IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 9, 2013 Session

MIKE LOCKE AND CVAN AVIAN v. THE ESTATE OF DAVID ROSE

Appeal from the Circuit Court for Davidson County
No. 10P-869 and 12P-291 David Randall Kennedy, Judge

No. M2012-02508-COA-R3-CV - Filed June 30, 2014
No. M2012-01314-COA-R3-CV - Filed June 30, 2014

MIKE LOCKE AND CVAN AVIAN v.
THE ESTATE OF THOMAS W. SCHLATER ET AL.

Appeal from the Circuit Court for Davidson County
No. 11P-756 David Randall Kennedy, Judge

No. M2012-02504-COA-R3-CV - Filed June 30, 2014

FRANK G. CLEMENT, JR., J., dissenting in part and concurring in part.

I respectfully dissent from the majority's conclusion that the plaintiffs are not time barred to establish that they have standing to contest David Rose's 2006 Trust Agreement. I fully concur with the affirmance of the dismissal of the other underlying cases.

To have standing to challenge David Rose's 2006 Trust Agreement, the plaintiffs must prove that they are his "issue," specifically, that he was their father. Paternity was not established prior to Mr. Rose's death. Twenty-two months after Mr. Rose's death, the plaintiffs filed a petition to establish paternity. The probate court dismissed the petition to establish paternity as time barred by the one-year statute of limitations that applies to claims against a decedent's estate. We affirmed the dismissal of the petition to establish paternity. Because the petition to establish paternity has been dismissed, I submit the plaintiffs cannot establish that they are "issue" of David Rose; thus, they have no standing in the trust case.

My dissent is based on what I believe to be a clear mandate from the Tennessee Supreme Court in *Bilbrey v. Smithers*, 937 S.W.2d 803 (Tenn. 1996) on the period of

limitation by which a non-marital child may seek to establish paternity of a deceased parent. Following a detailed analysis of the competing interests including, *inter alia*, consideration of the law of real property, intestate succession, and equal protection, the Supreme Court concluded:

> A reasonable accommodation of these state interests and the rights of persons born out of wedlock to inherit from their natural fathers is to require that, in the absence of a statute addressing the issue, a claimant must assert the right to inherit within the time allowed creditors to assert a claim against the estate of the person who was the owner of the property in which an interest is claimed. Admittedly, this is a somewhat arbitrary determination. However, in the absence of a statute, this determination is necessary in order to resolve competing rights. In any event, this limitation can be determined by familiar and well-defined rules, it meets constitutional standards of notice to claimants, it protects the rights of creditors and subsequent owners of the property, it poses no threat to "rights of inheritance" beyond those which may now be posed by creditors and taxing authorities, and it retains the present degree of dependability in the titles to intestate property.

Id. at 808 (internal footnotes omitted).

The plaintiffs did not file a petition to establish paternity or otherwise make a proper demand to establish paternity prior to the limitation period expiring, whether it be the four month period or the one year limitation period.[1] To assert a claim to establish paternity a petitioner must identify the statute upon which he or she relies, in this case Tenn. Code. Ann. § 31-2-105, or state facts necessary for the other party and the court to know that the statute is being relied upon. *See* Tenn. R. Civ. P. 8.05(1). The plaintiffs failed to do either until after the limitation period expired.

In the first of the underlying proceedings, wherein the plaintiffs filed their "Objection to Probate in Solemn Form and Complaint to Contest/Construe Will" (the "Will Contest"), they stated they were the biological children of David Rose; however, they never made a demand to establish paternity. Moreover, the plaintiffs were named beneficiaries under the will; thus, regardless of paternity, the plaintiffs would inherit under the will. Accordingly, the non-issue of paternity was moot because there was no " present, ongoing controversy" regarding paternity in the Will Contest. *Alliance for Native Am. Indian Rights in Tenn. v.*

[1]Because the plaintiffs received actual notice of the Notice of Creditors, the applicable limitation period was the four month period; nevertheless, the plaintiffs failed to file a proper petition to establish paternity within the one year limitation period.

Nicely, 182 S.W.3d 333, 338 (Tenn. Ct. App. 2005) (stating a case is moot and not justiciable when "it no longer involves a present, ongoing controversy. A case is moot if it "no longer serves as a means to provide some sort of relief."). The foregoing notwithstanding, the plaintiffs voluntarily dismissed the Will Contest and the order of dismissal is a non-appealable judgment. Therefore, this court is without jurisdiction to rule upon any matter arising from the Will Contest.

