REL: August 28, 2020

SUPREME COURT OF ALABAMA

SPECIAL TERM, 2020

1190457

Ex parte Berry Stephens

PETITION FOR WRIT OF MANDAMUS

(In re: Berry Stephens

v.

Pauline Youngblood)

(Coffee Circuit Court, CV-19-65)

MENDHEIM, Justice.

Berry Stephens ("Stephens") petitions for a writ of mandamus directing the Coffee Circuit Court to appoint him

administrator ad litem of the estate of his mother, Louise Gennuso. We grant the petition and issue the writ.

I. Facts

In the 1990s Gennuso opened two accounts with Army Aviation Federal Credit Union ("the credit union"); Gennuso was the sole owner of those accounts. On September 29, 2006, Gennuso executed a will. The primary beneficiaries under the will were Gennuso's two sons -- Stephens and Stephen Stephens. Gennuso's niece, Pauline Youngblood ("Youngblood"), was also a beneficiary under the will; she was to receive $20,000. The will noted that, at the time of its execution, Gennuso held seven promissory notes given to her in exchange for loans she had made to Youngblood and her husband Dan Youngblood that totaled $695,000. Under the terms of Gennuso's will, $100,000 of the loan amount was to be paid to her estate at the time of Gennuso's death, $100,000 more would be due six months after her death, and the loans were to be completely paid off, including interest, by the time Youngblood died. The will further provided that, at Gennuso's death, Gennuso's sons would be entitled to the principal and interest owing from

those promissory notes. The will named Youngblood as personal representative of Gennuso's estate.

On July 10, 2013, Gennuso, who was then 83, was admitted to Wiregrass Medical Center ("WMC") for combative and uncooperative behavior while she had been a physical-therapy patient at Enterprise Health and Rehab. Youngblood, who was living with Gennuso, accompanied Gennuso to WMC. During Gennuso's stay at WMC, she was diagnosed with dementia that included "moderate to severe cognitive impairment." Medical records from WMC state that Gennuso had "little family involvement. She has one son [Stephens] that is somewhat involved with her care. Her other son [Stephen] is not involved at all with her care. Both sons were in agreement that her niece, Pauline Youngblood, have [power of attorney]." Youngblood related to WMC personnel that Gennuso "'has no friends and no one likes her,'" and she also claimed that Gennuso "has 'two personalities.'" A psychological evaluation of Gennuso on July 17, 2013, concluded that Gennuso's "[t]hought process is generally disorganized," that she "tends to be generally delusional," that her "[a]ttention span and concentration were poor," and that her "[i]nsight and judgment

were poor." The medical records indicated that Gennuso's family members had decided to place Gennuso in a skilled long-term nursing-home facility upon her discharge from WMC because Youngblood could no longer provide Gennuso with the level of care she required, given Gennuso's condition.

On September 30, 2014, Youngblood accompanied Gennuso to the credit union and they executed documents to change Gennuso's two accounts into joint accounts with a right of survivorship naming both Gennuso and Youngblood as owners. At that time, one of those accounts had a balance of approximately $465,000; the other account had a balance of approximately $152,000. Youngblood had her own account with the credit union. At that time, Youngblood's account had a balance of $909.70. Gennuso contributed all the funds to the two joint accounts; Youngblood contributed no funds to those accounts.

On September 20, 2015, Gennuso died at the age of 86 from chronic obstructive pulmonary lung disease. Within one month of her death, Youngblood withdrew nearly all the funds from the two joint accounts and deposited the funds into Youngblood's personal account. In October 2015, the joint

account that had had an initial balance of approximately $465,000 showed a balance of $1,000. The joint account that had had an initial balance of approximately $152,000 showed a balance of $5,000. The balance of Youngblood's account at the credit union had increased $418,000.

On March 7, 2016, Youngblood filed in the Coffee Probate Court a "Petition for Probate of Will" that declared that Gennuso's sole heirs were Stephens and Stephen Stephens and that the will named Youngblood as personal representative of the estate. Both of Gennuso's sons submitted to the probate court waivers agreeing that the will should be admitted to probate. On March 9, 2016, the probate court entered an order admitting the will to probate and granting Youngblood letters testamentary as personal representative of Gennuso's estate. On February 11, 2019, Stephens filed in the Coffee Circuit Court a "Petition for Removal of Estate" seeking removal of Gennuso's estate to the circuit court. On June 14, 2019, the circuit court entered an order removing Gennuso's estate from the probate court to the circuit court.

