STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of DANIEL P. LAWSON, JR.,
Deceased.

SOPHIA LEWIS-HAMLET,

Petitioner-Appellee,

v

DANIEL P. LAWSON, SR., and PHYLLIS LAWSON,

Respondents-Appellants.

UNPUBLISHED
December 27, 2002

No. 235478
Wayne Probate Court
LC No. 01-632794-DE

Before: Fitzgerald, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

Respondents appeal as of right from an order removing them as co-personal representatives of the estate of Daniel P. Lawson, Jr., and appointing petitioner as successor personal representative. We affirm.

On January 27, 2001, the decedent in this case was killed in an airplane crash. Respondents, the parents of decedent, signed a petition for probate and appointment of personal representative for decedent's estate on March 21, 2001, and filed it with the court the following day. According to this petition, respondents were the decedent's only heirs. However, on March 21, 2001, petitioner gave birth to Ramses Dominic Hereford and a subsequent paternity test established that the decedent was his father.

Respondents initially argue that the probate court erroneously removed them as co-personal representatives and appointed petitioner in their place. Respondents essentially contend that they were the only heirs of decedent at the time of their appointment and that they were not required to notify Hereford. We disagree. Whether jurisdiction exists is a question of law that this Court reviews de novo on appeal. *In re Haque*, 237 Mich App 295, 299; 602 NW2d 622 (1999). A trial court's decision to vacate an order is reviewed for a clear abuse of discretion. *SNB Bank & Trust v Kensey*, 145 Mich App 765, 774; 378 NW2d 594 (1985). Similarly, "the appointment of a representative is a matter committed largely to the discretion of the lower court." *In re Powell Estate*, 160 Mich App 704, 715; 408 NW2d 525 (1987).

In formal testacy proceedings, the petitioners are required to notify the decedent's heirs. MCL 700.3403. It has long been held that probate courts are authorized to issue orders only after all interested parties are given proper notice. *Kammerer v Morlock*, 125 Mich 320, 324; 84 NW 319 (1900); *Gillet v Needham*, 37 Mich 143, 145 (1877). Notice is a jurisdictional fact, and a want of jurisdiction may always be taken advantage of by parties whose interests are prejudiced. *Gillet, supra* at 147-148; *Wilkinson v Conaty*, 65 Mich 614, 623; 32 NW 841 (1887); *In re Jones*, 128 Mich App 690, 693; 341 NW2d 179 (1983). Thus, an heir, as an interested party, is entitled to notice and a court has no jurisdiction to hear a claim until such service has been made. *Day v Dullam*, 235 Mich 516, 519-520; 209 NW 561 (1926); see also MCR 5.125(A)(4) and (C)(2)(a).

Respondents suggest that notice was unnecessary because Hereford was not born until after their original petition was filed. Respondents further note the fact that paternity was not established at the time the original petition was filed. We find these arguments to be meritless. Under MCL 700.2108, "[a]n individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth." Thus, under the law Hereford was considered to be living at the time of decedent's death.[1]

Respondents further maintain that they were improperly removed as co-personal representatives without any finding of wrongdoing under MCL 700.3611. However, a careful review of the record reveals that the probate court actually vacated its prior appointment of respondents as co-personal representatives. In *In re Morgan*, 209 Mich 65, 79; 176 NW 606 (1920), our Supreme Court held that a probate court exceeded its jurisdiction when it named a person as administrator who was not properly entitled under the statute. "An attempted action by the probate court in violation [of its statutory power] is a nullity because of the lack of jurisdiction." *Smolenski v Kent Probate Judge*, 301 Mich 8, 26; 2 NW2d 900 (1942). As decedent's son, Hereford had priority over respondents to be appointed personal representative of the estate. MCL 700.3203(1). In this position, Hereford could have successfully challenged respondents' request for appointment as co-personal representatives. Consequently, the order appointing respondents was invalid and properly vacated.

Respondents also assert that the probate court abused its discretion by appointing petitioner as successor personal representative without determining her suitability.[2] Given his age, Hereford is not qualified to act as a personal representative. MCL 700.3204(3). However, a person with priority "may nominate a qualified person to act as personal representative." MCL 700.3203(3). Likewise, the probate court has the authority to appoint the representative of an estate if persons having priority fail to request an appointment or make a nomination. MCL 700.3204(2). "It is almost routine to appoint parents to manage the interests of their minor

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[1] We note that it appears from the record that respondents were also aware of the possibility that Hereford was their grandchild at the time they filed their original petition. Indeed, during the hearing Phyllis Lawson claimed that she knew of the pregnancy before her son's death and that she visited Hereford in the hospital the day he was born.

[2] Since the prior order appointing respondents as co-personal representatives was vacated, this would have been an appointment as personal representative rather than successor personal representative. Regardless, the outcome of this case is the same.

children." *Powell, supra* at 711. Additionally, on May 8, 2001, petitioner was issued letters of conservatorship with respect to all of Hereford's assets. Therefore, we find no abuse of discretion with the probate court appointment of petitioner as successor personal representative.[3]

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder
/s/ Jessica R. Cooper

[3] Respondents claim the probate court erred because it never specifically addressed petitioner's suitability. However, they failed to raise this issue before the probate court and we decline to address it on appeal. *Schellenberg v Rochester Elks*, 228 Mich App 20, 28; 577 NW2d 163 (1998).