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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001281-MR

TERRY NEAL CUMMINS — APPELLANT

v.

APPEAL FROM LIVINGSTON CIRCUIT COURT
HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 18-CI-00043

ESTATE OF CLYDE W. REED — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; MAZE AND K. THOMPSON, JUDGES.

CLAYTON, CHIEF JUDGE: Terry Neal Cummins appeals the Livingston Circuit Court's order dismissing his petition for declaration of rights against the Estate of Clyde W. Reed. The dispute involves Cummins' interest in identifying his father and obtaining genetic health information, and the putative father's heirs' right to

refuse DNA testing or have their father's body exhumed for testing. For the following reasons, we affirm.

BACKGROUND

Cummins was born on February 8, 1961. At the time, Cummins' mother, Gloria Sue Cummins, was married to Kenneth Keen Cummins. Mr. and Mrs. Cummins are listed as Cummins' parents on his birth certificate, and Cummins grew up believing Mr. Cummins was his father. However, in 2013, Mrs. Cummins told her son that his biological father was actually Clyde Reed. She had an affair with Mr. Reed in 1960 while Mr. Cummins was away serving in the Navy. Mrs. Cummins got pregnant and gave birth to Cummins. According to Mrs. Cummins' September 15, 2013 letter and November 29, 2013 affidavit, both her husband and Mr. Reed's wife at the time knew about the affair and subsequent pregnancy, but she does not state whether Mr. Reed ever knew about the pregnancy or Cummins' birth. Mr. Reed died on July 14, 1975, and his estate was closed in 1979.[1] Mrs. Cummins died in 2017.

In 2014, Cummins and his brother, Gregory Alan Cummins, underwent DNA testing which confirmed they were not full siblings. Cummins

[1] Both parties claim the Estate closed in 1979. A reference in the record, however, claims Mr. Reed's will was probated, and an order of approval of the administration and discharge of the Executor was entered by the Livingston District Court on October 27, 1982.

then contacted Mr. Reed's heirs to have similar testing done, but his request was denied.

In 2018, Cummins filed a petition to establish paternity against the Estate of Clyde W. Reed and, subsequently, amended that action as a petition for declaration of rights.[2] Cummins' petition asked Mr. Reed's legitimate children, David Reed and Marilyn Reed Buchanan, to submit to DNA testing or agree to have Mr. Reed's body exhumed for testing. Cummins' petition did not ask for any potential inheritance. Instead, the petition sought genetic information for the benefit of Cummins, his children, and grandchildren. In response, the Estate[3] filed a motion to dismiss asserting various grounds, including lack of personal and subject matter jurisdiction, insufficiency of process, and failure to state a claim.[4]

The trial court granted the Estate's motion and dismissed the petition for failure to state a claim upon which relief can be granted. The trial court held the Estate was no longer a legal entity and, furthermore, no Kentucky case permits forced DNA testing of an heir or exhumation of a body for curiosity about

[2] On April 25, 2018, the trial court ordered the Livingston Circuit Clerk to process the case as a declaratory judgment action even though Cummins' petition was "to establish paternity." The trial court's order noted the petition was not a paternity action.

[3] David Reed and Marilyn Reed Buchanan responded as the Estate, but maintained the Estate had been dissolved thirty-nine years ago and was a "legal fiction."

[4] The Estate filed a motion to dismiss in response to the petition to establish paternity, which the trial court treated as a motion to dismiss the amended petition for declaratory judgment.

parentage. While acknowledging that DNA testing is non-invasive, the trial court held that Mr. Reed's heirs have a privacy right in not being forced to take the test. Although Cummins may have a good faith belief that the law should allow him this genealogical data, the trial court was "not convinced [] it may do so without]guidance from a higher court or from the legislature." This appeal followed.

