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SUPREME COURT OF ALABAMA

SPECIAL TERM, 2023

SC-2022-0956

Ex parte S.M. and H.M.

PETITION FOR WRIT OF MANDAMUS

(In re: T.H.

v.

S.M. and H.M.)

(Etowah Juvenile Court: CS-22-900004)

PER CURIAM.

PETITION DENIED. NO OPINION.

SC-2022-0956

Parker, C.J., and Shaw, Wise, Mendheim, Stewart, and Mitchell,
JJ., concur.

Bryan, J., dissents.

Cook, J., dissents, with opinion, which Sellers, J., joins.

COOK, Justice (dissenting).

This is a paternity action. T.H. ("the mother") filed this action in the Etowah Juvenile Court against C.M. ("the alleged father"). C.M. is deceased; therefore, the mother named C.M.'s parents, S.M. and H.M., as his representatives. S.M. and H.M. filed a motion to dismiss, which the juvenile court denied, and the juvenile court then ordered them to submit to genetic testing. S.M. and H.M. ("the petitioners") responded by filing this petition for a writ of mandamus. The petitioners ask this Court to direct the juvenile court to enter an order either dismissing the mother's paternity action in its entirety or, alternatively, dismissing them from the mother's action because, they say, the juvenile court lacked subject-matter jurisdiction over the action. For the reasons stated below, I respectfully dissent from denying the petition.

According to the mother, she and the alleged father were involved in a brief sexual relationship that she claims resulted in her becoming pregnant and later giving birth to M.D.R. ("the child"). In 2015, the alleged father died without ever being informed of the mother's pregnancy and without the paternity of the child ever being established through genetic testing. Nearly six years after the alleged father died,

the mother commenced the paternity action against "[the alleged father], deceased[,] by and through his parents[, the petitioners]," in which she sought to establish that the alleged father was the child's biological father by compelling the petitioners to submit to genetic testing.

The petitioners appeared in the mother's action for the limited purpose of filing a motion to dismiss on the basis that the juvenile court lacked subject-matter jurisdiction. According to the petitioners, because the mother brought the paternity action against a dead person, the action was a legal nullity and, therefore, was due to be dismissed. A referee appointed by the juvenile court denied the petitioners' motion, noting that, under § 43-8-48, Ala. Code 1975, "paternity can be established after the death of the alleged father." The petitioners filed an objection to the referee's findings and renewed their motion to dismiss. Following a hearing, on August 15, 2022, the juvenile court denied their motion and ordered the petitioners to submit to genetic testing.

The petitioners then filed a petition for the writ of mandamus in the Court of Civil Appeals in which they apparently challenged the juvenile court's subject-matter jurisdiction over the mother's paternity

action against the alleged father.¹ The petitioners allege that the Court of Civil Appeals denied that petition.² The petitioners then filed the present mandamus petition with this Court; we subsequently ordered answers and briefs.

The petitioners contend that they have a clear legal right to the dismissal of the mother's paternity action because, they say, under Alabama law a claim filed against a deceased person is a legal nullity and does not invoke the jurisdiction of the trial court.³ Relying on the Court of Civil Appeals' decision in A.E. v. M.C., 100 So. 3d 587 (Ala. Civ. App. 2012), the petitioners further argue that, because the jurisdiction of the juvenile court was never invoked, all orders issued in the action -- including the order denying their motion to dismiss -- are void.

¹A copy of that petition was not included as an exhibit to the present petition.

²A copy of that order was not included as an exhibit to the present petition.

³To prevail in this case, the petitioners are required to show "(1) a clear legal right in the petitioner to the order sought; (2) an imperative duty on the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) the properly invoked jurisdiction of the court." Ex parte McNaughton, 728 So. 2d 592, 594 (Ala. 1998).

The mother argues, however, that Alabama law permits the establishment of paternity after the presumed father has died. Specifically, she contends that the Alabama Uniform Parentage Act ("the AUPA"), § 26-17-101 et seq., Ala. Code 1975, allows a court to order the genetic testing of a deceased person for good cause shown. See § 26-17-509, Ala. Code 1975.⁴ Therefore, the mother contends, she is entitled to proceed with her paternity action.

The petitioners point out that the Court of Civil Appeals has held as follows:

"A deceased person lacks the capacity to be sued in an action such as the one initiated by the father, and, therefore, we conclude that the father, in asserting his custody claim [against the deceased mother], failed to invoke the subject-matter jurisdiction of the trial court. See 67A C.J.S. Parties § 54 (2002) ('The capacity to be sued exists only in persons in being and so, does not exist in the case of persons deceased, and a suit filed against a dead person does not invoke the jurisdiction of the court.' (footnotes omitted))."

