NO. 12-16-00255-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN RE: J.F.S. JR.,	***§***	
	§	***ORIGINAL PROCEEDING***
RELATOR	***§***	

MEMORANDUM OPINION

J.F.S. Jr. filed a petition for writ of mandamus, in which he challenges the trial court's order for genetic testing.[1] We conditionally grant the writ.

BACKGROUND

In October 2015, Relator signed an acknowledgment of paternity with regard to J.F.S. III. The Texas Department of Family and Protective Services later filed a petition for protection of a child, for conservatorship, and for termination of the parental rights of both Relator and the child's mother, B.L. In its petition, the Department sought a determination of parentage regarding Relator and requested genetic testing. The Department subsequently filed a motion asking the trial court to order Relator to submit to genetic testing.

At an adversary hearing, B.L. testified that she has no doubt that Relator is the child's father. She denied questioning paternity or having a sexual relationship with another man. Gary Aven testified, on behalf of the Department, that the child was born at a "good size," seven months and twenty-seven days after the parents met. He testified that the Department felt paternity needed to be resolved before it placed the child with Relator's parents. He knew Relator had signed an acknowledgment and that both parents maintained that Relator is the biological father. Jason Veihl, a caseworker for the Department, testified that B.L. admitted

[1] The respondent is the Honorable Lori Chrisman Hockett, assigned as a visiting judge in the 354th Judicial District Court of Rains County, Texas.

having one other sexual partner in the ten months before the child's birth. Relator's father told the trial court that he did not believe the child is his biological grandson, but that it did not matter. The trial court did not order genetic testing at that time.

At a hearing on the Department's motion for genetic testing, Veihl testified that B.L. told him she had known Relator for eight months before the child's birth and that she had another sexual partner in the two months before she met Relator. Veihl testified that, on other occasions, the mother said she had no doubt that Relator was the biological father. He testified that both parents now claim to be positive that Relator is the child's father. He believed that there is a question as to who the biological father is; thus, the Department sought genetic testing. Peggy Walker with the Court Appointed Special Advocates also recommended genetic testing. She believed the testing was in the child's best interest. Relator's father admitted that, in a previous hearing, he stated that he did not believe Relator is the child's biological father. He testified that Relator claims the child as his own.

B.L. did not oppose the genetic testing. The child's attorney ad litem favored the testing. The trial court found that although there is an acknowledgment of paternity, there was no adjudication of paternity. Additionally, the trial court stated that the Department, a party to the suit, believed there was reason to question Relator's admission of paternity. The trial court granted the Department's motion and ordered genetic testing.

Subsequently, the Texas Attorney General denied the Department's application for parentage establishment services. In the denial letter, the attorney general explained that parentage was legally established by the acknowledgment of paternity. However, the attorney general stated that a case would be opened if the office received an order for genetic testing that recited particular language, such as the following:

> The [c]ourt finds that evidence indicates that there may be a material mistake of fact as to the circumstances surrounding the AOP previously entered and genetic test results are required to rule on the issue of paternity of the child. Therefore, genetic testing is ordered[.]

In a nunc pro tunc order for genetic testing, the trial court found that "evidence indicates that there may be a material mistake of fact as to the circumstances surrounding the Acknowledgement of Paternity previously entered and genetic test results are required to rule on the issue of the paternity of the child." The trial court also found that "it is medically practical to

take blood, buccal cells, bone, hair, or other body tissue or fluid samples for genetic testing of the child who is the subject of this order and that genetic testing is required by § 160.502 of the Texas Family Code." The trial court denied Relator's motion to reconsider.

PREREQUISITES TO MANDAMUS

A writ of mandamus will issue only when the relator has no adequate remedy by appeal and the trial court committed a clear abuse of discretion. ***In re Cerberus Capital Mgmt., L.P.***, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding). The relator has the burden of establishing both of these prerequisites. ***In re Fitzgerald***, 429 S.W.3d 886, 891 (Tex. App.—Tyler 2014, orig. proceeding.). A trial court abuses its discretion when (1) its decision is so arbitrary and unreasonable as to amount to a clear and prejudicial legal error; or (2) it clearly fails to correctly analyze or apply the law. ***In re Cerberus Capital Mgmt., L.P.***, 164 S.W.3d at 382. We must defer to the trial court's factual resolutions and any credibility determinations that may have affected those resolutions. ***In re Fitzgerald***, 429 S.W.3d at 891. We review the entire record when addressing whether there is an abuse of discretion. ***Id***.