On June 14, 2019, Stephens filed a "Motion for Appointment of Administrator Ad Litem" in which he asserted

that he had recently discovered that Youngblood had transferred funds from the joint accounts she and Gennuso held at the credit union into Youngblood's personal account before Youngblood had filed the petition to probate the will. He contended in the motion that the transferred funds were intended to be part of Gennuso's estate, that Youngblood had taken advantage of Gennuso's mental state in September 2014 when she had Gennuso change her accounts at the credit union to joint accounts with a right of survivorship in the names of both Gennuso and Youngblood, that Youngblood had wrongfully withdrawn nearly all the funds from the two joint accounts immediately following Gennuso's death, and that Youngblood, as personal representative of the estate, had a conflict of interest. Stephens further argued that § 43-2-250, Ala. Code 1975, mandated the appointment of an administrator ad litem under such circumstances and that the circuit court should appoint Stephens to that position. Along with the motion, Stephens submitted an affidavit asserting that he had personal knowledge of Gennuso's mental state and detailing what had occurred with the funds in her accounts at the credit union.

On July 11, 2019, the circuit court held a hearing on Stephens's motion. On August 21, 2019, because the circuit court had not ruled on the motion, Stephens filed a "Motion for Ruling on Administrator Ad Litem Motion" that requested action by the circuit court on his earlier motion. On September 3, 2019, Youngblood filed a "Response in Opposition to 'Motion for Ruling on Administrator Ad Litem Motion.'" In her filing, Youngblood asserted that Stephens's only support for his motion to have an administrator ad litem appointed was his "unsubstantiated affidavit" alleging that Gennuso had been diagnosed with a "severe cognitive impairment." Youngblood admitted to transferring funds from the joint accounts to her personal account but contended that

> "[a]n examination of the face of those bank records reveal[s] a perfectly normal transaction between the Credit Union, [Gennuso], and Youngblood, which accounts operated to transfer money in them to Youngblood upon the death of Gennuso outside the estate of Gennuso, and, contrary to the claim of [Stephens] in his Motion, he has not presented to this Court any admissible evidence otherwise."

On September 24, 2019, Stephens filed a "Reply to Youngblood['s] Opposition" in which he again contended that the facts related in his affidavit were based on personal knowledge. In addition, Stephens attached to that filing

copies of bank-statement records from the credit union showing the balances and transfers from the pertinent joint accounts to Youngblood's personal account. On November 14, 2019, Stephens filed a second "Motion for Ruling on Administrator Ad Litem Motion," again seeking a ruling from the circuit court.

On November 15, 2019, Youngblood filed a "Motion to Strike and Renewed Objection to Motion for Administrator Ad Litem." In that filing, Youngblood requested that the circuit court strike Stephens's affidavit on the ground that the affidavit lacked any admissible supporting evidence that Gennuso had been diagnosed in July 2013 with a "severe cognitive impairment." Youngblood additionally argued that Stephens

> "was not present at the Credit Union on September 30, 2014 when Gennuso created the two joint accounts with Youngblood, did not observe Gennuso on that occasion, has not presented any statement from any other witness who did observe Gennuso on that occasion, and therefore, he could not possibly know what Gennuso's condition was on that exact occasion when she signed the account forms at the Credit Union."

Youngblood attached to that filing copies of the documents from the credit union establishing the joint accounts in September 2014. Youngblood also asserted in that filing:

> "Pursuant to the language in the joint account creating documents signed by Gennuso and Youngblood and approved by the Credit Union, Youngblood could have taken all of the money out of the accounts at any time but did not do so until after the death of Gennuso. Since those were 'survivorship accounts,' the survivor, Youngblood, had every legal right to take the money out of them after Gennuso died on September 20, 2015. Due to the operation of the survivorship provision contained in the account documents, the funds in the accounts passed directly to Youngblood under Alabama law and did not pass to or through Gennuso's estate."

On January 13, 2020, Stephens filed a "Reply to Youngblood['s] Motion to Strike." Stephens noted in that filing that he was attaching Gennuso's medical records from WMC that he had obtained pursuant to a subpoena. The highlights from those medical records have already been related at the outset of this rendition of the facts. Stephens contended that the medical records were admissible under the Alabama Rules of Evidence and that his personal observations about Gennuso's condition were likewise admissible. Stephens also reiterated his position that § 43-2-250 mandated the appointment of an administrator

ad litem under the circumstances presented to the circuit court.

On January 24, 2020, the circuit court entered an order denying Stephens's motion for the appointment of an administrator ad litem. The order expressly stated that "[t]he Court, however, reserves its right to appoint an administrator ad litem in the future." On March 5, 2020, Stephens filed this petition for a writ of mandamus.

II. Standard of Review

> "Mandamus is a drastic and extraordinary writ, to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court."

Ex parte Integon Corp., 672 So. 2d 497, 499 (Ala. 1995).