A.E., 100 So. 3d at 594-95. See also Maclin v. Congo, 106 So. 3d 405, 408 (Ala. Civ. App. 2012) ("Proceedings instituted against an individual who is deceased at the time the action is filed are a nullity and do not invoke

⁴Specifically, § 26-17-509 provides: "For good cause shown, the court may order genetic testing of a deceased individual."

the trial court's jurisdiction."). This Court has held that "[t]he absence of subject-matter jurisdiction renders void any judgment entered in the action." Moore v. John Hancock Life Ins. Co., 876 So. 2d 443, 448 (Ala. 2003).

The petitioners do not argue that an action seeking to establish the alleged father's paternity of the child can never be brought; instead, they contend that any such action must be brought in a legally viable manner under Alabama law. Citing Ex parte L.F.B., 599 So. 2d 1179, 1182 (Ala. 1992), the petitioners state that this Court has held that a claim seeking to establish paternity is an equitable claim and that, under § 6-5-464, Ala. Code 1975,⁵ equitable claims may be asserted against the personal

⁵Section 6-5-464 specifically provides:

"(a) All claims equitable in nature upon which an action has been filed shall survive in favor of and against the heirs, successors, or personal representative of any deceased party to such an action.

"(b) All claims equitable in nature upon which no action has been filed shall survive in favor of and against the personal representatives, heirs, or successors of deceased persons who, but for their death, could have enforced such claims or against whom such claims could have been enforced."

representative, heir, or successor of a decedent if such claims could have been enforced against the decedent before his or her death.

Thus, the petitioners contend that an estate for the alleged father must be opened in a probate court and that a paternity claim must be asserted against the personal representative of the estate. In other words, the petitioners contend both that subject-matter jurisdiction is lacking and that the personal representative of the alleged father's estate is a necessary party. This argument is consistent with § 43-2-833(c), Ala. Code 1975, which provides, in relevant part: "[A] personal representative of a decedent domiciled in this state at death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as the decedent had immediately prior to death." See also Ex parte Advanced Disposal Servs. South, LLC, 280 So. 3d 356 (Ala. 2018)(granting a petition for a writ of mandamus and requiring a trial court to join a city as a necessary party to the action).

The mother has not named the alleged father's estate or the personal representative of the estate as a defendant in this action. In fact, she states: "This is not a case involving an estate." The mother's brief at 13. Further, none of the exhibits attached to the mandamus petition

indicate that an estate has been opened for the alleged father or whether, if one has been opened, a personal representative has been appointed (and the mother does not allege either in her "petition for paternity" or in her appellate briefing that an estate exists). Not only did the mother not plead that she was suing the petitioners as representatives of the alleged father's estate (that is, as administrators or executors), she pled the opposite (suing them in a different representative capacity).⁶

⁶I question whether the mother has, in fact, alleged a justiciable controversy. "A justiciable controversy is one that "is definite and concrete, touching the legal relations of the parties in adverse legal interest, and it must be a real and substantial controversy admitting of specific relief through a decree."" Rogers v. Burch Corp., 313 So. 3d 555, 561 (Ala. 2020) (quoting South Alabama Gas Dist. v. Knight, 138 So. 3d 971, 975 (Ala. 2013), quoting in turn Copeland v. Jefferson Cnty., 284 Ala. 558, 561, 226 So. 2d 385, 387 (1969)).

In her "petition for paternity," the mother stated:

"4. The [mother] avers [the petitioners] are the biological parents of [the alleged father], and, as such, their DNA would more than qualify for paternity to be established for the benefit of the [child]. Therefore, the [mother] respectfully requests that this Court enter an Order ordering and directing that the parties submit themselves for DNA testing.

"WHEREFORE, PREMISES CONSIDERED, the [mother] would respectfully request that this Court enter an Order ordering and directing the parties to submit for DNA testing within a time certain, and after paternity is established enter an Order adjudicating [the alleged father]

The mother does not cite a single case holding that a dead person can be sued through a representative -- other than a properly appointed administrator or executor after an estate has been opened. "The plaintiff has the burden of proving that the trial court has personal jurisdiction over the defendant." Ex parte Excelsior Fin., Inc., 42 So. 3d 96, 103 (Ala. 2010) (quoting J.C. Duke & Assocs. Gen. Contractors, Inc. v. West, 991 So. 2d 194, 196 (Ala. 2008), citing in turn Ex parte Covington Pike Dodge, Inc., 904 So. 2d 226 (Ala. 2004)).

Further, the mother may not force the petitioners to be the representatives of their deceased adult child. Again, the mother does not

as the child's legal father, and any other relief to which she may be entitled."