There is no adequate remedy at law for addressing erroneously ordered genetic testing. ***In re Office of Attorney Gen. of Tex.***, 272 S.W.3d 773, 777 (Tex. App.—Dallas 2008, orig. proceeding); ***In re Young***, No. 05-15-00024-CV, 2015 WL 1568835, at *3 (Tex. App.—Dallas Apr. 7, 2015, orig. proceeding) (mem. op.).

AVAILABILITY OF MANDAMUS

In his sole issue, Relator contends that the trial court abused its discretion by ordering genetic testing in the face of a signed and filed acknowledgment of paternity. The Department contends that it has standing to pursue a proceeding to adjudicate parentage and, consequently, testing was mandatory under section 160.502(a).

Abuse of Discretion

Section 160.502 provides that "a court shall order a child and other designated individuals to submit to genetic testing if the request is made by a party to a proceeding to determine parentage." TEX. FAM. CODE. ANN. § 160.502(a) (West 2014). A "determination of parentage" refers to the establishment of the parent-child relationship by either a valid acknowledgment of paternity or an adjudication by a court. ***Id***. § 160.102(5) (West 2014). The

family code authorizes certain persons and entities, such as the Department, to maintain a suit to adjudicate parentage. *See* ***id***. §§ 160.602(a)(4), 160.102(17)(E) (West 2014).

In this case, however, Relator signed an acknowledgment of paternity, which the record indicates was filed with the Texas Department of State Health Services. "[A] valid acknowledgment of paternity filed with the vital statistics unit is the equivalent of an adjudication of the paternity of a child and confers on the acknowledged father all rights and duties of a parent." ***Id***. § 160.305(a) (West Supp. 2016). A proceeding to challenge an acknowledgment of paternity shall be conducted in the same manner as a proceeding to adjudicate parentage. ***Id***. § 160.309(d) (West Supp. 2016). "A trial court abuses its discretion when a child's paternity has been legally established and it orders genetic testing before such a parentage determination has been set aside." ***In re Attorney Gen. of Tex.***, 195 S.W.3d 264, 269 (Tex. App.—San Antonio 2006, orig. proceeding).

Section 160.609 expressly provides that, when a child has an acknowledged father, a signatory or a nonsignatory "individual" may commence a timely proceeding to adjudicate parentage. TEX. FAM. CODE. ANN. § 160.609 (West 2014). Citing ***In re Dallas Group of America, Inc.***, 434 S.W.3d 647 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding), the Department argues that it may seek genetic testing because the "Family Code limits the class of persons who may challenge an [acknowledgment] to the same categories of individuals authorized to adjudicate parentage[.]" In that case, which involved a wrongful death action, various business entities sought genetic testing even though the deceased had signed an acknowledgment of paternity before his death. ***Id.*** at 648. The Dallas Court of Appeals held that the trial court properly denied the entities' request for genetic testing. ***Id***. The court explained as follows:

> [T]he Family Code [] generally limits the class of persons who may challenge an acknowledgment of paternity. Section 160.309(d) provides that "[a] proceeding to challenge an acknowledgment of paternity . . . shall be conducted in the same manner as a proceeding to adjudicate parentage under Subchapter G." Section 160.602 of Subchapter G, in turn, enumerates the persons who may adjudicate parentage: (1) the child; (2) the mother; (3) a man whose paternity is to be adjudicated; (4) a support enforcement agency or other government agency authorized by other law; (5) an authorized adoption or child-placement agency; (6) an authorized representative of an incapacitated or deceased person or minor who would otherwise be entitled to maintain a proceeding; (7) a person closely related to a deceased mother; and (8) an intended parent. The relators do not fall within the categories of individuals with standing under the Family Code to challenge [the] acknowledgment.

Id. at 652-53 (internal citations omitted).

