Opinion issued March 26, 2019

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00866-CV

EVELYN KELLY, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF DAVID CHRISTOPHER DUNN, Appellant

V.

HOUSTON METHODIST HOSPITAL, Appellee

On Appeal from the 189th District Court
Harris County, Texas
Trial Court Case No. 2015-69681

MEMORANDUM OPINION

Appellant, Evelyn Kelly, Individually and on Behalf of the Estate of David Christopher Dunn, challenges the trial court's order dismissing her claims against appellee, Houston Methodist Hospital ("Methodist"), as moot. In two issues, Kelly

contends that the trial court erred in dismissing her claims against Methodist as moot and that the trial court should have granted summary judgment in her favor.

We affirm.

Background

On November 20, 2015, Dunn, prior to his death, filed an Original Verified Petition and Application for Temporary Restraining Order and Injunctive Relief, seeking to preserve the life-sustaining treatment for a terminal condition that he was receiving at Methodist, a hospital located in Houston, Texas. Dunn also sought a declaration that Texas Health and Safety Code section 166.046 ("section 166.046"),[1] a statutory scheme that Methodist used to determine it would withdraw his life-sustaining treatment, violates due process. Methodist agreed to a temporary restraining order preserving the status quo of the life-sustaining treatment being provided to Dunn for fourteen days. A temporary injunction hearing was set for December 3, 2015, but, before the hearing, Methodist requested an abatement of the case while Dunn's guardianship issues were being resolved in probate court. In an agreed order of abatement, Methodist agreed to preserve the status quo by continuing life-sustaining treatment during the abatement.

[1] TEX. HEALTH & SAFETY CODE § 166.064.

On December 23, 2015, Dunn succumbed naturally to his terminal condition. At the time of his death, the case was still abated and Methodist had not ever withdrawn his life-sustaining treatment.

After Dunn's death, Kelly filed a motion to lift the abatement and substitute the plaintiff "David Christopher Dunn" with "Evelyn Kelly, Individually and on behalf of the Estate of David Christopher Dunn." The trial court entered an agreed order granting Kelly's motion and also granted her permission to file a first amended petition.

In her first amended petition, filed on February 2, 2016, Kelly alleged that she is the mother of David Christopher Dunn, a Texas resident who was receiving life-sustaining treatment at Methodist for "an unidentified mass on his pancreas which caused damage to other organs." Dunn "faced immediate irreparable harm of death" if Methodist discontinued the life-sustaining treatment. Methodist informed Kelly and Dunn on November 10, 2015, that it planned to initiate procedures to discontinue Dunn's treatment.

After a hearing before a committee, pursuant to section 166.046, Methodist determined that it would discontinue life-sustaining treatment "on or about Monday, November 23, 2015." "Dunn had neither legal counsel nor the ability to provide rebuttal evidence" at the committee meeting. Kelly asserted that the Texas Constitution and the U.S. Constitution guaranteed Dunn a representative to advocate

for his life and an opportunity to be heard when life-sustaining treatment was being removed.

In her first amended petition, Kelly asserted a cause of action against Methodist for a declaratory judgment that section 166.046 violates procedural and substantive due process. She alleged that section 166.046 violated her and Dunn's rights to procedural due process by "failing to provide an adequate venue for [them] and those similarly situated to be heard in this critical life-ending decision," failing "to impose adequate evidentiary safeguards against hospitals and doctors by allowing them to make the decision to terminate life-sustaining treatment in their own unfettered discretion," and by failing to "provide a reasonable time or process for a patient to be transferred." Kelly alleged that their substantive due process rights were violated because "there [was] no evidentiary standard imposed by [s]ection 166.046" and the "doctor and ethics committee [were] given complete autonomy in rendering a decision that further medical treatment [was] 'inappropriate' for a person," like Dunn, "with an irreversible or terminal condition." Kelly also asserts a cause of action against Methodist for violation of her and Dunn's civil rights pursuant to Chapter 42, section 1983,[2] of the United States Code based on the same alleged due process violations.[3] She sought recovery for attorney's fees and costs.

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[2] 42 U.S.C. § 1983.

[3] Kelly also asserted a claim against Methodist for intentional infliction of emotional distress, which she later abandoned.

On April 22, 2016, Methodist filed a motion to dismiss, arguing, among other things, that Kelly's claims for violations of due process and civil rights against Methodist should be dismissed as moot because "[a]s a result of Dunn's passing," Kelly's "claims no longer present a live case or controversy," and "[a]ny opinion rendered . . . on such issues would constitute an advisory opinion." In response, Kelly argued that Dunn's death did not moot the due process claims and that "[t]he absolute authority and unfettered discretion by . . . Methodist Hospital's application of [s]ection 166.046[] violated Dunn's right to due process of law" as guaranteed to him by the United States and Texas constitutions.