STANDARD OF REVIEW

A motion to dismiss for failure to state a claim upon which relief may be granted "admits as true the material facts of the complaint." *Fox v. Grayson*, 317 S.W.3d 1, 7 (Ky. 2010) (quoting *Upchurch v. Clinton Cty.*, 330 S.W.2d 428, 429-30 (Ky. 1959)). A court should not grant such a motion "unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved . . . ." *Id.* (quoting *Pari-Mutuel Clerks' Union of Kentucky, Local 541, SEIU, AFL-CIO v. Kentucky Jockey Club*, 551 S.W.2d 801, 803 (Ky. 1977)). Thus, the pleadings should be liberally construed in a light most favorable to plaintiff, with all allegations being taken as true. *Id.* "This exacting standard of review eliminates any need by the trial court to make findings of fact," as the question is purely a matter of law. *Id.* "Since a motion to dismiss for failure to state a claim upon which relief may be granted is a pure question of law, a reviewing court owes no deference to a trial court's determination; instead, an appellate court reviews the issue de novo." *Id.* (footnote omitted).

ANALYSIS

As an initial matter, we note that Cummins' legal status as Mr. Cummins' child does not preclude him from proving filiation to Mr. Reed. Although Cummins is presumed to be Mr. Cummins' child under Kentucky Revised Statutes (KRS) 406.011 because Mr. and Mrs. Cummins were married at the time of his birth, this presumption does not bar a child from attempting to prove the identity of his biological father. *J.K. v. N.J.A.*, 397 S.W.3d 916, 919 (Ky. App. 2013) (holding a presumption of paternity is rebuttable).

Next, we address Cummins' attempt to prove the identity of his biological father through the underlying action. Cummins initially filed a petition to establish paternity. However, the purpose of such a petition is to establish paternity for child support during the minority of the child, not to simply identify the father. *See* KRS 406.021; KRS 406.031. Recognizing this limitation, Cummins amended his petition to recast it as a petition for declaration of rights, claiming a declaratory judgment action can be used to establish paternity under *Wood v. Wingfield*, 816 S.W.2d 899 (Ky. 1991) and *Ellis v. Ellis*, 752 S.W.2d 781 (Ky. 1988). This is true, but only under certain circumstances.

In *Wood v. Wingfield*, plaintiff filed a declaratory judgment action to determine whether he was a child and heir of decedent and entitled to a share of the intestacy. The Kentucky Supreme Court held that, beside a KRS Chapter 406

paternity action, "paternity can also be established by a declaratory judgment action before or after the death of the putative father, an action to settle the estate, an action to quiet title, or by an action (such as this) for allowance of the intestacy share as a necessary condition of which the fact that the plaintiff is a child of the decedent must be established." *Wood*, 816 S.W.2d at 905 (footnote omitted). The *Wood* case did not address whether paternity may be established in a declaratory judgment action to simply identify the putative father or obtain genetic medical information. Based on the language in that decision, a declaratory judgment action can be used to establish paternity *for inheritance purposes*.

In the other case cited by Cummins, *Ellis v. Ellis*, the Kentucky Supreme Court specifically discussed, in dicta, using a declaratory judgment action to solely determine the father's identity. As in the *Wood* case, the plaintiff in *Ellis* sought a declaratory judgment that he was the decedent's illegitimate child and sole heir. The putative father died in 1981, and plaintiff brought suit more than two years later. The trial court dismissed plaintiff's claim as barred by the statute of limitations. On appeal, however, the Kentucky Supreme Court reversed, holding that destroying a claim before it legally existed "cannot be permissible if it accomplishes destruction of a constitutionally protected right of action." *Ellis*, 752 S.W.2d at 783 (quoting *Saylor v. Hall*, 497 S.W.2d 218, 225 (Ky. 1973)). That

"constitutionally protected right" is the right to inherit from your father. *Id.* In its decision, the Court also discussed suing to determine the identity of your father:

> Theoretically, appellee [adult child] could have brought an action against his putative father for a declaratory judgment as to his status as a child. Whether such an action could have been maintained in view of the lack of any legal consequence in the outcome is doubtful. If such could have been maintained, the only result would have been some personal satisfaction in having a court declare whether or not James Shelton Ellis was appellee's father. We will not now impose upon appellee a duty to have brought a speculative lawsuit which had no object other than personal satisfaction.

Id. at 784. This statement implies that an adult child may bring a declaratory judgment action for "some personal satisfaction," but that action may not survive because it would not serve any legal purpose.

Here, Cummins proffered two purposes for his declaratory judgment action: curiosity as to his parentage and the need for genetic health information for his daughter who is seeking a medical diagnosis for several health problems. He claims having only a portion of the family medical history is making it difficult to trace his daughter's illness.