However, the Dallas court also noted that the entities could not seek an adjudication of paternity under section 160.609(b) because they did not qualify as "individuals." ***Id***. at 653 n.2. The family code does not define the term "individual," but the Texas Code Construction Act defines "person" as a "corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity." TEX. GOV'T CODE ANN. § 311.005(2) (West 2013). Unlike the word "person," the word "individual" does not encompass a governmental agency, such as the Department. *See* ***id***.; *see also* ***In re N.A.D.***, 397 S.W.3d 747, 751 (Tex. App.—San Antonio 2013, no pet.) (use of "person" in section 156.102 of family code includes Department); ***City of Corinth v. NuRock Dev., Inc.***, 293 S.W.3d 360, 370 (Tex. App.—Fort Worth 2009, no pet.) (use of "individual" in attorney's fees statute indicated legislative intent to exclude governmental entities). The legislature's use of the word "individual," rather than "person," evidences an intent to exclude the Department from commencing a proceeding to adjudicate parentage when a child has an acknowledged father. *See* TEX. FAM. CODE ANN. § 160.609(b); *see also* ***In re Lee***, 411 S.W.3d 445, 451 (Tex. 2013) (a statute's plain language is surest guide to legislative intent); *see also* ***In re Dallas Group of Am., Inc.***, 434 S.W.3d at 653 n.2. Had the legislature intended otherwise, it could have used the word "person," as it did in other provisions of the Family Code. *See* ***In re M.N.***, 262 S.W.3d 799, 802 (Tex. 2008) (appellate courts assume legislature included each word for a purpose and words not included were purposefully omitted); *see also* ***N.A.D.***, 397 S.W.3d at 751.

Accordingly, the Department is not statutorily authorized to commence a proceeding to adjudicate parentage when the child's paternity has been legally established by a valid acknowledgment of paternity. *See* TEX. FAM. CODE ANN. §§ 160.102(5), 160.305, 160.609(b). Because the acknowledgment has not been set aside and cannot not be properly set aside by the Department, the trial court abused its discretion by ordering genetic testing. *See* ***In re Rodriguez***, 248 S.W.3d 444, 451 (Tex. App.—Dallas 2008, orig. proceeding); *see also* ***In re Attorney Gen. of Tex.***, 195 S.W.3d at 269. Therefore, we need not address Relator's remaining arguments challenging the trial court's order.[2] *See* TEX. R. APP. P. 47.1.

[2] Relator also contends that genetic testing is improper because he admitted to paternity in pleadings that he filed with the trial court, and the evidence does not support either a finding of mistake of fact or a need for genetic testing.

DISPOSITION

Under the circumstances of this case, we conclude that Relator is entitled to mandamus relief. We ***conditionally grant*** Relator's petition for writ of mandamus and direct the trial court to vacate its order of July 25, 2016, requiring genetic testing. We trust the trial court will promptly comply with this opinion and order. The writ will issue only if the trial court fails to do so ***within ten days of the date of the opinion and order***. The trial court shall furnish this Court, within the time for compliance with this Court's opinion and order, a certified copy of the order evidencing such compliance.

JAMES T. WORTHEN
Chief Justice

Opinion delivered November 30, 2016.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

ORDER

NOVEMBER 30, 2016

NO. 12-16-00255-CV

J.F.S. JR.,
Relator
V.

HON. LORI CHRISMAN HOCKETT,
Respondent

ORIGINAL PROCEEDING

ON THIS DAY came to be heard the petition for writ of mandamus filed by J.F. S. Jr., who is the relator in Cause No. 9986, pending on the docket of the 354th District Court Judicial District Court of Rains, Texas. Said petition for writ of mandamus having been filed herein on September 13, 2016, and the same having been duly considered, because it is the opinion of this Court that the petition for writ of mandamus be, and the same is, ***conditionally granted***.

And because it is further the opinion of this Court that the trial judge will act promptly and vacate her order of July 25, 2016 requiring genetic testing; the writ will not issue unless the **HONORABLE LORI CHRISMAN HOCKETT**, fails to comply with this Court order ***within ten (10)*** days from the date of this order.

It is further ORDERED that all costs of this proceeding shall be adjudged against the party incurring same.

By *per curiam* opinion.
Panel consisted of Worthen, C.J., Hoyle, J. and Neeley, J.