On October 13, 2017, the trial court granted Methodist's motion to dismiss on the grounds that Kelly's claims for due process and civil rights violations were moot. It then dismissed Kelly's lawsuit against Methodist for lack of subject-matter jurisdiction, without expressly ruling on the parties' competing, pending motions for summary judgment.

Mootness Doctrine

Whether the trial court has subject-matter jurisdiction is a question of law that we review de novo. *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). The mootness doctrine implicates subject-matter jurisdiction. *See Speer v. Presbyterian Children's Home & Serv. Agency*, 847 S.W.2d 227, 229 (Tex. 1993). Whether a claim is moot depends on whether there is a justiciable

controversy remaining between the parties. *City of Hou. v. Kallinen*, 516 S.W.3d 617, 622 (Tex. App.—Houston [1st Dist.] 2017, no pet.). A justiciable controversy must exist between the parties at every stage of the legal proceedings. *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001). If a controversy ceases to exist or the parties lack a legally cognizable interest in the outcome, a case is moot. *Allstate Ins. Co. v. Hallman*, 159 S.W.3d 640, 642 (Tex. 2005). The same is true when a judgment would not have any practical effect upon a then-existing controversy. *Kallinen*, 516 S.W.3d at 622 (citing *Zipp v. Wuemling*, 218 S.W.3d 71, 73 (Tex. 2007)). Thus, under certain circumstances, the death of a party may render a case moot. *Zipp*, 218 S.W.3d at 73.

Here, Kelly asserted two causes of action against Methodist. In her first cause of action, she sought a declaratory judgment, pursuant to Chapter 37 of the Texas Civil Practices and Remedies Code,[4] that Methodist's "actions in furtherance of coming to its decision to discontinue life[-]sustaining treatment under" section 166.046 "infringed" upon her and Dunn's federal and state "due process rights." In her second cause of action, Kelly asserted a claim for deprivation of due process rights pursuant to 42 U.S.C. § 1983 based on Methodist utilizing section 166.046 to cease provision of life-sustaining treatment to Dunn. Thus, both causes of action asserted by Kelly were based on alleged due process violations.

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[4] TEX. CIV. PRAC. & REM. CODE § 37.001–.011.

The United States Supreme Court has determined that due process[5] has both procedural and substantive components. *See, e.g.*, *Daniels v. Williams*, 474 U.S. 327, 331 (1986). "A violation of substantive due process occurs only when the government deprives individuals of constitutionally protected rights by an arbitrary use of its power." *Byers v. Patterson*, 219 S.W.3d 514, 525 (Tex. App.—Tyler 2007, no pet.) (citing *Simi Inv. Co. v. Harris Cty.*, 236 F.3d 240, 249 (5th Cir. 2000)). Procedural due process protects an individual from deprivation of "certain substantive rights—life, liberty, and property—without constitutionally adequate procedures." *Bexar Cty. Sheriff's Civil Serv. Comm'n v. Davis*, 802 S.W.2d 659, 661 (Tex. 1990). Accordingly, an analysis of due process claims—whether procedural or substantive—requires an inquiry into whether the plaintiff has been deprived of a protected interest. *See id.*; *see also Am. Mfrs. Mut. Ins. Co. v. Sullivan*,

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5 The due course of law guarantee in the Texas Constitution provides:

> No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

TEX. CONST. art I, § 19. The federal due process clause, which is nearly identical, provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law[.]

U.S. CONST. amend. XIV, § 1; *see also Univ. of Tex. Med. Sch. at Hou. v. Than*, 901 S.W.2d 926, 929 (Tex. 1995) (explaining courts regard terms "due course" and "due process" "without meaningful distinction").

526 U.S. 40, 59 (1999) ("Only after finding the deprivation of a protected interest do we look to see if the State's procedures comport with due process.").

The foundation for Kelly's request for relief was Methodist's determination to remove the life-sustaining treatment Dunn had been receiving at its facility allegedly without providing procedural due process and in violation of substantive due process. The constitutionally-protected interests that she alleged she and Dunn were deprived of without due process are the "rights to life and self-determination to make one's own medical decisions."[6] It is undisputed that Methodist continued the life-sustaining treatment allegedly desired by Dunn until he passed away naturally from his terminal condition. Accordingly, no action inconsistent with Dunn's alleged desires regarding his medical treatment was ever taken and he was not actually deprived of any constitutionally-protected right by Methodist's utilization of the procedure set forth in section 166.046. Because there was no deprivation of his rights, and there can be no deprivation of his future rights by these means due to his death, there is also no remaining controversy between the parties in regard to the alleged due process violations.