The circuit court's order refusing to appoint an administrator ad litem is an interlocutory order, not susceptible to review by appeal. Moreover, Stephens persuasively argues that waiting until the estate administration is final to seek review of the circuit court's order denying his motion to have an administrator ad litem appointed is not an adequate remedy given: (1) the length of

time that has already transpired with the administration of this estate, (2) the fact that the funds in question allegedly constitute the bulk of Gennuso's assets, and (3) the fact that Youngblood could dissipate those assets at any time. This Court has permitted mandamus review of similar rulings by circuit courts. See Ex parte Adams, 168 So. 3d 40, 46 (Ala. 2014) (concluding that the petitioner, the coexecutor of the estate, had "a clear legal right to have [the testator's son] removed as coexecutor," but ultimately denying the mandamus petition because the circuit court had not yet ruled on the petitioner's motion to remove the testator's son as coexecutor). Consequently, we conclude that a petition for a writ of mandamus is the appropriate avenue for review of the circuit court's order denying Stephens's motion seeking the appointment of an administrator ad litem.

III. Analysis

Stephens contends that § 43-2-250 requires the appointment of an administrator ad litem under the circumstances presented in this case. Section 43-2-250 provides:

> "When, in any proceeding in any court, the estate of a deceased person must be represented, and

> there is no executor or administrator of such estate, or he is interested adversely thereto, it shall be the duty of the court to appoint an administrator ad litem of such estate for the particular proceeding, without bond, whenever the facts rendering such appointment necessary shall appear in the record of such case or shall be made known to the court by the affidavit of any person interested therein."

(Emphasis added.) In Ex parte Riley, 247 Ala. 242, 250, 23 So. 2d 592, 599 (1945), this Court explained the three requirements of § 43-2-250:

> "Under the statute three things must concur to justify the appointment: (1) The estate of the deceased person 'must be represented,' which means that the interests of the estate require representation. (2) 'There is no executor or administrator of such estate, or he is interested adversely thereto.' (3) 'The facts rendering such appointment necessary shall appear in the record of such case, or shall be made known to the court by the affidavit of any person interested therein.'"

Stephens argues that he has met all three requirements under § 43-2-250 because the interests of Gennuso's estate had to be represented, Youngblood's personal interests are adverse to the interests of the estate, and he presented facts making known Youngblood's adverse interests in the form of Gennuso's medical records from WMC and bank statements from the credit union. Stephens explains that he believes it is clear in this case that Youngblood has interests adverse to Gennuso's estate

because, he says, she is in personal possession of funds that he says belong to the estate, as evidenced by the large funds transfers from the two joint accounts to Youngblood's personal account. Stephens adds that the creation of the joint accounts was contrary to the terms of the will with respect to the amount of money Youngblood owed Gennuso, which raises doubt about the propriety of that transaction. Stephens further contends that he has produced evidence indicating that Youngblood exerted undue influence upon Gennuso before her death to obtain the funds that were originally held in accounts controlled solely by Gennuso. Specifically, Stephens asserts that, at the time Youngblood accompanied Gennuso to the credit union in September 2014 to set up the two joint accounts with a right of survivorship, Gennuso had been diagnosed with dementia that indicated severe cognitive impairment, as evidenced by the medical records from WMC that he produced.

Stephens notes that, although normally no inquiry can be made regarding the ownership of a joint-survivorship account that is clear upon its creation, that is not the case if there is evidence of undue influence upon, or a competency issue

regarding, one of the owners. See, e.g., Johnson v. Sims, 501 So. 2d 453, 457 (Ala. 1986) (observing that Alabama law "preclude[s] post-death inquiries into the ownership of funds in a joint savings and loan account, 'absent allegations of fraud, duress, mistake, incompetency or undue influence'" (quoting Hines v. Carr, 372 So. 2d 13, 14 (Ala. 1979))); Campbell v. Colonial Bank, 678 So. 2d 189, 191 (Ala. Civ. App. 1996) (explaining that, "if an instrument is unambiguous and complete on its face regarding survivorship status, no reason exists to allow extrinsic evidence to contradict these findings, absent allegations of fraud, duress, mistake, incompetency, or undue influence").

Stephens draws parallels between this case and McCollough v. Rogers, 431 So. 2d 1246 (Ala. 1983). In McCollough, the defendant at trial, Willie B. McCollough, worked and cared for Mary Lee Rogers, an elderly woman, for two years. During that period, Rogers was hospitalized twice for serious conditions, including a stroke. In the second year, McCollough accompanied Rogers to a bank at which Rogers had an existing account, and they opened a joint account with a right of survivorship naming both McCollough and Rogers as owners.