At no point in her "petition for paternity" did the mother state why she brought this action or what difference a paternity determination would make. For instance, she did not specify whether her "petition" related to an inheritance claim or some other issue affecting the child. In every case cited by the mother in this case that this Court has reviewed here, the party seeking to determine the paternity of a deceased person has alleged a specific reason for filing the paternity action, such as child support, child custody, or intestate succession. The mother's sparse allegations in her "petition" make it difficult to determine the purpose of her action. Nevertheless, even if I could determine the purpose of the mother's action, I believe the mandamus petition is due to be granted because the juvenile court lacked subject-matter jurisdiction.

cite a single case supporting the imposition of involuntary representative status (particularly for a dead person).⁷ A court simply has no subject-matter jurisdiction when a dead person is sued for relief -- even if the plaintiff purports to involuntarily name a "representative" on behalf of the dead person.

The mother, however, relies on § 43-8-48(2)b. to argue that the Legislature intended to extend the right to establish paternity after the death of a putative father.⁸ She also relies on § 26-17-508(a), Ala. Code

⁷I note that in Everheart v. Rucker Place, LLC, 313 So. 3d 1113 (Ala. 2020), this Court considered an appeal from a judgment entered in an action commenced by "Cardell Coachman, a deceased minor, by and through his mother and next friend Johnitia Coachman." Unlike in this case, however, the Coachman plaintiff voluntarily assumed the representative role and no other party attempted to force her to involuntarily represent her child. Moreover, for all that appears, neither the parties nor this Court raised the issue of the capacity of the Coachman plaintiff; therefore, the Everheart opinion did not discuss the issue.

⁸Section 43-8-48(2)b. provides, in relevant part:

"If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person:

"....

"(2) In cases not covered by subdivision (1) of this section, a person born out of wedlock is a child

1975, a part of the AUPA, which provides, in relevant part:

"[I]f a genetic-testing specimen is not available from an individual who may be the mother or the father of a child, for good cause and under circumstances the court considers to be just, the court may order the following individuals to submit specimens for genetic testing:

"(1) the parents of the individual"

The mother contends that this Court and the Court of Civil Appeals have previously allowed cases to proceed in which a party sought to establish a deceased putative father's paternity of a child. For example, she notes that, in Cotton v. Terry, 495 So. 2d 1077, 1079 (Ala. 1986), this Court concluded it was clear from the plain language of § 43-8-48(2)b. "that paternity of an illegitimate child may be established after the death of the father through an adjudication supported by clear and convincing evidence." She also relies on Wheeler v. Marvin, 350 So. 3d 302 (Ala.

of the mother. That person is also a child of the father, if:

"....

"b. The paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof"

(Emphasis added.)

2021) (plurality opinion); Clemons v. Howard, 124 So. 3d 738 (Ala. Civ. App. 2018); and Free v. Free, 507 So. 2d 930 (Ala. Civ. App. 1986), for this same proposition.

However, in each of those cases, the parties sought to establish paternity for purposes of intestate succession. For instance, Cotton involves a quiet-title action based upon a dispute over intestate succession. Likewise, Wheeler concerned a dispute over whether the petitioner was an heir entitled to share in an estate (a dispute in probate court). 350 So. 3d at 303 (appeal of judgment "declaring that Kristin Marvin is the biological child of [Eugene] Drayton and is therefore an heir of Drayton for purposes of intestate succession"). In other words, our caselaw has recognized that § 43-8-48(2)b. allows a relationship between a deceased parent and a child to be established only for the purpose of determining intestate succession.

Here, the mother did not commence such an action. Her "petition for paternity" makes no claim that her action is for the purpose of intestate succession and seeks no relief for the purpose of "intestate succession." Further, her "petition for paternity" names the petitioners only in their alleged representative capacities for the deceased alleged

father (rather than in their personal capacities or even in representative capacities of the alleged father's estate). The exhibits before us show that the mother's petition names as the sole defendant "[C.M.], deceased, by and through his parents, [S.M.] and [H.M.]."

Therefore, I would hold that the juvenile court lacked subject-matter jurisdiction over the action against the alleged father. Because the proper steps have not been taken, the mother's action is a legal nullity; thus, I would hold that any order issued by the juvenile court in the action is void. See A.E., 100 So. 3d at 595; Maclin, 106 So. 3d at 408. In the alternative, I would hold that the mother may not force the parents of the deceased alleged father to represent him and that, instead, this action lacks a necessary party. Accordingly, I would grant the petition for a writ of mandamus and direct the juvenile court to dismiss the paternity action in its entirety.

Sellers, J., concurs.