincing evidence (including permitting her to have a blood test), apart from the Parentage Act.

The facts of *Jotham* involved a probate proceeding where an established daughter (Diann Nelson) of the decedent sought to introduce evidence to challenge a presumption of paternity under the Parentage Act that benefited another woman, Sandra Barnett. See *Jotham*, 722 N.W.2d at 449. Ms. Barnett argued that the statute of limitations and the standing requirements of the Parentage Act prohibited Ms. Nelson from challenging the presumption. *Id.* at 451. Ms. Nelson contended that the statute of limitations and standing requirements of the Parentage Act did not apply, because the case was a probate proceeding outside the scope of the Parentage Act. *Id.* The narrow issue before the court in *Jotham* was whether the statute of limitations and standing requirements of the Parentage Act applied to a probate proceeding, where a party was attempting to challenge another party's presumption of paternity, under the Parentage Act, for intestacy purposes. *Id.*at 452.

The *Jotham* court began its analysis by distinguishing the facts of the case from *Palmer, supra*. In *Palmer*, the Minnesota Supreme Court upheld the lower court's decision that "for the

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purpose of *establishing* intestate succession, parentage may be *established* by 'clear and convincing' evidence apart from the Parentage Act." *Palmer,* 658 N.W.2d at 200. (emphasis added). Unlike *Palmer*, where a party was attempting to establish paternity without the benefit of a Parentage Act presumption, the respondent in *Jotham* was "attempting to *challenge* the paternity of an individual who [was] *presumed* to be the decedent's child." *Jotham,* 722 N.W.2d at 452 (emphasis in original). Based on that distinction, the *Jotham* court concluded that *Palmer* did not apply to the facts of the *Jotham* case.

Given the distinguishing facts of *Palmer* and *Jotham*, the court took the opportunity to clarify when, for intestacy purposes, probate courts should use a Parentage Act presumption to establish paternity, and when the clear and convincing evidence method in *Palmer* should be employed. *Id.* The court decided that if a party benefits in a probate proceeding by invoking a Parentage Act presumption, then the entirety of the Parentage Act must be applied to that party. *Id.* The court explained that this included challenges to the presumption by other parties. *Id.* Otherwise, the *Jotham* court left its previous *Palmer* holding intact.

The *Jotham* holding makes clear that the Parentage Act has no bearing on Jackson Leverette's claim. *Jotham* only requires that the Parentage Act is applied to a party who invokes the Act's presumptions of paternity for their benefit in a probate proceeding. Jackson Leverette has not invoked the Parentage Act's presumption of paternity for her benefit, in any way, in Decedent's probate proceeding, and thus the Parentage Act does not apply to her heirship claim. Accordingly, this Court should consider Jackson Leverette's claim and her request for genetic testing solely in the context of the Probate Code and not the Parentage Act.

To judge Jackson Leverette's claim or to decide whether she should receive genetic testing within the context of the Parentage Act would be patently unfair, prejudicial, and go

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against the holding in *Jotham*. Jackson Leverette has submitted facts that create a reasonable possibility that she may be the half-sibling of the Decedent. Given those facts, the Court should order genetic testing immediately.

Finally, any concern that Jackson Leverette will attempt to later use any genetic testing to challenge presumptions of paternity that have benefited other parties in this matter is misplaced. Jackson Leverette's only purpose in obtaining genetic testing is to benefit her own claim, and not to challenge other parties who are already presumed to have relationships with the decedent.

III. THE SPECIAL ADMINISTRATOR'S PROTOCOL ERRONEOUSLY USES THE DEFINITION OF "GENETIC FATHER" TO PRECLUDE TESTING OF PERSONS WHO MAY BE GENETICALLY LINKED TO DECEDENT:

The Special Administrator has asked that the court accept the following two-pronged argument: (1) as a matter of law, John Louis Nelson is Decedent's "genetic father" within the meaning of Minn. Stat.§ 524.1-201(22); and (2) therefore, only persons claiming to be descendants of John Louis Nelson are eligible to claim heirship. The Special Administrator's argument is based upon an erroneous use of the term "genetic father" and a misapplication of the role this term plays in the Probate Code.