Kelly argues, without any citation for support, that "[a]s written, § 166.046 denies patients constitutional due process before a life-terminating decision is

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[6] For purposes of this opinion, we do not need to decide whether there is a constitutionally protected right to "self-determination to make one's own medical decisions." *See* TEX. R. APP. P. 47.1.

made." But, as we previously explained, there is no right to due process if there has not been a deprivation of a constitutionally-protected interest. *See Sullivan*, 526 U.S. at 59; *Davis*, 802 S.W.2d at 661. And Kelly's assertion that "the procedures outlined in § 166.046(b)(1)–(4) expose patients to a risk of mistaken or unjustified deprivation of life without protection, and an unjustified deprivation of life cannot be corrected" is also without force here since there can no longer be a "risk of mistake or unjustified deprivation of life" with respect to Dunn because he succumbed to his terminal condition.

Accordingly, we hold that Kelly's claims, which are all based on the alleged due process violations, are moot.

A. Nominal Damages

Kelly argues that even if the underlying claims at issue are moot, her claim for nominal damages pursuant to section 1983 keeps the claims alive because "[d]eath does not moot a § 1983 claim for past damages that may be asserted by a decedent's estate." We agree with Methodist that "a claim for nominal damages, extracted late in the day from [Kelly's] general prayer for relief and asserted solely to avoid otherwise certain mootness, [necessitates] close inspection." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997). And where, as here, there has been no deprivation of constitutional rights, a claim for nominal damages cannot save a moot claim. As the United States Supreme Court has emphasized, "whatever

the constitutional basis for § 1983 liability, such damages must always be designed 'to *compensate injuries* caused by the [constitutional] deprivation"—a conclusion that "simply leaves no room for non-compensatory damages measured by the jury's perception of the abstract 'importance' of a constitutional right." *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 309 (quoting *Carey v. Piphus*, 435 U.S. 247, 265 (1978)). Because the claims in this case were mooted before any deprivation, and, thus, no due process violation could potentially occur, Kelly is not entitled to damages. *See id.* Accordingly, there is no surviving nominal damages claim that could arguably keep the controversy alive in this case.

B. Capable of Repetition Yet Evading Review

Kelly also argues that the claims at issue are capable of repetition yet evading review and are, therefore, excepted from application of the mootness doctrine in this case.

"Capable of repetition yet evading review" is a "rare exception to the mootness doctrine." *Tex. A & M Univ.—Kingsville v. Yarbrough*, 347 S.W.3d 289, 290 (Tex. 2011) (citing *Lara*, 52 S.W.3d at 184). To invoke this exception, a party must establish that both (1) the challenged act is of such a short duration that the issue becomes moot before review may be obtained, and (2) a reasonable expectation exists that the same complaining party will be subjected to the same action again. *Lara*, 52 S.W.3d at 184–85.

This exception does not apply to Dunn because he cannot be subjected to the same complained-of actions again since he is deceased. *Id.* (explaining requirement of exception is that same complaining party will be subjected to same action again). Kelly does not assert in her brief that she has a reasonable expectation that she will personally be subjected to the same action again. But in the trial court, she did assert that she "has other children" and "fears that without a declaration of unconstitutionality, this situation may repeat itself, while evading review." However, the capable of repetition element requires a "reasonable expectation" or a "demonstrated probability" that the same controversy will recur involving the same complaining party. *See, e.g.*, *City of Dall. v. Woodfield*, 305 S.W.3d 412, 419 (Tex. App.—Dallas 2010, no pet.) (citing *Murphy v. Hunt*, 455 U.S. 478, 482 (1982)). A merely "theoretical possibility that the same party may be subjected to the same action again is not sufficient to satisfy the test." *Id.*; *see also Murphy*, 455 U.S. at 482 (explaining if every theoretical or physical possibility were sufficient to satisfy test then "virtually any matter of short duration would be reviewable"); *Lara*, 52 S.W.3d at 184 (holding former inmates did not meet capable of repetition requirement of exception where "[w]hether and when" they "may be charged with a crime that would lead to their incarceration" and subject them to the same conduct that allegedly violated their constitutional rights was "speculative"). Thus, Kelly's asserted fear that she or one of her surviving children may be subject to the

procedures in section 166.046 again in the future is too speculative to meet the requirements of the exception.

Accordingly, we hold that the exception to the mootness doctrine for issues capable of repetition and evading review is inapplicable here.

We overrule Kelly's first issue challenging the trial court's dismissal for mootness. Because we agree that the claims at issue are moot, we lack subject-matter jurisdiction to consider her remaining issue.

Conclusion

We affirm the trial court's order dismissing the claims in this case for lack of subject-matter jurisdiction.

Julie Countiss
Justice

Panel consists of Chief Justice Radack and Justices Goodman and Countiss.