McCollough began withdrawing funds from the joint account shortly before Rogers's death, and she withdrew the remainder of the funds shortly after Rogers's death. An heir of Rogers, Christine Rogers, sued McCollough regarding ownership of the funds that were formerly in the joint account. After an ore tenus trial, the trial court awarded the funds to Christine Rogers. McCollough appealed, contending that there was insufficient evidence of a confidential relationship and that she had overcome the presumption of undue influence. After noting that "undue influence or incompetency could be made a defense to a property disposition like the one before us," 431 So. 2d at 1248, this Court explained:

> "'The law presumes the exercise of undue influence in transactions inter vivos where confidential relations exist between the parties, and puts upon the donee or grantee, when shown to be the dominant party in the relation, the burden of repelling the presumption by competent and satisfactory evidence. [Citations omitted.]' [(Quoting Webb v. Webb, 250 Ala. 194, 203, 33 So. 2d 909, 915 (1948), quoted with approval in McEniry v. Coats, 333 So. 2d 568, 570-71 (Ala. 1976).)]

> "Thus, in order to establish the presumption of undue influence, a confidential relationship must be shown to have existed. Such a relationship may spring from 'those multiform positions in life wherein one comes to rely upon and trust another in his important affairs.' Raney v. Raney, 216 Ala. 30, 34, 112 So. 313, 316 (1927), and so that kind of relationship could have arisen between Mrs. Rogers and Mrs. McCollough in this instance. Once that was established it was incumbent upon the plaintiff here to establish that Mrs. McCollough was the dominant party in that relationship."

Id. The McCollough Court concluded that the record supported the existence of a confidential relationship and that it was a question of fact, left to the trial court's judgment, as to whether McCollough had overcome the presumption of undue influence.

Stephens asserts that, as in McCollough, because he has introduced evidence indicating that in September 2014 Gennuso was not of sound mind and because Youngblood had been caring for Gennuso and held her power of attorney, a presumption of undue influence arises that calls into doubt Youngblood's right to the funds that were in the two joint accounts she shared with Gennuso. Because of the possibility that those funds were assets belonging to the estate, Stephens contends that Youngblood's interests are clearly adverse to the interests of the estate. Accordingly, Stephens argues, §

43-2-250 mandates that an administrator ad litem should have been appointed by the circuit court.

Youngblood presented two arguments below in response to Stephens.[1] First, she argued that documents from the credit union concerning the creation of the joint accounts showed that it was "a perfectly normal transaction between the Credit Union, [Gennuso,] and Youngblood." But those documents shed no light on the condition of Gennuso's mental faculties at the time the joint accounts were opened. Thus, Youngblood's only pertinent argument was her contention that Stephens's affidavit should be stricken because, she says, it was not based on personal knowledge or evidence with respect to the accusation that Gennuso had been diagnosed with "severe cognitive impairment" in July 2013. We have nothing before us indicating that the circuit court ruled on Youngblood's motion to strike Stephens's affidavit. In any event, Stephens eventually supported his assertion with respect to Gennuso's mental state with medical records from WMC obtained through a subpoena. The medical records corroborated the statements in Stephens's affidavit, and Youngblood did not file a response

[1]Youngblood did not file a respondent's brief with this Court.

to Stephens's submission of the medical records. Thus, Youngblood's arguments below did not weaken in any way the case presented by Stephens for the appointment of an administrator ad litem.

In her filings below, Youngblood openly admitted transferring nearly all the funds in the joint accounts held at the credit union to her personal account immediately after Gennuso's death. She contended that her actions were perfectly permissible, but she did not counter Stephens's evidence of Gennuso's mental capacity at the time the joint accounts were opened or the presumption of undue influence that could arise from such facts. Accordingly, the facts showed that Youngblood, the personal representative of Gennuso's estate, had an interest adverse to the estate. Therefore, under § 43-2-250, the circuit court had a duty to appoint an administrator ad litem for the estate, but it failed to do so. See, e.g., Loving v. Wilson, 494 So. 2d 68, 70 (Ala. 1986) (observing that, "[s]ince all of the elements necessary to require an appointment of an administrator ad litem are present, it was error for the trial court not to appoint one for each of the estates"); Cannon v. Birmingham

Tr. & Sav. Co., 212 Ala. 316, 319, 102 So. 453, 456 (1924) (stating that an identical predecessor statute to § 43-2-250 "makes it the duty of the court, in any proceeding where the personal representative is interested adversely to the estate, to appoint an administrator ad litem").

IV. Conclusion

Based on the foregoing, we grant the petition for the writ of mandamus, and we direct the circuit court to appoint Stephens as administrator ad litem for the estate of Gennuso.

PETITION GRANTED; WRIT ISSUED.

Parker, C.J., and Bolin, Shaw, Wise, Bryan, Sellers, Stewart, and Mitchell, JJ., concur.