The second action filed by the plaintiffs, referred to in the majority opinion as the trust case, does not involve the Estate of David Rose for it was never a party to the trust case.[2] The only defendants in the trust case were the trustees and, once again, the plaintiffs made no demand to establish paternity. No other action was properly commenced to establish paternity prior to the expiration of the statute of limitation and the untimely petition to establish paternity was dismissed as time barred. Nevertheless, the majority has concluded that the paternity statute only applies to cases involving "intestate inheritance" and that the applicable statute of limitations is that which applies to trusts, which is six years. The majority, therefore, concluded the plaintiffs are not time barred to establish in the trust case that they are "issue" of David Rose, which would give them standing to contest the trust.[3] As they explained:

> We see no reason why the rules governing the administration of decedents' estates and intestate succession should preclude the court from considering the challenge to the validity of the trust. There is no authority requiring that the same limitations for intestate succession of nonmarital children apply in a case brought to challenge or construe a trust.

I agree with the majority that the plaintiffs would have standing to challenge the 2006 trust if they are "issue" of David Rose, the definition of which would include "the biological children" of David Rose. "The rule in this state . . . is that issue includes all persons who

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[2]It is not necessary to address whether a valid "paternity claim" may be asserted in an action to challenge the validity of a trust without also naming the executor of the decedent's estate as a party. Stated another way, based upon the facts at issue in these appeals, is the Estate of David Rose an indispensable party in addition to the Trust and its Trustees? I will leave that issue for another day. What is important is that the plaintiffs made no demand to establish paternity in the Trust case and no demand to establish paternity in any of these actions until the limitation period expired.

[3]In order to "challenge or construe" the 2006 trust, the plaintiffs must establish, at the commencement of the proceedings, that they will benefit from setting aside the 2006 trust. *See Jolley v. Henderson*, 154 S.W.3d 538, 543 (Tenn. Ct. App. 2004); *Doyle v. Doyle*, No. 03A01-9310- CV-00343, 1994 WL 85959, at *1 (Tenn. Ct. App. Mar. 9, 1994); *In re Estate of West*, 729 S.W.2d 676, 677-78 (Tenn. Ct. App. 1987) (stating "[B]efore a party may go forward with a will contest he must show that he would take a share of the decedent's estate if the probated will were set aside.").

have descended from a common ancestor; that unless controlled by the context, it means lineal descendant without regard to degree of proximity or remoteness from the original stock or source." *Third National Bank v. Noel*, 192 S.W.2d 825, 828 (Tenn. 1946). I do not, however, understand how the plaintiffs can prove, after Mr. Rose's death, that they are his issue or his biological children without a proper and timely proceeding to establish paternity because proving that one is the natural child of his father is needed for many purposes, not just inheritance. *See Coyle v. Erickson*, No. E2010-02585-COA-R9-CV, 2011 WL 3689157, at *5 (Tenn. Ct. App. Aug. 24, 2011) (stating "the law is clear that legitimate/legitimated children are treated as the natural children of their fathers for all other purposes, *not just including inheritance*[.]"). Thus, I cannot agree that a different protocol or a different period of limitation applies if the question is merely whether they are "issue" of David Rose as distinguished from his "descendants" or "biological children." *See id.* (stating that "issue" or "descendants" does not only refer to "natural, biological children under Tennessee law[.]").

I submit the only proper means to establish that the plaintiffs are issue of David Rose is to establish paternity pursuant to the paternity statute, the petition for which must be filed in a timely manner to avoid disturbing the *vested rights* of others after the death of the purported father, as *Bilbrey* emphasized. *Id*. at 808. "Determining the appropriate application of the limitation that vested rights will not be disturbed to the statute allowing paternity to be established after the father's death *requires consideration of the law of real property, intestate succession, and equal protection*." *Id*. at 807 (emphasis added). Consistent with the reasoning in *Bilbrey*, I submit it is a reasonable accommodation of the rights of non-marital children who did not establish paternity prior to their father's death to require them to comply with a limitation period and protocol of well-defined rules that, as in the case of creditors of a decedent's estate, protects the rights of non-marital children and subsequent owners of the property. *See id*. at 808 (internal footnotes omitted).

Furthermore, to indulge a period of limitation as long as six years after a purported parent died would be inconsistent with the desire expressed in *Bilbrey* to retain "the present degree of dependability in the titles to intestate property." *Id*. The six year limitation period the majority proposes for a paternity-related "trust action" merely moves the focus of uncertainty from "intestate property" to "trust property," a result that is inconsistent with *Bilbrey*. *See id*. (citing *Trimble v. Gordon*, 430 U.S. 762, 771 (1977) (recognizing that states have a legitimate interest in ensuring an orderly method of disposition of intestate property succession)).

For the foregoing reasons I respectfully dissent from the majority's ruling that the plaintiffs are not barred from asserting their claims as "issue" of David Rose in the trust case and the decision to reverse the probate court's dismissal of the trust case. I fully concur with the decision to affirm the dismissal of the other claims.

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FRANK G. CLEMENT, JR., JUDGE