Cummins' first purpose is the same as "some personal satisfaction" mentioned in *Ellis*, which the Kentucky Supreme Court suggested as a "doubtful" reason to maintain a declaratory judgment action. *Id.* at 784. While the desire to know the identity of your biological father is understandable, no Kentucky law or

case has allowed a child to determine paternity through a declaratory judgment action for curiosity's sake. Thus, we conclude Cummins' petition for this purpose fails to state a claim upon which relief can be granted. Kentucky Rules of Civil Procedure (CR) 12.02(f).

Cummins' second purpose for his petition – to obtain genetic health information – bears more thought. Obviously, no child is responsible for the conditions of his birth. Cummins did not know Mr. Reed may be his father until 2013, and Mr. Reed had already been dead for thirty-eight years by that time. We must consider whether Cummins should be foreclosed from obtaining potential genetic health information through a declaratory judgment action simply because he is an illegitimate child.

Over the last forty years, courts have reconsidered how illegitimate children are treated under the law. Before 1977, an out-of-wedlock child could inherit from his mother and her kindred, but could not inherit from his father unless the parents married and the father acknowledged the child. In 1977, the United States Supreme Court invalidated such a law in *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977), holding this as an unconstitutional denial of equal protection to out-of-wedlock children. That same year, the Kentucky Supreme Court made a similar ruling in *Pendleton v. Pendleton*, 560 S.W.2d 538 (Ky. 1977) and *Rudolph v. Rudolph*, 556 S.W.2d 152, 154 (Ky. 1977), invalidating

KRS 391.090, which restricted out-of-wedlock children from inheriting from their fathers. Because of *Pendleton* and its progeny, out-of-wedlock children gained the same inheritance rights as children born in wedlock. The next year, the Kentucky Supreme Court held that an out-of-wedlock child could inherit from his paternal grandfather in a testamentary situation. *Murray v. Murray*, 564 S.W.2d 5, 8 (Ky. 1978). In that case, the child's father, the testator, died leaving a gift in his will to his own, already-deceased father. The Court held that all the grandchildren of the testator's father, including the out-of-wedlock child of the testator, were entitled to a share of the gift in the will. Four years later, in *Fykes v. Clark*, 635 S.W.2d 316 (Ky. 1982), the Court permitted a posthumous, out-of-wedlock child to inherit in intestacy from his father. The child was born seven months after his father died and his parents never married. Although the putative father was dead, the Court allowed the child to establish the decedent was his father and successfully establish his paternity. Thus, the child had the same right to inherit from the decedent as did a child born in wedlock to the decedent. Finally, in 1988, almost a dozen years after the *Pendleton* decision, Kentucky's legislature adopted KRS 391.105, which established different statutory rules for determining the rights of intestate succession for children born out-of-wedlock. Under KRS 391.105, an out-of-wedlock child can inherit from his biological father if paternity was established

before the father died or, based upon clear and convincing evidence, after the father died.

The foregoing cases and law demonstrate the trend toward treating children equally, regardless of their biological parents' marital status. They do not comment, however, on establishing paternity in a declaratory judgment action for purposes other than inheritance, much less permitting DNA testing on collateral persons, like Mr. Reed's children in this case. Indeed, no Kentucky case or law permits a person to establish paternity in order to gain genetic health information through a declaratory judgment action. However, one Kentucky case addressed establishing paternity for Social Security benefits and ordering blood testing of collateral relatives.

In *Hibbs v. Chandler*, 684 S.W.2d 310 (Ky. App. 1985), a mother wanted to establish paternity to get Social Security benefits against the deceased putative father's account for her minor child. She sued the child's putative grandparents requesting they undergo blood testing. The mother did not file a paternity or declaratory judgment action. Instead, she sued under the now-repealed statute, KRS 396.060, which governed the liability of heirs and devisees. The trial court refused to order blood testing, granting summary judgment to the grandparent defendants because the mother failed to persuade the court that the deceased was her father's child. Apparently, the mother claimed she had sex with

the putative father on two specific nights, but proof showed the putative father worked third shift on both of those nights. This Court reversed to allow time for the appointment of a personal representative of the deceased father's estate, as the father died intestate with no administration of an estate. Defendants alleged the father had no assets, so no estate was opened. The Court held the grandparent defendants may be named as parties because they are heirs, although they may be dismissed upon a showing that the deceased father died with no assets. If the grandparents are parties as personal representatives of the estate, then the trial court could order them to undergo blood tests under CR 35.01, which allows the court to order parties to submit to physical or mental examinations. If they are not parties, however, then CR 35.01 does not apply as they will be mere witnesses and would not need to involuntarily submit to blood tests. *Id.* at 313.