A. <u>The Special Administrator ignores the fact that the definition of "genetic father" was introduced to the Probate Code for entirely different purposes:</u>

In 2010, the Minnesota legislature made multiple revisions to the Probate Code. One such revision was to add Minn. Stat. §524.2-117, which states that "[e]xcept as otherwise provided in section 524.2-114, 524.2-119, or 524.2-120, a parent-child relationship exists between a child and the child's genetic parents, regardless of the parents' marital status." This new language codified the well-understood principle that marital status at the time of a child's birth is not controlling for purposes of inheritance under the Probate Code. The Probate Code, however, includes three exceptions to the principle that genetics control the outcome of who is a

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parent for purposes of a probate proceeding. First, Minn. Stat. § 524.2-114 applies to certain parents who are barred from recovery. Second, Minn. Stat. § 524.2-119 applies to situations regarding adoptions. Third, Minn. Stat. § 524.2-120, applies to situations involving a child conceived by assisted reproduction. None of these exceptions apply to the facts of the instant case, which demonstrates that the Parentage Act, as a general rule, is simply not applicable to the determining heirship under Probate Code.

The Special Administrator does correctly recognize the current Probate Code's use of genetics to define a child's "genetic father" as the "man whose sperm fertilized the egg of a child's genetic mother." Minn. State. § 524.1-201(22). It also correctly cites the second part of the statute which reads: "If the father-child relationship is established under the presumption of paternity under chapter 257, 'genetic father' means only the man for whom that relationship is established," *Id.* However, the Special Administrator also jumps to an unsupported legal conclusion by stating the statute gives "priority to any parent-child relationship established under the Parentage Act." If that were the case, there would be no need for the statute to reference "genetics" and the Parentage Act's legal presumptions would control almost every case. A more viable interpretation, especially considering the criteria set forth in Minn. Stat. §524.2-117, is that the statute merely recognizes limited circumstances in which the Parentage Act would control. Otherwise, genetics remains the primary criteria to determine family relationships.

B. <u>The Special Administrator ignores the fact that Section 524.2-103(3), under which Jackson Leverette and other half-siblings would inherit, uses the term "parents" and not "*genetic* parents":</u>

Section 524.1-201 provides a list of general definitions for use in Chapters 524 (the Uniform Probate Code) and 525 (Probate Proceedings). Listed within Section 524.1-201 are definitions of the terms "genetic father," "genetic mother," and "genetic parent." <u>See</u> Minn. Stat.

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§ 524.1-201(22)-(24). These terms were added to the Uniform Probate Code in the 2010 legislative session. See Laws of Minnesota 2010, Chapter 334, section 5. The term "genetic father" appears nowhere else in the Uniform Probate Code.

The term "genetic parent," however, appears in Minn. Stat. § 524.2-119 – a new section, also introduced in 2010, entitled **Adoptee and Adoptee's Genetic Parents**, which sets forth rules as to when *adoptees* may inherit from genetic parents, and vice versa. In subdivision 1 of this section, the legislature makes clear its intent to *disqualify* adoptees who seek to inherit from their genetic parents ("[e]xcept as otherwise provided in subdivisions 2 to 5, unless otherwise decreed, a parent-child relationship does *not* exist between an adoptee and the adoptee's genetic parents") (emphasis supplied). Subdivisions 2 to 5 are narrow exceptions to this rule – none of which apply in the case at bar, as no one in this case claims heirship through adoption.

Jackson Leverette seeks genetic DNA testing as evidence to show that she is a descendent of Decedent's father, and therefore entitled to a share of the estate pursuant to Minn. Stat. § 524.2-103(3) (providing that the entire intestate estate passes "if there is no surviving descendant or parent, to the descendants of the decedent's parents or either of them by representation"). Section 524.2-103(3) uses the terms "parent" and "parents." It does *not* use the terms "*genetic* father," "*genetic* mother," or "*genetic* parents." As such, the term "genetic father" has no application to a party in the position of Jackson Leverette – i.e., one who seeks to prove that she is a relative of the half-blood, and entitled to inherit in the same share as if she was related to Prince in the whole blood. See Minn. Stat. § 524.2-107. Had the legislature in 2010 wanted to limit inheritances pursuant to Section 524.2-103(3) to only those persons who share a *genetic* parent with a decedent, as defined in Section 524.1-201(24), the legislature certainly could have done so. Because the legislature did not amend Section 524.2-103(3) to incorporate the new

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definitions in Section 524.1-201(22)-(24), the Special Administrator cannot ask the court to apply those definitions – or subpart 22's reference to the Parentage Act – to the facts of this case. Doing so would require that the court "read into" the statute terminology which the legislature never included when it revised the Probate Code in 2010.

Simply put, the "genetic father" definition inserted into the Probate Code in 2010 does not apply here. This definition was added to the Probate Code only to help explain the terminology used in a new section dealing with adoptees.[2] As such, the Special Administrator's reliance on the definition as a means of blocking certain parties from DNA testing is misplaced. In light of the known possibility that Jackson Leverette and Decedent may share the same father, this Court should permit her to obtain and present DNA evidence to establish heirship.