Although *Hibbs* did not involve a declaratory judgment action, it is informative because inheritance, *per se*, was not the legal purpose of the case. Instead, Social Security benefits were at stake. Accordingly, Kentucky courts do allow paternity to be established for purposes other than inheritance. The purpose in *Hibbs*, however, is explicitly provided for by federal law - the Social Security Act. Without a specific law permitting paternity to be established through a declaratory judgment action for non-inheritance purposes, Cummins' action is, as *Ellis* stated, "doubtful." *Ellis*, 752 S.W.2d at 784. Besides the doubtful purpose

served by Cummins' request to obtain genetic health information from collateral persons, we must consider the intrusion upon Mr. Reed's children's privacy.

Cummins requested Mr. Reed's two children to voluntarily undergo testing and, for whatever their reasons, they refused. Forcing such collateral persons to undergo DNA testing is not permitted under any Kentucky law or case. A person's refusal to take a DNA test and disclose her or his family medical history to a putative family member is personal and the law must respect that person's privacy.

As justification for his request, Cummins analogizes his claim to KRS 199.520(4), which allows adopted children to obtain health information. However, that statute is not like Cummins' request. Under KRS 199.520(4), an adult adopted child may obtain a written health history, including the results of any tests for HIV or hepatitis A, B, or C. This statute does not allow the child to obtain DNA results. In fact, KRS 199.520(4)(b) specifically states that the information "shall not be made available if it is of a nature that would tend to identify the biological parents of the adopted person[.]" Cummins, on the other hand, is specifically seeking to identify his biological father and half-siblings.

Because Cummins' petition presents a novel request, we consider other state's treatment of requests to order genetic testing on relatives. *See, e.g.*, *Sudwischer v. Estate of Hoffpauir*, 589 So.2d 474 (La. 1991); *M.A. v. Estate of*

A.C., 643 A.2d 1047 (N.J. 1993). In a law review article, *Implications of DNA Technology on Posthumous Paternity Determination: Deciding the Facts When Daddy Can't Give His Opinion*, 35 B.C. L. Rev. 747 (1994), author Charles Nelson Le Ray discusses how Minnesota addressed this issue. Minnesota passed a law in 1983 providing for testing relatives of a deceased putative father. Minn. Stats. § 257.62(1). This law was challenged in the 1987 case of *Voss v. Duerscherl*, 408 N.W.2d 161 (Minn. Ct. App. 1987), *rev'd on other grounds*, 425 N.W.2d 828 (Minn. 1988). In *Voss*, the trial court ordered the putative father to undergo blood tests, but he died before the test could be performed. *Id.* at 162. The trial court then ordered the deceased's father, brother, and sister to undergo blood tests and they appealed the order. *Id.* at 162-63. Analyzing the constitutionality of ordering collateral relatives to submit to testing, the court considered four factors in balancing the right to privacy: (1) the importance of the state's purpose in requiring the intrusion in question; (2) the nature and seriousness of the intrusion; (3) whether the state's purpose justifies the intrusion; and (4) whether the means adopted is proper and reasonable. *Id.* at 166-67. The Minnesota Court of Appeals reasoned that these factors translated into: 1) the state's interests in accurate and efficient resolution of paternity actions; in ensuring the proper allocation of public assistance funds among county, state and federal agencies and in protecting the child's interest in knowing the identity of his or her father; 2) a limited form of

intrusion into bodily integrity or privacy; 3) important state interests that justified a minimal intrusion; and 4) means that were proper, safe, and reasonable. *Id.* at 167. Thus, the appeals court held that the deceased's father, brother, and sister could be ordered to submit to blood tests to determine if the deceased was the plaintiff's father. *Id.* However, the Minnesota Supreme Court reversed, holding the underlying paternity action had not survived the putative father's death, due to the lack of any personal representative for the deceased's estate, and that the action could not be pursued against the deceased's father and siblings. *Voss v. Duerscherl*, 425 N.W.2d 828, 831 (Minn. 1988). The court reasoned that neither statutory nor case law supported the magnitude of potential consequences that would flow from allowing a general paternity action to survive against the deceased's relatives, rather than only allowing inheritance actions to survive against the deceased's personal representative. *Id.* at 831.