C. The Special Administrator ignores the fact that relying upon the Parentage Act to exclude potential heirs from genetic testing will conflict with the Probate Code's definition of "child":

If the presumptions found in the Parentage Act were intended to govern the Probate Code, then the definitional section of the Probate Code, Minn. Stat. §524.1-201, would have defined the word "child" with reference to the Parentage Act. Instead, the word "child" is defined as "any individual entitled to take as a child under law by intestate succession from the parent whose relationship is involved and excludes any person who is only a stepchild, a foster child, a

[2] Although the definition of "genetic father" does not preclude either Jackson Leverette or others like her from claiming heirship under Section 524.2-103, the second sentence of Section 524.1-201(22), which indicates that a man may be considered a "genetic father" by virtue of one of the presumptions in the Parentage Act (Chapter 257), is not superfluous. Under Section 524.2-119, subd. 1, a man deemed a "genetic father" by virtue of a presumption would not be allowed to inherit from a child who was subsequently adopted by different parents. This outcome makes perfect sense, as there would be no basis in fairness or equity to allow a mere "genetic father" in those circumstances to inherit from a child who had been given up for adoption to others. The reference to the Parentage Act in the second sentence of the definition of "genetic father" could not logically have been intended to bar the claims of those persons who could, with access to DNA testing, prove to be genetically related to a decedent.

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grandchild or any more remote descendant." Minn. Stat. § 524.1-201 (6). Because the Probate Code does not use the Parentage Act to define the word "child," it is clear that the references to the words "descendant," (Minn. Stat. §524.1-201 (11); "heirs," (Minn. Stat. §524.1-201 (27) "descendant's heirs," (Minn. Stat. §524.2-101) and "descendants of decedent's parents," (Minn. Stat. §524.2-103) are made with the understanding that genetics applies and controls. Moreover, applying these definitions with the limitations and legal presumptions imposed by the Parentage Act needlessly and unnecessarily converts the probate process from a simple, common sense process to an expensive and administratively challenging one. Certainly, the legislature did not mean to adopt such a process.

The Probate Code evidences a clear and unmistakable reliance on genetics rather than the legally created presumptions found in the Parentage Act. Complete reliance on the Parentage Act, as espoused by the Special Administrator, can create outcomes the Minnesota legislature never intended. Under the Special Administrator's analysis, individuals who are genetic strangers to a decedent are given priority over those individuals who are genetically related. In fact, not only are they given priority, but they take the entire estate to the detriment of the genetic siblings.

IV. THE SPECIAL ADMINISTRATOR'S PROTOCOL CREATES PREFERENTIAL TREATMENT FOR A LIMITED GROUP OF POTENTIAL HEIRS:

In its June 6, 2016, Order this Court approved the Special Administrator's proposed "Protocol Prior to Potential Genetic Testing." The Court further recognized that objections might be forthcoming, and set subsequent dates for filing objections to the protocol. The Court also established dates by which those "claiming a genetic relationship to the decedent that may give rise to heirship" should file the required affidavit with support, dates upon which the Special Administrator would "advise the person in writing of its determination," and dates upon which a

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person who "disagrees with the Special Administrator's determination" should file objections.

What the Court perhaps did not perceive when it entered the June 6 Order, was that the Special Administrator, through its counsel, had absolutely no interest in allowing persons "claiming a genetic relationship" to Decedent, to actually be permitted to establish their genetic claims. To date, to the best of Jackson Leverette's knowledge, only one individual has been allowed to test pursuant to the Special Administrator's established testing protocol. Given the Special Administrator's gate-keeping proclivity to disallow genetic testing that could establish a claim, it is the Court, and not the Special Administrator, that should decide who can and who cannot obtain a genetic test for purposes of establishing their "genetic relationship to the Decedent."

V. THE SPECIAL ADMINISTRATOR'S PROTOCOL FAILS TO PROVIDE OPPORTUNITIES FOR INDEPENDENT TESTING:

Moreover, the current "Protocol Prior to Genetic Testing" fails to allow the parties to obtain their own testing at an alternative facility, rather than the testing facility located in Ohio, chosen by the Special Administrator. In most cases involving DNA testing, a party is typically not required to rely on the results of the opposing party's tests and chosen testing lab to determine if a claim is viable. As such, a party who obtains a genetic testing result from the Special Administrator's selected lab in Ohio should also be allowed to have a second test conducted at another accredited genetic testing lab to be agreed upon by all of the parties.

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CONCLUSION

Based upon the arguments and authorities set forth therein, Jackson Leverette respectfully requests that the Court terminate the testing protocol currently being employed by the Special Administrator, and replace it with a testing protocol that would permit her access to approved DNA testing to prove heirship.

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Dated: July 15, 2016

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