We agree. While the state has an interest in establishing paternity to settle estates or ensure minor children are supported by child support payments or Social Security benefits, the law does not provide for subjecting collateral persons to undergo DNA testing to establish paternity to identify a father or to obtain genetic health information. This is not to diminish a child's interest in knowing the identity of his father, as an emotional benefit may flow from that knowledge. This

decision simply reinforces that Kentucky law does not provide for declaratory judgment actions to survive against the deceased's relatives for these purposes.

Also, contrary to Cummins' argument, the relationship between a child and parent is not a constitutionally protected right justifying his request. Cummins cites *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) and *Troxel v. Granville*, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) for this proposition, but these cases concern a parent's right to control and care for their child, not the right of a child to know the DNA makeup of his father by testing collateral persons.

We next turn to the Estate's argument that the trial court lacked jurisdiction over the Estate. In its order, the trial court acknowledged the Estate asserted lack of jurisdiction as grounds for dismissal, but specified that it was dismissing Cummins' petition for failure to state a claim. Despite this statement, the trial court's order concluded that the Estate was no longer a legal entity and any claims against the Estate were barred by the statute of limitations. Because the trial court made these conclusions, we will address the issue of lack of jurisdiction over the Estate.

Mr. Reed died testate with his two children as the alleged beneficiaries of his will. Cummins named the Estate as a party in his petition, even though the Estate had been finalized and closed for a few decades. He did not

name the personal representative/executor of the Estate or Mr. Reed's two children as defendants, although he served the petition on the two children. Apparently, the executor is deceased and Cummins claims the two children are the successor personal representatives of the Estate, as well as Mr. Reed's heirs/devisees.

We agree that the Estate is no longer a legal entity because it is closed. A personal representative of an estate carries out the wishes of the decedent and acts in the best interest of the estate with the end goal of distributing and closing that estate. That purpose was fulfilled for Mr. Reed's Estate many years ago. Furthermore, even if the Estate was a legal entity, the time for filing claims against the Estate expired long ago. Therefore, any claims against the Estate are barred by the statute of limitations. *See* KRS 396.011(1) (stating claims against a decedent's estate are barred against the estate, the personal representative, and the heirs and devisees of the decedent unless presented within six months after the appointment of the personal representative).

Finally, in his petition, Cummins asked the trial court to order Mr. Reed's body exhumed to obtain a DNA sample for paternity testing. Cummins did not set forth any details of where or how Mr. Reed was buried, much less any guidance on whether Mr. Reed's body may even contain a possible DNA sample to be tested. In fact, before ordering exhumation, some courts require proof that the exhumation will provide DNA samples that can be tested. *See* 16 Ky. Prac.

Domestic Relations L. § 23:22 (citing *Wawrykow v. Simonich*, 652 A.2d 843 (Pa. Super. Ct. 1994) (proponent of exhumation must establish that lapse of time since death does not preclude gathering usable samples). More importantly, Cummins cites no authority permitting the exhumation of a body for such a purpose. As the Estate correctly noted, Kentucky law allows a body to be exhumed upon a coroner's order, based upon an affidavit that the person is believed to have died from poisoning or other illegal cause. *See* KRS 72.440. If the coroner declines to order a body exhumed, then the county or Commonwealth's attorney may petition the court to order exhumation for an autopsy, but that request is also based on the belief that the person died from a criminal act. *See* KRS 72.445. Neither of these statutes apply to this case.

CONCLUSION

For the foregoing reasons, we affirm the Livingston Circuit Court's order dismissing Cummins' petition for declaratory judgment.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Jeffery P. Alford Paducah, Kentucky	William F. McGee, Jr. Smithland, Kentucky